

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
CABLE & WIRELESS, INC.	)	
	)	File No. I-T-C-96-271
Application for Authority Under	)	
Section 214 of the Communications Act, as	)	
Amended, to Resell Non-interconnected	)	
Private Line Services Between the United	)	
States and the United Kingdom	)	

**ORDER AND AUTHORIZATION**

**Adopted: September 26, 1996**

**Released: September 27, 1996**

By the Chief, Telecommunications Division:

**Introduction**

1. In this *Order and Authorization*, we grant authority to Cable & Wireless, Inc. (C&W) under Section 214 of the Communications Act of 1934, as amended,<sup>1</sup> to increase its authorized resale capacity to provide non-interconnected international private line (IPL) services between the United States and the United Kingdom. We find that the public interest supports grant of C&W's application. In addition, C&W has requested that the Commission regulate it as non-dominant for resale of non-interconnected IPL services to the United Kingdom. We will defer consideration of this request and will consider it in tandem with C&W's pending application for authority to provide facilities-based switched and private line services between the United States and the United Kingdom.

**Background**

2. C&W, organized under the laws of the District of Columbia, is a domestic common carrier authorized to provide international switched and private line services between the United States and numerous countries through the resale of facilities of underlying carriers. C&W is also authorized to acquire and operate facilities to provide switched and private line

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<sup>1</sup> 47 U.S.C. § 214.

services, on a facilities basis, between the United States and Canada. In the *C&W Order*,<sup>2</sup> the Commission specifically authorized C&W to provide non-interconnected IPL resale services between the United States and numerous international points, including the United Kingdom.

3. C&W filed an Application for Additional Authority on May 7, 1996 (*C&W Application*), seeking permission to obtain an additional 40 E-1 circuits of resold capacity for providing non-interconnected IPL services between the United States and the United Kingdom. In its application, C&W states that it is indirectly affiliated with Mercury Communications, Ltd., a domestic and international telecommunications carrier in the United Kingdom.<sup>3</sup> We gave public notice of the *C&W Application* on May 14, 1996, and received no comments.

### Discussion

4. C&W was authorized to provide non-interconnected IPL services to the United Kingdom two years prior to adoption of the *Foreign Carrier Entry Order*. In last November's *Foreign Carrier Entry Order*, the Commission required that a dominant, foreign-affiliated carrier obtain Section 214 approval before adding facilities-based or resale circuits on those routes for which the carrier is regulated as dominant.<sup>4</sup> The Commission reasoned that this requirement would enhance its ability to limit anticompetitive conduct by allowing it to monitor addition of circuits on affiliated routes as a means of detecting deviations from expected traffic flows.<sup>5</sup> Furthermore, the *C&W Order* specifically required that C&W, as a dominant carrier, request Section 214 authorization for all circuit additions to any of the international points authorized in that order.<sup>6</sup>

5. In the *Foreign Carrier Entry Order*, the Commission adopted as an important part of its Section 214 public interest analysis an examination of whether effective competitive

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<sup>2</sup> *Cable & Wireless Communications, Inc., Order and Certification*, 8 FCC Rcd 1664 (1993) (*C&W Order*).

<sup>3</sup> *See Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order*, 11 FCC Rcd 3873, 3900-06 (¶¶ 73-87) (1995), *recon. pending (Foreign Carrier Entry Order)* (defining affiliation to include an ownership interest of greater than 25 percent, or a controlling interest at any level, by the applicant or an entity that directly or indirectly controls or is controlled by it, in a foreign carrier). C&W has an 80 percent ownership stake in Mercury.

<sup>4</sup> *Id.*, 11 FCC Rcd at 3974-75 (¶¶ 263-265).

<sup>5</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3974-75 (¶¶ 263-265). On January 17, 1996, C&W filed a Petition for Reconsideration with the Commission claiming that application of the standards adopted in the *Foreign Carrier Entry Order* to requests for authority to acquire additional capacity on pre-existing authorized routes is not in the public interest. However, C&W asks that we not delay grant of this application pending our review of its petition. *C&W Application* at 2.

<sup>6</sup> *C&W Order*, 8 FCC Rcd at 1664 (¶ 7).

opportunities exist in the foreign market for U.S. companies to offer international services comparable to those sought to be offered in the U.S. market by the foreign carrier. The effective competitive opportunities analysis applies where foreign carriers have market power, *i.e.*, the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities.<sup>7</sup> In asserting that the effective competitive opportunities test is satisfied in its application, C&W does not address the market power issue, although it does request that we regulate it as non-dominant for the resale of non-interconnected IPL services to the United Kingdom (which would also involve consideration of the market power issue).

