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

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
1998 Biennial Regulatory Review –)
Review of International Common Carrier)
Regulations)

File No. IB 98-118

COMMENTS OF AT&T CORP.

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Dated: August 13, 1998

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SUMMARY

AT&T supports the removal of regulations that no longer serve the public interest and supports many of the proposals set forth in the Notice. AT&T is concerned, however, that some of the proposed changes in Section 214 procedures would prevent the review of applications involving dominant foreign carrier investments that could adversely affect competition in the U.S. market. Although the WTO Agreement is now effective, the large majority of foreign markets remain closed to competition, requiring continued Commission safeguards against the abuse of foreign market power. These circumstances do not provide the “meaningful economic competition between providers” that is required by the Telecommunications Act for the removal of regulations under the Biennial Review of Regulations -- and that is particularly necessary before regulations safeguarding the U.S. market against anticompetitive conduct should be removed.

The blanket Section 214 authorization for international services on unaffiliated routes proposed by the Notice would effectively remove any further filing of Section 214 applications involving foreign carrier investments of 25 percent or below -- although, under Commission policies reaffirmed by the *Foreign Participation Order*, foreign carrier investments of 25 percent or below continue to create affiliations and require scrutiny where they have a significant potential impact on competition.

While many Section 214 applications can be subject to a blanket authorization without harm to the public interest, this does not apply to applicants with equity investments by, or in, carriers with market power at the foreign end of the international route. Applications involving dominant foreign carrier investments may

potentially affect competition and should be subject to a blanket authorization only where those investments are below 10 percent. Applications involving dominant foreign carrier equity interests above this level should continue to be subject to existing Section 214 application procedures. After-the fact notification, as proposed by the Notice, would not allow adequate scrutiny of the competitive concerns that may be raised by these investments.

The Commission should also not adopt the proposal to require applicants to provide notification only regarding shareholders with interests greater than 25 percent. Without identification of shareholders below this 25 percent level, there can be little or no review of competitive issues resulting from the substantial equity interests that may fall into this category. To ensure the continued availability of this critical information, the Commission should retain its existing requirements for notification of 10 percent or greater shareholders. The Commission should also amend its notification rules to require advance notification for acquisitions of dominant foreign carrier equity interests of 10 percent or more in, or by, existing Section 214 holders.

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COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its Comments in response to the Notice of Proposed Rulemaking¹ concerning the Commission's proposals to streamline its international Section 214 application rules.

I. APPLICATIONS INVOLVING DOMINANT FOREIGN CARRIER INTERESTS OF 10 PERCENT AND ABOVE SHOULD REMAIN SUBJECT TO EXISTING PROCEDURES.

The Notice proposes (¶ 8) to grant a blanket Section 214 authorization allowing the provision of international services on all unaffiliated routes. Under this proposal, Section 214 applications will be filed with the Commission only where the applicant is affiliated with a foreign carrier on the international route under Section 63.18(i) of the Commission's rules, which defines "affiliation" as "includ[ing]" equity interests greater than 25 percent and controlling interests.

¹ *Notice of Proposed Rulemaking*, IB Docket No. 98-118 (rel. Jul. 14, 1998), FCC 98-149.

Although the *Foreign Participation Order* makes clear that equity interests below this level also require scrutiny and will create affiliations where there is a significant potential impact on competition, no applicant is likely to acknowledge the existence of an affiliation on these grounds. Consequently, no Section 214 applications involving foreign carrier equity interests of 25 percent or below, even where these equity interests involve dominant foreign carriers, are likely to be filed with the Commission in the future if the proposal set forth in the Notice is adopted.

The proposed blanket authorization would thus effectively remove pre-entry review for applicants with dominant foreign carrier equity interests of 25 percent or below that could pose significant harm to competition in the U.S. market. To ensure that all investments raising potential competitive concerns continue to receive pre-entry public interest review, the Commission should continue existing application procedures for those applications most likely to raise those concerns -- those involving 10 percent or above equity interests in, or held by, dominant foreign carriers.

