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February 10, 1998

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Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of Rules and Policies on Foreign Participation in the U.S.
Telecommunications Market, IB Docket No. 97-142

Dear Ms. Salas:

Telefónica Internacional de España, S.A. ("Telefónica Internacional"), by its attorneys, hereby submits for filing an original and nine copies of its Opposition to MCI Telecommunications Corporation's Petition for Reconsideration in connection with the above-captioned matter.

Also enclosed is an additional copy of Telefónica Internacional's Opposition which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Alfred M. Mamlet
Colleen A. Sechrest
Counsel for Telefónica Internacional
de España, S.A.

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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

IB Docket No. 97-142

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

**COMMENTS OF TELEFÓNICA
INTERNACIONAL DE ESPAÑA, S.A. ON
PETITIONS FOR RECONSIDERATION**

I. INTRODUCTION AND SUMMARY

Telefónica Internacional de España, S.A. ("Telefónica Internacional") hereby submits its Comments on the petitions for reconsideration filed in the above-captioned proceeding. In particular, Telefónica Internacional strongly urges the Commission to deny MCI Telecommunications Corporation's ("MCI") request that the Commission condition the switched resale authorizations of foreign-affiliated carriers on their foreign affiliates' compliance with the Commission's new mandatory benchmarks. As Telefónica Internacional and others have demonstrated repeatedly, such a condition is both unnecessary and anti-competitive. It is also unlawful, as it directly conflicts with the United States' commitments under the WTO Agreement.

Additionally, Telefónica Internacional comments on the petition of

PanAmSat Corporation ("PanAmSat"). PanAmSat's proposal to reinstate two of the Commission's most burdensome dominant carrier safeguards, *i.e.*, the 14 day tariff filing requirement and the pre-approval requirement for circuit additions on affiliated routes, is also inconsistent with U.S. WTO commitments – and wholly without justification.

In short, Telefónica Internacional strongly urges the Commission to reject efforts by both MCI and PanAmSat to hamstring the participation of foreign-affiliated carriers in the U.S. market through unnecessary conditions and regulations. Instead, the Commission should ensure – as the *Foreign Participation Order* largely does¹ -- that, in compliance with both the letter and the spirit of the WTO Telecom Agreement, the U.S. telecommunications market offers the same competitive opportunities to all carriers.

II. THE COMMISSION SHOULD REJECT MCI'S REQUEST TO CONDITION THE SWITCHED RESALE AUTHORIZATIONS OF FOREIGN-AFFILIATED CARRIERS

The Commission should reject MCI's request to condition the switched resale authorizations of foreign-affiliated carriers on either immediate compliance with the Commission's new settlement rate benchmarks or compliance with the benchmarks by the date established in the *Benchmarks Order*.² MCI's request is based on two faulty conclusions: (1) that the lack of such a condition will enable foreign-affiliated carriers to distort competition in the U.S. market; and (2) that such distortion is next to impossible to detect.³ As the Commission recognized in the *Foreign Participation Order*, both of

¹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order, IB Docket No. 97-142 (rel. Nov. 26, 1997) ("*Foreign Participation Order*").

² MCI Petition at 2.

³ MCI Petition at 3-8.

these conclusions are wrong.⁴ In addition, the proposed condition is in itself anti-competitive, as it would serve only to reduce choice and increase prices for U.S. consumers. Finally, the proposed condition cannot be squared with the core GATS commitments of MFN, national treatment and market access.⁵

A. MCI's Proposed Condition Is Unnecessary to Prevent Anti-Competitive Conduct in the U.S. Market

MCI's proposed condition is unnecessary to prevent anti-competitive conduct by foreign-affiliated carriers in the U.S. market. MCI first claims that foreign-affiliated resellers can distort competition in the U.S. market because their foreign affiliates control accounting rates in the downstream market: "[s]o long as the foreign affiliate collects high settlement rates for all traffic it terminates from the United States, its affiliated U.S. reseller can use these accounting rate subsidies to compete unfairly and distort competition in the U.S."⁶ MCI, however, does not explain why this is so. Nor can it. As the *Foreign Participation Order* recognized, a foreign-affiliated reseller simply cannot succeed in an anti-competitive price squeeze strategy.⁷ There are two reasons for this.

