

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

In the Matter of

FTC
COMMUNICATIONS,
INC.

File No. I-T-C-88-127

Application for authority to resell
the switched voice services of
other carriers to provide
switched voice services from
the contiguous United States
to Canada.

**MEMORANDUM OPINION, ORDER,
AUTHORIZATION AND CERTIFICATE**

Adopted: January 26, 1989; Released: February 7, 1989

By the Chief, International Facilities Division:

I. INTRODUCTION

1. On April 29, 1988, FTC Communications, Inc. (FTCC) filed, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. Section 63.01, an application seeking authority to resell the international switched voice services of other common carriers to provide international message telephone service (IMTS) between the United States and Canada. On June 17, 1988, Pan American Satellite (PAS) filed a petition to deny FTCC's application. In this order, we grant FTCC's application, subject to certain conditions discussed below.

II. SUMMARY OF PLEADINGS

A. FTCC Application

2. The FTCC application seeks authority to acquire international switched voice service, to Canada, from the American Telephone & Telegraph Company (AT&T), MCI International Telecommunications Corp. (MCII) and US Sprint, as specified, respectively, in AT&T's Tariff Nos. 1 and 2, MCII's Tariff No. 1 and US Sprint's Tariff Nos. 1 and 2, and to provide direct IMTS to these points by reselling these services. FTCC states that the added competition that its entry will bring to the market will benefit the consumers of IMTS. FTCC observes that these benefits include competitive pricing and increased availability of a variety of service options. FTCC advises that its charges for its resale service to these points will be those reflected in FTCC's tariffs filed with the Commission and in subsequent amendments to those filings.

B. PAS Petition to Deny

3. PAS asks the Commission to deny FTCC's application or condition the grant of the application on FTCC's showing, to the Commission's satisfaction, that the French telecommunications market is not closed to U.S. separate satellite systems. PAS notes that it filed pleadings against other FTCC filings in which it has argued that the French government, as a part-owner of FTCC, has a policy against any French transaction with U.S. separate satellite systems. PAS asks the Commission to incorporate by reference its pleading, affidavit and attachments in one of these proceedings, involving an FTCC petition seeking a waiver of the Commission's international competitive carrier policy in order to be treated as nondominant for the provision of international telecommunications services originating or terminating in the United States.¹ PAS observes that its Opposition to FTCC's waiver petition urged the Commission not to take any action to change FTCC's status under the foreign ownership policy until the French telecommunications administration provided concrete evidence that the French market was open to U.S. separate satellite systems. PAS further observes that its Opposition noted that unless such evidence were forthcoming, the Commission should consider limiting FTCC's ability to expand in the U.S. market by employing its Section 214 authority to approve, condition or deny the construction, operation and use of common carrier facilities.²

4. PAS asserts that its analysis in its Opposition is directly relevant to the instant application. PAS states that the Commission classified foreign-owned carriers as dominant in their provision of international telecommunications services because of the Commission's concern about the opening of foreign markets to U.S. carriers. PAS notes that the Commission also stated in establishing its international competitive carrier policies that it would consider, on a case-by-case basis, attaching conditions on Section 214 certificates filed by foreign-owned carriers relating to reciprocal entry by additional U.S. carriers. PAS also notes that the Commission has expressed concern that U.S. separate satellite systems continue to be subject to explicit or implicit entry barriers and discriminatory treatment in foreign markets.³ PAS believes, for the reasons set forth in its Opposition and its petition to deny, that FTCC's instant application presents an appropriate opportunity for the application of a reciprocal standard in the context of the Section 214 authorization process.

C. FTCC's Opposition

5. On June 30, 1988, FTCC filed reply comments to the PAS petition to deny.⁴ FTCC claims that the PAS petition is a request for discriminatory treatment directed against FTCC solely on the basis of the nationality of an owner, which would violate the principles of equality of treatment of foreign investors contained in treaties to which the United States is a party, including the current treaty respecting commercial relationships between the United States and France. FTCC asserts that such discriminatory treatment would contravene the rights of both the French government and the U.S. majority owner of FTCC.

