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Policy Division
International Bureau

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

In the Matter of	)	
	)	
AT&T Supplemental Petition for Waiver of Section 43.51(e)(3), to Remove the International Settlements Policy on the Specific Route Between the United States and India	)	File No. ISP-WAV-20030414-00011

OPPOSITION OF DATAACCESS AMERICA INC.

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OPPOSITION OF DATAACCESS AMERICA INC.

DataAccess America Inc. ("DataAccess") hereby submits its opposition to the petition filed by AT&T Corp. ("AT&T") for waiver of Section 43.51(e)(3) of the Commission's rules, 47 C.F.R. § 43.51(e)(3), to remove the international settlements policy ("ISP") on the United States to India route (hereinafter referred to as "AT&T's Petition"). DataAccess is a new U.S. carrier holding international Section 214 authority for global facilities-based and resale telecommunications services.[1] DataAccess also is a subsidiary of Data Access (India) Ltd., a company that holds several telecommunications licenses in India and across the world for voice and data services.

I. Summary

As both a U.S. carrier and a subsidiary of one of the new licensed competitive carriers for international long distance ("ILD") services in India, DataAccess has first hand knowledge of the current market for U.S.-India traffic. Based on this knowledge, DataAccess firmly believes that the Commission's criteria has not been met for removing the ISP on the U.S.-India route, nor has AT&T shown good cause for a waiver of the Commission's standards for removing the ISP. Further, as demonstrated below, a grant of AT&T's petition would cause significant harm to

1 FCC File No. ITC-214-20021223-00593.

competition on the U.S.-India route. Therefore, the Commission should deny AT&T's Petition, and maintain the ISP on the U.S.-India route.

II. The Criteria for Removing the ISP Have Not Been Met

The Commission's rules clearly state that in order for the Commission to remove the ISP on a particular route, a party must demonstrate that U.S. carriers are able to terminate at least 50 percent of U.S.-billed traffic in the foreign market at rates that are at least 25 percent below the benchmark settlement rate.[2] While AT&T states that it cannot make such a demonstration on the U.S.-India route, it believes that this requirement has been met, and therefore asks for a waiver of the requirement that it affirmatively demonstrate so. In support, AT&T certifies that it terminates its traffic to India at rates that are lower than 25% of the benchmark settlement rate, and it presumes that other U.S. carriers are able to do the same. As demonstrated below, however, AT&T's presumptions are not reliable because they are not supported by any verifiable data. Therefore, AT&T has not met its burden of proof, and the Commission accordingly should not remove the ISP on the U.S.-India route.

In the ISP Order, the Commission specifically required that carriers filing a petition for waiver of the ISP demonstrate that the route qualifies for exemption from the ISP.[3] Such demonstration, by its very nature, must include something more than a mere belief. However, in the present case, AT&T has not filed any supporting documentation and relies only on its own presumptions. Even in this regard, however, AT&T's Petition is confusing.

In support of its petition, AT&T cites the Commission's finding that VSNL is the dominant carrier in India, but then it draws the conclusion, without supporting documentation,

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[2] 47 C.F.R. § 43.51(e)(3).

[3] *In the Matter of 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, Regulation of International Accounting Rates, and Market Entry and Regulation of*

that VSNL terminates at least 50% of the U.S.-billed traffic.[4] Next, AT&T certifies that it terminates its traffic to India at rates that are lower than 25% of the benchmark settlement rate requirement, but does not support this certification with any documentation. If AT&T is basing its certification on its accounting rates with VSNL, no where does AT&T demonstrate that its accounting rate with VSNL is 25% below the benchmark.

On the contrary, AT&T states that VSNL *has not* formally agreed to even a benchmark rate with AT&T, better yet a rate 25% below the benchmark.[5] AT&T certifies, however, that it is paying VSNL an unspecified benchmark compliant rate. One must assume then, in the absence of a formal agreement, AT&T is paying VSNL on an interim basis. Therefore, there is no guarantee that the rate AT&T is currently paying VSNL might not be trued up later to something higher than the benchmark rate.

