ORIGINAL

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

In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation	)	RM-8355
of Foreign-affiliated Entities	)	RM-8392
	)	

COMMENTS OF SPRINT

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Attachment

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ATTACHMENT

SUMMARY

In the *Notice*, the Commission has proposed a reciprocity, or "effective market access" (EMA), test as a means both of opening entry for U.S. carriers in foreign markets and of preventing a foreign carrier with an interest in a U.S. carrier from engaging in discriminatory or anticompetitive conduct as among U.S. carriers. Sprint wholeheartedly supports both of Commission's underlying goals. However, the precise means proposed for achieving these goals are open to serious question.

As a threshold matter, the Commission's proposal to use §214 as the basis for imposing its EMA test in cases where there is no direct foreign entry or acquisition of control of a U.S. carrier is highly questionable as a matter of law. Section 214 of the Act was designed to prevent the unnecessary duplication of facilities, not to regulate non-controlling investments or the conduct of carriers, and the Commission's proposed use of §214 to regulate non-controlling investments by a foreign carrier in a U.S. carrier would stretch the application of that section beyond its intended bounds. Moreover, where a change of control is not involved, the proposed rules would require notice of the transaction after it is completed; at that time, it is doubtful,

in light of the limited role of §214 and *Execunet*, whether the Commission could take any action.

The use of an EMA test as a condition for allowing foreign entry or foreign investment in U.S. carriers is a marked departure from past policy. For example, even the recent approval of BT's acquisition of a 20 percent in MCI would have been disallowed under this test, because the U.K. has not allowed U.S. carriers to offer facilities-based international services from the U.K.

The Commission has recognized in the past, *e.g.*, in *BT/MCI*, that foreign investment in the U.S. can be beneficial even though the foreign market is closed to U.S. carriers. While Sprint fully shares the Commission's desire to see foreign markets opened up, it is far from certain, as a matter of economic game theory, whether a reciprocity rule will in fact succeed in opening any foreign markets. There is no way to determine, in advance, whether a reciprocity rule would be successful enough in opening foreign markets to outweigh the costs to the U.S. economy of losing beneficial foreign investment that is precluded by application of the rule or is delayed while a game of "chicken" is played between the U.S. and a foreign government.

Clearly, application of an EMA test is likely to be least efficacious in situations that involve not foreign carrier entry or control, but merely minority, non-controlling investment in a U.S. carrier. In such cases, the benefit to the foreign nation of the U.S. investment is highly unlikely to exceed the perceived costs to the foreign government of opening its markets up to competition. Thus, applying an EMA test in such circumstances is likely to fail to open up the foreign market and at the same time would deny to the U.S. the strengthened competition and job creation that would accompany foreign investment in the U.S.

Sprint agrees with the Commission that anticompetitive or discriminatory conduct by a foreign administration to favor one U.S. carrier at the expense of others can be a serious problem. However, there is a better, more direct weapon than an EMA test to combat this problem: the use of industry-wide rules of general applicability. The incentive to engage in the kind of discriminatory, anticompetitive conduct the Commission seeks to prevent can exist not only in the case of foreign investment in a U.S. carrier, but also in other situations as well: where there is substantial U.S. carrier investment in a foreign carrier, or a substantial business relationship between the U.S. carrier and the foreign carrier (*e.g.*, sales of equipment or investment in joint ventures that do not involve investment in either host-country carrier). An EMA test would not reach discrimination arising from these other business relationships, but rules of general applicability would do so. Sprint believes the safeguards adopted in the *BT/MCI* decision would serve as a good template for such rules and would avoid the use of other, more onerous conditions proposed in the *Notice*, such as requiring the filing of the foreign carriers' accounting rates with third countries, which are unnecessary and likely to be regarded as too intrusive into areas beyond the Commission's jurisdiction.

