

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-10-IH-4243
FTTH Communications, LLC)	
)	NAL/Acct. No. 201132080037
)	
)	FRN 0007719230
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 14, 2011

Released: September 14, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that FTTH Communications, LLC (“FTTH”) apparently violated section 214(a) of the Communications Act of 1934, as amended (“Act”),¹ and section 63.18 of the Commission’s rules (“Rules”)² by willfully and repeatedly failing to obtain an international section 214 authorization before providing international telecommunications service.³ Based on our review of the facts and circumstances surrounding this matter, and for the reasons discussed below, we find that FTTH is apparently liable for a forfeiture of \$100,000.

II. BACKGROUND

2. FTTH is a Minnesota limited liability company that provides telecommunications services.⁴ FTTH is owned by FTTH Acquisition, LLC (“Everest”), a Delaware limited liability company based in New Jersey.⁵ In 2010, Everest acquired FTTH from Rudder Capital Corporation (“Rudder”), a Minnesota corporation.⁶

¹ 47 U.S.C. § 214(a).

² 47 C.F.R. § 63.18.

³ *Id.*

⁴ Application for Global Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Operate as an International Facilities-Based and Resale Carrier Between the United States and Various International Points, Int’l. Bur. Filing System (“IBFS”) Application No. ITC-214-20100129-00025 (filed Jan. 29, 2010) at 2 (“*FTTH International Sec. 214 Authorization Application*”).

⁵ Application of FTTH Communications, LLC and Everest FTTH Acquisition LLC for Transfer of Control of International Section 214 Authorization, IBFS Application No. ITC-T/C-20100201-00073 (filed Feb. 1, 2010) at 2 (“*FTTH International Transfer of Control Application*”).

⁶ *Id.* at 3, 6.

3. Prior to Everest's acquisition of FTTH from Rudder, FTTH was authorized pursuant to section 214(a) of the Act and section 63.01 of the Rules to provide domestic telecommunications services.⁷ FTTH provided interstate and intrastate telecommunications services, including facilities-based service, to several hundred customers in Minnesota, resold local exchange service in the Minneapolis-St. Paul metropolitan area, and provided interexchange service throughout Minnesota.⁸

4. On January 27, 2010, Rudder informed FTTH that it intended to liquidate FTTH's assets absent full payment by February 1, 2010 of outstanding debt that FTTH owed Rudder.⁹ Everest and Rudder thereafter entered into a securities purchase agreement for Everest to acquire FTTH.¹⁰ During the course of the acquisition process, but prior to consummation of the transfer of control of FTTH from Rudder to Everest, Everest and FTTH discovered that FTTH had provided international telecommunications services to its customers in Minnesota without having obtained Commission authority to do so, as required by section 214(a) of the Act and section 63.18 of the Rules.¹¹

5. On January 29, 2010, FTTH filed an application with the Commission's International Bureau for authority to provide facilities-based and resale international telecommunications services.¹² On the same day, FTTH and Everest jointly filed applications with the Wireline Competition Bureau and International Bureau for Special Temporary Authority ("STA") permitting FTTH to provide international section 214 services and for the transfer of control of domestic and international section 214 authority that would permit Everest to consummate its acquisition of FTTH from Rudder.¹³ Simultaneously, Rudder, FTTH and Everest also jointly filed an application for the permanent transfer of control of domestic section 214 authority.¹⁴ On February 1, 2010, Rudder, FTTH and Everest jointly filed an application for the permanent transfer of control of international section 214 authority.¹⁵ FTTH also supplemented its

⁷ 47 U.S.C. § 214(a), 47 C.F.R. § 63.01, *FTTH International Sec. 214 Authorization Application* at 2.

⁸ *Id.* FTTH also holds authority from the Minnesota Public Utilities Commission to provide facilities-based and resold local exchange telecommunications services in the St. Paul Minneapolis metropolitan area and interexchange telecommunications service throughout Minnesota. *Id.*

⁹ Declaration of Patrick J. Engels, President, FTTH Communications, LLC, accompanying Application for Special Temporary Authority for International Section 214 Authorization, IBFS File No. ITC-STA-20100129-00024 (filed Jan. 29, 2010) at ¶ 6 ("*FTTH International Sec. 214 STA Application*").

¹⁰ *Id.* at ¶ 5, *FTTH Sec. 214 Authorization Application* at 1 n. 1, 2; 47 U.S.C. § 214(a); 47 C.F.R. § 63.18.

