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

In the Matter of	)	
	)	
IMPSAT USA, Inc.	)	
	)	
Application for Authorization Pursuant to	)	
Section 214 of the Communications Act of	)	
1934, as Amended, to Acquire and	)	File No. ITC-95-434
Operate Facilities for Service to Various	)	
Overseas Points	)	
	)	
Application for Authorization Pursuant to	)	
Section 214 of the Communications Act of	)	File No. ITC-95-485
1934, as Amended, to Operate as an	)	
International Resale Carrier	)	

MEMORANDUM OPINION, ORDER, AUTHORIZATION, CERTIFICATE,
AND ORDER ON RECONSIDERATION

Adopted: June 4, 1997 Released: June 5, 1997

By the Chief, International Bureau:

Introduction

1. In this Order, we consider two applications filed by IMPSAT USA, Inc., ("Impsat") for authority to provide international telecommunications services. The first, a request to provide facilities-based service to a variety of international points, was previously granted, but is subject to a petition for reconsideration filed by AT&T. The second is a request to provide global resale services. Although we find AT&T's petition properly raises significant new facts regarding Impsat's ownership, we affirm our initial grant on the condition that Impsat's 25% investor, STET, maintains settlement rates with U.S. carriers within our current and future settlement rate benchmarks. We also find that, under the framework established in the Commission's Foreign Carrier Entry Order, we should grant Impsat global resale authority.

Background

2. On September 8, 1995, Impsat was granted authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to provide facilities-based service to a variety of international points. On October 19, 1995, AT&T Corp. ("AT&T") filed a Petition for Reconsideration. On August 16, 1995, Impsat filed an application for authority to resell telecommunications services of other carriers between the United States and the same international points. This application was opposed by AT&T. We granted special temporary authority for such resale (without prejudice to action on the underlying resale application) on

July 1, 1996, and that authority has been extended through June 30, 1997.

Discussion

a. Procedural Issues

3. Impsat's initial application for authority to provide facilities-based international communications services between the United States and various foreign countries was filed on July 17, 1995. That application included a request to provide transborder service using the Mexican Morelos and Solidaridad satellite systems and stated that the company intended to use those systems to provide transborder services not interconnected with the public switched network, such as private line voice, data, video, and business services. The application (file no. ITC-95-434) was placed on public notice on July 21, 1995. On August 2, 1995, Impsat amended its application to state that it intended that its transborder services provided over Morelos and Solidaridad would be interconnected with the public switched network. That amendment was placed on public notice on August 18.

4. In an order adopted September 8, 1995, and released September 19, 1995, we granted Impsat's application except for its request with respect to the Mexican satellite systems. The order was effective upon adoption. We deferred action on Impsat's request to acquire Morelos and Solidaridad circuits to countries in addition to Mexico pending the outcome of the rulemaking in Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41, FCC 95-146 ("DISCO I"). That proceeding has been completed, and we will address Impsat's request in a future order.

5. AT&T filed a petition to deny the facilities authorization on September 18, 1995, which was within 30 days of the public notice of Impsat's amendment (as measured by Section 1.4(b)(2) of our rules) but not within 30 days of the public notice of the original application. The petition also was filed after adoption, but before release, of the order. Impsat responded with a "Motion to Strike or, in the Alternative, Opposition to Petition to Deny." Impsat moves to strike the petition on the grounds that it was filed after the initial 30-day period, and the amendment did not change the applicable comment period either because it was not a "major" amendment within the meaning of 47 C.F.R. 63.52(b) or because that section extends the comment period only for the substance of the amendment. Impsat noted, in that regard, that AT&T's petition did not address any issue raised by the amendment. AT&T responded that its comments did apply to the Morelos/Solidaridad request, which was still pending, and should therefore be considered. We agree that AT&T's petition did relate to the Morelos/Solidaridad request, and we accordingly will consider AT&T's objections at the time we address Impsat's request to use those Mexican satellite systems.

6. On October 19, 1995, AT&T filed a petition for reconsideration of our September 8 order. It argued that reconsideration was appropriate based on its discovery of facts not presented in Impsat's application and of which AT&T could not have been aware through the exercise of ordinary diligence. The newly discovered facts relate to the equity association of Impsat with Societa Finanziaria Telefonica PA ("STET"), the monopoly provider of international services in Italy, which was not disclosed in Impsat's original application. Those facts, AT&T argued, present significant public interest implications that we should consider on reconsideration. Impsat opposed AT&T's petition on procedural and substantive grounds.

