

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

**DA 96-2006**

In the Matter of	)	
	)	
CABLE & WIRELESS, INC.	)	
	)	
Notification of Affiliation and	)	File No. I-S-P-95-006-ND
Application for Designation as a	)	
Non-dominant Carrier for International	)	
Communications Services with Canada	)	
	)	
Petition for Non-dominant Status on	)	File No. I-S-P-93-006-ND
all Routes Employing Resold International	)	
Message Telecommunications Services of	)	
Unaffiliated U.S. Carriers	)	
	)	
Petition for a Determination of Non-dominant	)	File No. I-S-P-93-007-ND
Status on International Private Line Routes	)	

**ORDER AND AUTHORIZATION**

**Adopted: November 27, 1996**

**Released: November 29, 1996**

By the Chief, International Bureau:

**I. INTRODUCTION**

1. In this Order, we reclassify Cable & Wireless, Inc. ("CWI") as a non-dominant carrier for all authorized international services on the U.S.-Canada route. We also reclassify CWI as a non-dominant carrier for resold non-interconnected international private line service on the U.S.-Australia and the U.S.-Japan routes.

**II. BACKGROUND**

2. CWI is a wholly-owned subsidiary of Cable & Wireless Holdings, Inc., which is, in turn, 100 percent owned by Cable & Wireless plc (C&W) of the United Kingdom. Initially, CWI was regulated as a dominant international carrier pursuant to the rules adopted in the Commission's *International Competitive Carrier* order.<sup>1</sup> In 1992, the Commission modified

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<sup>1</sup> *International Competitive Carrier Policies, Report & Order*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). Among other things, that order imposed dominant carrier status on any U.S.

(continued...)

the regulation of U.S. international carriers through the adoption of the *International Services* order.<sup>2</sup> Following the release of *International Services*, CWI filed two petitions requesting that it be reclassified as a non-dominant carrier for various international routes.<sup>3</sup> First, CWI requested modification of its regulatory status from dominant to non-dominant on all routes for which it resold international message telecommunications service (IMTS) of unaffiliated U.S. carriers.<sup>4</sup> Second, CWI requested modification of its regulatory status from dominant to non-dominant on all resold, non-interconnected private line routes where (1) no C&W group company held an ownership interest in the destination country; or (2) no C&W group company held an ownership interest in a carrier which is a monopoly or one which controls bottleneck services or facilities in the destination country.<sup>5</sup>

3. On October 7, 1994, the Common Carrier Bureau modified CWI's status from dominant to non-dominant on all routes for which it was authorized to resell the IMTS of unaffiliated U.S. carriers, with the exception of Canada, and on the resold, non-interconnected private line routes where no C&W group company had an ownership interest in a foreign carrier.<sup>6</sup> On the resold, non-interconnected private line routes where a C&W group company had an ownership interest in a carrier in the destination market (Australia, Japan, the United Kingdom and Sweden), the Common Carrier Bureau deferred consideration of CWI's request for non-dominance so that it could review specific market information.<sup>7</sup> On the Canadian

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<sup>1</sup>(...continued)

carrier in which a foreign telecommunications entity had a direct or indirect ownership stake of more than fifteen percent.

<sup>2</sup> *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992) (*International Services*). Under *International Services*, a U.S. international carrier is regulated as dominant only for those routes on which a "foreign affiliate" of the carrier has the ability to discriminate against unaffiliated U.S. carriers in the provision of services or facilities used to terminate U.S. international traffic in the destination market. *Id.* at 7332.

<sup>3</sup> When the petitions were filed, CWI was formally called "Cable & Wireless Communications, Inc." Subsequently, CWI changed its name to "Cable & Wireless, Inc." Supplemental Information filed October 10, 1996 at n. 1; *see also* Letter from CWI to the Commission, dated September 15, 1993.

<sup>4</sup> IMTS Non-dominant Application, File No. ISP-93-006-ND.

<sup>5</sup> Private line Non-dominant Application, File No. ISP-93-007-ND. On April 21, 1993, the Commission placed CWI's requests on public notice. On May 21, 1993, AT&T filed oppositions to both of CWI's applications. On June 3, 1993, CWI filed responses to AT&T's oppositions and on June 15, 1993, AT&T filed replies to CWI's oppositions.

