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

DA 96-1782

In Re Application of	)	
	)	
ITJ America, Inc.	)	File No. I-T-C-96-275
	)	
Application for Authority under	)	
Section 214 of the Communications	)	
Act of 1934, as amended, to Resell	)	
Non-interconnected Private Line	)	
Services Between the United States	)	
and Various International	)	
Points	)	

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 28, 1996 Released: October 29, 1996

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. In this Order we grant ITJ America, Inc. ("ITJ-America") authority, pursuant to Section 214 of the Communications Act of 1934, as amended,[1] to resell non-interconnected international private lines ("IPLs") between the United States and Japan. Pursuant to the *Foreign Carrier Entry Order*, we find that authorizing ITJ-America to resell this service serves the public interest by improving competition in the U.S. international services market by providing additional choice for consumers leading to heightened price and service competition.

II. BACKGROUND

2. ITJ-America is a Delaware corporation and a wholly-owned subsidiary of ITJ-Japan.[2] ITJ-Japan is a Japanese corporation providing Type I (facilities-based) international

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1 47 U.S.C. § 214 (1994).

2 Application of ITJ America, Inc. for Section 214 Authority to Resell Non-interconnected Private Line Services Between the United States and Japan ("ITJ-America Application") at 2, 5. Mr. H. Ihara, a director of ITJ-Japan is also a director of ITJ-America. *Id.* at 6.

telecommunications services in Japan.[3] On May 13, 1996, ITJ-America filed an application to obtain Section 214 authority to resell non-interconnected IPLs as a non-dominant carrier to Japan. AT&T filed a petition to deny. AT&T argues that ITJ-America's affiliate, ITJ-Japan, has market power in the IPL facilities-based market in Japan and that Japan does not offer effective competitive opportunities ("ECO") for U.S. carriers to provide resale services in Japan. ITJ-America opposed AT&T's petition and AT&T replied.

III. DISCUSSION

3. Because a foreign carrier owns greater than 25 percent of the capital stock of ITJ-America, the Commission's *Foreign Carrier Entry Order* requires us to review its application for service to Japan under the framework established in that order.[4] The Commission in the *Foreign Carrier Entry Order* stated that carriers seeking to provide international services to countries in which they have an affiliate with market power must demonstrate that the affiliated market offers ECO for U.S. carriers seeking to offer like services.[5] If an applicant's foreign affiliate does not have market power in the destination market, we do not conduct an ECO analysis.[6] The Commission also stated in the *Foreign Carrier Entry Order* that it will continue to consider other public interest factors that may weigh in favor of, or against, granting the application.

A. MARKET POWER

4. In the *Foreign Carrier Entry Order*, the Commission found that applications from foreign carriers that hold market power raise the greatest potential for anticompetitive conduct, particularly where U.S. carriers are not allowed to compete effectively in those markets. The *Foreign Carrier Entry Order* defines market power as "the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through control of bottleneck

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[3] The Telecommunications Business Law ("Telecom Law") in Japan refers to facilities-based carriers as Type I carriers. Type II carriers (resellers) are subdivided into Special Type II and General Type II. Type II carriers providing international services are known as Special Type II carriers, while Type II carriers providing domestic services in Japan are categorized as either Special or General Type II carriers based on the scale of their networks. Special Type II carriers serve an unspecified number of general subscribers and have a scale of facilities exceeding 500 circuits for 1,200 bps conversion, or serve locations outside Japan (e.g., international value added networks). *See KDD Order*, Authorization and Certificate, DA No. 96-1559 at notes 4, 5, 16 (Sept. 16, 1996) ("*KDD Order*").

[4] *Market Entry and Regulation of Foreign-affiliated Entities, Report and Order*, 11 FCC Rcd 3873 at ¶ 102 (1995) ("*Foreign Carrier Entry Order*"), *recon. pending*. The Commission defined affiliation to include an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. *Id.* at ¶¶ 73-89.

[5] *Foreign Carrier Entry Order* at ¶¶ 139-148 and Appendix A, § 63.01(r)(7).

