

**ORIGINAL**

PAUL. WEISS. RIFKIND. WHARTON & GARRISON

1615 L STREET, NW

WASHINGTON, DC 20036-5694

TELEPHONE (202) 223-7300  
FACSIMILE (202) 223-7420

LAURA S. SHERMAN  
COMMUNICATIONS COUNSEL

TELEPHONE (202) 223-7385

E-MAIL lsherman@paulweiss.com

**EX PARTE OR LATE FILED**

1285 AVENUE OF THE AMERICAS  
NEW YORK, NY 10019-6004  
TELEPHONE (212) 373-3000  
FACSIMILE (212) 737-3000

62, RUE DU FAUBOURG SAINT-HONORE  
75008 PARIS, FRANCE  
TELEPHONE (33) (1) 53 43 14 14  
FACSIMILE (33) (1) 53 43 00 23

FUKOKU SEIMEI BUILDING  
2-2, UCHISAIWAICHO 2-CHOME  
CHITODAI-KU, TOKYO 100, JAPAN  
TELEPHONE (81) (3) 3997-6101  
FACSIMILE (81) (3) 3997-6120

SUITE 2210 SCREECH TOWER  
22, JIANGUOMENWAI DAJIE  
BEIJING, 100004  
PEOPLE'S REPUBLIC OF CHINA  
TELEPHONE (86) (10) 6512-3828-30  
FACSIMILE (86) (10) 6512-3831

13TH FLOOR, HONG KONG CLUB BUILDING  
3A CHATER ROAD, CENTRAL  
HONG KONG  
TELEPHONE (852) 2338-9933  
FACSIMILE (852) 2338-9922

November 15, 1999

Via Facsimile

Ms. Susan O'Connell & Ms. Lisa Choi  
International Bureau  
Federal Communications Commission  
The Portals  
445 12th Street, SW  
Washington, DC 20554

**RECEIVED**

MAY 18 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: IB Docket No. 97-142 / Petition for Reconsideration  
Ex Parte Presentation

Dear Ms. O'Connell and Ms. Choi:

I am writing in regard to the Petition for Reconsideration ("Reconsideration Petition") filed by SBC Communications Inc. ("SBC") on January 8, 1998 with respect to the Federal Communications Commission's ("FCC") *Foreign Participation Order*.<sup>1/</sup> In its Reconsideration Petition, SBC asked the Commission to revise its foreign carrier affiliation notification rule in 47 C.F.R. 63.11 ("Rule 63.11") to eliminate the need for U.S. carriers to notify the FCC upon acquisition of an interest in excess of 25 percent in a foreign carrier and to seek Commission approval of acquisition of a controlling interest.<sup>2/</sup>

<sup>1/</sup> *Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

<sup>2/</sup> SBC's Reconsideration Petition was opposed by MCI Telecommunications Corporation.

Ms. Susan O'Connel and Ms. Lisa Choi

2

As a practitioner engaged in both the regulatory and corporate side of international transactions, I have concluded that Rule 63.11 is not workable in the real world of telecommunications joint ventures and acquisitions. Nor does it comport with the Commission's current liberal entry policies for international services. While it may not be possible to eliminate the prior approval requirement in all cases,<sup>3/</sup> I urge the Commission to narrow its application in one or more of the following ways: 1) limit application to carriers that are not subject to streamlined Section 214 license applications procedures adopted by the Commission or to an acquisition by or in those carriers presumed to possess market power in a foreign telecommunications market; 2) adopt a value or market share threshold below which prior approval is not required; and 3) significantly reduce the pre-approval timeframe.

There are a number of problems with Rule 63.11. First, it is probably honored more in the breach because it covers joint ventures and mergers between foreign carriers, one of which has a Section 214 license. While many of these carriers use U.S. counsel to obtain the Section 214 license itself, they do not necessarily use U.S. counsel in connection with their corporate transactions. So there are any number of Section 214 license holders that are unaware of the requirements of Section 63.11. While that is not itself a reason to modify Rule 63.11, it is a reason to significantly narrow the application of the Rule to cover only those joint ventures or mergers which actually warrant review.

