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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review	)	IB Docket No. 98-148
Reform of the International Settlements	)	
Policy and Associated Filing Requirements	)	
	)	
Regulation of International	)	CC Docket No. 90-337
Accounting Rates	)	

COMMENTS OF CABLE AND WIRELESS USA, INC.

Rachel J. Rothstein
Vice President for Regulatory and
Government Affairs
Paul W. Kenefick
Regulatory Counsel
CABLE & WIRELESS USA, INC.
8219 Leesburg Pike
Vienna, VA 22182

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SUMMARY

Cable & Wireless USA, Inc. ("C&W USA") submits the following comments which generally support the Commission's deregulatory and streamlining suggestions in this Notice of Proposed Rulemaking ("NPRM"). C&W USA supports the Commission's proposal to significantly expand ISR on more routes, to discard the ISP and its filing requirements on those routes where ISR is allowed, and supports the Commission's suggestion that the ISP and its filing requirements be inapplicable to nondominant carriers on WTO Member country routes. C&W USA's comments also address the Commission's proposals that the accounting rate flexibility and dominant classification rules be revisited in this new environment. Also, C&W USA requests the Commission rule that where the ISP has been discarded or held inapplicable for a certain carriers, its benchmark settlement rate condition be inapplicable as well. The proposal to remove this condition from facilities-based licenses is consistent with the ISP deregulation which recognizes competition, rather than government regulation, will fairly dictate the costs of international telecommunications.

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COMMENTS OF CABLE AND WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("CWUSA") hereby submits the following comments to the above entitled Notice of Proposed Rulemaking ("NPRM"). As with the Commission's other deregulatory and streamlining efforts in its 1998 Biennial Regulatory Review, C&W USA applauds the Commission in taking the lead on these issues and proposing to lift many burdensome and unnecessary regulations from U.S. international carriers. Deregulation of the international telecommunications market will increase competition and lower the costs of providing service, benefiting both carriers and consumers. Moreover, these proceedings provide an example to other nations that telecommunications quality increases and costs decrease when micro-management is replaced by competition and market based rates.

C&W USA generally supports and submits comments on many of the Commission's proposals in the NPRM. C&W USA supports significantly expanding the number of routes where International Simple Resale is permissible and lifting the

restrictions of the International Settlements Policy on these routes as well as for nondominant carriers on most routes. Further, C&W USA believes the Commission should declare its benchmark settlement rate condition as inapplicable to carriers on the routes where the ISP and its filing requirements have been lifted. Finally, the Commission should revise its rules concerning accounting rate flexibility arrangements to make them more attractive to U.S. and foreign carriers.

I. THE COMMISSION SHOULD IMMEDIATELY EXPAND THE ROUTES WHERE ISR IS PERMISSIBLE.

International Simple Resale, or ISR, places significant downward pressure on accounting rates through market forces and should be greatly expanded where feasible. In the Foreign Participation Order,[1] the Commission reiterated its policy adopted in the International Resale Order[2] encouraging resale and recognizing the benefits of services which carry traffic outside the traditional settlement rate system.[3] The result is strong marketplace pressure to lower settlement rates and reduce consumer prices.[4] Further, the Commission noted that the threat of "one-way bypass," the routing of only inbound traffic over private lines which exacerbates the settlements rate deficit, is far less of a concern on routes that terminate in WTO Member countries.[5]

C&W USA urges the Commission to greatly expand ISR on as many WTO Member country routes as possible. In this NPRM, the Commission recognizes ISR rules

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[1] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Dockets No. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997), recon. pending ("Foreign Participation Order" or "FPO").

[2] Regulation of International Accounting Rates, Phase II, CC: Docket No. 90-337, First Report and Order, 7 FCC Rcd 559 (1991)("International Resale Order").

[3] FPO at ¶77.

[4] Id. at ¶ 77.

[5] Id. at ¶ 76.

as a mechanism for putting greater pressure on settlement rates[6] and requests comment on whether it should adopt a less restrictive approach to ISR, such as in the United Kingdom, Sweden, Germany[7] and, as of January 1, 1999, in Hong Kong. The Commission should adopt a rebuttable presumption that all carriers holding Section 214 licenses to provide resold switched voice on WTO Member country routes be permitted to provide ISR on the route. In the exceptional case where a particular carriers poses a very high risk to competition in the U.S. market by ISR entry, then the Commission could deny entry based on the standard enacted in the Foreign Participation Order.[8] ISR could subsequently be declared lawful for carriers denied entry through this procedure pursuant to the Commission's existing test for WTO Member routes.