In addition, the Commission's records indicate that the last official accounting rate to India is $0.46, *i.e.*, the benchmark rate, but that rate was time-bounded, and was only in effect from April 1, 2002 to June 30, 2002.[6] As of today, therefore, there is no officially approved accounting rate in effect to India that AT&T can point to as the prevailing accounting rate. Accordingly, on its face it is hard to conclude at what rate AT&T is settling its traffic with VSNL, either at the benchmark rate (which would then make its petition ineligible for grant), or, if AT&T's certification is to be believed, AT&T is settling its traffic with VSNL at a rate different from the last officially approved accounting rate on file with the Commission.[7] For

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Foreign-Affiliated Entities, IB Dockets No. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), *Report & Order and Order on Reconsideration*, ("ISP Order"), FCC 99-73, Released May 6, 1999.

4 AT&T Petition at 4.

5 *Id.*

6 *See* http://www.fcc.gov/ib/pd/pf/consolar.xls, note 14.

7 Even though AT&T's previously filed accounting rate with VSNL has expired, AT&T should still be settling its traffic at the last prevailing accounting rate, or request authority from the Commission to do otherwise.

AT&T to pay such an "interim" settlement rate that is more favorable than other U.S. carriers are paying would be contrary to the Commission's rules and policies, and therefore should not qualify as being in compliance with the ISP, nor be a basis for removing the ISP.[8]

Even if one accepts AT&T's assumption that VSNL terminates 50% of the entire U.S.-billed traffic, according to the Commission's rules all the arrangements between VSNL (as a dominant foreign carrier) and U.S. carriers should be filed with the Commission.[9] Therefore, if U.S. carriers have reached an agreement with VSNL to terminate U.S.-billed traffic at rates 25% below the benchmark level, these agreements should be on file with the Commission, and therefore become the basis of support for AT&T's Petition. To the best of DataAccess' knowledge, however, no such agreements have ever been filed with the Commission. Therefore, in the absence of any such documentation being filed, the Commission must conclude that VSNL is not terminating U.S.-billed traffic at rates 25% below benchmark, and therefore at least 50% of U.S.-billed traffic does not meet the requirement for removing the ISP. Accordingly, not only has AT&T failed to make the proper showing required to remove the ISP on the U.S.-India route, existing evidence strongly suggests that U.S.-billed traffic to India is not being settled at rates 25% below the benchmark rate.

III. AT&T Has Not Shown Good Cause for Waiving Section 43.51(e)(3)

Section 1.03 of the Commission's rules provides that the Commission may grant a waiver of its rules only upon a showing of good cause.[10] Waiver is appropriate if special circumstances

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[8] *See* Sprint Communications Company L.P., ISP-97-M-708, Memorandum Opinion and Order, DA 98-2401, 13 FCC Rcd 24998, at ¶ 7 (Int'l Bur., released Nov. 24, 1998)("Sprint Order")("First we find that interim rates are contrary to public interest because they do not make adequate progress towards cost-based settlement rates. Second, we find that a denial of the interim rates is necessary to prevent whipsawing.")

[9] Section 43.51(a) requires that contracts or agreements with dominant carriers, whether oral or written, be filed with the Commission within 30 days of their execution.

[10] 47 C.F.R. § 1.03.

warrant a deviation from the general rule and such deviation would not eviscerate the rule, but would in fact better serve the public interest than would strict adherence to the general rule.[11] Moreover, the applicant "must plead with particularity the facts and circumstances" that support the grant of a waiver.[12] AT&T has failed to meet these standards.

A. AT&T Has Failed to Plead Particular Facts and Circumstances

As discussed above, AT&T's Petition relies almost entirely on unsupported presumptions and arguments. Simply stated, AT&T's Petition fails to plead, much less prove, special circumstances or facts that merit a waiver of the Commission's rules. AT&T's Petition supplements a broader petition to remove the ISP on a number of international routes where AT&T claims to be settling U.S.-billed traffic at rates 25% below benchmark, but AT&T itself does not have 50% of the traffic. The difference between the original petition and the instant supplement to add India, however, is that in the original petition AT&T backed up its waiver request with information showing that the Commission had on file an accounting rate agreement with the dominant carrier at rates 25% below benchmark, and no U.S. carriers had filed comments with the Commission saying they were not able to negotiate the same deal. In this case, however, AT&T admits that it does not have a formal benchmark compliant accounting rate agreement that is currently in effect with VSNL, nor has AT&T even filed with the Commission and made available for comment an interim agreement at rates 25% below the benchmark. AT&T fails to address this difference, or plead with specificity why such an agreement has not been filed with the Commission, or why under these circumstances a waiver of the Commission's rules is warranted.

