

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
NACS COMMUNICATIONS, INC.)
)
Application for authority pursuant to) File No. I-T-C-94-434
Section 214 of the Communications Act)
of 1934, as amended, to acquire and operate)
facilities for the provision of international)
service between the United States and Chile.)

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 25, 1996

Released: September 27, 1996

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. In this Order, we grant NACS Communications, Inc. (NACS) authority to provide switched and private line international telecommunications services between points located in the United States and Chile on both a facilities-based and resale basis. We also find NACS should be regulated as a non-dominant carrier for service between the United States and Chile.

II. BACKGROUND

2. NACS filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of a variety of international telecommunications services between the United States and Chile.¹ NACS also requests that it be classified as a non-dominant carrier for all services on the United States-Chile route. NACS states that the Chilean long distance telecommunications market is one of the most open in the world. It notes that there are at least five facilities-

NACS Application, File No. I-T-C-94-434 (filed August 2, 1994) (services that NACS seeks to provide include switched international message toll service, data transmission services interconnected to the public switched network (PSN), private line service not interconnected to the PSN and other value-added services).

based long distance telecommunications companies competing in Chile.² NACS submits that its application is in the public interest because adding another carrier on the U.S.- Chile route will increase competition along the route, which will in turn lower accounting rates and prices and broaden the array of services available to customers.³ The application was placed on public notice on August 17, 1994.

3. NACS certifies that it is affiliated with foreign carriers in Chile. Texcom S.A., a holding company organized under the laws of Chile, owns 100% of NACS's outstanding stock. Texcom S.A., is in turn controlled by Telex-Chile S.A. Telex-Chile S.A. owns 96% of the Texcom S.A. stock. Telex-Chile also owns 99.9% of Chilesat, a Chilean corporation that controls approximately 25% of the inbound and outbound international telecommunications traffic in Chile. Telex-Chile S.A. also owns 50% of the stock of Telefonica Andina S.A. ("Andina"), a local exchange carrier in Chile. On June 28, 1995, Andina obtained a concession to provide local exchange service in certain areas of Santiago.

4. AmericaTel Corporation (AmericaTel) filed a Petition to Deny the application. AmericaTel's opposition is limited to NACS's request to be treated as a non-dominant carrier for the United States-Chile route, at least until AmericaTel is also accorded non-dominant status.⁴ AmericaTel argues that NACS has power to discriminate against unaffiliated U.S. carriers. Because of its affiliation with Chilesat, AmericaTel claims that NACS can take advantage of a contractual agreement between Chilesat and CTC. CTC controls in excess of 93% of the local exchange service in Chile. AmericaTel argues that the contract between Chilesat and CTC ensures Chilesat 20% of all of CTC's international traffic. Further, "the agreement also provided for CTC to route to Chilesat 50% of all traffic destined to each of the United States and Spain."⁵ In addition to bottleneck control within Chile, AmericaTel notes that Chilesat also has Indefeasible Rights of User (IRUs) on numerous submarine cables, giving it control of significant international bottleneck facilities as well.

5. NACS argues that because Chilesat controls no bottleneck facilities, and because the Chilean market is fully competitive, AmericaTel's Petition should be denied. NACS states that the contractual arrangement between Chilesat and CTC has already expired or will expire by the time the matter comes before the Commission. Further, NACS argues that the introduction of the multi-carrier system in Chile will ensure that it is the subscriber who will

² See *AmericaTel Corporation*, 9 FCC Rcd 3993, 3999 (1994); see also *Americatel Corporation*, DA 96-1412, File Nos. I-S-P-96-002 and I-T-C-96-263 at ¶ 8 (rel. August 21, 1996) (noting that there are currently eight long distance service providers in Chile).

³ See *id.* at 4.