This policy of open ISR entry for WTO Member country routes will greatly expand this service and place significant, market driven downward pressure on accounting rates. The Commission would retain its ability to prevent market power abuses by initially precluding carriers that pose a very high risk to competition based standard adopted in the Foreign Participation Order. Further, the Commission will retain license restriction and post-entry safeguard mechanisms as well as the ability to prevent one-way bypass by denying entry in exceptional circumstances. By precluding carriers in only exceptional circumstances where license conditions and other post-entry safeguards are clearly inadequate, the Commission would remain consistent with standards adopted in the Foreign Participation Order, and since this liberalization is limited to WTO Member country routes, the Commission, through the Office of the U.S. Trade Representative, may employ the WTO's dispute resolution mechanism to address other issues that arise.

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[6] NPRM at ¶37.
[7] Id. at ¶38.

Additionally, the Commission should permit carriers to provide ISR for a limited amount of traffic on routes where it would not otherwise be authorized under the current rules.[9] In its comments to IB Docket No. 98-118, filed on August 13, 1998, Cable & Wireless, plc and C&W USA ("C&W") stated the Commission's ISR rules should be amended to recognize subsets of services.[10] C&W directed the Commission to an application filed by Hong Kong Telecommunications Pacific requesting ISR regulatory privileges for non-telephonic basic services. Foreign administrations do not always open their markets for all types of services at once, and the Commission's rules should provide the flexibility to recognize these deviations. Increased regulatory flexibility in this area would more accurately reflect these market conditions by permitting ISR in subsets of services, thus opening new markets to increased competition.

II. THE INTERNATIONAL SETTLEMENTS POLICY SHOULD BE DISBANDED ON ALL ISR ROUTES.

The Commission should discard the ISP and its filing requirements on routes where ISR has been permitted. In the NPRM, the Commission stated where ISR conditions are met on routes to WTO member nations, there is a significantly reduced threat that U.S. consumers will be injured as a result of allowing U.S. carriers to enter freely into agreements with foreign carriers without Commission oversight.[11] On these routes,[12] the Commission recognized that because U.S. carriers are authorized to carry switched

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[8] FPO, supra note 1, at ¶51.
[9] NPRM at ¶38.
[10] In the Matter of 1998 Biennial Regulatory Review, IB Docket No. 98-118, Notice of Proposed Rulemaking, Comments of Cable & Wireless at 6.
[11] NPRM at ¶27.
[12] As of this date, the Commission has authorized the provision of switched basic services via facilities-based or resold private lines between the United States and the following countries: Sweden, Canada, New Zealand, the United Kingdom, Australia, The Netherlands, Luxembourg, Norway, Denmark, France, Germany, Belgium, Austria, Switzerland and Japan.

traffic over private lines interconnected to the public switched telephone network, deviation from the ISP is currently permissible on such routes so long as traffic flows over private lines.[13]

As discussed in Section I of these comments, C&W USA supports expanding routes where ISR is permissible and lifting the ISP on these routes. As the Commission recognizes, on those routes where ISR is permissible, U.S. carriers have the option of taking traffic outside the accounting rate and ISP structure and entering into a direct agreements with the local operator. The uniform rates and proportionate return rigidity of the ISP reduces incentives for U.S. carriers to negotiate low settlement rates, is an entry barrier to new carriers, and inhibits retail competition.[14] The proportionate return traffic requirement, for example, can act as an entry barrier on these routes since U.S. carriers may have a business case to send outbound traffic without accepting proportionate return or the foreign carrier may not have return traffic to send, thus precluding the U.S. carrier from this route and stalling competition on the U.S. end.

Furthermore, maintenance of the ISP and its filing requirements on ISR routes could harm competition. Since many carriers take full advantage of ISR deregulation on these routes, the rates and conditions disclosed by the ISP on these routes do not accurately reflect the marketplace. The disclosure and public availability of information which is not demonstrative of the marketplace and which new entrants rely upon for bargaining purposes could harm and/or delay competition on the route.