<sup>6</sup> *Cable & Wireless, Inc., Memorandum Opinion and Order*, 9 FCC Rcd 6093, 6095 (¶¶ 14 and 16) (Com. Car. Bur. 1994) (*IMTS Non-dominance Order*); *Cable & Wireless, Inc., Memorandum Opinion and Order*, 9 FCC Rcd 6096, 6098 (¶ 14) (Com. Car. Bur. 1994) (*Private Line Non-dominance Order*).

<sup>7</sup> CWI also filed a request to defer consideration of its request for reclassification as a non-dominant carrier to Russia and Latvia. *See* CWI Request and Certification, filed May 20, 1994.

IMTS and private line routes, the Common Carrier Bureau noted that since the filing of CWI's petition, Bell Canada Enterprises (BCE) had purchased a 20 percent stake in CWI's U.K. affiliate, Mercury Communications.<sup>8</sup> Consequently, the Common Carrier Bureau deferred consideration of CWI's requests for non-dominance to Canada in order that it could "examine further the potential implications of this acquisition for CWI's U.S. operations and for the U.S. telecommunications market generally."<sup>9</sup>

4. In this order, we will first determine whether, under Section 63.18(h)(1)(i) of the Commission's rules,<sup>10</sup> CWI's interests in foreign carriers in the relevant destination markets constitute affiliations. Under this rule, a U.S. carrier generally is considered to be affiliated with a foreign carrier when a foreign carrier owns a greater than 25 percent interest in, or controls, the U.S. carrier, or when the U.S. carrier owns a greater than 25 percent interest in, or controls, a foreign carrier.<sup>11</sup> We will then apply Section 63.10 of the Commission's rules<sup>12</sup> to determine whether to modify CWI's regulatory status on the U.S.-Canada route for all authorized services, and on the U.S.-Japan and U.S.-Australia routes for resold non-interconnected private line service. Section 63.10 requires us to apply the following presumptions in order to determine whether CWI should be classified as a dominant or non-dominant on a particular route: (1) a carrier that has no affiliate on the foreign end is presumed non-dominant; (2) a carrier that has an affiliate on the foreign end that is a monopoly is presumed to be dominant; and (3) a carrier that is affiliated on the foreign end with a carrier that is not a monopoly bears the burden of submitting information sufficient to demonstrate that its foreign affiliate is unable to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country.<sup>13</sup>

### III. DISCUSSION

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<sup>8</sup> BCE is the parent of Bell Canada, Canada's largest local telephone company and member of Stentor, an alliance of regional telephone companies that provides long distance services in Canada, as well as international service between the United States and Canada. *IMTS Non-dominance Order*, 9 FCC Rcd at n.12. Mercury Communications is one of two carriers in the United Kingdom authorized to provide facilities-based international services.

<sup>9</sup> *IMTS Non-dominance Order* at 6094-6095 (¶ 12) and *Private Line Non-dominance Order* at 6098 (¶ 13).

<sup>10</sup> *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3900-3906 (¶¶ 73-87) and 47 C.F.R. § 63.18(h)(1)(i).

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

<sup>12</sup> 47 C.F.R. § 63.10(a)(1)-(3).

<sup>13</sup> *Id.* Section 63.10(a)(4), 47 C.F.R. § 63.10(a)(4), does not apply to any of the requests for reclassification here. That rule provides that a U.S. international carrier that merely resells the switched services (including IMTS) of unaffiliated U.S. facilities-based carriers on a particular route is presumed non-dominant without regard to any foreign affiliations. 7 FCC Rcd at 7335; 47 C.F.R. § 63.10(a)(4).

## A. U.S.-Canada Route

5. CWI is authorized to provide switched and private line services as a reseller and facilities-based carrier to Canada.<sup>14</sup> On February 3, 1995, CWI filed a Notification and Application indicating that CWI had established an affiliation with Hong Kong Telecom (Canada) (HKT (Canada)), a Canadian reseller.<sup>15</sup> In that filing, CWI also renewed its request that its regulatory status be modified to non-dominant on the U.S.-Canada route for all authorized services.<sup>16</sup> CWI's parent, C&W, owns 57.6 percent of Hong Kong Telecom (HKT), one of four domestic service providers and the exclusive facilities-based international service provider in Hong Kong. According to CWI, HKT (Canada) is a "resale division" of HKT and resells services in Canada. CWI indicates that HKT (Canada) owns no transmission facilities in Canada and holds no interest in any Canadian facilities-based carrier.<sup>17</sup>