1. **The *Foreign Participation Order* Requires Continued Scrutiny of Equity Interests Below 25 Percent.**

The *Foreign Participation Order* affirms that foreign carrier equity interests under 25 percent may still "present a significant potential impact on competition in the U.S. market for international telecommunications."² The Commission further

² *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, (rel. Nov. 26, 1997), FCC 97-398 ("*Foreign Participation Order*"), ¶ 332, n.679.

emphasizes in that order that "[w]e retain our policy of scrutinizing [such] investments."³

In support of this statement, the *Foreign Participation Order* cites the *Foreign Carrier Entry Order*, which established the Commission's policy of scrutinizing investments below 25 percent for the following reasons:

"[I]n a market such as international telecommunications where some players possess significant market power, the potential exists for substantial investments below the 25 percent level to have a dramatic impact on competition in certain limited circumstances. In addition, such scrutiny [of investments below 25 percent presenting a significant potential impact on competition] may be necessary to prevent carriers from using corporate structuring tactics to evade scrutiny under these rules."⁴

None of these reasons for reviewing substantial foreign carrier investments below 25 percent are changed by the WTO Agreement, or by the new rules introduced by the *Foreign Participation Order*. The Commission concludes in that order that the continued examination of potential risks to competition is a necessary part of its pre-entry public interest analysis of Section 214 applications by entities from WTO members,⁵ and that this review is fully consistent with U.S. commitments under the WTO Agreement.⁶ Those conclusions are not dependent upon particular investment thresholds, and apply to

³ *Id.* (emphasis added).

⁴ *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd. 3873, 3906 (1995) ("*Foreign Carrier Entry Order*"). See also, *id.* at 3905 ("We recognize that the percentage of investment by a foreign carrier, standing alone, may not identify all cases where Commission scrutiny is warranted. For this reason, we will scrutinize planned investments of 25 per cent or less where they represent a significant potential impact on competition in the U.S. international services market.")

⁵ *Id.* at ¶¶ 50-52.

⁶ *Id.* at ¶¶ 344-56.

all equity interests raising competitive concerns, whether they are above or below 25 percent.

The Commission further emphasized in the *Foreign Participation Order* that “[a]s we stated in the *Foreign Carrier Entry Order*, we also may find that a U.S. carrier may be treated as an affiliate of a foreign carrier where there is a significant potential impact on competition, even if the investment falls below the 25 percent affiliation threshold.”⁷ The *Foreign Carrier Entry Order* found that “it may be necessary to apply dominant carrier regulation to such carriers because an investment that presents a significant potential impact on competition may require application of safeguards to ensure that foreign carriers are unable to leverage their market power into the U.S. market for international services through an investment in a U.S. carrier.”⁸

As proposed by the Notice, however, unless a Section 214 applicant with a investment in or by a dominant foreign carrier of 25 percent or below acknowledges the existence of an affiliation because of the likelihood of a significant potential impact on competition, the applicant will commence service immediately under the blanket authorization. The proposal will thus effectively preclude the pre-entry review of applications involving such investments to determine whether dominant carrier regulation, benchmark conditions, or other measures are required to prevent competitive harm. As

⁷ *Foreign Participation Order*, ¶ 178, n.360 (emphasis added). See also, *Sprint Corp.*, ISP-95-002, Declaratory Ruling and Order, (rel. Jun. 26, 1998) (“*1998 Sprint Order*”), ¶ 10 (to be treated as affiliations, “[i]nvestments below 25 percent must constitute control or pose a risk of having a significant impact on competition in the U.S. international services market”).

further proposed by the Notice (§ 10), the Commission will merely receive notification that the carrier is providing service after it has begun to do so. Such after-the-fact notification would not only fail to allow adequate public interest oversight, which the Commission has repeatedly found to require pre-entry review,⁹ but may also prejudice the outcome. As the Commission has found, it can be "impracticable to withdraw[] service, once established, because of its disruptive effect [on consumers]."¹⁰

The Commission refused in the *Foreign Participation Order* to adopt "an unrestricted entry approach," even for carriers from WTO Member countries.¹¹ The Commission reached this conclusion because it was "unwilling to foreclose entirely the possibility, that in exceptional circumstances, we may have to attach additional conditions to (or even deny) a particular application."¹² Yet, the blanket authorization proposed by the Notice would, in effect, adopt an unrestricted entry approach for all foreign carrier investments below 25 percent, including those by dominant foreign carriers. Acceptance

(footnote continued from previous page)

⁸ *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3968.

