International Communications

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Of the numerous developments in the legal and regulatory framework for international telecommunications during 1996, those concerning: (1) foreign investment and entry into the U.S. telecommunications market, and (2) international satellites, were among the most noteworthy. Below, the principal changes and major events are highlighted.

I. United States Foreign Investment Restrictions

A. 1996 TELECOMMUNICATIONS ACT

In February 1996, the U.S. Congress passed and the president signed the first comprehensive legislative reform of U.S. telecommunications laws in 60 years.[1] The bulk of the legislation focused on the liberalization of U.S. domestic regulatory regimes, principally the deregulation of the long distance and local telephone markets. As a result of these changes, local telephone companies (especially the Regional Bell Operating Companies (RBOCs) that were created following the break-up of AT&T) eventually will be allowed to provide long distance service, including international service.[2]

During the long process of passing the telecommunications reform legislation, there were efforts, led by Rep. Michael Oxley of Ohio, to repeal the provisions of the existing telecommunications law that limit the ability of foreign companies to invest in U.S. telecommunications firms.[3] Specifically, Oxley sought the repeal of provisions of the Communications Act of 1934 that restrict non-U.S. citizens from holding more than twenty percent of the stock of a broadcasting or common carrier licensee or twenty-five percent of an intermediary company holding stock in a broadcast or common carrier licensee.[4] Although these efforts failed in the final push

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151-613 (1996) [hereinafter The 1996 Act].

2. Under the terms of the court order that broke up A T & T, the RBOCs were prohibited from providing long distance service. *See* United States v. A T & T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

3. The Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151-613.

4. 47 U.S.C. § 310(b)(3) and (4).

to adopt the legislation, the new law did repeal a cap on the percentage of permissible foreign officers and directors for such licensees or intermediary companies;[5] efforts to repeal or revise the remaining foreign ownership restrictions are likely to continue in Congress in 1997.

B. FCC "Effective Competitive Opportunities" Test

While congressional efforts to liberalize foreign investment laws affecting telecommunications foundered, the Federal Communications Commission (FCC or Commission) relied on its existing statutory authority to promulgate new rules that it claimed were aimed at liberalizing the ability of foreign companies to invest in U.S. telecommunications firms.[6] Under the FCC's new rules, which apply only to common carrier licensees,[7] the FCC will consider permitting foreign investment of up to one hundred percent of a U.S. common carrier if "effective competitive opportunities" (ECO) exist for U.S. telecommunications companies in the "home market" of the foreign investor(s).[8] The FCC claimed that a liberal use of this ECO standard would facilitate increased foreign investment and encourage foreign governments to open their markets to U.S. investment.[9]

The FCC also determined that it would apply its ECO test to foreign companies seeking to enter (or expand their presence in) the U.S. telecommunications services market.[10] In applying this standard to the telecommunications services market, the FCC will examine requests for authority under Section 214 of the 1934 Act to add or extend lines of communications to offer international message telephone service, including resale services, between the United States and foreign countries.[11] Under the ECO test, the FCC will examine the ability of U.S. carriers to compete effectively as international carriers in destination foreign markets where the foreign carrier in question has market power.[12]

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5. The 1996 Act § 403(k).

6. Under Section 310(b)(4), the FCC has the discretion to allow greater than twenty-five percent foreign investment in an intermediary company that in turn controls an FCC broadcast or common carrier licensee, if the Commission finds that a grant of such authority is in the public interest. *See* 47 U.S.C. § 310(b)(4).

7. The FCC historically has been less willing to allow foreign investment in excess of the statutory benchmarks where the licensee is a broadcast entity, largely because of concerns that broadcast licensees have control over the content of their transmissions. *See, e.g.*, MMM Holdings, Inc., 4 F.C.C.R. 8243, 8252 n.33 (1989). (Because radio common carriers are not responsible for message content, character considerations, while relevant, do not carry the same crucial significance as in broadcast proceedings); *cf. In re* Application of Fox Television Stations, 11 F.C.C.R. 5714 (1995) (allowing foreign ownership of television stations to exceed benchmark level under unique historical circumstances of the case).

8. In determining whether effective competitive opportunities exist, the Commission will examine first the *de jure* ability of U.S. companies to enter the foreign market. If no explicit legal restrictions on entry exist, then the Commission will examine the other factors of the test to determine whether companies have the *de facto* ability to enter the market. *See In re* Market Entry and Regulation of Foreign Affiliated Entities, 11 F.C.C.R. 3873, 3890 (1995) [hereinafter Foreign Market Entry Order].

