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TELECOMMUNICATIONS LAW UPDATE

FCC EASES REPORTING REQUIREMENTS FOR FOREIGN-AFFILIATED CARRIERS

In September, the Federal Communications Commission (FCC) issued an Order on Reconsideration in its docket concerning the standards for foreign carriers to participate in the U.S. telecommunications market. Though the order made no changes to the core standards, it eased the requirements for reporting foreign affiliations, which should help to facilitate these affiliation transactions in the future. In the same spirit, the FCC is considering additional liberalization of its foreign carrier regulations as part of its 2000 Biennial Regulatory Review.

No Change to Market-Entry Standards

The FCC declined either to loosen or tighten the substantive standards for foreign participation in the U.S. market.

- It made no change to the *market power test* for foreign carriers from WTO Members; the agency thus will continue to apply a rebuttable presumption that foreign carriers having less than a 50% market share in each relevant market (international transport, inter-city, and local access facilities or services) on the foreign end lack sufficient market power to have an adverse effect on competition in the United States.
- The FCC likewise declined to remove *dominant carrier safeguards* on U.S. carriers affiliated with foreign carriers with market power. (Those safeguards include advance notice tariff requirements, limited structural separation between the U.S.

carrier and its affiliate, and certain quarterly reporting requirements.) At the same time, the FCC declined to expand *competitive safeguards* on foreign-affiliated U.S. carriers; it refused to extend to foreign resale carriers the requirement applicable to foreign facilities-based carriers that they offer U.S. carriers a settlement rate for the affiliated route at or below the relevant benchmark.

- The agency declined to extend to *broadcast licensees* the open-entry standard applicable to foreign investment from WTO Members in common carrier radio licensees under section 310(b)(4).

Streamlined Reporting Requirements

The FCC previously adopted a rule (47 CFR § 63.11) requiring a carrier that holds a section 214 authorization (a "U.S.-licensed carrier") to report affiliations with foreign carriers. In its September decision, the FCC modified this rule to ease reporting requirements.

Under the old version of the rule, a U.S.-licensed carrier was required to notify the FCC *60 days before* making certain types of investments that would result in an affiliation with a foreign carrier operating in a market that the U.S.-licensed carrier was authorized to serve. Specifically, the U.S.-licensed carrier was required to notify the FCC if: (1) it (or certain of its holding companies) acquired a *controlling* interest in a foreign carrier, or (2) a foreign carrier (or entity controlling the foreign carrier) acquired either a *controlling interest* or a *greater than 25% interest* in the U.S.-licensed

carrier. For all other investments, the rule required only a *subsequent notification within 30 days* after the investment. If the FCC found that the planned investment raised a public interest issue, the carrier could not make the investment until it submitted a section 214 application and the application was granted.

The new rule narrows the *pre-notification* requirement in two respects. First, the time period for pre-notifications is reduced from 60 days to *45 days*. Second, three types of foreign carrier affiliations are no longer subject to pre-notification: where the foreign carrier (1) has been previously determined to lack market power, (2) is only a resale carrier, or (3) is from a WTO Member and either qualifies for non-dominant treatment or agrees to comply with the dominant carrier safeguards (including the benchmark condition on affiliated routes where the foreign carrier has market power).

The FCC also made several other adjustments to the rule. Carriers may now request confidential treatment of pre-notifications for the first 20 days of the 45-day period, and they must ensure that the information in the notification is kept up to date both during the 45-day period and on an ongoing basis.

In addition, notifications are to be kept separate from (but cross-reference) any applications for authority to transfer control under section 214. A notification must specify whether it is a pre-notification or a post-notification. Finally, where a U.S.-licensed carrier agrees to abide by dominant

carrier regulations on an affiliated route, the FCC may now classify the carrier as dominant by a public notice rather than by an order.

The streamlined reporting requirement should shift many more foreign affiliation transactions into the post-notification category and ease carriers' concerns about having to disclose sensitive information about potential investments so far in advance. The new rule went into effect as of November 9, 2000.

2000 Biennial Review

The 1996 Act requires the FCC to review its regulations every two years to determine whether any may no longer be necessary. As part of this process, the International Bureau has launched several rulemakings. One proceeding proposes to simplify applying for cable landing licenses. Another examines whether the detariffing regime adopted for domestic service should be expanded to international service.

In November, the FCC launched a rulemaking to simplify rules governing assignment of Section 214 authorizations. The FCC proposes to expand the availability of *pro forma* assignments, which can be made without prior FCC approval. In addition, the FCC has tentatively decided no longer to require facilities-based providers of international private line services to comply with the settlement rate benchmarks. The FCC also proposes to relieve dominant international carriers of the requirement to seek prior approval to discontinue service, except where those carriers possess market power in the provision of international service on the U.S. end.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

Lynn Charytan

202-663-6455

lcharytan@wilmer.com

John Harwood

202-663-6333

jharwood@wilmer.com

William Lake

202-663-6725

wlake@wilmer.com

Daniel Phythyon

202-663-6545

dphythyon@wilmer.com

William Richardson

202-663-6038

wrichardson@wilmer.com