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11 *Omnipoint Corporation* v. FCC, 213 F3d 720 (D.C. Cir. 2000); Northeast *Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)(citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972)).

12 *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (vacating FCC denial of waiver petition).

B. Grant of AT&T's Petition Would Be Contrary to the Intent of the ISP Rules

The ISP rules were adopted by the Commission in order to protect U.S. carriers from anticompetitive conduct of foreign carriers in negotiating and implementing operating agreements. In adopting the ISP Order, the Commission looked closely at how it could still protect U.S. carriers, yet give them more flexibility in their accounting rate negotiations as competition developed.

The Commission rejected a proposal to remove the ISP in cases where its allowed International Simple Resale ("ISR") because it would not adequately protect U.S. consumers against the harmful effects of the exercise of foreign market power.[13] The Commission noted that under the Commission's ISR standard, ISR is approved on routes where at least 50 percent of the traffic is settled at benchmark rates or below. The Commission found that in some markets settlement rates will fall to benchmark levels not because of competitive pressures, but because of action by the Commission and U.S. carriers to enforce the benchmark settlement rate requirement. As a result, the Commission said ISR could be approved on routes where there is a dominant carrier whose market power is not constrained by competitive pressures. The Commission stated it was concerned that lifting the ISP on such routes would enable a foreign carrier with market power to exercise its market power to evade its benchmark settlement rates or to engage in one-way bypass that would raise the effective rate paid by U.S. carriers to terminate traffic in the foreign market. On the other hand, the Commission said it is likely that on routes where rates to terminate traffic are significantly below benchmark levels, competitive forces exist which can constrain the market power of the dominant foreign carrier.[14] Therefore, the Commission established the 25% below benchmark rate as a bright-line test for evidence of a

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13 ISP Order at ¶ 53.

14 *Id.*

competitive market where U.S. carriers would be able to compete fairly, even in the absence of the ISP.[15]

Accordingly, for AT&T to justify a waiver of the Commission's ISP rules, AT&T must demonstrate that a waiver is in the public interest, and that it will not eviscerate the intent of the ISP rules by enabling VSNL to exercise its market power to evade its benchmark settlement rates or to engage in one-way bypass. AT&T's Petition, unfortunately, goes clearly against the public interest and the intent of the ISP rules. As detailed above, AT&T has proposed a waiver standard that would have the Commission remove the ISP on a route without any clear demonstration that more than 50% of the U.S.-billed traffic is settled at rates 25% below benchmark. Instead, the only evidence that would be required is a "certification" by the applicant that the standard has been met. And in this case, the "certification" has been made despite clear evidence to the contrary, *i.e.*, current accounting rate agreements for India on file with the Commission have expired, with their last effective rates not at levels 25% below the benchmark rate. Therefore, the Commission has cause enough here alone to reject AT&T's Petition on the grounds that it does not meet the intent of the ISP rules.

C. The Public Interest Would Be Harmed by Granting AT&T's Petition

Grant of AT&T's Petition would also be contrary to the intent of the ISP rules and the public interest because it would enable VSNL to continue to exercise its market power to the detriment of U.S. and Indian carriers. As demonstrated below, VSNL still possesses significant market power in India. If the ISP and its protections against discrimination were lifted, VSNL could drive out smaller carriers from the market, hurting competition both in the United States and in India.

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15 *Id.*

1. Competition in the ILD Sector in India is Still in an Early Developmental Stage

The international long distance sector opened in India in July 2002 and therefore, it is only in a nascent stage of development. While VSNL not only remains a fully dominant carrier,[16] it virtually controls all of the outbound traffic originating in India. Indian governmental policy treats VSNL as the most favored customer for routing the calls of the incumbent dominant basic carriers, i.e., BSNL and MTNL in India.[17] Because BSNL and MTNL control over 98% of all basic telephony services in India,[18] the virtual monopoly of VSNL over Indian outbound traffic is apparent. With regard to Indian inbound traffic, although the situation is marginally better with the introduction of competition in India, VSNL still holds substantial market power. As the Commission has noted, "Both a monopolist and a foreign carrier with market power that faces some level of competition have the ability to engage in price and non-price discrimination against unaffiliated U.S. carriers."[19] Therefore, even today VSNL would be fully capable of whipsawing U.S. carriers if there were not the protections of the ISP. In fact, due to underdevelopment of competition in the Indian ILD market, the ISP continues to be practically the only protection for U.S. carriers and for U.S. consumers from the potential harm that could be inflicted by VSNL.[20]

16 *See* FCC List of Foreign Carriers that are Presumed to Possess Market Power, DA 03-1812, released June 5, 2003.