[6] *Id.* at ¶ 102.

services or facilities on the foreign end."[7] Bottleneck services or facilities are "those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end." Our concern with ITJ-America's application is thus whether its affiliate, ITJ-Japan, possesses sufficient bottleneck control to discriminate against U.S. carriers providing non-interconnected private line service between the United States and Japan. Such discrimination could distort competition in the U.S. market among ITJ-America and other IPL carriers.

5. Although ITJ-America seeks to provide non-interconnected IPL resale service between the United States and Japan, the record indicates that ITJ-Japan does not provide resale service in Japan. Therefore, we find that ITJ-Japan does not have market power as an IPL reseller in Japan.[8]

6. We must examine the underlying facilities-based market, however, because ITJ-Japan operates as a facilities-based IPL carrier, and resellers ultimately depend on the underlying facilities to provide their resale service. Thus, we must determine whether ITJ-America's affiliate, ITJ-Japan, has market power in the underlying facilities-based market that could enable ITJ-Japan to act anticompetitively against U.S. carriers seeking to provide non-interconnected IPL resale service to Japan.

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7 *Id.* at ¶ 116.

8 ITJ-America states that an ITJ-Japan subsidiary, ITJ-IT, provides domestic and international value-added services in Japan, including frame relay and internet access via resold private lines. ITJ Ex Parte Presentation (Sept. 20, 1996). Under the framework established in *International Services*, which the Commission reaffirmed in the *Foreign Carrier Entry Order*, we limit our market power inquiry to those foreign entities that provide services and facilities in the destination market that are of the type the Commission regulates in the United States as common carriage. The services provided by ITJ-IT via resold IPLs appear to be enhanced within the meaning of Section 64.702(a) of the Commission's rules, and its operations as a value-added service provider are therefore irrelevant for purposes of assessing ITJ-Japan's market power. *See Foreign Carrier Entry Order* at ¶ 99; *see also Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 at ¶ 24 (1992), *erratum*, 8 FCC Rcd 452 (1993) (*International Services*).

7. Our market power analysis focuses on traditional antitrust principles:[9](1) ITJ-Japan's market share; (2) the supply elasticity of the market;[10] (3) the demand elasticity of ITJ-Japan's customers;[11] and (4) ITJ-Japan's cost structure, size and resources.

8. Within the underlying facilities-based market, we examine first the domestic market for terminating private lines at the Japanese destination, as an IPL carrier operating in the United States ultimately relies on a facilities-based carrier in Japan to reach the Japanese end user. A carrier controlling bottleneck facilities and services in the domestic market for terminating private lines could discriminate in favor of an affiliate competing in the non-interconnected IPL resale market by offering its affiliate superior technical quality, faster provisioning or preferential rates. Second, we examine the facilities-based IPL market. If a carrier were to exercise market power in the facilities-based IPL market, it could similarly discriminate in favor of an affiliated IPL reseller by offering the reseller preferential rates or conditions of service. For instance, if ITJ-Japan has market power in this market, it could discriminate in favor of ITJ-America by provisioning ITJ-America's requests for IPLs faster than other carriers; giving higher quality IPLs and better service; and offering better rates (e.g., volume discounts) not available to competing carriers.

1. Domestic Market for Terminating Private Lines

9. While the Japanese Ministry of Posts and Telecommunications ("MPT") permits ITJ-Japan to provide domestic services, ITJ-Japan states that it does not provide them.[12] Instead, ITJ-Japan leases facilities from Type I domestic carriers under tariff pursuant to nondiscriminatory terms, rates and conditions to originate and terminate its IPL

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9 *Motion of AT&T Corp. to be Declared Non-Dominant for International Service, Order*, FCC 96-209 at ¶¶ 37-79 (rel. May 14, 1996) (*AT&T International Non-Dominance Order*); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3293-94 (1995).

10 There are two factors that determine supply elasticities in the market. The first is the supply of capacity of existing competitors: supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period. The second factor is low entry barriers: supply elasticities tend to be high even if existing suppliers lack excess capacity if new suppliers can enter the market relatively easily and add to existing capacity. *AT&T International Non-Dominance Order* at ¶ 48.

