

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

DA 96-592

In the Matter of)
)
ABS-CBN Telecom, North America, Inc.)
)
Application for authority pursuant to)
Section 214 of the Communications Act) File No. I-T-C-95-522
of 1934, as amended, to acquire and operate)
facilities for the provision of international)
services between the United States and Japan)
and the Philippines.)

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 15, 1996

Released: April 16, 1996

By the Chief, International Bureau:

Introduction

1. ABS-CBN Telecom, North America, Inc. (ABS-CBN) has applied to acquire and operate facilities for the provision of International Message Telephone Service (IMTS) and International Private Line (IPL) services between the United States and Japan and the Philippines. Applying the Commission's recent *Foreign Carrier Entry Order*,¹ we find the public interest would be served by granting ABS-CBN's application.

Application

2. On September 11, 1995, ABS-CBN filed the above-captioned application to acquire up to two E-1 circuits² on the following facilities: PanAmSat (PAS)-2; the North Pacific Cable (NPC); the Trans Pacific Cable (TPC)-5; and the Asian Pacific Cable Network (APCN), for interconnecting circuits with TPC-5 on the Japan-Philippines segment only. ABS-CBN requests authority to use these facilities to offer international telecommunications services between the United States and Japan (IPL only) and the Philippines (IPL and IMTS). ABS-CBN submits that its application is in the public interest because it will enable ABS-

¹ See, *Market Entry and Regulation of Foreign-affiliated Entities Report and Order*, adopted November 30, 1995, FCC No. 95-475, 60 Fed. Reg. 67332. (*Foreign Carrier Entry Order*).

² An E-1 circuit is equivalent to thirty 64 Kilobit per second circuits.

CBN to offer competitive international services. ABS-CBN's application was put on Public Notice on September 19, 1995.

3. ABS-CBN certifies that it is affiliated with foreign carriers in the Philippines under Section 63.01(r)(1) of the Commission's Rules.³ ABS-CBN is 100 percent owned by ABS-CBN International, Inc., a U.S. corporation, that is 100 percent owned by ABS-CBN Broadcasting Corporation, a publicly traded Philippine corporation. The controlling shareholder in ABS-CBN Broadcasting Corporation is Benepres Holding Corporation, a diversified Philippine corporation with banking, power generation and telecommunications interests. Benepres Holding Corporation's controlling shareholder is Lopez, Inc., a Philippine corporation. Benepres Holding Corporation and Lopez, Inc. have controlling interests, through Bayantel, a Philippine company with various telecommunications interests, in two Philippine international carriers: International Communications Corporation (ICC) and Radio Communications of the Philippines, Inc. (RCPI).

Petition to Deny

4. AT&T filed a petition to deny in which it argues that ABS-CBN has not demonstrated that the potential for undue discrimination by ABS-CBN's foreign affiliates against unaffiliated U.S. carriers is outweighed by the benefit of additional competition in the U.S. international services market that ABS-CBN would bring.⁴ In support, AT&T cites the Commission's Order in *Domtel Communications, Inc.*, where the Commission stated that its open entry policy for foreign carriers would be balanced against the potential for undue discrimination by a foreign carrier offering end-to-end service against unaffiliated U.S. carriers.⁵ AT&T notes that the Commission has granted foreign carrier entry into the U.S. market where nondiscrimination safeguards are adequate to protect U.S. carriers. AT&T argues that ABS-CBN has not offered information on whether nondiscrimination safeguards would protect U.S. carriers and their customers from undue discrimination. In particular, AT&T contends that ABS-CBN and its affiliates in the Philippines will gain an unfair advantage by corresponding with themselves while maintaining above-cost accounting rates.⁶

5. In opposition, ABS-CBN argues that the public interest in additional facilities-based competition on the U.S.-Philippines route outweighs any risk that ABS-CBN's Philippine affiliates, which combined have approximately one percent of the market for international telephone services, could discriminate against unaffiliated U.S. international

³ See 47 C.F.R. § 63.01(r)(1).

⁴ AT&T Petition to Deny, p. 4.

⁵ See AT&T Petition to Deny, p. 2, citing *Domtel Communications, Inc.* 10 FCC Rcd 12159 (1995)

⁶ *Id.* at 4-5.

carriers in terms of interconnection or settlements.⁷ It points out that the other U.S. carriers serving the Philippines have interconnection agreements with up to six Philippine carriers. In addition, ABS-CBN cites the inability of its Philippine affiliates to discriminate against unaffiliated U.S. carriers. For example, RCPI does not have the facilities to offer basic switched service to the United States, and ICC has only begun commercial operations in September 1995 and has no more than one percent of outgoing international telephone minutes.