6. We defer a decision on whether C&W possesses market power in the relevant market and C&W's request for non-dominant treatment to another pending proceeding, where there is a more detailed record on this issue. We will consider the issue of non-dominant treatment in the context of reviewing C&W's pending application for authority to provide facilities-based switched and private line services between the United States and the United Kingdom (File No. I-T-C-96-239). For purposes of our analysis here, we will assume *arguendo* that it is appropriate to apply the effective competitive opportunities test to C&W's application.

7. In applying the effective competitive opportunities test, we first consider the legal ability to provide the relevant resale service in the destination country. Next, we consider practical barriers to entry, including the existence of reasonable and nondiscriminatory charges, terms and conditions for local termination of international services; competitive safeguards to protect against anticompetitive and discriminatory practices affecting resale; fair and transparent regulatory procedures; and separation between the regulator and operator of international facilities-based services.<sup>8</sup>

8. First, the United Kingdom affords open entry to U.S. non-interconnected IPL resale carriers. As indicated in *ACC/Alanna*,<sup>9</sup> in which the Commission found that the United Kingdom offers equivalent opportunities for U.S. carriers to resell interconnected IPLs for the provision of switched services, the United Kingdom imposes no restrictions on either foreign ownership of telecommunications service providers or foreign participation in the U.K. resale market. Second, the record does not suggest the existence of any practical barriers to entry. Although interconnection to the public switched network is not at issue for these non-interconnected IPLs, competing resellers need to be able to terminate their traffic over U.K. domestic private line facilities. C&W notes that U.K. Public Telecommunications Operators (PTOs) are required to provide both international and domestic private line capacity to U.K. licensees under published

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<sup>7</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3912 (¶ 126).

<sup>8</sup> *Id.*, 11 FCC Rcd at 3929 (¶ 146).

<sup>9</sup> *ACC Global Corporation/Alanna Inc., Memorandum Opinion, Order and Certificate*, 9 FCC Rcd 6240, 6247-48 (¶ 11) (1994) (*ACC/Alanna*).

tariffs which ensure nondiscriminatory and reasonable rates.<sup>10</sup> Third, C&W notes the existence of the following competitive safeguards: (1) conditions in all PTOs' licenses prohibiting cross-subsidization between "regulated" and "unregulated" businesses; (2) Mercury and British Telecommunications plc (BT), the incumbent U.K. international facilities-based carriers, are required to submit audited accounts to the Office of Telecommunications (or OFTEL, the U.K. regulatory body) for review, and BT is required to publish these accounts; and (3) U.K. PTOs are prohibited from using customer information in any manner except that for which the information was intended.<sup>11</sup> With regard to the final element of the effective competitive opportunities test, we note that Oftel, an independent regulatory body with no connection to any U.K. operator, employs rulemaking procedures similar to the Commission's, with publication of a consultative document and collection of public input prior to policy formulation.<sup>12</sup> For all these reasons, we conclude that the United Kingdom offers effective competitive opportunities for U.S. carriers for resale of non-interconnected IPL services.<sup>13</sup>

9. We also find that the additional factors we consider in making our Section 214 public interest determination are satisfied here.<sup>14</sup> Grant of C&W's request for additional capacity will help promote competition in the U.S. market by enhancing service options available to U.S. consumers on the U.S.-U.K. route and by stimulating the development of new services and pricing arrangements.<sup>15</sup> Further, the Executive Branch has not communicated to us any national security, law enforcement, foreign policy, or trade concerns with the *C&W Application*. For these reasons, and because we conclude that the United Kingdom offers effective competitive opportunities for U.S. carriers for resale of non-interconnected IPL services, we find that grant of the *C&W Application* is consistent with the public interest. We will continue to regulate C&W as dominant for resale of non-interconnected IPL services to the United Kingdom, and will address its request for non-dominant treatment in a later proceeding.

### Ordering Clauses

10. Accordingly, IT IS ORDERED that C&W is AUTHORIZED to add 40 E-1 circuits of resold capacity for providing non-interconnected IPL services between the United States and the United Kingdom.

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<sup>10</sup> *C&W Application* at 9.

<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> Most of the factors addressed in this analysis were extensively discussed in the *ACC/Alanna* decision. See also *ACC/Alanna*, 9 FCC Rcd at 6247-55 (¶¶ 11-28).

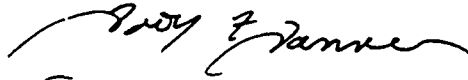
<sup>14</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3897 (¶ 62).

<sup>15</sup> *C&W Application* at 12-14.

11. IT IS FURTHER ORDERED that C&W's request for non-dominant regulation for resale of non-interconnected IPL services to the United Kingdom is DEFERRED so that it may be considered in the context of C&W's application for authority to provide facilities-based switched and private line services between the United States and the United Kingdom (File No. I-T-C-96-239).

12. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION



for Diane J. Cornell  
Chief, Telecommunications Division