11 Demand elasticity or responsiveness is the propensity of customers to switch carriers or otherwise change the amount of services they purchase from a carrier in response to relative changes in price and quality.

12 *Id.* at 2.

traffic in Japan.[13] Based on the record, we find that ITJ-Japan does not have market power in the domestic market for terminating private lines.

2. International Facilities Market

10. ITJ-America explains that for the fiscal year that ended in March 1996, ITJ-Japan had a 17 percent share of the Japanese market for IPLs (as measured by the number of IPLs).[14] ITJ-Japan is not the sole provider of any service in any geographic area.[15] ITJ-America explains that IPL service is supplied in Japan by two other international Type I carriers: Kokusai Denshin Denwa Co. ("KDD") and International Digital Communications Inc. ("IDC"), and that there are more than 100 Type I domestic carriers that potentially could enter the IPL market.[16] ITJ-Japan contends that demand is highly elastic in this market, and that dissatisfied customers could simply switch to KDD, IDC or to an international resale carrier.[17] As for ITJ-Japan's size, cost structure and resources, for fiscal year ending in March 1996, ITJ-Japan had IPL revenues of 3.250 million yen, which is 12 percent of the IPL market.[18] No party argues that ITJ-Japan can exercise market power by virtue of its size, cost structure or resources.

11. AT&T contends that a foreign carrier need not be the "sole provider" of telecommunications services to control bottleneck facilities or to be found dominant.[19] AT&T argues that ITJ-Japan has market power because it is one of only three carriers providing facilities-based international services in Japan. According to AT&T, being part of a restrictive oligopoly grants ITJ-Japan the ability to discriminate against unaffiliated U.S. carriers, notwithstanding its small size relative to KDD-Japan. AT&T asserts that it is

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[13] *Id.*; ITJ-America Application at 8. Additionally, we recognize that almost all Type II and international Type I telecommunications carriers, including ITJ-Japan, depend on Nippon Telephone and Telegraph's ("NTT") local access networks to reach the end user. NTT has 93 percent market share of all domestic calls (local and long-distance combined) and 82.8 percent of the private line circuits. Review of the Future Status of NTT, MPT (Sept. 1995).

[14] ITJ-America Ex Parte Presentation Attachment (July 25, 1996).

[15] Opposition of ITJ-America at 2.

[16] ITJ-America Application at 6. As of December 8, 1995, the MPT clarified that Type I domestic carriers in Japan other than NTT may enter the international market. *Id.* at 8. ITJ-America states that one domestic Type I carrier has reportedly announced plans to enter the international market and to open an office in New York. Opposition of ITJ-America at 10 n.7.

[17] ITJ-America Application at 7.

[18] ITJ-America Ex Parte Presentation Attachment (July 25, 1996). In contrast, KDD-Japan had 20.940 and IDC had 3.765 million yen in revenues.

[19] AT&T Reply at 2 note 1.

premature to rely on potential entry in the facilities-based IPL market by domestic providers, as only one out of more than 100 Type I domestic carriers has announced plans to enter the market. Additionally, AT&T states that MPT only permits Type I carriers to enter the market based on demand.[20] AT&T contends that the lack of competitive pressure in the Japanese IPL facilities market is illustrated by: (1) the 50 percent higher tariffs for private line half-channels in Japan as compared to U.S. tariffed rates[21] and (2) the stability of the market shares for switched traffic since 1989. Almost all of KDD's market share loss for switched traffic occurred in ITJ-Japan's and IDC's first two months of service.[22] Finally, AT&T asserts that limiting foreign ownership of a Type I carrier to a third precludes U.S. carriers from obtaining a controlling interest in a carrier sufficient to constrain an incumbent's possible anticompetitive behavior.[23] Thus, AT&T believes that ITJ-Japan has market power and asserts that ECO should be applied to ITJ-America's application.