⁴ *Foreign Participation Order* at ¶195.

⁵ MCI also argues that, to prevent traffic distortions, foreign affiliated carriers be required to provide quarterly traffic and revenue reports not only for themselves, but also for their foreign affiliates. MCI Petition at 8-9. Such a double reporting requirement is clearly unnecessary given that the Commission has found that "concerns about potential traffic distortions are not directly related to affiliation status." *Foreign Participation Order* at ¶ 211. In other words, such reports serve no purpose other than to burden foreign-affiliated carriers with pointless reports.

⁶ MCI Petition at 5.

⁷ *Foreign Participation Order* at ¶¶ 198-203.

First, a foreign-affiliated reseller would not be able to benefit from a long-term below-cost pricing by generating additional settlements profits through increased U.S. market demand. As the Commission recognizes, such a theory rests on the highly dubious assumption that U.S. carriers would match such a pricing strategy.⁸ They would not. As Telefónica Internacional demonstrated in earlier comments, by simply maintaining their existing prices, unaffiliated U.S. carriers can ensure that even facilities-based carriers and their foreign affiliates engaged in price squeeze behavior would incur losses.⁹ Such losses would be even larger for resale carriers whose costs are higher and whose settlement revenues are lower.¹⁰ In short, a price squeeze strategy makes absolutely no economic sense, regardless of whether the settlement rate at the foreign end of the call remains high.

Second, without control of the underlying facilities, a foreign-affiliated reseller cannot effectively use a price squeeze strategy to either force competitors to exit the market or foreclose future entry, thereby enabling it to reap anti-competitive profits.¹¹ Most significantly, a reseller's lack of facilities makes it impossible for the reseller to eliminate competition on a given route, particularly since there must always be at least one facilities-based carrier from whom the reseller can purchase service.¹² Additionally, as the Commission points out, a facilities-based carrier is under a legal obligation to provide wholesale rates to any and all resellers. "Thus, a reseller that

⁸ *Foreign Participation Order* at ¶ 202.

⁹ See Reply Comments of Telefónica Internacional filed in IB Docket No. 97-142, 18-21 (Aug. 12, 1997).

¹⁰ See Ex Parte Comments of Telefónica Internacional filed in IB Docket No. 97-142, 4-5 (October 28, 1997).

¹¹ *Foreign Participation Order* at ¶199.

¹² *Id.*

attempts to execute a predatory price squeeze would be unable to prevent new switched resale entrants from easily entering the market and defeating the predatory strategy.¹³ In other words, without facilities, a reseller has no ability to monopolize the U.S. market and gouge U.S. consumers.

MCI also argues that a resale condition is necessary because any anti-competitive conduct would be extremely difficult to detect.¹⁴ According to MCI, this is because the underlying costs of a reseller are themselves very difficult to determine. MCI points to the ever-changing spot market and the multiple private wholesale arrangements that many carriers participate in to support this conclusion.¹⁵ This argument is without merit. While the complexity of market arrangements do make it more difficult to determine an average cost over a given period of time, it nevertheless remains quite easy for an underlying facilities-based carrier to determine whether a reseller is regularly selling below the cost of its wholesale contracts with that carrier. It also has an incentive to do so. Moreover, as the *Foreign Participation Order* points out, the existence of an active spot market for wholesale minutes provides all market participants with up to date information on pricing trends.¹⁶ In other words, the sophistication of the wholesale market makes a reseller's underlying average costs generally, if not precisely, discernible to both the Commission and other market participants. If these costs suggest anti-competitive behavior, the Commission itself can always order a reseller to provide it with the exact information necessary to make a

¹³ *Foreign Participation Order* at ¶ 200.

¹⁴ MCI Petition at 5.

¹⁵ MCI Petition at 6-8.

¹⁶ *Foreign Participation Order* at ¶ 205.

price squeeze determination.¹⁷

B. MCI's Proposed Condition is Anti-Competitive

Not only is MCI's proposed condition not necessary, it is also anti-competitive. This is because many foreign-affiliated resellers would no longer be able to service their affiliated routes. As a result, they would lose existing customers and would be unable to add new ones. The resellers would be forced to significantly scale back its operations, making it harder to provide the fully panoply of services demanded by customers today. Indeed, it may even be forced to exit the market. In other words, by conditioning the current and future resale authorizations of foreign-affiliated carriers, the Commission will ensure not only that competition in this market does not expand, but that it actually shrinks. The result: higher prices and fewer choices for U.S. consumers – hardly a pro-competitive outcome.