The Commission should consider expanding this proposal to include non-WTO member nation routes where ISR is permitted. If a route has met the Commission's two-

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[13] NPRM at ¶27.
[14] Id. at ¶¶9-11.

prong test of equivalency and meeting the 50 percent benchmark settlement rate requirement, then competition on this route and in the destination country would suffice to protect competition and the interests of consumers. The ISP would no longer be applicable because traffic is carried outside the ISP, regardless of WTO membership.

The Commission's alternative proposals would impose unnecessary barriers to competition. These alternatives, which include declining to impose the ISP only on routes where at least 50 percent of the traffic is settled at the current best practices rate[15] or where the traffic is settled at or below the 50% benchmark rate and the foreign market permits U.S. carriers to provide service via ISR,[16] provide increased regulatory barriers to competition. First, the Commission should not rely on the best practices rate because it assumes, incorrectly, that termination costs are the same in all countries. It would be unreasonable to use termination costs as a condition to deregulation when many international carriers cannot control domestic interconnection or long distance charges. Second, the proposal to require destination countries provide ISR before discarding the ISP is basically an equivalency test of a WTO Member country's regulatory structure and contrary to the Commission's policies adopted in the Foreign Participation Order. As previously noted, a significant amount of traffic on ISR routes, regardless of WTO membership, is currently settled outside the accounting rate system and not subject to the uniform rates or proportionate return requirements of the ISP. Rather, these routes permit competition among carriers without the burdensome regulatory constraints of the ISP, resulting in increased quality at reduced costs.

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[15] Id. at ¶28 (describing the current best practices rate as $.08 per minute).
[16] Id. at ¶29.

III. THE ISP SHOULD NOT APPLY TO NONDOMINANT CARRIERS ON WTO MEMBER ROUTES.

On those WTO Member country routes where the ISP is not completely removed, the ISP and related filing requirements for arrangements with foreign carriers that lack market power should be removed. In the NPRM, the Commission discusses the inability of carriers to engage in whipsawing or serious anticompetitive behavior if they lack market power.[17] Consistent with its findings in the Foreign Participation Order which narrowed the No Special Concessions rule to foreign carriers with market power, the Commission has recognized there is little danger that a foreign carrier that lacks market power will have the ability to whipsaw U.S. carriers.[18] U.S. carriers on such a route would therefore be free to enter unencumbered into commercial negotiations with foreign carriers in WTO member countries that lack market power.[19]

C&W USA supports the Commission's decision to relieve U.S. carriers of the ISP and its filing requirements when they enter into agreements with nondominant carriers in WTO Member countries that lack market power. The Commission has accurately recognized that without market power, there is little danger that a foreign carrier will have the ability to whipsaw or have any anti-competitive effect on other U.S. carriers.

In its Order implementing these rule changes, C&W USA requests the Commission clarify that these restrictions will be lifted for all U.S. carriers in a nondiscriminatory manner. First, the Commission should specifically rule that the ISP and its filing requirements will be lifted in this situation so long as the U.S. carrier contracts with a foreign carriers that lacks market power, regardless of the U.S. carrier's dominant status

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[17] Id. at ¶18.
[18] Id. at ¶20.
[19] Id. at ¶20.

on the route. In this case, all U.S. carriers would be exempt from the ISP and its filing requirements if they interconnect with a carrier that lacks market power on the foreign end. Second, all U.S. carriers interconnecting with foreign carriers that lack market power on these routes should be exempt from the ISP and its filing requirements, even if the U.S. carrier is affiliated with the nondominant foreign carrier. The Commission's rules should recognize where the U.S. carrier's foreign affiliate does not possess market power in the foreign market, there is little danger of anti-competitive effects.