⁴ AmericaTel Petition to Deny, p. 2. On August 21, 1996, AmericaTel was reclassified as a non-dominant carrier for all services between the United States and Chile. See *AmericaTel Corporation*, DA 96-1412, File Nos. I-S-P-96-002 and I-T-C-96-263 (rel. August 21, 1996)

⁵ *Id.* at 6.

control which carrier will handle the call.⁶ Also, the purported international bottleneck interests in several undersea cables owned by Chilesat are similar to the interests held by AmericaTel's affiliate, ENTEL-Chile. The Commission found in an AmericaTel Order that ENTEL-Chile did not control bottleneck facilities in Chile.⁷ NACS concludes that, because Chilesat and Andina lack market power and the ability to discriminate against unaffiliated U.S. carriers, NACS should be regulated as a non-dominant carrier.

III. Discussion

A. Section 214 Application

6. The new rules and standards adopted in the *Foreign Carrier Entry Order*⁸ apply to this application. In that Order, we determined that an important element of a foreign carrier's entry into the U.S. international service market is whether U.S. carriers have effective opportunities to compete in the destination market that a foreign carrier seeks to serve. We stated that an effective competitive opportunities (ECO) test would be one part of our overall public interest analysis of international Section 214 applications. We also stated that we will continue to consider other public interest factors that may weigh in favor of, or against, granting the application. These factors include the general significance of the proposed entry to the promotion of competition in the U.S. telecommunications market, any national security, law enforcement, foreign policy, or trade concerns raised by the Executive Branch, and the presence of cost-based accounting rates.

7. In adopting the ECO test, we stated that we would only apply this test to those applications from foreign carriers that have market power, or are affiliated with such carriers, in the destination market they seek to serve.⁹ The *Foreign Carrier Entry Order* defines market power as "the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end."¹⁰ We found that applications from foreign carriers that hold market power raise the greatest potential of anticompetitive conduct, particularly if U.S. carriers are not allowed to compete effectively in those markets. If the affiliation is with a non-dominant foreign carrier, we

⁶ See NACS Opposition to Petition to Deny, p.3. On October 29, 1994, Chile implemented the Multi-carrier Amendment previously adopted by the Chilean legislature. The Amendment requires local exchange carriers to allow consumers to choose a long distance carrier on a call-to-call or monthly basis.

⁷ See *AmericaTel Corporation*, 9 FCC Rcd 3993, 4000, Memorandum Opinion, Order, Authorization and Certificate ¶ 33 (1994).

⁸ *Market Entry and Regulation of Foreign-affiliated Entities Report and Order*, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*).

⁹ See *Foreign Carrier Entry Order* at ¶ 102.

¹⁰ *Foreign Carrier Entry Order* at ¶ 116.

would not apply an effective competitive opportunities analysis to the application.

8. Under our new rules, NACS is clearly affiliated with two foreign carriers in Chile.¹¹ We must therefore first determine whether or not NACS's application requires us to undertake an ECO analysis of the Chilean market. According to NACS, neither of its affiliates, Chilesat or Andina, has market power as that term is defined in the *Foreign Carrier Entry Order*. While Chilesat has approximately a 25% market share of international traffic, NACS indicates that Chilesat does not provide domestic interexchange services.¹² In addition, the Commission has previously recognized that the market for international telecommunications services in Chile is highly competitive. In the Order reclassifying AmericaTel as non-dominant for the provision of all services on the U.S.-Chile route, we noted that the number of long distance providers in Chile has grown to eight.¹³ We then found that ENTEL-Chile's 37 percent market share for international service revenues, coupled with the increasing number of competitors, was evidence that ENTEL-Chile did not possess market power in the IMTS market.¹⁴ Likewise, we find here that Chilesat, with its 25% international marketshare also lacks market power in the Chilean IMTS market. As for NACS's other affiliate, Andina, we also find that it lacks market power in the local exchange service market. As indicated above, CTC controls 93% of this market in Chile. Given that Andina is a new company with little or no market share, we find that it lacks control over bottleneck services or facilities. Therefore, we find that NACS, through its affiliates, lacks market power that would require us to undertake an ECO analysis of the Chilean telecommunications market.