17 The Government of India has assured VSNL that MTNL and BSNL will route their ILD calls through VSNL, as the "most favoured customer," for two years after the eventual privatization, at the market rate. VSNL Annual Report 2002-03.

18 Telecom Regulatory Authority of India - Consultation Paper on Tariffs for Basic Services, 2002, dated 23rd September, 2002 - Consultation Paper No. 2002/3 - para 2.9 at ¶ 14.

19 *See* Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd 23,891 (1997) ("Foreign Participation Order") at ¶ 227.

20 "We thus conclude that the application of the ISP to arrangements with foreign carriers with market power is necessary unless potential harm from the exercise of foreign market power is otherwise limited." *See* ISP Order at ¶ 31.

2. Removing the ISP Could Significantly Harm Competition

Removing the ISP could enable VSNL to indulge in a number of anticompetitive activities in the U.S.-India ILD market. VSNL would be able to enter into exclusive arrangements with more established U.S. carriers, like AT&T, which would discriminate against smaller U.S. carriers.[21] Because VSNL has a near monopoly on outbound traffic, VSNL has the ability to whipsaw U.S. carriers into accepting arrangements that are not favorable to all U.S. carriers.[22] For instance, VSNL could refuse to negotiate with any U.S. carrier that did not meet its demands.[23] VSNL could then offer a significant price advantage to those carriers with whom it chooses to enter into bilateral arrangements.

In another scenario, VSNL could bundle services in a manner wherein VSNL retains larger portions (more than 50%) of the accounting rates for Indian inbound traffic and pays higher portions on outbound traffic. This would imply that while a U.S. carrier might have a loss of revenues from sending traffic to India, it would have a corresponding increase in its revenues in terminating India outbound traffic. Therefore, those U.S. carriers favored by VSNL to terminate larger portions of the India outbound traffic would be able to mitigate their losses. However, other U.S. carriers who got little or no volume of India outbound traffic would have to

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[21] "The ISP requires, ...(ii) non discriminatory treatment of all US carriers (all US carriers must receive the same accounting rate, with the same effective date." ISP Order at ¶ 9.

[22] "Frequently, whipsawing takes the form of the foreign carrier isolating a U.S. carrier in an effort to negotiate a favorable accounting rate agreement. Once an agreement is reached with the foreign carrier, other U.S. carriers are under substantial pressure to accept the same agreement or risk retaliation by the foreign carrier. The retaliation could take several forms, some more subtle than others." Sprint Order at ¶ 9.

[23] "For example, a foreign carrier could retaliate simply by refusing to negotiate with other U.S. carriers. More aggressive forms of retaliation include diverting a disproportionate share of traffic to the U.S. carrier that agreed to the foreign carrier's demands or cutting off circuits of U.S. carriers that refuse to agree to the foreign carrier's terms." Sprint Order at nt. 21.

settle at higher rates (for India inbound traffic) without reciprocal benefits.[24] In addition, VSNL controls key cable landing stations in India, and in at least one instance, has not been above denying access to its new ILD competitors, including DataAccess (India). The two new Indian ILD carriers do not possess any market power to counteract such situations. As a result, smaller U.S. carriers that were discriminated against would find it impossible to compete for U.S.-India ILD business. Smaller U.S. carriers would either have to increase their calling rates or leave the U.S.-India route.

3. VSNL Already Appears to Discriminate Amongst U.S. Carriers

Even today it appears from AT&T's Petition that VSNL is possibly discriminating amongst U.S. carriers by not offering the same "interim arrangement" that AT&T has to all other U.S. carriers. The Commission has expressed its concerns about the past conduct of foreign carriers in the context of granting licenses.[25] Here, the Commission should likewise be concerned that by removing the ISP it is sanctioning, and practically encouraging, VSNL to engage in the same anticompetitive discriminatory conduct that it has engaged in the past.

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24 The India outbound-inbound ratio presently stands at approximately 20:80. Therefore even if VSNL does not abuse its monopoly status, for which there can be no assurance, some U.S. carriers would necessarily be forced out of the U.S.-India route.