C. The Proposed Condition Is Unlawful Under GATS

The proposed condition is clearly unlawful under GATS, as it directly conflicts with clear U.S. commitments. As Telefónica Internacional demonstrated in earlier comments, such a benchmark condition directly conflicts with U.S. MFN, national treatment and market access obligations.¹⁸ Such conflicts cannot be avoided by denominating the condition a “competitive safeguard” pursuant to GATS Article VI. Any such safeguard cannot compromise key GATS obligations and must be proportional to the problem it seeks to address. Destroying the existing resale business of foreign-

¹⁷ *Foreign Participation Order* at ¶ 205.

¹⁸ Comments of Telefónica Internacional at 12-14. See also Reply Comments of Telefónica Internacional filed in IB Docket No. 906-261 at 10-22, which are incorporated herein by reference.

affiliated carriers and discouraging future foreign entry on the basis of misconduct that is at most only remotely possible cannot be construed as a proportionate response.

III. THE COMMISSION SHOULD REJECT PANAMSAT'S REQUEST TO TIGHTEN U.S. DOMINANT CARRIER REGULATIONS

The Commission should reject PanAmSat's request to tighten U.S. dominant carrier regulations. Specifically, PanAmSat requests that the Commission reimpose two of its most burdensome dominant carrier regulations – that of the 14 day tariff filing requirement and the prior approval requirement for circuit additions.¹⁹ Yet both of these requirements directly conflict with the key GATS principle of national treatment – as well as the principle that a country should adopt only those safeguards that are no more burdensome than necessary.²⁰ Clearly, neither of these regulations is necessary to protect the U.S. market from anti-competitive conduct. Indeed, they are themselves anti-competitive.

PanAmSat's request that the Commission reinstate both its tariff filing requirement and its prior approval requirement for circuit additions directly conflicts with the U.S. GATS national treatment principle. Under this principle, the FCC must impose a given regulation on all international carriers, affiliated and unaffiliated alike. The

¹⁹ PanAmSat Petition at 2.

²⁰ *Foreign Participation Order* at ¶143; GATS Article VI.

Commission simply cannot justify imposing these onerous regulations on only foreign-affiliated carriers, particularly since such differential treatment is unnecessary to protect the U.S. market. PanAmSat provides no substantive reason why the Commission should do so. Rather, it simply asserts that such regulations are necessary to prevent price collusion and circuit loading by dominant carriers.²¹ At the same time, it lightly dismisses the fact that these regulations do put foreign-affiliated carriers at a significant disadvantage vis-a-vis their unaffiliated counterparts. According to PanAmSat, if a foreign-affiliated carrier is competitive, it will respond to U.S. consumers' demands, even if it must delay in doing so.²² However, delaying competition is not what either the *Foreign Participation Order* or the WTO Telecom Agreement is about. Such a delay constitutes a market barrier that is unacceptable in a pro-competitive regime.

IV. CONCLUSION

For the foregoing reasons, Telefónica Internacional urges the Commission to deny the petitions for reconsideration filed by MCI and PanAmSat. Both petitions seek to impede competition through inappropriate and unnecessary regulatory barriers. In particular, the Commission should reject MCI's proposal to condition the resale

²¹ PanAmSat Petition at 3-5.

²² PanAmSat Petition at 4.

authorizations of foreign-affiliated carriers on compliance with the Commission's new benchmarks.

Dated: February 10, 1998

Respectfully submitted,

**Telefónica Internacional
de España, S.A.**



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CERTIFICATE OF SERVICE

I, Colleen Sechrest, do hereby certify that a copy of the foregoing **Comments Of Telefónica Internacional de España, S.A.** has been sent via hand delivery on this 10th day of February, 1998 to the following:

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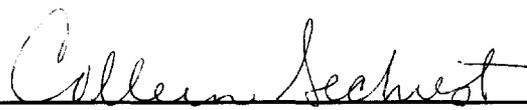
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