⁹ *See Foreign Participation Order*, § 50 ("we find that adopting a rebuttable presumption in favor of entry will allow the Commission to grant the vast majority of applications swiftly, while maintaining the oversight necessary to ensure that entry by an applicant from a WTO Member is consistent with the public interest") (emphasis added); *id.*, § 128 (maintaining the ECO test as part of the pre-entry public interest inquiry for applications from foreign carriers from non-WTO members and carriers affiliated with such carriers).

¹⁰ *AT&T Corp. v. Ameritech Corp.*, No. 98-141 (rel. June 30, 1998), § 25.

¹¹ *Foreign Participation Order*, § 55.

¹² *Id.* at § 54.

of this proposal would severely weaken the Commission's safeguards against anticompetitive conduct.

2. **The Proposal Cannot be Justified by Competitive Circumstances.**

The Telecommunications Act requires the removal of regulations under the Biennial Review of Regulations only where "such regulation is no longer necessary in the public interest as the result of meaningful competition between providers." 47 U.S.C. Sect. 161(a)(2). But no showing can be made that the existence of "meaningful" competitive conditions in foreign markets now warrants the effective removal of pre-entry review for all Section 214 applications involving foreign carrier equity interests of 25 percent or below.

In *Sprint Corp.*, the Commission found pre-entry competitive analysis "warranted and necessary" to address below 25 percent investments by Deutsche Telecom and France Telecom "because of the size of the carriers involved and the potential impact on competition in the U.S. basic international services market."¹³ In view of the substantial number of foreign carriers that have not yet entered the U.S. market, many of them monopolists in closed markets, it would be highly premature to conclude that no application involving a below 25 percent investment by a dominant foreign carrier will ever give rise to similar concerns.

Competitive conditions in France and Germany have now changed, but those in the large majority of other countries -- both WTO Members and non-WTO

¹³ *Sprint Corp.*, 11 FCC Rcd. 1850, 1856 (1996).

Members -- have not.¹⁴ Outside the small number of countries that have fully opened their international markets to competition, no “meaningful competition between providers” exists today in foreign telecommunications markets. The Commission has recently stated that only 28 countries (of the more than 130 WTO Members) committed to competition on January 1, 1998 under the WTO Basic Telecommunications Agreement.¹⁵ These circumstances fail to provide the justification required by the statute before pre-entry scrutiny may be effectively removed for all Section 214 applications involving equity interests below 25 percent.¹⁶

The fact that “[t]he great majority of streamlined applications are unopposed” (Notice, ¶ 7) fails to show that scrutiny of foreign carrier interests below 25 percent should be foreclosed only six months after the *Foreign Participation* rules became

¹⁴ See *1998 Sprint Order*, ¶ 14 (French and German markets are now “open to competition”).

¹⁵ *1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148, CC Docket No. 90-337, *Notice of Proposed Rulemaking*, (rel. Aug. 6, 1998), FCC 98-190, ¶ 15.

¹⁶ Any claim that a “more competitive marketplace” resulting from the WTO Agreement justifies the blanket authorization proposed by the Notice (which it does not, because effective competition has been introduced by only a small number of WTO Members) cannot even purport to justify extending the blanket authorization to non-WTO Members, where all the closed market conditions that gave rise to the *Foreign Carrier Entry Order* and *Sprint Corp.* continue unabated. Thus, there has been no relaxation in the Commission’s market entry policies toward non-WTO Members since the issuance of the *Foreign Carrier Entry Order* and *Sprint Corp.* See *Foreign Participation Order*, ¶¶ 140-42 (continuing the ECO test for non-WTO Members to encourage market-opening and to prevent discrimination against U.S. carriers). The proposed blanket authorization of applications involving equity interests below 25 percent would serve neither of the public interest objectives behind the continued application of ECO to non-WTO Members.

effective in February 1998. It rather demonstrates that the continuation of existing procedures for some of these applications in the future will have a minimal impact, if any, on the number of new carriers providing service in the U.S. market.