6. Finally, AT&T replied to ABS-CBN's Opposition by raising the additional argument that, based upon the Commission's recent *Foreign Carrier Entry Order*, the Commission should reject ABS-CBN's application because effective competitive opportunities do not exist in the Philippines for U.S. carriers.⁸ In addition, AT&T reiterated its argument that, because of the end-to-end facilities-based arrangement between ABS-CBN and its Philippine affiliate, there continues to exist the potential for discrimination by ICC vis-a-vis unaffiliated U.S. carriers.⁹ AT&T also argues that ICC has the ability to use its settlements payments to subsidize ABS-CBN's prices in the United States to the detriment of other unaffiliated U.S. carriers that compete with ABS-CBN in the United States and that cannot avoid the U.S.-Philippine accounting rate maintained by the Philippine Long Distance Telephone company (PLDT) and ICC.¹⁰

Discussion

7. At the outset, we reject AT&T's argument that the Commission's decision in *Domtel* warrants a rejection of ABS-CBN's application. The new rules and standards adopted in the *Foreign Carrier Entry Order* apply to this application.¹¹ In that Order, we determined that an important element of a foreign carrier's entry into the U.S. international services market is whether U.S. carriers have effective opportunities to compete in the destination markets that a foreign carrier seeks to serve. Therefore, we stated that an effective competitive opportunities test would be one part of our overall public interest analysis of international Section 214 applications. We also stated 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

⁷ ABS-CBN Opposition to Petition to Deny, pp. 1, 6-8.

⁸ AT&T Reply to Opposition, pp. 3-4. See also, *Foreign Carrier Entry Order*.

⁹ AT&T Reply to Opposition, pp. 5-8. See also, AT&T Petition to Deny, pp. 4-5.

¹⁰ AT&T Reply to Opposition, pp. 5-6.

¹¹ We note that the new rules and standards are consistent with the finding in *Domtel*. In that Order, we found that the entry of a non-dominant foreign carrier into the U.S. international services market was in the public interest, and that the risk of anticompetitive effects to the U.S. communications market would be minimal. See *Domtel*, 10 FCC Rcd 12159 at 12161 (1995).

in the U.S. communications market, any national security, law enforcement, foreign policy, or trade concerns raised by the Executive Branch, and the presence of cost-based accounting rates.

8. In adopting the effective competitive opportunities (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 markets they seek to serve.¹² 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."¹³ 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 would not apply an effective competitive opportunities analysis to the application.

9. ABS-CBN is clearly affiliated with a foreign carrier under our new rules. As a result, we need to determine whether or not to conduct an effective competitive opportunities analysis of the Philippine market. According to ABS-CBN, the two Philippine carriers with which ABS-CBN is affiliated, RCPI and ICC, do not have market power as defined in the *Foreign Carrier Entry Order*, that is, control over bottleneck facilities. RCPI is primarily a local exchange carrier offering limited international service via a coastal radio station.¹⁴ ICC has a very limited number of local exchange lines, and upon its fulfilling an obligation to construct 300,000 local telephone lines, expects to serve approximately five percent of the total number of local exchange lines in the Philippines.¹⁵ As a result, neither RCPI nor ICC have the ability to terminate more than a very small number of U.S. international calls which might have been originated by ABS-CBN or otherwise.¹⁶ Finally, because of the limited domestic network of these affiliates, ABS-CBN will almost be wholly dependent upon interconnection for distribution of incoming international traffic on the Philippine Long Distance Telephone Company (PLDT), which controls approximately ninety percent of the Philippines's local exchange lines.¹⁷ Based on this record, we conclude that RCPI and ICC do not have market power in the Philippines. Accordingly, we do not need to examine whether effective competitive opportunities exist in the Philippines.

¹² *Foreign Carrier Entry Order*, ¶ 102.

¹³ *Foreign Carrier Entry Order*, ¶ 116.

¹⁴ See, ABS-CBN Opposition to Petition to Deny, p. 4.

¹⁵ *Id.* at 7, footnote 12.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 4.