9. In the first major test of its new ECO standard, the Commission examined a request by Sprint, the third largest U.S. long distance carrier, to enter into a global alliance with France Telecom and Deutsche Telekom. The FCC found that neither France nor Germany afforded U.S. carriers effective competitive opportunities, but determined that there were sufficient countervailing public interest considerations to allow the deal to proceed. *See In re* Sprint Corp. Petition for Declaratory Ruling Concerning Section 310(b)(4), 11 F.C.C.R. 1850 (1995). The Commission will consider similar issues in the near future in determining whether to allow British Telecom to purchase MCI, the second largest U.S. long distance carrier.

10. Foreign Market Entry Order, 11 F.C.C.R. at 3881.

11. *Id.*

12. *Id.*

II. International Satellite Developments

A. Disco I

In January 1996, the FCC eliminated its long-standing regulatory distinction between satellites licensed to provide domestic service (domsats) and those licensed to provide international service. In its Domestic and International Satellite Consolidation Order (DISCO I),[13] the Commission ruled that henceforth it would permit "all U.S.-licensed fixed satellite service (FSS) systems, mobile satellite service (MSS) systems, and direct broadcast satellite service (DBS) systems to offer both domestic and international service."[14] The Commission concluded that the regulatory separation between domestic and international satellites was outdated and did not respond to the needs of customers for service providers that offer both domestic and international services.[15] As a result, domestically licensed satellites no longer need FCC approval to offer international services. However, such licensees still need to complete the consultation process mandated by Article XIV(d) of the Intelsat Agreement to determine if their proposed service would cause either technical or economic harm to the Intelsat system.[16]

B. Disco II

Shortly after adopting its rules in the DISCO I proceeding, which focused on permitting U.S.-licensed satellites to offer service outside of the United States, the Commission instituted a new rulemaking to consider allowing foreign satellites to transmit signals to, from, and within the United States.[17] In this rulemaking, which is still pending, the FCC proposes to allow foreign satellites access to the U.S. market, using the same reciprocity test developed in its Foreign Market Entry proceeding—*i.e.*, whether foreign markets allow effective competitive opportunities to U.S.-licensed satellites.[18]

Rather than relicensing satellites that had previously been licensed by a foreign government, the FCC proposed that it implement its foreign satellite access policies by licensing earth stations within the United States.[19] Under the Commission's proposal, any earth station user that wishes to send or receive transmissions over a non-U.S. licensed satellite must first apply for a license from the Commission.[20] In considering the application, the Commission will apply the ECO test, focusing on the effective competitive opportunities for U.S. satellites in (1) the "home" market of each non-U.S. satellite; and (2) some or all of the "route" markets that the non-U.S. satellite seeks to serve from earth stations in the United States, examining both *de jure* and *de facto* barriers in each case.[21]

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13. *In re* Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Report and Order, 61 Fed. Reg. 9946 (1996) [hereinafter DISCO I].

14. *Id.*

15. *Id.*

16. *Id.*

17. *In re* Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Notice of Proposed Rulemaking, 61 Fed. Reg. 32399 (1996) [hereinafter DISCO II].

18. *Id.*

19. *Id.* at 32400. The Commission concluded that requiring non-United States systems to obtain space station licenses from the United States before serving the American market would be "time consuming and wasteful," as these systems already would have been licensed by a foreign government and registered with the ITU. *Id.*

20. *Id.* at 32400.

21. *Id.*

C. Direct Broadcast Satellites

In late 1995, the FCC adopted new rules for the DBS service, including the use of competitive bidding (auctions) to award licenses.[22] It proceeded to auction two DBS licenses in early 1996, marking the first time a satellite license of any kind had been awarded by auction.[23]

In its first opportunity to apply its DISCO II–ECO test to the DBS service, the FCC rejected efforts by two Canadian companies to provide DBS service to the United States using Canadian satellites.[24] The application was opposed by various U.S. companies; in addition U.S. government executive branch agencies urged a deferral of the application, arguing that Canadian companies could not meet the FCC's ECO test for DBS services because Canadian content restrictions discriminate against U.S. and other foreign programmers and service providers. Ultimately, however, the Commission rejected the applications on procedural rather than substantive grounds, finding the applications premature because the satellites had not yet been licensed by the Canadian government.[25] While the Commission thus has not yet decided whether a DBS provider may use a foreign-licensed satellite to offer DBS service in the United States, it explicitly has stated that U.S.-licensed DBS operators may provide service internationally.[26]