Section 310(b)(4) should be applied consistently with the recommendations above. If, as Sprint recommends, a reciprocity test is applied (if at all) only where there is acquisition of control of a U.S. carrier, then the Commission should routinely grant petitions for declaratory ruling, brought under §310(b)(4), that minority, non-controlling investments are not inconsistent with the public interest. Under Sprint's proposals, any opportunity for discriminatory conduct would be provided for in rules of industry-wide applicability, and routine approval of non-controlling investments in excess of the 25 percent statutory benchmark would be consistent with the Commission's lenient treatment in the past of foreign ownership of common carrier radio licensees.

However, if the Commission does not adopt Sprint's recommendations, it should nonetheless grant petitions for declaratory rulings under §310(b)(4) in any case where a foreign carrier acquires 20 percent or less of the U.S. carrier and the U.S. carrier and its foreign partner are willing to adhere to the conditions required in *BT/MCI*. Having allowed that transaction to go forward, it would be unfair to other U.S. carriers to now impose a different and more stringent standard that could impair those carriers' ability to compete with the BT/MCI alliance.

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Sprint Communications Company L.P. ("Sprint") hereby respectfully submits its comments on the *Notice of Proposed Rulemaking* ("*Notice*"), FCC 95-53, issued February 17, 1995, in the above-referenced proceeding. Sprint fully supports the Commission's goals in this proceeding. However, Sprint believes that the Commission's goal of opening foreign markets to U.S. competitors through the compulsion of a reciprocity test is questionable and that, in particular, such a test should not be imposed where a foreign carrier is not acquiring a license (through control or *de novo* entry) under §214. In addition, the Commission's goal of protecting the U.S. market against anticompetitive conduct is best achieved, not through application of the public interest test in §214, but rather, through rules of general applicability similar to those imposed on British Telecom ("BT") and MCI in *BT/MCI*, 9 FCC Rcd 3960 (1984).

I. INTRODUCTION.

The Commission observes, *Notice* at ¶20, that the telecommunications needs of customers in an increasingly global economy are forcing carriers to rapidly change the way they provide services; that there is a growing customer demand for seamless packages of international services; that multinational corporations "prefer one-stop shopping to satisfy their varied and specialized communications needs;" and that individuals "who travel internationally, or have family or friends in other countries, have an interest in efficient and affordable global telecommunications." As the Commission suggests, no carrier can expect to satisfy its customers' requirements for end-to-end global telecommunications under the existing bilateral market structure for international services. *Id.* at ¶23. And, this inability has required both U.S. and foreign carriers to "develop[] strategies to serve customers' needs through alliances with other service providers and entry into foreign international and domestic markets." *Id.* at ¶20.

Perhaps because of this rapidly shifting international landscape, the Commission has undertaken in this rulemaking to examine existing international market rules with the "primary goal" of "promot[ing] effective competition in the global market." *Id.*

at ¶27. The Commission explains, however, that its "primary goal" does not stand by itself. In order to obtain global competitiveness, the Commission notes that it must also reach two other goals. It must (1) "...prevent anticompetitive conduct in the provision of international services or facilities" *id.* at ¶28; and (2) "...encourage foreign governments to open their communications markets." *Id.* at ¶26(3).

The Commission proposes to accomplish both of these underlying goals by modifying its "public interest analysis of foreign carrier entry applications under Section 214...." *Id.* at ¶33. Specifically, the Commission proposes to add to the public interest standard under §214 an "effective market access" ("EMA") test. Under this test, "entry into the U.S. international facilities-based services market by foreign-affiliated carriers" would be considered to be in the public interest if there was "effective market access for U.S. carriers in the primary international telecommunications markets served by the [foreign-affiliated] carrier desiring entry." *Id.* at ¶38. Such access would have to "exist at the time of entry, or in the near future." *Id.*

Sprint agrees with the Commission as to the changing nature of the international marketplace and its increasing globalization. Sprint also agrees, of course, with the Commission's overriding goal of promoting effective competition in the emerging global telecommunications market. And, Sprint agrees with the Commission that to promote competition it should seek to prevent anticompetitive conduct and encourage foreign governments to open their communications markets.