3. Dominant Foreign Carrier Interests of 10 Percent and Above Should Remain Subject to Existing Procedures .

A more limited blanket authorization is necessary to address these concerns. Specifically, AT&T proposes that no blanket authorization should apply where (a) a carrier that has not been found to lack market power at the foreign end of the relevant route (or an entity controlling, controlled by, or under common control with such a carrier) has an equity investment of 10 percent or above in the applicant (or in an entity controlling, controlled by, or under common control with the applicant), or (b) where the applicant (or an entity controlling, controlled by, or under common control with the applicant) has an equity investment of 10 percent or above in a carrier that has not been found to lack market power at the foreign end of the route (or in an entity controlling, controlled by, or under common control with such a carrier).

Requiring the filing of applications involving dominant carrier equity interests of 10 percent and above would ensure that all investments with a potential impact on competition would receive pre-entry review. In establishing the former ten percent notification requirement in the *Foreign Carrier Entry Order*, the Commission recognized that a ten percent equity interest could be cause for concern.¹⁷ The soundness of this conclusion was subsequently demonstrated by the findings by both the Commission and

¹⁷ *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3910.

the Department of Justice that competitive concerns would indeed arise as the result of 10 percent investments in Sprint by DT and FT.¹⁸

There is also ample precedent in analogous areas supporting 10 percent as the most appropriate threshold to identify equity interests likely to trigger competitive concerns, including Section 3 of the Telecommunications Act, which defines an “affiliate” as including ownership of an equity interest “of more than 10 percent.”¹⁹ Here, however, AT&T is not seeking to lower the Commission’s existing affiliation thresholds, but merely to ensure the filing and pre-entry review of all applications involving below 25 percent dominant carrier investments that may constitute affiliations and require scrutiny under the Commission’s existing rules and policies because of their potential impact on competition. The use of a 10 percent threshold for this filing requirement would ensure that applications potentially raising competitive concerns would receive the necessary review.

II. APPLICANTS SHOULD CONTINUE TO LIST ALL 10 PERCENT OR GREATER SHAREHOLDERS.

Nor should the Commission adopt its proposed removal of the Section 63.18 requirement that applicants must list all of their 10 percent or greater direct or indirect shareholders in their certifications regarding affiliation. As proposed by the

¹⁸ See *Sprint Corp.*, 11 FCC Rcd. 1850; *U.S. v. Sprint Corp. & Joint Venture Co.*, 1996-1 Trade Cas. (CCH) ¶ 71,300 (D.C.D.C. 1996) (Final Judgment); 60 Fed. Reg. 44049 (1995) (Competitive Impact Statement).

¹⁹ 47 U.S.C. Section 153(1). See also 15 U.S.C. Section 18a(c)(9) (acquisitions of voting securities “solely for the purposes of investment” are exempt from Hart-Scott-Rodino Act reporting requirements where the acquiring person will not hold more than 10 percent of the issuer’s voting shares).

Notice (§ 39), Section 214 applicants would be required to list only shareholders with interests greater than 25 percent.

Acceptance of this proposal would, in effect, moot all the concerns expressed in Section I above, as it would deny the Commission and other carriers all information regarding below 25 percent interests, thus precluding all review, both pre-entry and post-entry, of the competitive issues that may be raised by those investments. If applicants are not even required to identify equity interests below 25 percent, including those by dominant foreign carriers, little or no scrutiny will be possible of any investments below this level that may potentially affect competition -- contrary to the policies established in the *Foreign Participation Order*. This information could be virtually impossible to obtain from other sources, particularly regarding non-public companies and foreign carriers operating in countries that provide little or no transparency for such information.