10. As for AT&T's concern about "self-correspondency" between ABS-CBN and its affiliates, this is relevant only if the carrier or carriers on the foreign end are dominant carriers with the ability to act anticompetitively through the control of bottleneck facilities. Here, ICC and RCPI have a very small number of local exchange lines, and there is little risk of anticompetitive activity between these carriers. While the potential exists for "self-correspondency" between ABS-CBN and its affiliates, ABS-CBN is still required to file any operating agreement with either of its affiliates, and our International Settlements Policy bars any discriminatory arrangements regarding traffic and revenue. It is at that point that we can determine whether or not any arrangements between carriers are anticompetitive.

11. We next examine whether there are any countervailing public interest factors that would require denial of ABS-CBN's application. The Executive Branch has not raised any concerns with grant of this application. AT&T's concern regarding above-cost accounting rates is a valid one. According to AT&T, the accounting rate of \$1.20 per minute set by ABS-CBN's affiliate with MCI is well above cost.¹⁸ We declined in the *Foreign Carrier Entry Order*, however, to make cost-based accounting rates a precondition to entry. Instead, we determined that it would be part of our additional public interest factors that may way in favor of, or against, grant of an application.¹⁹ Accordingly, we view the above-cost accounting rates in the Philippines as a negative factor in our overall public interest analysis of this application. Despite this negative factor, we find that grant of ABS-CBN's application would be appropriate because the \$1.20 accounting rate ABS-CBN's affiliate has established with other U.S. carriers is within our established benchmark for the Philippines.²⁰ We will condition ABS-CBN's authorization, however, on ABS-CBN's affiliate maintaining an accounting rate within or below our benchmarks.

12. Upon consideration of the application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we believe that ABS-CBN's entry will increase competition in the United States and Philippine markets and thus benefit U.S. consumers. Therefore, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant of the present application, conditioned upon ABS-CBN maintaining an accounting rate with U.S. carriers at or below our benchmarks.

¹⁸ AT&T Petition to Deny, p. 5.

¹⁹ *Foreign Carrier Entry Order*, ¶ 71.

²⁰ The benchmark for this region is \$0.78 - \$1.20. See *Regulation of International Accounting Rates*, Second Report and Order and Second Further Notice of Proposed Rulemaking (Phase II), 7 FCC Rcd 8040 (1992).

Ordering Clauses

13. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-522 IS GRANTED, and ABS-CBN is authorized to:

- a. acquire on an Indefeasible Right of Use or lease basis and operate up to two E-1 circuits (or up to sixty four (64) kilobit per second circuits equivalents) on the following facilities: PanAmSat (PAS)-2; the North Pacific Cable (NPC); the Trans Pacific Cable (TPC-5); and the Asia Pacific Cable Network (APCN), for interconnecting circuits with TPC-5 on the Japan-Philippines segment only, connecting with similar facilities between these cables and Japan and the Philippines furnished by its correspondents;
- b. lease and operate any necessary domestic connecting facilities and overseas connecting facilities, and;
- c. use the facilities set forth in the foregoing subparagraphs to provide regularly authorized international switched and private line services between the United States and the Philippines, and private line service to Japan.

14. IT IS FURTHER ORDERED that our authorization of ABS-CBN to provide private lines as a part of its authorized services is limited to the provision of such private lines only between the United States and Japan and the Philippines — that is, private lines which originate in the United States and terminate in Japan or the Philippines or which originate in Japan or the Philippines and terminate in the United States. In addition, ABS-CBN may not -- and ABS-CBN's tariff must state that ABS-CBN's 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 a finding that the Philippines affords resale opportunities equivalent to those available under U.S. law, in accordance with *Foreign Carrier Entry Report and Order*, FCC No. 95-475, released November 30, 1995. The limitations in this paragraph are subject to the exception contained in Section 63.01(k)(6)(i) of the Commission's Rules, 47 C.F.R. § 63.01(k)(6)(i).

15. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

16. IT IS FURTHER ORDERED that grant of ABS-CBN's application is conditioned on ABS-CBN's affiliate maintaining an accounting rate with U.S. carriers within or below our benchmarks.

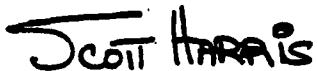
17. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

18. 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. §43.61.

19. IT IS FURTHER ORDERED, the ABS-CBN shall file annual circuit status reports 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).

20. 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 the public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION



Scott Blake Harris
Chief, International Bureau