However, Sprint believes that the means chosen by the Commission to accomplish these goals are open to serious question and in some cases are plainly flawed. As shown in Section II herein, the use of §214 of the Act as a vehicle to review transactions where there is no direct entry or transfer of control (and where, accordingly, authority need not be sought under §214) raises troublesome legal issues. Except where a party voluntarily comes forward, an "affiliation" test can only be applied after the transaction has occurred and when the Commission's power to "correct" matters is seriously limited. Fortunately, the Commission can readily avoid such problems -- and obtain a better substantive solution as well -- by limiting EMA to situations involving a change of control. Where a foreign carrier seeks to make a minority investment in a facilities-based U.S. international carrier, the Commission, rather than stretching the scope of §214, should rely instead upon rules of general applicability similar to those adopted in *BT/MCI* to deter anticompetitive behavior.

As shown in Section III, the application of EMA as a device to coerce foreign administrations to open their communications markets is a questionable strategy. It risks the loss of beneficial investment that may well outweigh the value of EMA as an "incentive" likely to induce a foreign administration to open its communications market. Although the measurement of risks and benefits is extremely difficult, the risk-to-benefit ratio is, other things being equal, least attractive in those situations where foreign carriers are seeking only to invest in a U.S. carrier without obtaining control. Thus, the probability of overall success of the Commission's EMA requirement would be increased by limiting the employment of EMA to those cases where a foreign carrier is entering the U.S. market by obtaining control of a U.S. carrier.

As shown in Section IV, investment by a foreign carrier in a facilities-based U.S. international carrier is only one possible source of anticompetitive behavior. Incentives for collusion and discrimination may also result from other types of alliances, such as international partnerships and joint ventures, particularly if such alliances and joint ventures are with a dominant

U.S. carrier. Such alliances have grown steadily with the increasing globalization of telecommunications (noted by the Commission) and represent an increasingly complex problem. The only reasonable course is for the Commission to seek to control such problem through the implementation of rules of general applicability. To limit enforcement to §214 procedures or a test of "affiliation" based upon investment will almost certainly prove inadequate and will be discriminatory in its application.

As explained in Section V, applications under §310(b)(4) should be treated by the Commission consistent with the control function of §214. Accordingly, acquisitions under §310(b)(4) which involve less than a controlling interest should be considered to be *prima facie* in the public interest. Any concerns of possible discrimination or collusion relating to foreign carrier investment can be handled by implementation of rules of general applicability. However, where a change of control is involved, the Commission should make an independent determination under §310(b)(4) (as would be required under §214 as well) as to whether such change would serve the public interest.

Finally, in Section VI, Sprint sets forth its views on some of the other issues which the Commission has raised in its *Notice*, *e.g.*, dominant/nondominant regulation, definition of a U.S.

facilities-based international carrier, and regulation of international resale carriers.

II. THE APPLICATION OF THE COMMISSION'S EMA TEST SHOULD BE LIMITED TO SITUATIONS WHERE A FOREIGN CARRIER SEEKS TO ENTER THE U.S. INTERNATIONAL MARKET BY ACQUIRING CONTROL OF A FACILITIES-BASED U.S. CARRIER.

The Commission's proposal to apply its EMA test not only to situations that involve foreign entry through control of a U.S. carrier, but also to situations that involve minority foreign carrier investment, creates a serious procedural problem. The §214 facilities authorization process is triggered by the construction, extension, acquisition or operation by a carrier of a "line." A minority investment in a carrier does not require a §214 filing. See *Notice* at ¶51. Notification of such an investment would come only after "affiliation," unless a carrier voluntarily petitioned the Commission for a declaratory ruling. There is certainly a reasonable possibility that the Commission will obtain advance notification of some "affiliations" by receiving petitions for declaratory ruling. However, since the filing of such petitions is voluntary, the Commission will not always receive such notification, and perhaps the most questionable transactions will be those where the U.S. carrier chooses not to give the Commission notification until after the "affiliation" has occurred. And although the Commission suggests (in ¶51) that it would "designate[]" a carrier's §214 certificates "for hearing," it is not clear what the Commission's remedy would be under §214 if it were dissatisfied with the transaction.

