

Before the
Federal Communications Commission
Washington, D.C. 20554 P 5:21

In the Matter of)
)
1998 Biennial Regulatory Review --)
Reform of the International Settlements)
Policy and Associated Filing Requirements)
)
Bell Canada)
Petition for Declaratory Ruling)

IB Docket No. 98-148 /

ORDER

Adopted: June 14, 2001

Released: June 15, 2001

By the Chief, International Bureau:

I. INTRODUCTION

1. On November 4, 1999, Bell Canada filed a request for declaratory ruling seeking treatment as a non-dominant carrier by removal of its name from the Commission's "List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets."¹ As discussed below, we find that Bell Canada has failed to demonstrate that it lacks market power and therefore qualifies to be removed from the list. Consequently, we deny Bell Canada's request.

II. BACKGROUND

2. In 1999, the Commission removed the International Settlement Policy (ISP)² and modified the related filing requirements for: (1) all settlement arrangements between U.S. carriers and foreign carriers that lack market power; and (2) all settlement arrangements along routes where at least 50 percent of U.S.-billed traffic is terminated at

¹ List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets, Public Notice, DA 99-809 14 FCC Rcd 7038 (rel. May 6, 1999; erratum rel. June 18, 1999) (Foreign Carriers List PN).

² "The ISP requires: (1) the equal division of the accounting rate between the U.S. and foreign carrier; (2) nondiscriminatory treatment of U.S. carriers (all U.S. carriers must receive the same accounting rate, with the same effective date); and (3) proportionate return of inbound traffic." See In the Matter of 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, IB Docket No. 98-148, Report and Order and Order on Reconsideration, 14 FCC Rcd 7963 (1999) (ISP Reform Order) (emphasis added).

rates that are at least 25 percent below the relevant benchmark.³ Under the Commission's rules, U.S. carriers are still required to file with the Commission copies of their operating agreements and settlement arrangements with foreign carriers that possess market power,⁴ even for arrangements on routes that are no longer subject to the ISP.⁵

3. Contemporaneous with the *ISP Reform Order*, the Commission released a list of foreign telecommunications carriers that are presumed to possess market power in foreign telecommunications markets.⁶ U.S. carriers are prohibited from exchanging traffic outside the ISP with carriers on the list unless otherwise allowed, for example, on routes where at least 50 percent of the U.S.-billed traffic is terminated at rates that are at least 25 percent below the relevant benchmark. U.S. carriers are also prohibited from agreeing to accept special concessions from carriers on the list unless otherwise allowed under the Commission's rules.⁷ Included on the list are all incumbent local exchange carriers (LECs) in the foreign market, such as Bell Canada.⁸

4. Settlement arrangements on the U.S.-Canada route are no longer subject to the ISP because at least 50 percent of U.S.-billed traffic is terminated at rates that are at least 25 percent below the Commission's settlement rate benchmark.⁹ However, because Bell Canada is included on the Commission's list of foreign carriers presumed to possess market power, U.S. carriers that have arrangements with Bell Canada are required to file copies of those arrangements with the Commission.¹⁰ In addition, because Bell Canada is listed as a carrier presumed to possess market power, no U.S. carrier is permitted to accept a "special concession" from Bell Canada.¹¹

5. On November 4, 1999, Bell Canada filed a petition for declaratory ruling requesting that it be removed from the Commission's list of foreign carriers presumed to possess market power.¹² Alternatively, Bell Canada requests that the Commission prospectively waive the contract filing requirements of section 43.51 of the Commission's rules for U.S. carriers entering into settlement agreements with Bell

³ The Commission adopted benchmark settlement rates in *International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 (1997) (*Benchmarks Order*), *aff'd sub nom. Cable and Wireless Plc v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999).

⁴ See 47 C.F.R. § 43.51.

⁵ *ISP Reform Order*, 12 FCC Rcd at 7989-90.

⁶ See *Foreign Carriers List PN*.

⁷ The "No Special Concessions" rules does not apply to the rates, terms and conditions in an agreement between a U.S. carrier and a foreign carrier that govern the settlement of international traffic if the international route is exempt from the ISP. See 47 C.F.R. § 63.14(c).

⁸ See *Foreign Carriers List PN* at 6.

⁹ See *Commission Releases List of International Routes That Satisfy Criteria for Relief from the International Settlements Policy and Associated Filing Requirements*, Public Notice, 14 FCC Rcd 12158 (1999).