D. United States–Mexican Satellite Services Agreement

Shortly before the release of DISCO II, the United States and Mexico reached a landmark agreement establishing a framework under which satellite operators licensed by either government could offer services in both the United States and Mexico.[27] Under the Agreement, Mexican-licensed satellites will be permitted to provide service to, from, and within the United States, to the extent that the services "enhance rather than distort competition in the U.S. market" and "enhance public interest objectives."[28] The same conditions will apply to U.S.-licensed satellites that wish to provide service within Mexico. In November 1996, the two governments signed a Protocol to this agreement facilitating the transmission of DBS services.[29]

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22. *In re* Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 F.C.C.R. 9712 (1995).

23. MCI Telecommunications Corporation and Echostar DBS Corporation were winning bidders at the auction. The MCI application for its DBS license is still pending, however, in part due to foreign ownership issues raised by BT's investment stake in (and its proposed takeover of) MCI.

24. *See In re* Applications of Western Telecommunications and Telquest Ventures, Inc., DA 96-1128 1996 WL 393, 239 (F.C.C.) (released July 15, 1996).

25. *Id.*

26. DISCO II, 61 Fed. Reg. at 9950. The Commission noted the public interest benefits of allowing licensees to provide international DBS, including: expanding the potential audience for American programming; better serving the needs of multilingual subscribers in the United States; creating economies of scale; and by permitting service to the Pacific Rim, accelerating the delivery of DBS service to Hawaii and Alaska. *Id.*

27. Agreement Between the Government of the United States of America and the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996, U.S.-Mex., State Dept. No. 96-199.

28. *Id.*

29. Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, November 11, 1996.

E. Low Earth Orbit Satellites

The United States continued to make progress in 1996 toward the licensing of low earth orbit (LEO) satellites.[30] In late 1996, the FCC issued a Notice of Proposed Rulemaking in its Little LEO proceeding, aimed at carving up the available spectrum to allow as many as three additional Little LEO licensees.[31] The proceeding is still pending; if in the wake of the rulemaking there are more applicants than spectrum available for these systems, the FCC may proceed with auctions for the Little LEO spectrum.

With regard to Big LEO services, the FCC continued to make progress towards licensing three U.S. satellite operators;[32] in addition, the Big LEO licensees agreed in 1996 on a spectrum sharing plan and planned to work together to resolve international satellite regulatory and licensing matters.

At the same time, national telecommunications regulators and global satellite operators concluded in October 1996 the first World Telecommunications Policy Forum (WTPF); delegates to the WTPF reached consensus on a nonbinding memorandum of understanding that is aimed at giving private satellite operators and governments a common starting point as countries begin licensing mobile satellite services, including Big and Little LEOs. The hope is that the MOU will avoid the development of a patchwork of differing regulations, taxes, and conditions applying to mobile satellites.

30. LEO satellites are satellites that orbit outside of the geostationary orbit, and thus do not remain "fixed" at a particular point in the sky. Little LEO systems are being developed to provide primarily nonvoice services, including position location, data transmission, and advanced messaging services. Big LEO systems are designed to provide mobile voice services in competition with terrestrial cellular and fixed-satellite services.

31. *See In re* Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 96-220, FCC 96-426, 1996 WL 628011 (F.C.D.) (released Oct. 29, 1996) (NVNG NPRM).

32. As of November 1996, the FCC had concluded its licensing proceedings for three Big LEO licensees: Motorola's "Iridium" system; Loral's "Globalstar" system; and TRW's "Odyssey" system. *See In re* Application of Motorola Satellite Communications, Inc., DA 96-1789, 1996 WL 627969 (F.C.C.) (released Oct. 30, 1996); *In re* Application of L/Q Licensee, Inc., DA 96-1924, 1996 WL 665488 (F.C.C.) (released Nov. 19, 1996); *In re* Application of TRW, Inc., DA 96-1923, 1996 WL 665514 F.C.C.) (released November 19, 1996). Applications for two additional systems, filed by Constellation Communications Inc. and Mobile Communications Holdings, Inc. (MCHI), are still pending at the FCC, which is considering the financial qualifications of these applicants.