The role of §214 in the Act is a narrow one. As the Court of Appeals stated in *Execunet I*,[1] (footnote omitted, emphasis in original):

> The primary purpose of Section 214(a) is prevention of unnecessary duplication of *facilities*, not regulation of services. Because of this, Section 214 would appear to have a limited office with respect to regulation of service offerings on existing lines.

This is consistent with the Commission's long-standing view of §214.[2] That section requires Commission approval for acqui-

[1] *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977).

[2] *See, e.g., Satellite Business Systems, et al.*, 62 FCC 2d 997, *recon. denied*, 64 FCC 2d 872 (1977), *aff'd sub nom., United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980), where the Commission explained (62 FCC 2d at 1068) that "the Commission is granted control over entry and exit from common carriage by communications common carriers [in §214] and regulatory control over the...practices...by communications common carriers [in] Section 201-05." *See, also*, the "Memorandum of Federal Communications Commission As Amicus Curiae" submitted to the U.S. District Court for the District of Columbia and appended to the *SBS* decision, where the Commission explained (at 1111) that §214 gives it authority to authorize construction and retirement of facilities, and thus gives it control over entry into and exit from the market, without mentioning the use of that section for any other purpose.

sition of new lines (including acquisition resulting from a change in control of a certificate holder) and for discontinuance of service, but there is no language in §214 giving the Commission any jurisdiction over non-controlling interests of a foreign carrier (or anyone else) in a carrier holding §214 authorizations. Furthermore, while the Commission has, on occasion, suggested that it has the power to modify or revoke a final, unconditioned §214 authorization,[3] Sprint is unaware of any case in which the Commission has done so.[4] It may be noted that the Commission has, in the past, declined to confront arguments that it lacks the statutory authority to revoke a §214 certificate,[5] and that in *BT/MCI*, the Commission did not undertake to amend MCI's existing certificates in order to impose the nondiscrimination conditions there involved. Instead, MCI voluntarily agreed

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[3] *See, Regulatory Policies and International Telecommunications (Notice of Inquiry and Proposed Rulemaking)*, 2 FCC Rcd 1022, 1033 (1987). *See, also, Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7335 (1992).

[4] Title II stands in marked contrast to Title III, which specifically contemplates, in §312, Commission revocation of licenses it has already issued and details both the circumstances under which such licenses may be revoked and the procedures the Commission must follow for such revocation.

[5] *See Specialized Common Carrier Services*, 29 FCC 2d 870, n. 47 at 926 (1971).

to file amendments to its §214 certificates, presumably in order to obtain a favorable ruling on its petition for declaratory ruling under §310(b).[6] Plainly, if there were no question as to the Commission's authority to modify §214 certificates, it could simply have ordered such modification for MCI's certificates in the same way that it ordered anti-discrimination constraints and reporting requirements.

There is really nothing to be gained -- and much to be lost -- by a Commission effort to stretch the application of §214 of the Act beyond its intended bounds. Apart from the quite real problem of judicial reversal, the Commission's application of an EMA test as a means of coercing foreign administrations is, as shown in Section III herein, highly questionable even where a foreign carrier is seeking to enter the U.S. market by obtaining control of, or forming a new, facilities-based U.S. international carrier. The use of EMA as a coercive device would seem particularly ill-advised where the foreign carrier is not really entering the U.S. market,[7] but simply making a non-controlling equity investment in a U.S. carrier. As explained more fully in Section

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[6] *See BT/MCI*, 9 FCC Rcd at 3966-67.

[7] *BT/MCI*, 9 FCC Rcd at 3963 (¶18, n. 34) and 3965 (¶27).

III, a prohibition against such investments by foreign carriers can hardly be expected to have much of a coercive effect on foreign administrations. Therefore, limiting EMA to situations where a foreign carrier seeks to control a facilities-based U.S. international carrier basically gives up nothing of significance. As for the problem of limiting anticompetitive behavior, such limitation is best accomplished -- at least in situations where control is not involved -- by the adoption of rules of general applicability specifically designed to counteract the incentives for such anticompetitive behavior as will be discussed in Section IV.