IV. THE COMMISSION SHOULD DISCARD FILING REQUIREMENTS ON ROUTES WHERE THE ISP IS NO LONGER APPLICABLE.

On those routes where the Commission has determined the ISP should no longer apply to arrangements between U.S. and foreign carriers, the Commission should discard its Section 43.51 contract filing and Section 64.1001 accounting rate filing requirements. C&W USA agrees with the Commission that there is little rationale in maintaining these requirements where the ISP does not apply, and the public availability of these contracts could have a detrimental effect on competition.[20] C&W USA, with affiliates operating worldwide, has witnessed first hand the reluctance of foreign carriers to enter into unique accounting rate arrangements due to the public disclosure and proportionate return requirement.[21] Many foreign carriers do not wish to have their contracts made available for competitive and proprietary reasons, and many demonstrate a misconception, even in flexibility arrangements, that public disclosure results in uniform access to the terms and conditions of the contract, i.e. a regulatory most favored nation clause. Furthermore, the policy reasons for requiring contracts to be filed with uniform rates and proportionate

[20] Id. at ¶30.

return is outdated and now appears to be a wasteful regulatory exercise which serves no compelling policy interest. As the Interstate Commerce Commission demonstrated in the trucking and shipping industries and the FCC allows in the competitive domestic interexchange market, the FCC should rely on market based policies rather than regulatory mandates.

On competitive routes where the ISP has been discarded, the Commission should not require contracts be filed or be made publicly available solely due to the carrier's affiliation with a foreign carrier. Since the route must be competitive in order for the ISP to be discarded, nondominant affiliated carriers should not be held to a different standard since they do not have the necessary market power to adversely affect U.S. consumers. As the Commission recognizes in its discussion concerning flexibility arrangements, where the foreign affiliate does not posses market power in the foreign market, there is little danger of anticompetitive effects.[22]

Likewise, since the Commission has previously determined the routes in question are competitive, the dominant carrier should not automatically be required to file its contracts with the Commission. If the route justifies competition without ISP oversight, then it is difficult to imagine a circumstance where one carrier could adversely affect competition and consumers through unilateral action. In the event a finding is made to the contrary, then the Commission could require these filings be made in confidence. If the dominant carrier's contracts and rates are publicly available on an otherwise competitive and deregulated route, then these contract terms could become the standard for all other

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[21] Id. at ¶26.
[22] Id. at ¶34.

agreements on this route, possibly retarding or delaying competition between the nondominant carriers.

V. THE BENCHMARK SETTLEMENT RATE CONDITION SHOULD BE REMOVED ON ROUTES WHERE THE ISP HAS BEEN HELD INAPPLICABLE.

On those routes where the Commission does not apply the ISP and its filing requirements to a carrier, the Commission should not condition this carrier's facilities-based license with the settlement rate condition enacted in the Benchmark Settlements Rate Order.[23] This condition prohibits a U.S. carrier from exercising its facilities-based authority on a route where it is affiliated with a foreign carrier that offers settlement rates in excess of the applicable benchmark.[24] This condition precludes the exercise of facilities-based authority on the route regardless of the foreign affiliate's market power or the degree of influence the U.S. carrier has over the foreign affiliate.

On routes where the ISP and its filing requirements have been held inapplicable, whether for all carriers or limited to nondominant carriers on the route, and U.S. carriers no longer must file the terms and conditions of their contracts with the Commission, this condition should be removed. When the Commission determines the ISP should no longer apply to a particular carrier on a specific route, it is affirming that market forces will dictate prices and conditions and Commission micro-management of international traffic is no longer necessary. In such a case, the benchmark condition should be removed since the underlying purpose of the Benchmark Order, to foster cost based settlement rates and prevent affiliated carriers from engaging in an illegal price squeeze, will

[23] International Settlement Rates, Report and Order ("Benchmark Order"), 12 FCC Rcd 19,806 (1997), recon. and appeal pending.

be achieved through market forces. On these routes, settlement rates should be dictated by market forces and competitive carriers, rather than the Commission's less than accurate assumptions of termination and interconnection costs in these countries. In some cases, market forces will drive the affiliate's settlement rates down below the benchmark rate. However, if the ISP is not applicable for this carrier because the route satisfies the Commission's standard for ISP removal or the carrier is nondominant, and the affiliate's settlement rate nevertheless exceeds the benchmark, then the Commission's benchmark condition is inappropriate in that market because it clearly would require the affiliate to price below market rate and perhaps even below cost. In this situation, the benchmark settlement rate could actually harm the marketplace by forcing some carriers to offer service below cost.

