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

In the Matter of	)	
	)	
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

TO: The Commission

REPLY OF KOKUSAI DENSHIN DENWA CO. LTD.

Kokusai Denshin Denwa Co. Ltd. ("KDD"), by its attorneys and pursuant to 47 C.F.R. § 1.429(g), hereby replies to the comments filed by AT&T Corp. ("AT&T") and MCI Telecommunications Corp. ("MCI")[1] in opposition to the Petition for Reconsideration ("Petition") filed by KDD on January 8, 1998 regarding the Report and Order and Order on Reconsideration (FCC 97-398) ("Report and Order"), in the above-captioned proceedings.

In its Petition, KDD asked 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 is subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market. Were the FCC to deny that request, KDD asked the FCC to remove the dominant carrier safeguards that apply to each U.S.

[1] See AT&T Comments in Support of MCI Petition for Reconsideration and Opposition to Petitions of BellSouth, KDD and SBC ("AT&T Opposition"), filed Feb. 10, 1998; Opposition to Petitions for Reconsideration, filed by MCI on Feb. 10, 1998 ("MCI Opposition").

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carrier having an affiliation with a foreign carrier which is deemed to possess market power on the route. For the reasons specified below, the FCC should grant the Petition.

I. THE PRESUMPTION OF NON-DOMINANT REGULATORY STATUS

The premise of KDD's Petition is that a foreign carrier rarely if ever will possess 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. Neither AT&T nor MCI seriously disputes that premise, and their oppositions accordingly must be rejected.

AT&T argues against KDD's proposed presumption on the ground that the International Bureau already has found KDD to possess market power in the Japanese market. AT&T Opposition at 8-9. However, AT&T misconstrues the nature of KDD's request. While KDD strongly disagrees with the International Bureau's finding,[2] the Petition does not ask the FCC to make a determination that KDD lacks market power in the Japanese market. Rather, KDD asked the FCC to establish a rebuttable presumption that any foreign carrier satisfying the above-referenced criteria in its home market (including KDD in Japan) lacks market power. Should AT&T or other U.S. carriers believe that such a foreign carrier possesses market power

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[2] KDD's U.S. affiliate, KDD America, Inc., filed a still-pending petition for reconsideration regarding the International Bureau's market power finding in File No. ITC-95-481. KDD joins KDD America, Inc. in urging the International Bureau to act expeditiously upon that petition.

in its home market, they could present evidence to the FCC in an attempt to rebut the presumption.

AT&T does not challenge KDD's showing that a foreign carrier which satisfies the above-reference criteria normally will not possess foreign market power. Rather, AT&T asserts merely that there is "no certainty" that such a carrier will lack foreign market power. AT&T Opposition at 10. However, AT&T ignores the FCC's standard for adopting a market power presumption. As the FCC stated, "[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, ¶ 160 (emphasis supplied). It cannot reasonably be disputed that, as a general matter, foreign carriers satisfying KDD's proposed criteria will not possess market power. AT&T's concern that exceptions may exist is accommodated fully by the rebuttable nature of the presumption.

It may be that, in citing the International Bureau's market-power finding for KDD in Japan, AT&T was trying to show that a foreign carrier could satisfy KDD's proposed criteria yet still possess market power. However, even here AT&T has failed. The principal reason for the International Bureau's finding that KDD possessed market power in Japan was its concern that entry into the Japanese facilities-based international market was restricted. See KDD America, Inc., 11 FCC Rcd 11329, 11336 (1996). The WTO Agreement, which was concluded approximately five months after that decision and which went into force earlier this month, mooted the Bureau's concern. The FCC has recognized that "[t]he WTO commitments of our trading partners require that they open their markets to competition and promote the introduction of procompetitive regulatory principles." Report and Order, ¶ 33. Japan has implemented its

WTO commitments by confirming its free-entry policy for U.S. and other foreign carriers, and several major carriers (e.g., BT and WorldCom) already have announced plans to become facilities-based international carriers in Japan.[3] By applying its proposed presumption only to carriers in WTO member countries, KDD removed any possible basis for challenging the underlying premise that foreign carriers which face multiple facilities-based competitors in an open entry environment and which do not control local exchange facilities normally will rarely if ever possess foreign market power.

AT&T's opposition to KDD's presumption is ironic given the FCC's decision in 1996 to reclassify AT&T as a non-dominant international carrier even though AT&T had a market share greater than 50%. Motion of AT&T Corp. to be Declared Non-Dominant for International Service, 3 Comm. Reg. 111 (1996). The FCC expressly recognized that market share is not the sole or even the primary determining factor of whether a carrier has market power. Id., 3 Comm. Reg. at 119. The FCC reclassified AT&T as a non-dominant international carrier because AT&T did not control local exchange facilities and faced multiple competing facilities-based international carriers in an open-entry environment characterized by significant

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[3] E.g., "WorldCom, BT Eye Licenses," Japan Times, February 6, 1998 at p. 9. Similarly, the Bureau's concern about the ability of the Japanese Ministry of Posts and Telecommunications ("MPT") to limit entry to that which is "appropriate in light of demand," 11 FCC Rcd at 11336, is no longer valid, as that provision has been removed. In addition, Japan's WTO compliance efforts have resulted in the removal of foreign ownership restrictions (except as regards KDD and NTT), and MPT has liberalized the Japanese international telecommunications market in the post-WTO environment, including the authorization of international simple resale on the U.S.-Japan route without any reciprocity or settlement rate conditions. In addition, MPT announced the removal of all tariff regulations except advance notification on international services in recognition of the competitive conditions prevailing today in that market segment in Japan.

supply and demand elasticities. KDD's proposed presumption tracks the FCC's decision to reclassify AT&T as a non-dominant carrier and would simply extend the FCC's rationale to foreign carriers which occupy a market position today that is similar to AT&T's in 1996.