Because lack of this critical information would severely impede the ability of the Commission to address the competitive concerns that may be raised by equity interests below 25 percent, AT&T urges Commission to retain its existing requirements.

III. NOTIFICATION SHOULD BE REQUIRED OF ALL DOMINANT FOREIGN CARRIER INTERESTS OF 10 PERCENT AND ABOVE.

The same reasons requiring the filing of all Section 214 applications involving dominant foreign carrier equity interests of 10 percent and above also require the notification of all 10 percent and above dominant foreign carrier investments in, or by, holders of existing Section 214 authorizations. Under Commission policies reaffirmed by the *Foreign Participation Order*, affiliations with dominant foreign carriers may be

created when an existing Section 214 holder undertakes or acquires an under 25 percent investment in or by a dominant foreign carrier where there is a significant potential impact on competition.²⁰

The Commission's present rules for the notification of investments, however, require the notification only of acquisitions of above 25 percent or controlling investments.²¹ These rules fail to recognize that acquisitions of below 25 percent non-controlling equity interests may also create affiliations that require public interest review. Indeed, by allowing a dominant foreign carrier -- from a WTO Member or non-WTO Member country -- to acquire a non-controlling equity interest of up to 25 percent in any U.S. carrier without triggering notification requirements, the Commission's rules would exempt from notification a future transaction similar to the 10 percent FT and DT investments in Sprint, even if that future transaction involved an investment in a major U.S. carrier by a dominant carrier from a non-WTO Member country with a closed market. In view of the adverse impact of the FT and DT investments on competition, as found both by the Commission and by the Department of Justice, and the absence of any significant change in competitive conditions in most countries since those findings, it cannot be concluded that no future investments below 25 percent will ever again generate the same competitive concerns.²²

²⁰ *Foreign Participation Order*, ¶ 178, n.360.

²¹ *See* 47 C.F.R. Section 63.11.

²² The Commission's removal of the former 10 percent notification threshold in the *Foreign Participation Order* (¶ 332) is not consistent with its findings in that order that its public interest review of applications is fully consistent with WTO obligations

Accordingly, the Commission should amend its notification rules to ensure review of all investments involving dominant carriers at the foreign end of the Section 214 holder's international routes that may raise competitive concerns to determine whether dominant carrier regulation, benchmark conditions, or other measures are required to safeguard competition in the U.S. market. As with Section 214 applications, a 10 percent threshold for this filing requirement would ensure that investments potentially raising these concerns could receive the necessary review.

The Commission should require notification where (a) a carrier that has not been found to lack market power at the foreign end of the relevant route (or an entity controlling, controlled by, or under common control with such a carrier) acquires an equity investment of 10 percent or above in a holder of an existing Section 214 authorization (or in an entity controlling, controlled by, or under common control with the Section 214 holder), or (b) where the Section 214 holder (or an entity controlling, controlled by, or under common control with the Section 214 holder) acquires an equity

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(¶¶ 348-57), that scrutiny remains necessary of below 25 percent investments that potentially impact competition (¶ 332, n.679), and that investments below 25 percent may still require a U.S. carrier to be treated as the affiliate of a foreign carrier where there is a significant potential impact on competition (¶ 178, n.360).

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investment of 10 percent or above in a carrier that has not been found to lack market power at the foreign end of the route (or in an entity controlling, controlled by, or under common control with such a carrier).

CONCLUSION

For the reasons explained above, AT&T requests the Commission to continue existing Section 214 application procedures where a carrier with market power at the foreign end of the international route has an equity investment of 10 percent or above in the applicant, or where the applicant has a similar equity investment in a carrier with market power at the foreign end of the route. The Commission should also (a) retain its existing notification requirements for 10 percent or greater shareholders, and (b) require advance notification for 10 percent or greater dominant foreign carrier equity interests in, or held by, U.S. carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen Kotula, do hereby certify that on this 13th day of August, 1998 a copy of the foregoing " Comments of AT&T Corp." was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list:

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