6. FTCC also claims that the PAS petition is based on speculation. FTCC argues that PAS has provided no credible evidence that its failure to contract with a French company is a result of intervention by the French government as opposed to PAS' failure to offer a reasonable

economic proposal or the French company's belief that the traffic over PAS' system would not justify the required investment.

7. FTCC further claims that the French government has the sovereign right to disapprove a non-INTELSAT system. FTCC states that a French government prohibition against all French company dealings with a non-INTELSAT system--whether French or American--would not violate treaty obligations, but merely would constitute equal application of a permissible policy that PAS happens not to like. FTCC thus asserts that even if PAS had succeeded in proving that its failure to reach agreement resulted from French government policy, PAS would not have provided any basis for the action it seeks.

8. Finally, FTCC claims that the relief proposed by PAS would be ineffective and damaging to the public interest. FTCC argues that any connection between FTCC's resale of IMTS and the French government's attitude toward non-INTELSAT satellite systems would be so tenuous and far-fetched that it would be ludicrous to assume that denial of FTCC's application would cause the French government to cave in and reverse its legitimate policies. FTCC also asserts that denial of FTCC's application would deny the U.S. public the benefit of additional competition in this market.

D. PAS Reply to Opposition

9. On July 13, 1988, PAS replied to FTCC's Opposition. PAS asserts that FTCC's request that the Commission's reciprocity policies be declared inapplicable to FTCC on the basis of certain treaties involving the U.S. and France should be rejected for at least three reasons. First, PAS argues that a denial of FTCC's application under the Commission's reciprocity policies would not be based solely on the nationality of an owner, but also on the fact that the foreign owner represents a government that has denied market access to a U.S.-based company. Second, PAS asserts that FTCC's argument is, in essence, an untimely petition for reconsideration of the Commission's decisions in *International Competitive Carrier*. Third, PAS claims that FTCC's Opposition is supported by a defective affidavit because the affidavit is dated June 29, 1988 and thus cannot attest to the factual validity of the Opposition dated June 30, 1988.

III. DISCUSSION

10. Section 214 provides the Commission with the authority to require that carriers obtain a certificate that the "present or future public convenience and necessity require or will require the construction, or operation . . ." of a new line or an extended line.⁵ In this *Order*, we find that the present and future public convenience and necessity will be served by the grant of FTCC's application to provide international message telephone service between the United States and Canada by reselling the international switched voice services of other common carriers, and that FTCC is qualified to provide IMTS service. In particular, we believe that the provision of IMTS service by FTCC on a resale basis will give U.S. consumers an additional choice in selecting a service provider. Moreover, the grant of FTCC's Section 214 application is fully consistent with our policy of promoting open entry in international telecommunications.

11. We also believe that the grant of FTCC's Section 214 application, with the continued treatment of FTCC as a dominant carrier for all international common carrier services originating or terminating in the U.S., is fully consistent with the Commission's international competitive carrier policies. In the *International Competitive Carrier* proceeding, the Commission made clear its continuing concerns about reciprocity -- that is, market entry -- and market distortions and that we would impose certain filing requirements and would consider conditioning specific Section 214 certifications to carriers owned by foreign telecommunications entities on an ad hoc basis. In this context, we welcome France Telecom's recent announcement that it would initiate consultations with INTELSAT for the provision of certain international telecommunications services over PAS.⁶ We believe that any remaining competitive issues expressed by PAS concerning the provision of IMTS service by FTCC on a resale basis can be best addressed by retaining regulatory oversight of FTCC's provision of IMTS services on a resale basis. As a result, we condition our grant of FTCC's Section 214 application on FTCC's compliance with the full facilities certification and tariffing requirements that apply to dominant carriers.⁷ Moreover, we condition our grant of FTCC's Section 214 application on the submission by FTCC of quarterly reports of revenues, number of messages, and number of minutes of originating and terminating traffic with Canada individually for the previous quarter within ninety days from the end of the calendar quarter.⁸ With these conditions, and in light of France Telecom's recent action, we do not believe the FTCC application requires the imposition of any additional regulatory requirements.⁹

IV. ORDERING CLAUSES

12. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by FTCC between the United States and Canada.