¹⁰ See *Foreign Carrier List PN*.

¹¹ See 47 C.F.R. § 63.14.

¹² Bell Canada's Petition for Declaratory Ruling, filed November 4, 1999 (Bell Canada Petition).

Canada.¹³ AT&T Corp. (AT&T) filed an opposition to Bell Canada's petition on January 19, 2000.¹⁴

III. DISCUSSION

6. We find that Bell Canada has not demonstrated that it should be removed from the Commission's list of foreign telecommunications carriers that are presumed to possess market power in foreign telecommunications markets. Under section 43.51 of the Commission's rules "[a] party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market."¹⁵ Bell Canada does not argue that it lacks 50 percent market share in the local access market, but rather relies on the second prong of the test.¹⁶ Specifically, Bell Canada argues that even though it may possess greater than 50 percent market share in Canada's local access market (which Bell Canada argues should be defined as the national market), it nevertheless lacks sufficient market power in Canada to affect competition adversely in the U.S. market.¹⁷ Therefore, Bell Canada contends that U.S. carriers' agreements with it should not have to be filed with the Commission, and that the "No Special Concessions" rule should not apply to those agreements.¹⁸ As we detail below, we do not find that Bell Canada has made the necessary demonstration. We also do not find that Bell Canada has demonstrated that a waiver of the contract filing requirements of section 43.51 for U.S. carrier agreements with Bell Canada is in the public interest.

7. Definition of Market Power. The Commission defines market power as a carrier's ability to raise price by restricting the output of its services.¹⁹ In the international context, the Commission's regulatory approach addresses the ability of a carrier operating in a foreign market to discriminate against unaffiliated carriers through

¹³ Bell Canada Petition at 9-10, citing 47 C.F.R. § 43.51.

¹⁴ Opposition of AT&T Corp., filed January 19, 2000 (AT&T Opposition).

¹⁵ 47 C.F.R. § 43.51, note 3. This is the same standard that the Commission adopted in the *Foreign Participation Order* for the purpose of determining when to apply competitive safeguards to U.S. carrier dealings with affiliated and unaffiliated foreign carriers. See *ISP Reform Order* 12 FCC Rcd at 7976-78, ¶¶ 38, 43, citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, 12 FCC Rcd 23891, 23952-52 (1997), Order on Reconsideration, 15 FCC Rcd 18158 (2000).

¹⁶ "Bell Canada's petition is based solely on the second prong of the test, i.e., it [nevertheless] lacks sufficient market power to adversely affect competition in the U.S. market." Letter from Gregory C. Staple, Counsel for Bell Canada, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Sept. 1, 2000 (Bell Canada Sept. 1, 2000 Letter).

¹⁷ As discussed supra, and in greater detail in the *Foreign Participation Order*, 12 FCC Rcd at 23951, ¶ 145, and *ISP Reform Order*, 14 FCC Rcd at 7976-78, the Commission's concern with the potential for leveraging of foreign market power into the U.S. market extends to a carrier's control of any one of the three types of services: international transport facilities or services; inter-city facilities or services; and local access facilities or services.

¹⁸ See Bell Canada Reply at 2; Bell Canada Sept. 1, 2000 Letter at 8-9.

¹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23951, ¶ 144.

the control of an input that is necessary for the provision of international services. In previous decisions, the Commission's market power analysis has considered: (1) the foreign affiliate's market share in any relevant terminating market on the foreign end of the particular route; (2) the supply elasticity of the market; (3) the demand elasticity of that market's customers; and (4) the foreign affiliate's cost structure, size and resources.²⁰ In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power. Indeed, the Commission has stated that, consistent with well-accepted economic principles, market conditions related to demand and supply elasticities are the more crucial determinants of a firm's market power. These conditions include the availability of close demand substitutes and ease of entry and expansion.²¹

8. Relevant Geographic Market. Bell Canada argues that it lacks sufficient market power to affect adversely competition in the U.S. market. It contends that the relevant local access market is "the national market in Canada, not just certain Canadian provinces."²² However, in the *Foreign Participation Order*, the Commission recognized that, for purposes of identifying the relevant geographic market for local access facilities on the foreign end, it might be appropriate in some instances to examine the market power of a carrier in a discrete geographic region rather than the national market of a foreign country.²³ Indeed, in *Cable and Wireless*, the Telecommunications Division examined the market power of Cable and Wireless Inc.'s affiliate, Shenda Telephone Company, in a single region, a region that generated a significant portion of China's international traffic, in determining whether Cable and Wireless Inc. should be subject to dominant carrier safeguards on the U.S.-China route.²⁴ This was based in part on the affiliate's dominant position in a market that generates such a significant portion of China's international traffic and the overall volume of international traffic coming from the relevant region in China.²⁵