¹¹ *FTTH Sec. 214 Authorization Application* at 1 n. 1, Letter from Jean L. Kidoo and Danielle Burt, Counsel for Everest Acquisition, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 29, 2010) (Letter accompanying *FTTH International Sec. 214 STA Application*).

¹² *FTTH Sec. 214 Authorization Application*.

¹³ *FTTH International Sec. 214 STA Application*, Request for Special Temporary Authority (Transfer of Control of Domestic Section 214 Authorization), WC Docket No. 10-38, (filed Jan. 29, 2010) ("*FTTH Domestic Sec. 214 STA Application*").

¹⁴ Joint Application of Rudder Capital Corp. ("Transferor") and Everest FTTH Acquisition LLC ("Transferee") for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Transfer Control of FTTH Communications, LLC ("Licensee"), WC Docket No. 10-35, (filed Jan. 29, 2010) ("*FTTH Domestic Sec. 214 Transfer of Control Application*").

¹⁵ *FTTH International Transfer of Control Application*, *supra* note 5.

section 214 authorization application with additional ownership information requested by the International Bureau.¹⁶

6. On February 1, 2010, the Wireline Competition Bureau granted an STA for the transfer of control of domestic section 214 authority.¹⁷ On February 2, 2010, the International Bureau granted an STA providing FTTH with international section 214 authority. On that same day, the International Bureau granted an STA allowing the transfer of FTTH's international section 214 authority from Rudder to Everest.¹⁸ On March 5, 2010, the International Bureau granted FTTH's application for permanent authority to provide international section 214 facilities-based and resale services, and the application for Rudder to transfer control of section 214 authority held by FTTH to Everest.¹⁹ The International Bureau granted FTTH international section 214 authority "without prejudice to any enforcement action by the Commission for non-compliance" with the Act or the Rules.²⁰ On March 19, 2010, the Wireline Competition Bureau granted the application for the transfer of control of domestic section 214 authority held by FTTH from Rudder to Everest.²¹ Thereafter, the matter was referred to the Enforcement Bureau, which commenced its investigation. On November 1, 2010, the Enforcement Bureau issued a Letter of Inquiry to Everest regarding the matters recited above.

III. DISCUSSION

7. Under section 503(b)(1) of the Act, "[a]ny person who is determined by the Commission ... to have ... willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ... shall be liable to the United States for a forfeiture penalty."²² Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate any provision of this Act or any rule or regulation by the Commission authorized by this Act...."²³ The legislative history to section 312(f)(1) of the Act clarifies that this definition of "willful" applies to both sections 312 and 503(b) of the Act,²⁴ and the Commission has so interpreted the term in the section 503(b) context.²⁵ To impose a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty

¹⁶ See IBFS Application File No. ITC-AMD-20100201-00072 (supplementing *FTTH International Sec. 214 Authorization Application*).

¹⁷ See *Domestic Section 214 Application Filed for the Transfer of Control of FTTH Communications, LLC From Rudder Capital Corporation to Everest FTTH Acquisition LLC, Streamlined Pleading Cycle Established*, Public Notice, WC Docket No. 10-38, 25 FCC Rcd 1349 (Wireline Comp. Bur. 2010) at n.1.

¹⁸ Record of action by Int'l Bur. in *FTTH STA Application* available through IBFS at <http://licensing.fcc.gov/myibfs/>.

¹⁹ See *International Authorizations Granted, Section 214 Applications*, DA No. 10-412, Public Notice, 25 FCC Rcd 2337 (FCC/Int'l Bur. 2010) ("Int'l Bur. Grant PN").

²⁰ *Id.*

²¹ *Notice of Domestic Section 214 Authorization Granted*, WC Docket No. 10-38, Public Notice, 25 FCC Rcd 2727 (Wireline Comp. Bur. 2010).

²² 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²³ 47 U.S.C. § 312(f)(1).

²⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁵ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, ¶ 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

should be imposed.²⁶ The Commission will then issue a forfeiture if it finds, based on the evidence, that the person has violated the Act, a Rule, or a Commission Order.²⁷

8. Section 214(a) of the Act prohibits any carrier from constructing, extending or operating any line, and from engaging in transmission through any such line, “unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity” require, or will require, the construction, extension, or operation of the line.²⁸ While the Commission has granted “blanket” authority to carriers providing domestic service,²⁹ allowing such carriers to provide domestic service without first applying to the Commission for such authority to do so, the Commission has not done the same for providers of international telecommunications services.³⁰ Section 63.18 of the Rules requires that any carrier that seeks section 214 authority “for provision of common carrier communication services between the United States, its territories or possessions, and a foreign point shall request such authority by application.”³¹ The application requirement applies to both international facilities-based and resale services.³²

9. We conclude that it is apparent that FTTH willfully violated section 214(a) of the Act and section 63.18 of the Rules because it failed to obtain Commission approval before providing international telecommunications service.³³ The Commission has consistently imposed forfeiture penalties in the amount of \$100,000 for failing to obtain an international section 214 authorization before providing international telecommunications service.³⁴ In determining the amount of a forfeiture penalty, section 503(b)(2)(E) of the Act³⁵ and section 1.80(a)(4) of the Rules direct the Commission to take into account “the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”³⁶ There is no evidence before us to suggest that the base amount should be adjusted in any way based on these factors.