III. APPLICATION OF THE COMMISSION'S EMA TEST IS QUESTIONABLE UNDER THE BEST OF CIRCUMSTANCES AND, AT THE VERY LEAST, SHOULD NOT BE APPLIED TO SITUATIONS WHERE ONLY MINORITY INVESTMENT IS INVOLVED.

As noted, the Commission has adopted as a separate underlying goal in this proceeding, the task of "encourag[ing] foreign governments to open their communications markets." Although it is not entirely clear from the *Notice*, the need to encourage the opening of foreign markets is apparently regarded by the Commission as an end in itself, that is, as a "trade" issue, which is separate and apart from anticompetitive concerns such as discrimination or leveraging of monopoly power which might possibly occur as a result of entry by a foreign monopoly (or dominant) carrier into the U.S. international market.

Sprint does not quarrel with the Commission's decision to "encourage" the opening of foreign monopoly markets. The difficulty is the Commission's tentative conclusion that such "encouragement" should be undertaken through a form of compulsion. Specifically, the Commission proposes a kind of reciprocity test -- effective market access -- which, in some cases, would hold foreign carrier participation in the U.S. facilities-based international market hostage to induce foreign administrations to open their communications markets to U.S. carriers.

A. As The Commission Has Repeatedly Found, Asymmetric Market Access Or Investment May Well Be Beneficial.

The Commission's proposal appears to be based, at least in part, on the view that "...asymmetric market access is detrimental to both U.S. service providers and U.S. consumers." *Notice* at ¶22.[8] But, as recent Commission actions and decisions at-

[8] The Commission also suggests that entry into the "lucrative U.S. market" may be viewed as a kind of reward to be bestowed on "both the carriers and the consumers of those countries with liberalized entry policies...." *Notice* at ¶21. Whatever the visceral attractiveness of such an approach, it is unsound as a matter of economics. As shown herein, entry by foreign carriers into the U.S. will not only "reward" them, but, absent other fac-

Footnote continued on next page

test, this view is a marked departure from prior policy. Without even considering the issue of symmetry, the Commission has allowed (to the extent consistent with the licensing requirements contained in §310 of the Act) foreign carriers to enter and invest in the U.S. domestic long distance market and to provide U.S. international service through resale (after obtaining §214 authority).

In certain cases, the Commission has also allowed dominant foreign carriers to enter or invest in the U.S. international market as well. For example, in *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 108-109 (¶¶9-11) (1992) ("*TLD Order*"), the Commission specifically declined to require symmetry or to adopt a policy of reciprocal entry.[9] It reasoned that there were sufficient nondiscrimination safeguards to protect U.S. carriers from Telefonica's potential to abuse its market power, and that, under such circumstances, an open entry policy in the U.S. market would encourage competition and lower prices for U.S. consumers. Similarly, in *BT/MCI*, 9 FCC Rcd at 3965

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tors, also benefit the U.S. communications market, U.S. consumers, and, more generally, the U.S. economy.

[9] In that case, Telefonica Larga Distancia de Puerto Rico ("TLD") was being acquired by the monopoly Spanish carrier, Telefonica de Espana, S.A. ("Telefonica").

(¶26) and 3964 (n. 45), the Commission refused to require comparable market access to the U.K. as a prerequisite to BT's purchase of a non-controlling equity investment in MCI, since such investment would enable MCI to upgrade its infrastructure and provide a wide range of services to U.S. consumers, and since the nondiscrimination requirements imposed upon MCI were felt to provide adequate protection against BT's potential abuse of market power. *See* also, *AmericaTel Corporation*, 9 FCC Rcd 3993, 3994 (¶7) and 3995-96 (¶¶13-15).[10]

In any case, it is readily apparent that the usual effects of investment and entry -- both foreign and domestic -- in the U.S. telecommunications market are to increase the viability and competitiveness of that market. Only when investment and entry are accompanied by anticompetitive behavior might this presump-