13. Accordingly, IT IS ORDERED that the application of FTC Communications, Inc., File No. I-T-C-88-127, IS GRANTED SUBJECT TO THE CONDITIONS set forth in paragraphs 14 to 17 herein and FTCC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCII's Tariff F.C.C. No.1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and Canada.

14. IT IS FURTHER ORDERED that grant of FTCC's application IS SUBJECT TO THE CONDITION that FTCC must file Section 214 applications with the Commission before it can add circuits to provide facilities-based service to this or any other point.

15. IT IS FURTHER ORDERED that grant of FTCC's application IS SUBJECT TO THE CONDITION that FTCC will continue to be classified as dominant in its provision of international services absent an express determination by this Commission that FTCC is nondominant.

16. IT IS FURTHER ORDERED that grant of FTCC's application IS SUBJECT TO THE CONDITION that FTCC file quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for Canada individually within 90 days from the end of each calendar quarter.

17. IT IS FURTHER ORDERED that grant of FTCC's application is SUBJECT TO THE CONDITION that FTCC file any operating agreement entered into by itself or its parent/affiliate that affects traffic and revenue flows to or from the United States within 30 days of its execution.

18. IT IS FURTHER ORDERED that the applicant SHALL FILE tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this decision.

19. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

20. IT IS FURTHER ORDERED that the Petition to Deny filed by PAS IS GRANTED to the extent discussed herein AND IS OTHERWISE DENIED.

21. IT IS FURTHER ORDERED that the Motion to Dismiss Petition to Deny filed by FTCC IS DENIED.

22. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. 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 public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

¹ In the Report and Order in the International Competitive Carrier proceeding, the Commission concluded that it would consider all foreign-owned carriers to be dominant for the provision of all international common carrier services to all foreign points. See *International Competitive Carrier*, 102 F.C.C. 2d 812, 843 (1985) *recon. denied* 60 Rad. Reg. 2d (P&F) 1435 (1986). On July 22, 1987, FTCC filed its first petition seeking a waiver of the Commission's international competitive carrier policies in order to be treated as nondominant for the provision of international common carrier services. On December 14, 1987, we denied FTCC's first petition. See Memorandum Opinion and Order, *FTCC Communications, Inc.*, I-S-P-87-005, 2 FCC Rcd 7513 (1987) (hereinafter *Denial Order*). On January 5, 1988, FTCC filed a petition requesting the Commission to review the *Denial Order*. On March 29, 1988, FTCC filed a motion to hold this petition for review in abeyance and a second petition for waiver. On January 5, 1989, FTCC requested that the Commission dismiss these pleadings. We granted FTCC's request. See January 19, 1989 Letter from Chief, Common Carrier Bureau to Roger P. Newell, Counsel for FTCC.

² The PAS Opposition, filed May 6, 1988, stated that PAS had learned that the French government, through its telecommunications administration, had established a policy against any French transactions with U.S. separate satellite systems. PAS stated that, for the period from August 1987 through January

1988, PAS had extensive discussions with a French company about the lease of satellite capacity from PAS, but that these discussions did not culminate in an agreement because of the intervention of the French telecommunications administration, which refused to allow consummation of the transaction. PAS stated that it understood the French government decision to be motivated not by commercial considerations but by considerations arising out of the fact that PAS is a separate satellite system, authorized by the United States. PAS Opposition at 2-3. The PAS Opposition also asserted that there is a close connection between the French telecommunications administration and the French entity holding the stake in FTCC. PAS stated that the French government has not only a significant interest in FTCC but also a seat on FTCC's board of directors, and that, contrary to FTCC's past representations to the Commission, the French telecommunications administration controls the French government's stake in FTCC. PAS cited the annual report of Direction Generale des Telecommunications (DGT)(now France Telecom), *Resultats financiers 1986*, which lists Cogecom and FCR, the indirect parents of FTCC, as among "the accounts of the DGT and its subsidiaries." PAS attached the title page and table of contents of *Resultats financiers 1986* as Exhibit B to its Opposition. PAS Opposition at 4-5 and Exhibit B.