12. ITJ-America responds that the Commission has never stated that non-dominance requires unlimited entry in the foreign market.[24] ITJ-America contends that absent collusion, which AT&T has not alleged, a competitor in a market with a limited number of participants does not have market power.[25] Finally, ITJ-America contends that the high rates for Japanese international half-circuits and the stability of market shares in switched services are irrelevant to whether ITJ has market power.[26]

13. We conclude that ITJ-Japan does not control bottleneck facilities or have market power in the facilities-based IPL market. We base our decision on two findings: ITJ-Japan does not provide domestic origination or termination of IPLs; and it has only 17 percent of the number of IPL lines and 12 percent share of the revenues from the IPL market. As discussed in the *KDD Order*,[27] however, we are concerned that the supply of IPLs in Japan is somewhat restricted. Only two additional facilities-based IPL providers

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20 AT&T Petition to Deny at 3. AT&T Reply at 2 note 1, & at 4.

21 AT&T Petition to Deny at 4-5.

22 AT&T Reply at 2-3.

23 AT&T Petition to Deny at 9.

24 Opposition of ITJ-America at 2.

25 *Id.* at 7. ITJ-America states that, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2081 (1992), the Court defined market power as the ability of a single seller to raise prices and restrict output and that the existence of such power ordinarily is inferred from the sellers' possession of a predominant share of the market. ITJ-America contends that, given ITJ-Japan's market share, ITJ-Japan obviously would be unable unilaterally to raise prices or restrict output.

26 *Id.* at 6.

27 *KDD Order* at ¶¶ 13-16.

have entered Japan's facilities-based IPL market since 1989, when MPT authorized two new common carriers to enter the international services market as Type I carriers in direct competition with KDD-Japan, which at that time had a monopoly. Furthermore, MPT restricts entry into the IPL market based on demand[28] and Japan's 33 1/3 percent foreign ownership cap on IPL facilities-based providers prevents U.S. carriers from gaining control of such facilities which could restrain an incumbent's anticompetitive behavior.[29] We note that the record indicates that IPL prices for the Japanese half of a circuit are approximately fifty percent higher than for the corresponding U.S. half, which suggests that the Japanese facilities-based IPL market lacks vigorous competition.

14. While we have concerns about the Japanese telecommunications market, we are not persuaded by AT&T's argument that a limited number of players necessarily indicates market power. In this case, ITJ-Japan's quantity share (i.e., number of lines) of the IPL market is 17 percent and its revenue share is 12 percent. This revenue share, which is about 30 percent lower than the quantity share, could be indicative of lower prices to attract more customers or it could mean that ITJ-Japan cannot set prices so that, at a minimum, its revenue share is equal to its quantity share. Lowering prices to attract more customers does not suggest market power. Similarly, an inability to set a higher price relative to its competitors suggests that ITJ-Japan does not have the ability to enforce higher prices. Thus, we conclude that ITJ's affiliate, ITJ-Japan, does not have market power in the facilities-based IPL market.

15. Because we find that ITJ-Japan does not have market power in the domestic market for terminating private lines or the international facilities-based market, we conclude that we need not apply the ECO test to ITJ-America's application.

B. ADDITIONAL PUBLIC INTEREST FACTORS

16. The additional public interest factors that we consider include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, and any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch. Also, we consider the relationship of accounting rates to relevant cost benchmarks as a factor under our general public interest analysis.[30]

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28 We disagree with ITJ-America that the 100 domestic carriers are potential competitors. We find it premature to consider the domestic providers as competitors. Given that MPT permits entry into Type I services only if "appropriate in light of demand in the service area," we cannot be certain that the domestic carriers or others will ever gain entry into the IPL market.

29 Foreign ownership restrictions preclude U.S. carriers from controlling facilities-based IPL carriers. Such restrictions provide a form of protection against competitive pressures generated by open capital markets.

30 *Foreign Carrier Entry Order* at ¶¶ 62, 66.