25 "We are also concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of a carrier that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct. This approach is consistent with our treatment of domestic applicants. We find that such conduct demonstrates that a carrier is likely to evade our safeguards and thus may pose a very high risk to competition." *See* Foreign Participation Order at ¶ 53; *see also, MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

4. Removing the ISP Would Help VSNL to Maintain Its Near Monopoly Market Share

Removing the ISP would help VSNL strengthen its market share, and keep its grip on its near monopoly. In May 2001, the Indian Government gave a free national long distance ("NLD") license and a Category 'A' Internet Service Provider license to VSNL as a package. This package has not been made available to the other ILD providers in India. VSNL has recently started providing NLD services and has thus become a vertically integrated carrier with respect to these services. This may shortly have a direct bearing on the competitive scenario in India, making it difficult for the other two Indian ILD carriers to survive and therefore resulting in a virtual monopoly of VSNL in ILD markets.

Further, VSNL in its Annual Report 2001-02 itself admits that its dominance in the Indian market is going to remain virtually unchallenged. It takes a very long time to break a carrier's monopoly and dominance.[26] In the long run, a waiver of the ISP would enable VSNL to engage in anticompetitive activities such as one-way bypass in conjunction with certain large U.S. carriers. This would hurt its Indian ILD competitors, as well as smaller U.S. carriers, ultimately resulting in the re-establishment of its full monopoly in the Indian market. Strengthening VSNL's market position would not only be contrary to the interests of the general public, but would also hamper the growth of competition in the U.S. market.

Once VSNL's monopoly in India is restored, settlement rates would invariably go up again as VSNL would take advantage of its market power. Even if VSNL were to raise its rates to reflect its costs, the rates would be higher as VSNL has a higher cost-basis than its newer

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[26] TeleGeography reports that it took about three years, from 1997-2000, for Telecom Italia's outbound market share to go down from 100% to 65.4% in a market where competition laws were enforced. Given the pro-VSNL policies of the Government of India, it is apparent that competition in India being in a nascent stage of

competitors with their more cost efficient networks. This ultimately would get reflected in higher calling rates and would thus be contrary to the interests of U.S. consumers[27] and would also eat into the settlement revenues of the U.S. carriers.[28] Therefore, the Commission should not take actions such as removing the ISP that will strengthen VSNL's monopoly power and ability to discriminate in the U.S.-India ILD market.

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development will require a long time to develop in a meaningful way, particularly in outbound India-U.S. traffic where VSNL has a virtual monopoly.

[27] "We therefore must take action to ensure that the settlement rate component of an end user rate does not prevent U.S. consumers from having access to telecommunications services at reasonable rates." *See, International Settlement Rates,* IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 at ¶ 25 (1997) (Benchmarks Order) *aff'd sub nom., Cable and Wireless Plc. v. FCC,* 166 F.3d 1224 (DC Cir. 1999), *Report and Order on Reconsideration and Order Lifting Stay,* 14 FCC Rcd 9256 (1999).

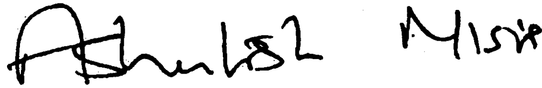
[28] A simple analysis of the interaction between a foreign monopoly and competitive U.S. operators, would suggest that the foreign monopoly ends up holding all the power in the absence of regulation. The settlement rate for calls into the U.S. would be driven to marginal cost through the competition of the U.S. operators, while the settlement for calls abroad would be set by the foreign monopolist at a level which would allow it to capture all the rents available in that market. This is a well known result in the theory of vertical relations. If a firm sells an input to perfectly competitive firms downstream, it price this input in such a way that the product is sold to consumers at the monopoly price and all rents are captured by the input supplier through the inflated input price. S*ee,* "Telecommunications in Central America", Pedro Raventos, Development Discussion Paper No. 648, August 1998, Harvard Institute for International Development.

III. Conclusion

As shown in the foregoing discussion, AT&T's petition for a waiver of Section 43.51(e)(3) and removal of the ISP on the U.S.-India route is not supported by proper documentation, and is contrary to the public interest. Therefore, AT&T has not met the Commission's standards for grant of a waiver, and the Commission should deny AT&T's Petition.

Respectfully submitted,

DATAACCESS AMERICA INC.



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