



PUBLIC NOTICE

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DA 05-1813
June 27, 2005

AUTHORIZATIONS GRANTED

APPLICATIONS FILED FOR ACQUISITION OF ASSETS OF KMC OPERATING COMPANIES BY TELCOVE, INC.

WC Docket No. 05-90
ITC-ASG-20050302-00078

By the Chief, International Bureau and Chief, Wireline Competition Bureau:

On March 1, 2005, TelCove, Inc. ("TelCove"), TelCove Investment, LLC ("TelCove Investment"), TelCove of Kentucky, Inc. ("TelCove Kentucky"), TelCove Operations, Inc. ("TelCove Operations"), TelCove of Virginia, LLC ("TelCove Virginia") (collectively, not including TelCove, the "TelCove Operating Companies"), KMC Telecom Holdings, Inc. ("KMC Holdings"), KMC Telecom LLC ("KMC"), KMC Telecom II LLC ("KMC II"), KMC Telecom III LLC ("KMC III"), and KMC Telecom of Virginia, Inc. ("KMC Virginia") (collectively, the "KMC Operating Companies" and, together with TelCove and the TelCove Operating Companies, the "Applicants"), filed applications pursuant to section 214 of the Communications Act, as amended ("the Act").¹ The unopposed applications seek Commission approval to complete a transaction whereby TelCove will acquire certain assets, including certain customer accounts, from the KMC Operating Companies.² These applications pertain to domestic and international section 214 authorizations.³

¹ 47 U.S.C. § 214. On March 14, 2005, the Commission released a public notice accepting the domestic section 214 application for streamlined processing. *See Domestic Section 214 Application Filed for Acquisition of Assets of KMC Operating Companies by TelCove, Inc.*, WC Docket No. 05-90, Public Notice, DA 05-669 (rel. Mar. 14, 2005). The Applicants also filed an application related to international section 214 authority held by the KMC Operating Companies. The application for the international section 214 authorization was placed on public notice on April 1, 2005. *Non Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-00896NS (rel. April 1, 2005).

² TelCove is 20% owned by Bay Harbour Partners, Ltd., a Cayman Islands investment firm, 17% owned by Bay Harbour 90-1, Ltd., a U.S. investment firm, 15% owned by Goldman Sachs, a U.S. corporation, and 10% owned by Credit Suisse First Boston, a Switzerland investment firm. Both Bay Harbour Partners, Ltd. and Bay Harbour 90-1, Ltd. are managed and controlled by Bay Harbour Management, L.C., a U.S. entity. Bay Harbour Management, L.C. is owned and controlled by Tower, Inc., a U.S. corporation (85%) and Unity, N.V., a Netherland Antilles investment firm (10%). Tower, Inc. is owned and controlled by two U.S. citizens, Douglas Teitlebaum (50%) and Stephen Van Dyke (50%). Unity, N.V. is owned by Sir John M. Templeton (100%), a British citizen. Credit Suisse First Boston is owned by Credit Suisse Group (100%), a Switzerland investment firm.

³ TelCove will provide international service to customers acquired as a result of this transaction pursuant to its international section 214 authorization granted in File No. ITC-214-1997-1128-00747 (*see also* ITC-ASG-

On March 28, 2005, the Applicants, along with the Department of Homeland Security (“DHS”) for itself and for the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) (collectively, the “Executive Branch Agencies”) filed with the Commission a joint petition to defer grant of these applications while the Executive Branch Agencies and Applicants address potential national security, law enforcement, and public safety issues.⁴ Subsequently, on June 16, 2005, the Applicants along with the Executive Branch Agencies submitted a joint petition to adopt conditions to authorizations and licenses (“Joint Petition”).⁵ In the Joint Petition, the Executive Branch Agencies advised the Commission that they do not object to the grant of the instant applications, provided that the Commission conditions such grant on compliance with the agreement reached on June 15, 2005 between TelCove and the Executive Branch Agencies (the “TelCove Agreement”).⁶

Consistent with Commission precedent, the Wireline Competition Bureau and International Bureau accord the appropriate level of deference to the Executive Branch Agencies’ expertise on national security and law enforcement issues.⁷ The Executive Branch Agencies indicate that the commitments set forth in the TelCove Agreement address their stated concerns regarding national security, law enforcement, and public safety.⁸ Accordingly, we grant the Joint Petition filed by the Executive Branch Agencies and the Applicants, and grant the subject applications subject to compliance by TelCove with the terms of the TelCove Agreement.

20040628-00262) and through its operating subsidiaries TelCove Investment, LLC, TelCove of Kentucky, Inc., TelCove Operations, Inc., and TelCove of Virginia, LLC. KMC Telecom III LLC will retain its international section 214 authorization, File No. ITC-214-19980211-00101 (*see also* ITC-ASG-20030708-00378).