6. CWI argues that, because HKT (Canada) is only authorized as a reseller, it cannot discriminate against unaffiliated U.S. carriers serving the Canadian market. CWI further asserts that there is "no likelihood" that HKT (Canada) could obtain control of a Canadian facilities-based carrier due to Canadian foreign ownership restrictions limiting foreign investment to 20 percent.<sup>18</sup> CWI also points out that HKT (Canada) is only one of "scores" of resellers operating in Canada, further weakening any ability it might have to discriminate against unaffiliated U.S. carriers.<sup>19</sup> Finally, CWI argues that BCE's 20 percent interest in Mercury has no bearing upon CWI's U.S.-Canada operations. CWI states that BCE holds no direct or indirect ownership or management interest in CWI, C&W or any intermediary holding company, nor does it have any representatives on the C&W Board of Directors. In addition, neither C&W nor its affiliates hold ownership interests in BCE.<sup>20</sup> CWI also reports that, other than their common ownership interests in Mercury, C&W's sole joint equity

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<sup>14</sup> See *Cable & Wireless, Inc.*, 9 FCC Rcd 6509, File No. ITC-93-328 (1994); *Cable & Wireless Communications, Inc.*, 6 FCC Rcd 236, File No. ITC-90-102 (1991); and *Cable & Wireless Communications, Inc.*, 5 FCC Rcd 7583, File No. ITC-90-101 (1990).

<sup>15</sup> *Cable & Wireless, Inc.*, Notification of Affiliation and Application for Designation as a Non-dominant Carrier for Service to Canada, File No. ISP-95-006-ND, filed on February 3, 1995 (Notification and Application). In a supplemental filing, CWI states that there have been no significant ownership changes in C&W's ownership interests in Canada and that C&W continues to own a 57.6 percent interest in HKT, the parent company of HKT (Canada). Supplemental Information filed October 10, 1996 at 4. Thus, under the Commission's rules, CWI is affiliated with HKT (Canada).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3-4.

<sup>18</sup> Notification and Application at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

participation with BCE consists of a 12.85 percent interest in Bell Cablemedia plc, a provider of cable and telephony services.<sup>21</sup>

7. AT&T requested that the Commission defer consideration of CWI's request for non-dominant carrier regulation on the U.S.-Canada route until it completed work on the *Foreign Carrier Entry NPRM*.<sup>22</sup> AT&T argued that CWI's request should be analyzed under the then-anticipated *Foreign Carrier Entry Order* so that proper consideration could be made of CWI's affiliates in the United Kingdom, Hong Kong and Canada.<sup>23</sup>

8. Upon further review, we do not find that BCE's 20 percent interest in Mercury constitutes an affiliation between CWI and BCE or that this investment otherwise necessitates regulating CWI as a dominant carrier on the U.S.-Canada route.<sup>24</sup> In *International Services*, the Commission adopted a route-by-route approach under which a carrier would be regulated as dominant only on those routes where a foreign affiliate of the carrier has the ability to discriminate in favor of its U.S. affiliate through the control of bottleneck services or facilities on the foreign end of the route.<sup>25</sup> The Commission affirmed the appropriateness of this route-by-route approach in its *Foreign Carrier Entry Order*.<sup>26</sup> That order, which established standards for regulating foreign carrier entry into the U.S. market, did not alter the rules regarding the regulatory classification of authorized carriers with foreign affiliates. Therefore, AT&T's concerns about the market power of CWI's foreign affiliates in destinations other than Canada are misplaced. Under *International Services* and the *Foreign Carrier Entry Order*, we limit our market power analysis to CWI's Canadian affiliate, HKT (Canada).

9. After reviewing the record, we conclude that CWI's sole Canadian affiliate lacks the ability to discriminate against unaffiliated U.S. carriers providing service to Canada. As noted above, CWI's affiliate, HKT (Canada), operates purely on a resale basis. HKT (Canada) does not own or control any telecommunications facilities in Canada. As CWI points out, the Commission has previously found that there is no substantial risk of discrimination against unaffiliated U.S. carriers where the foreign carrier-affiliate does not own any

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<sup>21</sup> Notification and Application at 7. This interest is well below the 25 percent affiliation threshold established under the Commission's rules, and we find no other basis to consider CWI affiliated with Bell Cablemedia plc. See 47 C.F.R. § 63.18(h)(1)(i).