7. We need not address Impsat's procedural objections to AT&T's petition for reconsideration because we find that consideration of the facts brought to our attention by AT&T is required in the public interest. Section 1.106(c) of our rules allows us to grant a petition for reconsideration that "relies on facts not previously presented to the Commission" if we "determine[] that consideration of the facts relied on is required in the public interest." In this case, STET's 25 percent indirect ownership interest in Impsat should have been disclosed in Impsat's original application. Foreign carrier ownership in U.S. carriers is a significant factor the Commission considers in reviewing Section 214 applications. Under our rules at the time Impsat filed its application, we needed to make a determination whether Impsat was controlled by any foreign carriers for purposes of knowing how to regulate it. This information should have been included in Impsat's application as part of its Section 63.01(r)(2) listing of 10 percent or greater shareholders, which implicitly includes both direct and indirect shareholders. Accordingly, we consider the merits of AT&T's petition for reconsideration in ITC-95-434.

8. In the matter of Impsat's resale application, file no. ITC-95-485, AT&T filed a timely petition to deny that raised the same concerns about foreign ownership of the applicant. Impsat opposed AT&T's petition in part on grounds that AT&T had made a procedural error by failing to state its interest in the pending application as required by Section 63.52(c) of our rules. We find, as argued by AT&T, that AT&T's status as a party in interest is a matter of public record of which we can take official notice. AT&T holds Section 214 authority to provide international service between the United States and many international points, including Italy, and therefore potentially could be competitively harmed by grant of this application.

b. Analysis of Market Entry Under the Foreign Carrier Entry Order

9. We do not address whether the new rules adopted in the Commission's Foreign Carrier Entry Order, in particular the new affiliation standard, apply to our reconsideration of Impsat's facilities authorization, because we find that, under both the old and new rules, Impsat's application would still be granted. We do, however, apply the new rules to Impsat's application for resale authority, which was pending at the time the rules were adopted. We have stated as recently as Shell Offshore Services Company that the Commission's authority to apply new rules and policies to pending matters is well established, and in the Foreign Carrier Entry Orderthe Commission explicitly said that all carriers would have their "future or pending" applications subject to the standards adopted in that order.

10. In the Foreign Carrier Entry Order, the Commission determined that the provision of telecommunications services by a foreign carrier to a market in which it is has market power presents a risk of anticompetitive conduct. To prevent this anticompetitive conduct, we will examine whether effective competitive opportunities exist for U.S. carriers in the destination markets when either the applicant is affiliated with a dominant foreign carrier or the investment otherwise presents a significant potential impact on competition in the U.S. market for basic telecommunications services.

11. Our review under the current rules begins with the question of whether Impsat is affiliated with any foreign carrier with market power. Under the Foreign Carrier Entry Order's definition of affiliation, a carrier is affiliated with a foreign carrier if the foreign carrier owns more than a 25 percent equity interest or otherwise controls the U.S. carrier or the U.S. carrier is under common control with a foreign carrier. Here, Impsat clearly has affiliations with those carriers in Argentina, Colombia, Mexico, Ecuador, and Venezuela in which Impsat Corporation

has a controlling investment. We find, however, based on the record, that none of those affiliated carriers has market power. Therefore, we will not conduct an ECO analysis of those countries.

12. On the other hand, Impsat does have a relationship with STET, a carrier that clearly has market power in Italy due to its monopoly position there. But STET's ownership interest in Impsat is only 25 percent, which does not rise to the initial threshold of our definition of affiliation. In addition, there is no evidence that STET has other means of controlling Impsat. In particular, because the remaining 75 percent of Impsat Corporation is owned by a single holding company, STET's 25 percent interest does not appear to give STET control of Impsat. Therefore, we find that Impsat is not affiliated with any foreign carrier with market power.

13. Even when foreign carrier investment in an applicant does not rise to the level of an affiliation, we nevertheless apply the ECO test if the foreign investment presents a significant potential impact on competition. For instance, when a U.S. carrier is very large, even a small incentive to discriminate in favor of its foreign investor could have a large effect on the market for service on that route. This is especially a concern where a carrier could leverage its market power along one route into the market for service along other routes.

14. Here, Impsat is a small carrier that does not, at this time, have a significant share of the market for service along any route. Therefore, even if STET's investment gives Impsat some incentive to discriminate, that discrimination would not have a significant effect on the U.S. Italy market. Because Impsat could not dominate the U.S. Italy route, we need not address its ability to leverage its market power into other routes. We thus conclude that a carrier the size of Impsat operating along the U.S. Italy route does not present the degree of anticompetitive risk that was presented in Sprint, where the second- and fifth-largest international carriers sought an investment in the third-largest U.S. international carrier.