Second, Rule 63.11 is unworkable in the real world of telecommunications where joint ventures and acquisitions are an integral part of doing business. The parties to a corporate transaction usually want to act quickly and keep the transaction confidential until it is finalized. Requiring notice 60 days in advance of consummating a transaction is not possible. It would alert competitors, which might want to use Rule 63.11 to simply stall an acquisition they do not like, or reveal strategic corporate plans. In any case, it imposes a substantial time burden for no good reason.

Third, Rule 63.11 imposes a much longer waiting period on carriers than is imposed in order to obtain the Section 214 license itself. In the *1998 Biennial Review*, the Commission streamlined the Section 214 licensing process so that almost

---

<sup>3/</sup> Elimination is probably impossible for the same reasons that the Commission did not adopt its proposal to grant blanket section 214 authorizations as proposed in its *1998 Biennial Regulatory Review -- Review of International Common Carrier Regulation*, Notice of Proposed Rulemaking, 13 FCC Rcd 13713 (1999), ¶ 14.

Ms. Susan O'Connel and Ms. Lisa Choi

3

all applications are automatically granted within 14 days of public notice of the application.<sup>4/</sup>

Finally, the requirements of Rule 63.11 do not comport with the liberalized entry standard adopted by the Commission in the *Foreign Participation Order*. That *Order* presumes that entry for carriers from World Trade Organization ("WTO") Members is in the public interest and makes abundantly clear that denial of a license would occur only in the "exceptional case."<sup>5/</sup> Yet, Rule 63.11 states that the Commission will review investments which raise the question of "whether the investment serves the public interest, convenience and necessity."<sup>6/</sup> This implies a higher standard of review.

Rule 63.11 was adopted in order to give the Commission and the public the opportunity to review an acquisition by a U.S.-licensed carrier of 25 percent or more of a foreign carrier under the entry standards adopted in the *Foreign Participation Order*.<sup>7/</sup> It should only be applied in cases where there is an actual possibility of a "very high risk to competition." Thus, Rule 63.11 should not apply to those cases where the Commission has determined that the competitive risks are so slight that it can apply streamlined licensing applications.<sup>8/</sup> Alternatively, the Commission could apply Rule 63.11 only to those carriers who actually have market power on the foreign end, using the list issued last June.<sup>9/</sup> Only these carriers have the ability to act in an anti-competitive manner.

Another way to tailor Rule 63.11 more closely to the types of transactions that might cause competitive concerns is to require notification only of joint ventures or mergers of major carriers. The combination of new entrants, with

---

<sup>4/</sup> 1998 Biennial Review at ¶ 2

<sup>5/</sup> *Id.* at ¶¶ 51-52.

<sup>6/</sup> 47 C.F.R. 63.11(e)(2).

<sup>7/</sup> *Foreign Participation Order* at ¶ 333.

<sup>8/</sup> 1998 Biennial Review at ¶ 20.

<sup>9/</sup> *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 99-809 (June 18, 1999).

Ms. Susan O'Connell and Ms. Lisa Choi

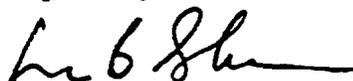
4

low capitalization and market share, should not be of concern to the Commission. In this regard, the Commission should note that the anti-trust authorities, the Federal Trade Commission and the Justice Department, do not require notification of joint ventures or mergers that fall under certain thresholds.<sup>10/</sup> The Commission should consider adopting similar thresholds.

At the least, the Commission should revise the time frame for notification. In almost all cases, the time period should mirror the streamlined license application process. Reducing the 60-day notification period to a fourteen-day public notice period would make a significant difference from a practical point of view.

For the foregoing reasons, the Commission should significantly revise Rule 63.11, limiting its applications to only those joint ventures and mergers that could pose a very high risk to competition and reducing the notification period to 14-days.

Respectfully submitted,



Laura B. Sherman

cc: SBC Communications  
James D. Ellis  
Robert M. Lynch  
Stanley J. Moore  
Gina Harrison

---

<sup>10/</sup> See Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18(a)) and 16 U.S.C. § 802.20 which apply a "size-of-person" test and a "size-of-acquisition" test.

**Ms. Susan O'Connel and Ms. Lisa Choi**

**5**

**MCI Telecommunications Corporation  
Sanford C. Reback  
Scott A. Sahefferman  
Larry A. Blosser**

**Federal Communications Commission  
Magalie Roman Salas**