<sup>22</sup> AT&T Petition to Deny at 6.

<sup>23</sup> *Id.*

<sup>24</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3900-3906 (¶¶ 73-87) and 47 C.F.R. § 63.18(h)(1)(i).

<sup>25</sup> See *International Services*, 7 FCC Rcd at 7332 (¶ 4).

<sup>26</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3912 (¶ 102) and 3966-3977 (¶ 246) (maintaining the basic regulatory framework adopted in *International Services* for determining the regulatory status of U.S. international carriers that are affiliated with foreign carriers).

telecommunications facilities in the foreign market.<sup>27</sup> We see no other evidence to suggest that CWI's affiliate has market power in Canada such that it could discriminate against unaffiliated U.S. carriers. Continued regulation of CWI as a dominant carrier on the U.S.-Canadian route is unnecessary because HKT (Canada) does not have the ability to favor CWI through control of bottleneck services or facilities in Canada.

## B. U.S.-Japan Route

10. CWI is authorized to resell switched and non-interconnected private line service between the United States and Japan.<sup>28</sup> According to CWI, C&W has invested in several telecommunications companies in Japan. C&W has a two to eight percent interest in 18 cellular carriers in Japan; a 17.6 percent interest in IDC, a Japanese facilities-based carrier; and an 87.8 percent interest in C&W Japan Communications Service Limited (Japan CSL).<sup>29</sup> CWI states that most of the services Japan CSL provides would be considered "enhanced services" under Section 64.702(a) of the Commission's rules.<sup>30</sup> Japan CSL also provides international private line service on a resale basis but does not own or control any facilities. According to CWI, Japan CSL controls less than five percent of the Japanese international private line (IPL) market.

11. AT&T opposed CWI's request for reclassification as a non-dominant private line carrier on the U.S.-Japan route. It argued that government policy in Japan limits the number of carriers authorized to provide facilities-based international private line services. According to AT&T, this policy affords IDC a "privileged" position, enabling it to discriminate against unaffiliated U.S. carriers in the provision of private line services.<sup>31</sup> The Common Carrier Bureau deferred taking action on CWI's request for non-dominant treatment for its resold

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<sup>27</sup> Notification and Application at 6, citing *fonOROLA Corporation*, ISP-93-001-ND (rel. May 31, 1995) at ¶ 7; see also *KDD America, Inc., Order, Authorization and Certificate*, File No. ITC-95-481, DA 96-399 (rel. March 21, 1996) at ¶ 7, citing 47 C.F.R. § 63.12(c)(1) as amended in *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 95-118, FCC 96-79 (rel. March 13, 1996) at Appendix A (allows for streamlined processing of resale and facilities-based applications filed by foreign carriers that do not own or control telecommunications facilities in the destination country).

<sup>28</sup> See *Cable & Wireless Communications, Inc.*, File No. I-T-C-90-190, 8 FCC Rcd 1664 (1993); *Cable & Wireless Communications, Inc.*, File No. ITC-02-099, 7 FCC Rcd 6653 (1992); and *Cable & Wireless Communications, Inc.*, File Nos. ITC-88-132, ITC-88-156, 3 FCC Rcd 6114 (1988).

<sup>29</sup> Supplemental Information at 3.

<sup>30</sup> *Id.*, citing 47 C.F.R. § 64.702(a).

<sup>31</sup> See AT&T Petition to Deny at 11-14; AT&T Reply at 3-4.

non-interconnected IPL service between the United States and Japan because of C&W's interest in IDC.<sup>32</sup>

12. C&W's interests in IDC and the 18 cellular carriers fall well below the affiliation threshold established under the Commission's rules.<sup>33</sup> In the *Foreign Carrier Entry Order*, the Commission stated that it would normally only scrutinize the market power of a foreign carrier in a destination market when the applicant's attributable investment in or by the foreign carrier exceeds 25 percent, or when the applicant directly or indirectly controls, is controlled by, or is under common control with, the foreign carrier. However, the Commission reserved the right to scrutinize an investment of 25 percent or less where such an investment "presents a significant potential impact on competition in the U.S. market for international telecommunications services."<sup>34</sup>

13. We find no evidence in this record to conclude that C&W's small investment interest in either IDC or the 18 cellular carriers presents a significant potential impact on competition in the U.S. market for international telecommunications services. C&W's investment in Japan CSL does appear to create an affiliation between CWI and Japan CSL.<sup>35</sup> However, because Japan CSL neither owns nor controls any telecommunications facilities in Japan, we find that there is little risk that this CWI affiliate could discriminate against unaffiliated U.S. carriers serving the U.S.-Japan non-interconnected private line service route.<sup>36</sup> Consequently, we find that CWI should be regulated as a non-dominant carrier for its authorized services on the U.S.-Japan route.