9. Concerns regarding carrier dominance in a specialized region are applicable here, where Bell Canada controls more than 95 percent of local access lines in

²⁰ See, e.g., *IDC America, Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service between the United States and Japan*, Order, Authorization and Certificate, File No. ITC-96-685, 13 FCC Rcd 4084, ¶ 4 (IB/TD 1997) (citing *Motion of AT&T Corp. to be Declared Non-dominant for International Service*, Order, 11 FCC 17963, ¶¶ 37-79 (1996); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293-94 (1995)); see also 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) 20, 569, 20,570.

²¹ See *Foreign Participation Order*, 12 FCC Rcd at 23961 fn. 317.

²² See Bell Canada's Reply at 4.

²³ See *Foreign Participation Order*, 12 FCC Rcd at 23953 at ¶ 145.

²⁴ See *Cable and Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Service between the United States and China*, File No. ITC-214-19980515-00326 (previous File No. ITC-98-380), Order, Authorization, and Certificate, DA 98-2498 14 FCC Rcd 13418 at ¶ 18 (IB/TD rel. Dec. 8, 1998) (*Cable and Wireless*).

²⁵ See *id.*

the six Canadian provinces that constitute Bell Canada's local franchise area.²⁶ These provinces include Canada's two most populous provinces, Ontario and Quebec, which generate more than 60 percent of Canada's international traffic. Therefore, we find that it is appropriate in this instance to consider Bell Canada's local franchise area as the relevant geographic market for purposes of determining whether it possesses sufficient market power in Canada to affect competition adversely in the United States

10. Market Power Analysis. We find that, through its control of more than 95 percent of local access lines in its franchise area, Bell Canada has control of inputs that are necessary to terminate a substantial portion of U.S. international traffic in Canada. Bell Canada generally claims that there are multiple options for traffic termination in the local marketplace.²⁷ Bell Canada, however, fails (1) to specifically identify the multiple options that are available for traffic termination or (2) to present sufficient evidence to establish that any such alternatives are available in sufficient supply and that demand by end user customers is sufficiently elastic to offset to any significant degree Bell Canada's current near ubiquitous control of access to end users in its franchise area. As a result, we find that Bell Canada has the ability to discriminate against and among U.S. carriers seeking to terminate traffic in Canada by, for example, raising the price of, or withholding or degrading the quality of, terminating access in its region.

11. Bell Canada relies in the main on the argument that Canada has a comprehensive and effective regulatory regime in place to ensure that no incumbent LEC in Canada can use its position to adversely affect competition or consumer choice by "discriminat[ing] against new entrants or otherwise act[ing] in an anti-competitive fashion."²⁸ AT&T questions the effectiveness of the competitive safeguards in Canada.²⁹ In the *Foreign Participation Order*, the Commission stated that it "generally [does] not consider the effectiveness of foreign regulation as a separate matter when making a determination of a foreign-affiliated carrier's regulatory classification."³⁰ The Commission stated that "experience has shown that obtaining sufficiently reliable and timely information about a foreign regulatory regime is a difficult, resource-intensive, and time-consuming process. We find that the delay inherent in such a process would slow entry into our markets and the attendant benefits to our consumers."³¹ Thus, regardless of what regulations may or may not exist, the burden is on the petitioner to prove that it lacks sufficient market power to affect competition adversely in the U.S. market. Bell Canada has failed to make that showing.

²⁶ Bell Canada Enterprises's Annual Report states "Bell Canada's local market share at December 31, 2000 . . . [was] an estimated market share of 97.1%." Bell Canada Enterprises 2000 Annual Report. See also AT&T's Opposition at 2-3. We note that Bell Canada did not refute these market share numbers. We also note that the Annual Report states that "Bell Canada's share of long distance market, as at December 31, 2000, . . . [was] an estimated market share of 61.0%." Bell Canada Enterprises 2000 Annual Report.

²⁷ See Bell Canada's Petition at 9.

²⁸ See Bell Canada's Petition at 7-8.