⁴ *See In the Matter of the Application of KMC Telecom Holdings, Inc., KMC Telecom LLC, KMC Telecom II, LLC, KMC Telecom III LLC, KMC Telecom of Virginia, Inc. and TelCove, Inc., TelCove Investment, LLC TelCove of Kentucky, Inc., TelCove Operations, Inc., and TelCove of Virginia, LLC*, WC Docket No. 05-90, Joint Petition to Defer (filed Mar. 28, 2005). On April 1, 2005, the Wireline Competition Bureau removed the domestic section 214 application from streamlined treatment pending notification from the Executive Branch Agencies that the evaluation has been completed. *See Notice of Removal of Domestic Section 214 Application from Streamlined Treatment*, WC Docket No. 05-90, Public Notice, DA 05-1001 (rel. Apr. 1, 2005).

⁵ *KMC Telecom Holdings, Inc., KMC Telecom LLC, KMC Telecomm II LLC, KMC Telecom III LLC, KMC Telecom of Virginia, Inc. and TelCove, Inc., TelCove Investment, LLC, TelCove of Kentucky, Inc., TelCove Operations, Inc., and TelCove of Virginia*, Joint Petition to Adopt Conditions to Authorizations and Licenses, WC Docket No. 05-90 (dated June 16, 2005) (“Joint Petition”).

⁶ *See* Joint Petition at 3.

⁷ The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing a transfer of control or assignment application in which foreign ownership is an issue. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23919-921, paras. 61-66 (1997), Order on Reconsideration, 15 FCC Rcd 18158 (2000) (“*Foreign Participation Order*”). In assessing the public interest, the Commission considers the record and accords the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues. *See Foreign Participation Order*, 12 FCC Rcd at 23919-921, paras. 61-66; *see e.g., Application of Infonet Broadband Services Corporation and Infonet Telecommunications Corporation to Transfer Control of FCC Licenses and Authorizations to BT Group plc*, WC Docket 04-421, Public Notice, DA 05-387 (rel. Feb. 11, 2005); *International Authorizations Granted*, Public Notice, DA 05-372 (rel. Feb 10, 2005) (ITC-T/C-2004119-00460, Infonet Broadband Services Corporation); *Applications of XO Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, IB Docket No. 02-50, Memorandum Opinion & Order, 17 FCC Rcd 19212, 19228-29, paras. 36-40.

⁸ *See* Joint Petition at 4.

The International Bureau and the Wireline Competition Bureau find that grant of the Applications, subject to the condition set forth in this Public Notice, will serve the public interest, convenience, and necessity.⁹ Specifically, in accordance with the request of the Executive Branch Agencies, in the absence of any objection from the Applicants, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and sections 0.261 and 0.291 of the Commission's rules,¹⁰ the Bureaus hereby grant the applications conditioned on compliance with the commitments set forth in the TelCove Agreement.¹¹

Within 30 days of consummation, the Commission shall be notified by letter of the date of consummation and the file numbers of the applications involved in the transaction.¹² Failure to comply with all relevant Commission rules, policies, or any specific condition to the grant of these Applications will result in automatic rescission of the Commission's approval, dismissal of the underlying applications, and could subject the applications to enforcement action, including but not limited to the imposition of forfeitures.

Pursuant to section 1.103 of the Commission's rules, the grant is effective upon release of this Public Notice.¹³ Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules may be filed within 30 days of the date of this Public Notice.¹⁴

For further information, please contact Denise Coca at (202) 418-0574, or Terri Natoli at (202) 418-1574, Competition Policy Division, Wireline Competition Bureau for the domestic section 214 authorization and Susan O'Connell at (202) 418-1460 for the international section 214 authorization.

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⁹ 47 U.S.C. § 214(a).

¹⁰ 47 C.F.R. §§ 0.261, 0.291. Upon consummation of the transaction, the Applicants will have a market share in the U.S. interstate interexchange market of less than 10 percent, and will provide competitive telephone exchange services or exchange access services exclusively in geographic areas served by a dominant local exchange carrier in the U.S. that is not a party to the transaction. In addition, no party to this transaction is dominant with respect to any domestic service.

¹¹ The TelCove Agreement and the Joint Petition submitted in WC Docket No. 05-90 and File No. ITC-ASG-20050302-00078 by the Applicants and the Executive Branch Agencies, which petition we here grant, is publicly available in the record of this proceeding and may be viewed through the Commission's Electronic Comment Filing System (ECFS) by searching WC Docket No. 05-90 and through the Commission's International Bureau Filing System (MyIBFS) by searching ITC-ASG-20050302-00078.

¹² 47 C.F.R. § 63.24(e)(4).

¹³ See 47 C.F.R. § 1.103.

¹⁴ See 47 C.F.R. §§ 1.106, 1.115.