17. According to AT&T, there are other countervailing public interest reasons to deny ITJ-America's application. AT&T contends that: (1) Japan's accounting rates are far above relevant cost benchmarks despite the entrance of ITJ-Japan and IDC into the market; (2) KDD-Japan negotiates accounting rates on behalf of all three carriers, as IDC and ITJ-Japan are not permitted to negotiate separately with U.S. carriers for accounting rates; and (3) ITJ-America's entry into the U.S. market would have no general significance in promoting competition in the U.S. communications market, as there are already a large number of carriers providing resale and facilities-based IPL services in the U.S. market.[31]

18. ITJ-America contends that AT&T's criticism of the U.S.-Japan accounting rate is inapposite, as ITJ-America is not a dominant foreign carrier.[32] Also, ITJ-America states that all Type I international carriers have independent authority to negotiate accounting rates with U.S. carriers and that ITJ-Japan does, in fact, negotiate its own accounting rates.[33] ITJ-America asserts that AT&T has chosen to negotiate with KDD-Japan, which underscores ITJ-Japan's lack of market power.[34] ITJ-America further states that there are no foreign ownership restrictions applicable to special Type II carriers.[35] Finally, ITJ-America contends that grant of its application will promote the public interest by increasing competition on the U.S.-Japan route and providing consumers with more choices and cost-based rates.[36]

19. We find that there are no other countervailing public interest reasons to deny grant of ITJ-America's application. The Executive Branch has not raised any national security, law enforcement, foreign policy, or trade concerns with this application. While we are concerned about Japan's high accounting rates and would like to see them decrease, we do not find that a reason to deny ITJ-America's application to enter the non-interconnected IPL market, as proliferation of these services will help put pressure on the above-cost accounting rates. We believe also that U.S. consumers will benefit by authorization of a new non-interconnected IPL resale carrier serving Japan. We accordingly find it in the public interest to permit ITJ-America to enter the non-interconnected IPL resale market on the U.S.-Japan route.

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31 AT&T Petition to Deny at 16.

32 Opposition of ITJ-America at 14.

33 *Id.* at 8.

34 *Id.* at 9.

35 *Id.*

36 ITJ-America Application at 4.

C. REGULATORY STATUS OF ITJ-AMERICA

20. The final issue to determine is whether to regulate ITJ-America as dominant on the U.S.-Japan route.[37] ITJ-America requests non-dominance because it asserts that its affiliate, ITJ-Japan, lacks market power and the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck service or facilities in Japan.[38] Given our finding that ITJ-America's affiliate, ITJ-Japan, does not have market power in the underlying domestic market for terminating private lines or the IPL facilities market, we find that ITJ-Japan does not have the ability to discriminate against unaffiliated U.S. private line carriers in favor of ITJ-America. Therefore, we find that ITJ-America should be regulated as non-dominant on the U.S.-Japan route.

IV. CONCLUSION

21. We find that grant of authorization to ITJ-America to resell non-interconnected IPL circuits for service to Japan is in the public interest and consistent with Section 214 of the Communications Act. We classify ITJ-America as non-dominant on the U.S.-Japan route for providing IPL resale services. Authorizing ITJ-America to provide non-interconnected IPL resale service to Japan will benefit consumers by adding an additional resale carrier on the U.S.-Japan route.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that application File I-T-C-96-275 IS GRANTED and ITJ America, Inc. is authorized to resell international private line circuits not interconnected to the public switched network for the provision of international private line services between the United States and Japan.

23. It is FURTHER ORDERED that ITJ America, Inc. shall comply with Section 203 of the Communications Act, 47 U.S.C. § 203, Part 61 and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. Part 61 and §§ 43.51 and 43.61, and shall file annual reports of circuit additions in accordance with the requirements set forth in *Rules for Filing of International Circuit Status Reports*, CC Docket No. 93-157, *Report and Order*, 10 FCC Rcd 8605 (1995).

24. It is FURTHER ORDERED that this authorization of ITJ America, Inc. to provide resold private line service as part of its authorized services is limited to the provision of non-interconnected private line service only between the United States and Japan, that is, private lines that originate in the United States and terminate in Japan, or that originate in Japan and terminate in the United States. In addition, ITJ America may not -- and ITJ

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[37] 47 C.F.R. § 63.10 (1995).

[38] ITJ-America Application at 6, 10.

America's tariffs 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 authorized to do so by the Commission upon finding that Japan affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking,* 7 FCC Rcd 7927 (1992), *Third Report and Order and Order on Reconsideration*, FCC 96-160, released May 20, 1996. *See also Foreign Carrier Entry Order* at ¶¶ 133-138.

25. 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 public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

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