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[10] In its *AmericaTel* decision, which approved the acquisition of a controlling interest in AmericaTel, a U.S. carrier, by the Empresa Nacional de Telecommunicaciones S.A. (ENTEL-Chile), a Chilean long distance and international carrier, the Commission did examine whether there were effective opportunities for U.S. firms to compete in the Chilean market as one element in its public interest analysis. *Id.* at 3996 (¶14). However, such examination was made primarily to determine the conditions that needed to be imposed to protect U.S. carriers from discrimination. *Id.* at 4000 (¶32).

tion be overcome.[11] Sprint considers such behavior, as well as possible remedies, in Section IV. The point here is that the Commission cannot assume, without more, that investment and entry is "detrimental" simply because such investment and entry is "asymmetrical."

B. There Is No Way For The Commission To Determine That A Reciprocity Test Would Benefit Overall U.S. Interests.

Because asymmetric foreign investment and entry may well be beneficial, rejection of such investment as a means of pressuring foreign administrations to open their markets is obviously not risk free. The result of such risk may well be that the foreign administration remains adamant; that it refuses to be "encouraged" to open up its market; and that the only consequence of a Commission policy rejecting asymmetrical investment and entry is the loss of the benefits of such investment and entry to U.S. telecommunications consumers.

It is therefore important that the Commission recognize, and carefully consider, the possible costs of a policy of reciprocity or requirement for symmetry. To assist the Commission in weighing the factors relevant in making such an assessment, Sprint

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[11] *See, e.g.* Mansfield, *Economics*, 3rd ed., Norton & Co., at 438.

provides, as Attachment A, "A Game-Theoretic Analysis Of The FCC's Proposed Reciprocity Rule," prepared by Stanley M. Besen and John M. Gale of Charles River Associates. This paper "...examines a series of simple game-theoretic models that analyze how foreigners will react to the imposition of a reciprocity rule and, in turn, whether adopting such a rule is in the best interests of U.S. consumers." Based on such analysis, Besen and Gale reach four broad conclusions:

1. If the foreigners believe they have more to lose from opening their market than they could gain by entry or investment in the U.S., they will decline to open their market. U.S. consumers would then be worse off with a reciprocity rule: they would forego the benefit of foreign entry or investment which would otherwise be made.

2. A foreign government's reaction to a reciprocity requirement will depend on several variables: the size of the investment in the U.S. carrier, whether that investment is controlling, and the size and profitability of the foreign market in question. If, because of this complex calculus, the U.S. tries to tailor its policy to the facts of each case, it will weaken its reciprocity policy by raising doubts as to whether the U.S. will really stand firm.

3. If, on the other hand, the U.S. adopts a hard-and-fast rule to apply in all cases, the rule cannot take into account the circumstances of each case, and it will therefore often result in demands for reciprocity that foreign governments will decline to meet.

4. If the foreign government declines to open its market, then either an impasse will result, thus denying the U.S. the benefit of foreign investment; or the U.S. will later back down, thereby delaying the benefit of the foreign investment (and also jeopardizing the credibility of the reciprocity rule in subsequent cases); or the foreign government will later back down, in which case the U.S. benefits from both foreign investment and the opening of a foreign market, but these benefits are delayed.

In short, it is far from certain whether a reciprocity rule will in fact succeed in opening any foreign markets, and even if it does, it may delay investments in the U.S. There is no way to determine, in advance, whether the possible benefits of a reciprocity rule to the U.S. economy are likely to outweigh the possible costs of delayed or foregone foreign investment.

These conclusions follow inextricably from a straightforward analysis of well-accepted game-theory principles. Such principles make it quite clear that the adoption of a reciprocity approach faces serious obstacles. At a minimum, it is virtually impossible for the Commission (as would be the case for most other "game players") to accurately weigh the various factors involved in tailoring a reciprocity commitment. It is also difficult to establish a general commitment (necessary for credibility) that would be successful in a series of cases that are almost certain to present very different factual situations. And,