³ See, e.g., *Regulatory Policies and International Telecommunications, Notice of Inquiry and Proposed Rule Making*, CC Docket No. 86-494, 2 FCC Rcd 1022 (1987), Report and Order, FCC 88-71 (released March 25, 1988), Order on Reconsideration, FCC 88-405 (released January 4, 1989).

⁴ FTCC concurrently filed a Motion to Dismiss Petition to Deny, alleging that PAS failed to comply with the requirements of Section 63.52(c). FTCC contends that PAS has not shown that it is a party in interest with any connection with or interest in the service that FTCC seeks to provide or that will be harmed in any way by a grant of the application. FTCC further contends that PAS has not shown that grant of the application would be prima facie inconsistent with the public interest. FTCC also contends that the affidavit attached to PAS' Opposition is insufficient to meet the requirement that a petitioner seeking denial of a Section 214 application support its allegations of fact with an affidavit. Finally, FTCC contends that the PAS petition is frivolous because PAS has filed two virtually identical petitions to deny two successive FTCC Section 214 applications without supplying any information or allegations relating to the content of the applications. On July 13, 1988 PAS opposed FTCC's motion and responded to each of FTCC's contentions. First, PAS asserts that FTCC has overlooked the Commission's determination in *International Competitive Carrier* that reciprocity concerns are directly relevant to the Section 214 application process. Second, PAS asserts that, by presenting facts showing that the French government, as a part owner of FTCC, is preventing PAS from gaining access to the French market, it has demonstrated why granting FTCC's application would be contrary to the public interest. Third, PAS asserts that its affidavit both satisfies the requirements of Section 63.52 and is relevant to both the Opposition and petition to deny. It cites *Palm Beach Cable Television Co.*, 33 Rad. Reg. 2d (P&F) 969, 971, 973 (1975) as precedent for the incorporation by reference of affidavits. Fourth, PAS asserts that its petition is meritorious because one of the Commission's policies is to consider reciprocity issues in the context of a Section 214 application. On July 25, 1988 FTCC replied to the PAS opposition. FTCC argues that the Commission's statement in *International Competitive Carrier* that it would consider attaching conditions to Section 214 certificates is inapplicable to FTCC's instant application for authority to resell IMTS services between the U.S. and Canada because Canada is not within the jurisdiction of the French

telecommunications administration. FTCC further argues that nothing in Section 63.52 states that its requirements may be ignored if the Commission has stated in another proceeding that it might impose Section 214 conditions under circumstances not relevant to the instant application. FTCC also restates its claim that the PAS petition is frivolous.

⁵ See 47 U.S.C. Section 214.

⁶ See December 2, 1988 Letter from Jean Grenier, Director, Industrial and International Affairs, France Telecom, to Parker W. Borg, Director, International Communications and Information Policy, Department of State. See also December 8, 1988 Letter from Rene Anselmo, Alpha Lyracom Space Communications to Chairman Dennis R. Patrick.

⁷ A dominant carrier must seek authority for circuit additions by formal application, must file changes in customer tariffs on 45 days' notice and must support its filings with cost data. Moreover, a carrier owned by a foreign telecommunications entity that is classified as dominant for the provision of international telecommunications service originating or terminating in the United States must report traffic and revenue data on a quarterly basis and must file any operating agreement entered into by itself or its parent/affiliate that affects traffic and revenue flows to or from the United States within 30 days of its execution. See *International Competitive Carrier*, *supra* n.1. In this context, we note that the Commission recently addressed the issue of national treatment of carriers owned by foreign telecommunications entities. See, e.g., *Order on Reconsideration*, *supra* n.3 at paras. 65-75.

⁸ This specific requirement will apply only to FTCC and therefore is not subject to the review of the Office of Management and Budget under the Paperwork Reduction Act.

⁹ We also wish to make clear, however, that we do not agree with the procedural objections raised by FTCC and therefore deny FTCC's Motion to Dismiss the PAS Petition to Deny.