In the alternative, the Commission should not apply this condition on routes where the ISP has been discarded and the U.S. carrier has been held to be nondominant on the route. As the Commission stated in this Order when it discussed flexibility arrangements between affiliated carriers that lacked market power, if a foreign carrier affiliate does not have market power in the foreign market, there is little danger it could act anticompetitively.[25] If the route is competitive to the point where the ISP will no longer apply, then the benchmark condition will provide no benefit to unaffiliated U.S. carriers. On such a route, new entrants would provide service to customers at lower rates and higher standards of service than the dominant carrier and unaffiliated U.S. carriers would have several alternative carriers with which to terminate traffic.[26]

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[24] Benchmark Order at ¶¶195-231.
[25] See NPRM at ¶34.
[26] See Id. at ¶15 (discussing benefits of competitive carriers in liberalized markets).

VI. THE COMMISSION'S FLEXIBILITY POLICY SHOULD BE REVISED.

In Part II. C. of the NPRM, the Commission reexamines rules concerning accounting rate flexibility arrangements and their role in a deregulated system.[27] The Commission seeks to modify the flexibility policy in order to limit the filing of commercial information on routes that qualify for flexibility. C&W USA supports the Commission's efforts to reform the accounting rate flexibility rules to make them more applicable to the competitive international telecommunications market and to limit the amount of proprietary information which is disclosed to competitors.

First, the Commission should recognize that true accounting rate flexibility would best occur in an environment where the ISP has been discarded. In other words, on those routes where the Commission does not apply the ISP, whatever the standard, carriers would be permitted to enter into private contracts for the termination of international switched voice traffic without the proportionate return, uniform rates or public notification restraints. Since flexibility arrangements are an exception to the ISP, they would be inapplicable in these situations.

Second, on those routes where the ISP remains in force, the Commission should reexamine its flexibility rules to make them more appealing to international carriers. The Commission itself recognized that few carriers were taking advantage of the flexibility rules since the Order was released in December 1996 and has requested comment on how more carriers could enter into these arrangements.[28] It is the filing and public disclosure requirements of these rules which prevent carriers from taking full advantage of

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[27] Id. at ¶¶32-36.
[28] See Id. at ¶26.

accounting rate flexibility. As with other industries, international telecommunications carriers prefer contract arrangements be proprietary and protected from disclosure to competitors. Public disclosure which subjects these arrangements to comment inhibits these negotiations and provides the foreign carrier with a disincentive to enter into flexibility arrangements.

The Commission should amend its rules and enact its proposal permitting arrangements which do not meet the 25% traffic threshold to be authorized without the public disclosure of the terms and conditions. Carriers entering into arrangements below this traffic threshold should only be required to file a certification that the arrangement does not trigger the flexibility safeguards and to identify the destination market.[29] Further, the Commission's rules should not discriminate against arrangements between affiliated carriers that do not meet the 25% traffic threshold. As the Commission recognized, where the U.S. carrier's foreign affiliate does not possess market power in the foreign market, there is little danger that flexible arrangement would have an anticompetitive effect.[30]

VII. THE COMMISSION SHOULD INITIATE A PROCEEDING TO DETERMINE DOMINANT CARRIERS.

In the NPRM, the Commission requests comment on how to determine which carriers are dominant and which should be exempt from the ISP and its filing requirements, while at the same time minimizing the amount of proprietary information which must be filed.[31] The Commission recognizes a carrier's exemption to the ISP could be less beneficial if the carrier had to publicly file proprietary information to prove it qualified for the

[29] Id. at ¶35.
[30] Id. at ¶34.

exemption. At the same time, the Commission needs some mechanism for determining which foreign carriers possess market power in their markets in order to properly apply its' safeguards.

While C&W USA reiterates its general opposition to the Commission's dominant carrier safeguards, it supports proposal that if dominant carrier safeguards are to be enacted, then the Commission should make an affirmative finding whether a foreign carrier possesses market power. The Commission recognizes that in most foreign markets, the determination of whether a carrier has market power is clear cut, because most foreign markets are divided between a former incumbent with a market share of well over 50 percent and new entrants with market shares below 50 percent.[32] Assuming the Commission maintains its 50 percent market share test for market power, it should initiate a proceeding whereby it would issue an Order naming which foreign carriers are dominant in which international points. Interested parties could file comments to support or challenge the accuracy of this list. After the dominant carrier list is finalized, the Commission could make amendments to the list through declaratory ruling based on information filed in confidence. This process is superior to others suggested by the Commission because it does not require nondominant carriers to file proprietary information demonstrating their nondominant status.