MCI's opposition to KDD's Petition is equally devoid of merit.[4] MCI argues that KDD has failed to show that international facility bottlenecks will disappear in an environment characterized by open entry and multiple competing facilities-based carriers. MCI Opposition at 3. However, the International Bureau recently rejected that argument in granting facilities-based Section 214 authority to KPN US Inc. ("KPN"), an affiliate of PTT Telecom BV, on the U.S.-Netherlands route. In re Application of KPN US Inc., DA 98-156, rel. Jan. 30, 1998 (Chief, International Bureau).[5] The Bureau found that multiple facilities-based carriers will ensure competitively adequate backhaul facilities and transmission capacity on the route, and therefore found the Netherlands to satisfy the effective competitive opportunities standard. Id., ¶ 27. In numerous other decisions the FCC has relied upon open entry and multiple competitors to preclude the exercise of foreign market power through the control of backhaul facilities, even for foreign carriers which are regarded as dominant based upon their control of foreign local

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4 MCI's argument that KDD's proposal should be excluded from this proceeding because it is not on the record is baseless. MCI Opposition at 3 n.6. KDD included this proposal in its comments and reply comments. See KDD Comments, filed July 9, 1997, at 13-14; KDD Reply Comments, filed Aug. 12, 1997, at 7. KDD's sole modification in the Petition was to expressly limit the proposed presumption to WTO member countries, a modification which was implicit in the original proposal and plainly within the scope of this proceeding.

5 KPN's status as a dominant U.S. carrier is due to its foreign affiliate's control of local exchange facilities in the Netherlands, not the foreign affiliate's international facilities or services.

exchange facilities.[6] In light of these precedents, KDD's proposed presumption is a reasonable if not conservative reflection of the competitive reality in the post-WTO environment.

Lastly, neither AT&T nor MCI addressed KDD's showing that the FCC implicitly endorsed KDD's proposal when the FCC established a rebuttable presumption that alternative settlement arrangements are permitted with carriers in WTO member countries. Report and Order at ¶ 302. In order to rebut that presumption, the FCC required "a party [to] 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. at ¶ 307. The FCC's confidence in the ability of multiple facilities-based entrants to erode foreign market power supports adopting KDD's proposal.[7]

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 requested 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. KDD showed that such safeguards are unnecessary and

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6 See Merger of MCI Communications Corp. and British Telecommunications plc, GN Docket No. 96-245, FCC 97-302, ¶¶ 170-71 (Sept. 24, 1997); In the Matter of BT North America, Inc., DA 97-2071, rel. Sept. 25, 1997, at ¶ 11 n.27 (Chief, Telecommunications Division, International Bureau).

7 The FCC regarded this test as being a "straightforward, objective standard," Report and Order at ¶ 307, thereby repudiating MCI's allegation that KDD's proposed presumption would be "burdensome" to administer. MCI Opposition at 3.

contrary to fundamental principles of the General Agreement on Trade in Services ("GATS") under the WTO Agreement. Cable & Wireless plc and Cable & Wireless, Inc. ("C&W Companies") supported KDD's request,[8] while AT&T and MCI, predictably, opposed it.

AT&T and MCI argue that the dominant carrier safeguards are consistent with GATS principles because they are based upon an objective market power analysis. AT&T Opposition at 8 n.8; MCI Opposition at 4. However, the FCC's presumptive classification of foreign carriers as dominant based solely upon their market share is a more severe standard than the FCC has used to classify U.S. carriers. As noted above, the FCC reclassified AT&T as a non-dominant international carrier in 1996 even though foreign carriers in exactly the same market position as AT&T would be presumed dominant under the FCC's regulations governing foreign-affiliated carriers. That is a double standard, not "objective economic analysis" as AT&T and MCI assert. Id. (citing Report and Order, ¶ 374).

Further, neither AT&T nor MCI challenged KDD's showing that the dominant carrier safeguards are unnecessary. The FCC already imposes annual traffic and revenue reporting requirements upon all U.S. carriers, and 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.

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8 See Comments of Cable and Wireless plc and Cable & Wireless, Inc., filed Feb. 10, 1998, at 2, 9-10.

Lastly, KDD appreciates the suggestion of the C&W Companies that if the FCC continues to believe that dominant carrier safeguards are necessary, the structural separation requirements, by themselves, are sufficient to satisfy the FCC's objectives.

Conclusion

For the foregoing reasons, KDD requests that the FCC grant KDD's Petition.

Respectfully submitted,

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February 20, 1998

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply of Kokusai Denshin Denwa Co., Ltd. were served upon the parties listed below by United States mail, postage prepaid, this 20th day of February, 1998.

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