15. In these circumstances, we reject AT&T's objections and find that there is not a need to apply the ECO test to Impsat's application to carry traffic along the U.S. Italy route. STET's 25 percent investment in Impsat does not present such a significant potential impact on competition that such scrutiny is warranted, and we need not address AT&T's arguments as to the state of competition in Italy.

16. Finally in our review of Impsat's applications, we must look at any other public interest factors that weigh in favor of or against grant of the applications. The Commission has recently announced a renewed interest in seeing accounting rates lowered closer to cost-based levels, and to reach this goal has proposed new benchmark settlement rates. Although Italy's current settlement rate of $0.26 is within our current benchmarks, it is significantly above our proposed benchmark rate and is well above the actual cost of providing service. We are concerned that STET could use the subsidy embedded in this above-cost settlement rate to cross-subsidize Impsat. Therefore, to ensure that Impsat does not gain an unfair competitive advantage, we will condition Impsat's authorization to serve Italy on a facilities basis on Impsat's maintaining its settlement rate with STET within our current and future benchmarks. We also note that under the Commission's International Settlements Policy, the rate at which Impsat settles with STET must be available to all U.S. carriers on a nondiscriminatory basis. We impose this condition on reconsideration based on the new information brought to our attention by AT&T's petition. Our ability to do so does not depend on whether the rules adopted in the Foreign Carrier Entry Order apply to the petition for reconsideration.

17. We find that Impsat's application for resale authority should be granted under the standard adopted by the Commission in the Foreign Carrier Entry Order, and we find that, whether or not those rules apply to the petition for reconsideration of Impsat's facilities authorization, that application would also be granted. We therefore deny AT&T's petition for reconsideration of the facilities authorization and grant Impsat's resale authorization.

d. Regulatory Classification of Impsat Along the U.S. Italy Route

18. Under the rules adopted in the Foreign Carrier Entry Order, a U.S. carrier that has no affiliation with a foreign carrier in a particular country to which it provides service is presumptively classified as non-dominant for the provision of international communications services to that country. Affiliation is defined the same way it is defined in the entry context: an ownership interest greater than 25 percent, or a controlling interest at any level, by the foreign carrier.

19. The presumption of non-dominance is overcome, and an unaffiliated U.S. carrier will be regulated as dominant, when the foreign carrier investment nonetheless presents a significant potential impact on competition. In such circumstances, the Commission stated, safeguards may be needed to ensure that the foreign carrier is unable to leverage its market power into the U.S. market for international services through an investment in the U.S. carrier.

20. Here again, Impsat is presumed non-dominant along the U.S. Italy route because its relationship with STET does not rise to the level of an affiliation. We thus turn again to whether STET's investment presents a significant potential impact on competition. In these circumstances, there are no facts peculiar to this investment that persuade us that the presumption should be overcome. Thus, consistent with the Foreign Carrier Entry Order, we find no need to impose dominant carrier safeguards on Impsat's operation on the U.S. Italy route.

Ordering Clauses

21. Accordingly, IT IS ORDERED that AT&T's petition for reconsideration of the application of IMPSAT USA, Inc., File No. ITC-95-434, is DENIED. IMPSAT USA, Inc., is authorized to provide the services authorized in our earlier order, DA 95-1962, adopted September 8, 1995, released September 19, 1995.

22. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant of the present application, and IT IS ORDERED that application File No. ITC-95-485 IS GRANTED, and IMPSAT USA, Inc., is authorized to provide international switched service by the resale of international switched services of other authorized international carriers pursuant to Section 63.18(e)(2) of the Commission's Rules, 47 U.S.C. 63.18(e)(2).

23. IT IS FURTHER ORDERED that IMPSAT USA, Inc., shall be regulated as a non-dominant carrier on all routes pursuant to Section 63.10 of the Commission's rules.

24. IT IS FURTHER ORDERED that the authorization to provide facilities-based service to Italy shall be valid only so long as IMPSAT USA, Inc., maintains with its Italian affiliate a settlement rate that is within the Commission's current and future benchmarks.

25. IT IS FURTHER ORDERED that IMPSAT USA, Inc., shall comply with Sections 43.82, 63.15, and 63.21 of the Commission's rules, 47 C.F.R. 43.82, 63.15, 63.21.

26. This order is issued under Section 0.261 of the Commission's rules, 47 C.F.R. 0.261 (1996), 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, 47 C.F.R. 1.106, 1.115, may be filed within thirty days of the public notice of this order (see 47 C.F.R. 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Peter F. Cowhey
Chief
International Bureau