VIII. THE COMMISSION SHOULD IMMEDIATELY PERMIT OUTBOUND GROOMED TRAFFIC.

In the NPRM, the Commission seeks comment on whether carriers may negotiate agreements to accept "groomed" traffic, i.e. traffic that terminates in particular

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[31] Id. at ¶¶22-23.

geographic regions. The Commission has examined, but not ruled on, this particular issue in past proceedings when addressing whether incumbent local exchange carriers ("ILECs") may accept such traffic within or outside their operating regions.

Consistent with its proposal for subsets of ISR services discussed in Part I of these comments, C&W USA strongly urges the Commission to permit outbound groomed traffic. While the Commission has domestic and international market power concerns with inbound groomed traffic terminated by the ILECs, regulations permitting outbound groomed traffic would reflect current market conditions. On those routes still subject to the Commission's ECO test, foreign carrier affiliates may possess market power in certain regions of a country, such as the ILECs do in the United States, but this market power does not extend to the entire country. In an Order authorizing CWI to provide facilities-based service to Russia, the Commission recognized a foreign affiliate may have market power in one particular region but not the entire nation.[33] The Commission's order tailored its benchmark settlement rate condition and dominant regulatory status to only those regions of Russia where the foreign affiliates could exercise market power. The Commission should codify this policy and allow groomed traffic to be sent to a nation when the market power of an affiliate is confined to just one area.

IX. CONCLUSION

C&W USA again applauds the Commission in proposing significant deregulatory measures in the international telecommunications market. These comments attempt to demonstrate the benefits of competition versus regulation. The Commission has correctly

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[32] Id. at ¶23.

[33] See Cable & Wireless, Inc., Order, Authorization, and Certificate, File No. I-T-C-97-290, DA 98-628, released April 2, 1998.

recognized that the rules developed in 1936 to prevent monopoly abuses are no longer applicable in the competitive market of 1998. Expansion of ISR, removal of the ISP, as well as other proposed measures will create a regulatory structure which more accurately reflects the modern international telecommunications marketplace.

Respectfully Submitted,

By: Rachel J. Rothstein
Vice President for Regulatory and
Government Affairs
Paul W. Kenefick
Regulatory Counsel
CABLE & WIRELESS USA, INC.
8219 Leesburg Pike
Vienna, VA 22182

CERTIFICATE OF SERVICE

I, Theresa M. Caban, hereby certify that I have caused copies of the foregoing "Comments of Cable & Wireless USA, Inc." to be served this 16th day of September 1998, by first class mail, postage prepaid to the following:

Theresa M. Caban

Regina M. Keeney
Chief, International Bureau
Federal Communications Commission
Room Number 800, Stop Code 0800
2000 M Street, NW
Washington, D.C. 20554

Diane J. Cornell
International Bureau
Federal Communications Commission
Room Number 800, Stop Code 0800A
2000 M Street, NW
Washington, D.C. 20554

Troy Tanner
International Bureau
Federal Communications Commission
Suite 800
2000 M Street, N.W.
Washington, DC 20554

Douglas Klein
International Bureau
Federal Communications Commission
Suite 800
2000 M Street, N.W.
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Deputy Assistant Secretary of
Defense (Telecommunications)
Office of the Assistant Secretary
of Defense
Pentagon, Room 3E160
Washington, D.C. 20401

Vernon McConnell - W36
Director
National Security Agency
Fort George G. Meade, MD. 20755

Earl Barbely
Office of International Communications
Policy
Department of State
21st and C Streets, NW - # 5824
Washington, D.C. 20520

Carl Wayne Smith, Esq.
Acting Chief Regulatory Counsel
Defense Communications Agency
Washington, D.C. 20305-2000
Attention: Code 115

The Hon. Clarence Irving
Assistant Secretary of Commerce
National Telecommunications and
Information Agency
14th & Constitution Ave., NW
Room H 4717
Washington, D.C. 20320