²⁶ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁷ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

²⁸ 47 U.S.C. § 214(a).

²⁹ 47 C.F.R. § 63.01(a) (“Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.”).

³⁰ *Implementation of Section 402(b)(2)(A) of the Telecomm. Act of 1996*, Report and Order, CC Docket No. 97-11, Second Memorandum Opinion & Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11366 n. 8 (1999) (grant of blanket authority is only for domestic services and does not extend to the provision of international services).

³¹ 47 C.F.R. § 63.18.

³² 47 C.F.R. § 63.18(e)(1)-(2).

³³ *FTTH Sec. 214 Authorization Application* at 1 n. 1.

³⁴ See, e.g., *ADMA Telecom, Inc.*, Forfeiture Order, 26 FCC Rcd 4152, 4161 ¶¶ 26-27 (2011) (assessing a \$100,000 forfeiture for unauthorized international telecommunications service); *InPhonic, Inc.*, Notice of Apparent Liability of Forfeiture and Order, 20 FCC Rcd 13277, 8706 ¶ 41 (2007) (“*InPhonic NAL*”) (same); *Omniat International Telecom, LLC d/b/a Omniat Telecom*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 4254, 4264 ¶ 25 (2009) (“*Omniat NAL*”) (same); *Teleplus, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 7666, 7670-71 ¶ 12 (Enf. Bur. 2009) (“*Teleplus NAL*”) (same).

³⁵ 47 U.S.C. § 503(b)(2)(E).

³⁶ 47 C.F.R. § 1.80(a)(4).

10. The Commission has stated that a carrier's failure to obtain international section 214 authorization "undermines the Commission's ability to accomplish Congress's objectives in section 214 of the Act."³⁷ It has explained that given the "clear requirements and the important public interest considerations involving national security, law enforcement, foreign policy and trade, the failure to obtain section 214 authority from the Commission prior to providing international telecommunications services [is] egregious."³⁸ Given these considerations and consistent with precedent, we conclude that a forfeiture of \$100,000 is warranted for FTTH's apparent willful and repeated failure to obtain section 214 authority from the Commission prior to providing international telecommunications service.³⁹

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to section 503(b) of the Act and sections 0.111, 0.311, 0.314 and 1.80 of the Rules,⁴⁰ FTTH Communications LLC, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of one hundred thousand dollars (\$100,000) for apparently willfully and repeatedly violating section 214(a) of the Act and section 63.18 and 63.04 of the Rules.⁴¹

12. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank Federal Reserve Bank of New York, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). FTTH will also send electronic notification within forty-eight (48) hours of the date said payment is made to Terry.Cavanaugh@fcc.gov, Pamela.Kane@fcc.gov, and Robert.Krinsky@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeitures, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Commission's Rules.⁴² The written statement must be mailed to Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above. The written statement should also be emailed to Terry Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela Kane at Pamela.Kane@fcc.gov, and Robert.Krinsky at Robert.Krinsky@fcc.gov.

³⁷ *Omniat NAL*, 24 FCC Rcd at 4264 ¶ 25.

³⁸ *Id.*; *Teleplus NAL, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd at 7670-71 ¶ 12; *InPhonic NAL*, 20 FCC Rcd at 8706 ¶ 41 (2007).

³⁹ See Note 34, *supra*.

⁴⁰ See 47 U.S.C. § 503; 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80.

⁴¹ See 47 U.S.C. § 214(a); 47 C.F.R. §§ 63.18, 63.04.

⁴² See 47 C.F.R. §§ 1.80(f)(3), 1.16.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁴³ For answers to questions regarding payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov.

16. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by certified mail, return receipt requested, to counsel for Everest FTTH Acquisition LLC, the parent company of FTTH Communications LLC: Jean L. Kiddoo, Esq. and Danielle Burt, Esq., Bingham McCutchen LLP, 2020 K Street, N.W., Washington, D.C. 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

⁴³ See 47 C.F.R. § 1.1914.