9. We next examine whether there are any countervailing public interest factors listed in the *Foreign Carrier Entry Order* that would require denial of the NACS application. The Executive Branch has not raised any national security, law enforcement, foreign policy or trade concerns with this application. No other countervailing public interest factors have been raised by any party in this proceeding. Consequently, we find that the public interest would be served by granting NACS Section 214 application to provide switched international telecommunications services, data transmission services interconnected with the public network and private line service not interconnected with the public switched network between points located in the United States and Chile both on a facilities-based and resale basis.

10. Upon consideration of the application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we believe that NACS's entry will increase

¹¹ The Commission's rules provide, *inter alia*, that a U.S. carrier is considered to be affiliated with a foreign carrier when a foreign carrier owns a greater than 25 percent interest in, or controls, the U.S. carrier. See *Foreign Carrier Entry Order* at ¶ 78 and 47 C.F.R. § 63.18(h)(1)(i)(B).

¹² See NACS Opposition to Petition to Deny, p.5.

¹³ See *AmericaTel*, DA 96-1412 (rel. Aug. 21, 1996) at ¶ 8.

¹⁴ *Id.*

competition in the United States and Chilean markets and thus benefit U.S. consumers. Therefore, IT IS HEREBY CERTIFIED that the present and future public convenience require a grant of the present application.

B. Request for Non-dominant Treatment

11. Under the Commission's rules, a U.S. carrier that is affiliated with a foreign carrier that is not a monopoly in a destination country and that seeks to be regulated as non-dominant bears the burden of submitting information sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.¹⁵ Thus, in determining whether to classify NACS as non-dominant for the U.S.-Chile route, we examine whether its affiliates, Chilesat and Andina, have the ability to discriminate against unaffiliated U.S. international carriers terminating traffic in Chile through the control of bottleneck services or facilities in Chile.¹⁶

12. As noted above, neither Chilesat nor Andina controls bottleneck services or facilities in Chile. Thus, neither of NACS's affiliates has the ability to discriminate against unaffiliated U.S. international carriers terminating traffic in Chile. Consequently, we find that NACS should be regulated as a non-dominant carrier for service between the United States and Chile. AmericaTel's petition to deny NACS's request to be regulated as a non-dominant carrier is therefore denied.

IV. Ordering Clauses

13. Accordingly, IT IS ORDERED, that application File No. I-T-C-94-434 IS GRANTED, and NACS is authorized to provide international basic switched, private line and data services between points located in the United States and Chile on both a facilities-based and resale basis.

14. IT IS FURTHER ORDERED that our authorization of NACS to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Chile -- that is, private lines which originate in the United States and terminate in Chile or which originate in Chile and terminate in the United States. In addition, NACS may not -- and NACS's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless

¹⁵ 47 C.F.R. § 63.10(a)(3).

¹⁶ See *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7334 (1992) (¶¶ 19-20) (*International Services*); see also *Foreign Carrier Entry Order* at 3966-3977 (¶ 246) (maintaining the basic regulatory framework adopted in *International Services* for determining the regulatory status of U.S. international carriers that are affiliated with foreign carriers).

authorized to do so by the Commission upon finding that Chile affords resale opportunities equivalent to those available under U.S. law, in accordance with *Foreign Carrier Entry Order*. The limitations in this paragraph are subject to the exception contained in Section 63.18(e)(4)(ii) of the Commission's Rules, 47 C.F.R. § 63.18(e)(4)(ii).


15. IT IS FURTHER ORDERED that NACS shall comply with Sections 63.21 and 63.15 of the Commission's Rules, 47 C.F.R. §§ 63.21 and 63.15.

16. IT IS FURTHER ORDERED that NACS shall be regulated as a non-dominant carrier for services between the United States and Chile.

17. IT IS FURTHER ORDERED that AmericaTel's Petition to Deny NACS's application is DENIED.

18. This Order is issued under Section 0.261 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 the date of public notice on this Order (See Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION



Diane Cornell
Chief, Telecommunications Division
International Bureau