²⁹ Letter from James J.R. Talbot, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Mar. 3, 2000, at 1, 4-5.

³⁰ See *Foreign Participation Order*, 12 FCC Rcd at 23995, ¶ 230.

³¹ See *id.*

12. We also disagree that our ruling in *GTE Hawaiian Telephone Company, Inc.*, supports Bell Canada's request for removal from the list. The facts presented in that proceeding are significantly different than the ones before us now. In *GTE Hawaiian Telephone Company, Inc.*, the Bureau treated GTE Hawaii as a non-dominant carrier to Canada, even though it was affiliated with two incumbent LECs -- British Columbia Telephone Company (BC Tel) and Quebec Telephone (Quebec Tel). GTE Hawaii demonstrated that neither BC Tel nor Quebec Tel provided long distance or international service and that all U.S. carriers interconnected directly with Stentor-Canadian Network Management (Stentor) for U.S.-Canada traffic.³² GTE Hawaii established that Stentor delivered U.S. traffic to the appropriate local telephone company for termination at the local exchange. For U.S. carriers, all settlements were handled exclusively with Stentor. The Bureau determined that because neither BC Tel nor Quebec Tel controlled more than 25 percent of the interests in Stentor, GTE Hawaii's Canadian affiliates had limited ability to discriminate in favor of GTE Hawaii.³³ Stentor, however, no longer serves as the interconnection carrier for U.S. carriers terminating traffic in Canada.³⁴ In Bell Canada's region, U.S. international carriers and their Canadian correspondents (including U.S. international carriers operating on both ends of a U.S.-Canadian circuit) now interconnect directly with Bell Canada. Thus, Bell Canada has the ability to discriminate against and among U.S. carriers seeking to terminate traffic in its region. As discussed above, that was not the case with either BC Tel or Quebec Tel at the time the Commission found them to be non-dominant. Therefore, the reasons for non-dominant treatment of GTE Hawaii's affiliates do not apply to Bell Canada.

13. Waiver Request. Alternatively, Bell Canada argues that pursuant to section 1.3 of our rules the Commission should waive the contract filing requirements of section 43.51 of the rules for U.S. carrier arrangements with Bell Canada.³⁵ Under section 1.3 of our rules, the Commission may waive a requirement "for good cause shown."³⁶ The general purpose of the filing requirement for arrangements with foreign carriers possessing market power is the protection of U.S. consumers. Specifically, the filing requirements helps the Commission to detect unreasonable discrimination in the treatment of U.S. carriers by foreign carriers. Bell Canada states that grant of its waiver request will help protect competition in the U.S. international telecommunications market because carriers would be free to enter into arrangements with a variety of Canadian carriers, including Bell Canada. Yet, Bell Canada fails to demonstrate how waiver of the filing requirement of section 43.51 for Bell Canada will protect competition in the U.S. telecommunications market. To the contrary, as discussed above, we find that Bell Canada has the ability to discriminate against and among U.S. carriers seeking to terminate traffic in its region. Accordingly, we deny Bell Canada's request to waive the filing requirement of section 43.51 for Bell Canada for failure to show good cause.

³² *In the Matter of Petition of GTE Hawaiian Telephone Company, Inc. for Reclassification as a Non-dominant IMTS Carrier*, Order 11 FCC Rcd 20354, 20381-382, ¶ 60 (1996) (*GTE Hawaiian Telephone Company*).

³³ *GTE Hawaiian Telephone Company*, 11 FCC Rcd at 20381-382, ¶ 60 (1996).

³⁴ Subsequent to the GTE decision, Stentor dissolved. Bell Canada Petition at 5-6.

³⁵ Bell Canada Petition at 9-10, citing 47 C.F.R. § 1.3.

³⁶ See 47 C.F.R. § 1.3

IV. Conclusion

14. We find that Bell Canada has not met its burden to show that it lacks market power in Canada. Therefore, we deny Bell Canada's request for declaratory ruling seeking removal of its name from the Commission's "List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets." We also deny Bell Canada's request to waive the filing requirement of section 43.51 for Bell Canada for failure to show good cause.

V. Ordering Clauses

15. Accordingly, it is ORDERED that Bell Canada's petition for declaratory ruling seeking removal of its name from the Commission's "List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets" is DENIED.

16. IT IS FURTHER ORDERED that Bell Canada's request for a waiver of the filing requirement of section 43.51 for Bell Canada is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
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