### C. U.S.-Australia Route

14. CWI is authorized to resell switched and non-interconnected private line service between the United States and Australia.<sup>37</sup> According to CWI, C&W currently has a 24.5 percent interest in Optus Communications PTY Limited (Optus). Optus is one of two carriers authorized to provide facilities-based telephone service and one of three carriers authorized to

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<sup>32</sup> *Private Line Non-dominance Order* at 6097 (¶ 13).

<sup>33</sup> *See* 47 C.F.R. 63.18(h).

<sup>34</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3906 (¶ 89).

<sup>35</sup> *See* 47 C.F.R. § 63.18(h)(1)(i).

<sup>36</sup> *See* ¶ 9 and n.27 *supra*.

<sup>37</sup> *See Cable & Wireless Communications, Inc.*, File No. ITC-90-190, 8 FCC Rcd 1664 (1993); *Cable & Wireless Communications, Inc.*, File No. ITC-02-099, 7 FCC Rcd 6653 (1992) *Cable & Wireless Communications, Inc.*, File Nos. ITC-88-132, ITC-88-156, 3 FCC Rcd 6114 (1988).

provide cellular service in Australia.<sup>38</sup> However, CWI asserts that the Australian Telecommunications Act, passed in 1991, terminates the duopoly on fixed telecommunications networks and the triopoly on cellular networks in June, 1997. CWI argues that because Optus is a second-tier carrier in Australia, it cannot discriminate against unaffiliated U.S. carriers seeking to serve the Australian market. In addition, CWI argues that because C&W's investment in Optus falls below the affiliation threshold, CWI should be entitled to the presumption of non-dominance on the U.S.-Australia private line route.<sup>39</sup> AT&T opposed CWI's request for non-dominant treatment on the U.S.-Australia private line route for the same reasons it opposed CWI's request on the U.S.-Japan route.<sup>40</sup> The Common Carrier Bureau deferred action on CWI's request because of C&W's interest in Optus.<sup>41</sup>

15. Under the Commission's rules, C&W's 24.5 percent interest in Optus does not create an affiliation between CWI and Optus.<sup>42</sup> In addition, we find there is no basis in this record to conclude that C&W's investment in Optus presents a significant potential impact on competition in the U.S. market for international telecommunications services.<sup>43</sup>

#### IV. CONCLUSION

16. We find that reclassifying CWI as non-dominant on the U.S.-Canada route for all services, and on the U.S.-Australia and the U.S.-Japan routes for resold, non-interconnected international private line service, will serve the public interest. This reclassification should foster lower prices, innovative services, and increased responsiveness to U.S. consumer needs.

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<sup>38</sup> Supplemental Information at 5. Bell South owns another 24.5 percent of Optus and a consortium of Australian companies control the remaining 51 percent.

<sup>39</sup> *Id.*

<sup>40</sup> See ¶1, *supra*.

<sup>41</sup> *Private Line Non-dominance Order* at 6097 (¶ 13).

<sup>42</sup> See 47 C.F.R. § 63.18(h)(1)(i).

<sup>43</sup> See ¶ 12, *supra*.



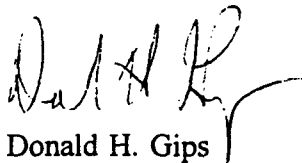
## V. ORDERING CLAUSES

17. Accordingly, it is ORDERED that CWI shall be regulated as a non-dominant carrier for all authorized international services on the U.S.-Canada route, and for resold, non-interconnected international private line service on the U.S.-Japan and U.S.-Australia routes.

18. It is FURTHER ORDERED that, as a non-dominant carrier for all authorized international services on the U.S.-Canada route, and for resold, non-interconnected international private line service on the U.S.-Japan and U.S.-Australia routes, CWI shall comply with Sections 43.82, 63.15(b) and 63.21 of the Commission's rules.

19. 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 the public notice of this Order (see 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION



Donald H. Gips  
Chief, International Bureau