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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	IB Docket No. 02-286
	File Nos. ISP-PDR-20020822-0029;
GLOBAL CROSSING, LTD.	ITC-T/C-20020822-00406
(Debtor-in-Possession), Transferor,	ITC-T/C-20020822-00443
	ITC-T/C-20020822-00444
and	ITC-T/C-20020822-00445
	ITC-T/C-20020822-00446
GC ACQUISITION LIMITED,	ITC-T/C-20020822-00447
Transferee	ITC-T/C-20020822-00449
	ITC-T/C-20020822-00448
Application for Consent to Transfer	SLC-T/C-20020822-00068
Control and Petition for Declaratory	SLC-T/C-20020822-00070
Ruling	SLC-T/C-20020822-00071
	SLC-T/C-20020822-00072
	SLC-T/C-20020822-00077
	SLC-T/C-20020822-00073
	SLC-T/C-20020822-00074
	SLC-T/C-20020822-00075
	0001001014

STATEMENT IN SUPPORT OF OBJECTIONS TO APPLICANTS' PETITION FOR DECLARATORY RULING

I. INTRODUCTION

On August 22, 2002, Global Crossing Ltd., Debtor-in-Possession ("Global Crossing"), and GC Acquisition Limited ("New G X and, with Global Crossing, the "Applicants") filed an application for Commission consent to transfer control of the radio licenses, cable landing licenses, and certificates of named subsidiaries of Global Crossing Ltd. to GC Acquisition Limited ("New GX') and a petition for declaratory ruling that the proposed indirect ownership in

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Applicant New GX by Hutchison Telecommunications Limited and Singapore Technologies Telemedia Pte Ltd is in the public interest under Sections 214(a) and 310(b)(4) of the Act.

Numerous informal comments have been filed by stockholders and former employees of Global Crossing and Frontier Communications in opposition to the Applicant's request for a declaratory ruling, as well as a more substantial request for denial filed by the Communications Workers of America ("CWA")[1] and a request for rejection filed by Global Axxess ("Axxess").[2] American Communications Network, Inc. ("ACN") files this pleading in support of the objections offered by the various parties that the Commission should not issue the declaratory ruling requested by Applicants, as they have failed to demonstrate that the transfer is in the public interest and meets the requirements of Sections 214 and 310 of the Act.[3]

The record in this docket demonstrates that:

- Applicants are not entitled to the transfer of the various certificates, as the requested transfers do not meet the public interest test set forth in Sections 214(a) and 310(d) of the Communications Act;
- Applicants are not entitled to the transfer of the various radio or aeronautical certificates identified in the application, as such transfers are prohibited by Section § 310; and

[1] Comments of the Communications Workers of America, filed October 21, 2002.

[2] See October 19,2002 letter of Karl W. B. Schwarz Chairman and Chief Executive Officer of Global Axxess to Chairman Powell. (Axxess Comments).

[3] This statement is a proper "response" under the terms of Part VI of the instant public notice. See Musical Heights, 17 P&F R.R. 1101, 1104 (1958) (Commission denies motion to strike comments in support of petition). Musical Heights was followed in Telecable Corp. (Bloomington and Normal, Ill.), 18 F.C.C. 2d 348,348 n. 4, 16 P&F R.R.2d 574, 576 n. 4 (Rev. Bd. 1969) (holding that responsive comments are not limited to oppositions) and in RKO General (KHJ-TV), 22 F.C.C.2d 737, 740, 18 P&F R.R.2d 1079 (Com'n 1970) at call 4, where the Commission denied a motion to strike but did, however, limit its consideration to facts not previously rejected in the designation order.

- Applicants are not entitled to an unqualified declaratory ruling that the indirect ownership interests in New GX would be in the public interest.

ACN also submits a robust array of additional relief that the Commission should adopt to protect ACN, as a certificated reseller[4] not identified in the application, as well as any other similarly situated certificated carriers. Both the public interest and such carriers, individually and collectively, would be placed in danger of prejudice by the Commission's unqualified grant of the applications and petition.

If the Commission does not deny the transfer applications, it should make clear that ACN's and any similarly situated carriers' certificates are neither involved in this proceeding nor are the carriers estopped on the merits in respect of any future transfer of their certificates by any other Commission action herein. If necessary, the Bureau should publish a new notice and establish a new pleading schedule so that the current holder of Section 214 certificates implicated by, but not identified in, the applications have the opportunity to make their concerns known to the Bureau.

II. ACN, AS A RESELLER OF TELECOMMUNICATIONS SERVICES HERE AND ABROAD, WOULD BE AFFECTED BY THE PROPOSED TRANSFER.

ACN and other similarly situated carriers would be adversely impacted by the proposed transfer of control of Global Crossing.

[4] ITC-214-2000020300052

A. ACN Competes in the Domestic and International Telecommunications Market.

ACN is a holding company incorporated in Michigan and operates through its subsidiaries as a reseller of domestic and international telecommunications services. American Communications Networks, Inc., holds a global resale certificate, ITC-214-20000203-00052, granted by the Commission on March 1,2000, and it holds domestic resale certificates or registrations in all fifty states and the District of Columbia. Other subsidiaries operate as resellers in eleven foreign countries, most notably Canada, the United Kingdom, Germany, the Netherlands, Denmark, Sweden and Norway. ACN resells telecommunications services procured from Global Crossing Bandwidth and MCI Worldcom, debtors-in-possession, and other facilities-based carriers. On information and belief, Global Crossing has supported financially other similarly situated resellers.

ACN is a success story in the making. It is a privately held customer-acquisition company that in just ten years has grown from a $ 2 million startup with a handful of ambitious entrepreneurs to blossom into a $280 million force providing products to customers around the globe. Despite its present successes, ACN still accounts for less than 1/2 % of the rapidly growing $ 820-billion-dollar world-wide telecommunications market.

ACN began domestic operations in January of 1993. The company extended resale into Canada in June of 1997 and continued global expansion in 1999 with the launching of resale operations in the United Kingdom, Germany, Denmark, the Netherlands, and Sweden.

Employing cooperative (or network) marketing, ACN offers competitive long distance, Internet, and utility services directly to the customer, cutting advertising costs and passing

competitive rates on to the consumer. Over ten years, this unique system has helped over 300,000 ACN representatives develop their own successful businesses, achieving their individual personal and financial goals in the process.

B. ACN Is Implicated In Global Crossing's Attempt To Transfer Control.

Though not mentioned in the instant application, ACN and other similarly situated carriers are implicated by Global Crossing's proposed transfer of control. While ACN's Section 214 certificate is not controlled by Global Crossing, Global Crossing is an ACN investor. Should that investment pass to New GX, ACN's future viability and opportunity to compete will be seriously compromised. In the Spring of 2000, Global Crossing Bandwidth, Inc. ("GCB") and ACN entered into contractual agreements relating to ACN's purchase of Global Crossing's telecommunications services for resale. Among the contractual agreements were an ACN stockholders' agreement, a carrier services agreement, and a security agreement. The carrier services agreement has been subsequently amended from time-to-time. Associated with these agreements was a restatement of ACN's articles of incorporation.

Under the stock purchase agreement ACN sold to GCB all of ACN's newly created Series A Convertible Preferred Stock. The carrier services agreement with its significant traffic commitment was part of the consideration for GCB's dollar payments to ACN. The shareholders' agreement also reserved for ACN a right of first refusal should GCB seek to sell its interests in ACN pursuant to a bona fide offer from a third party. Despite Global Crossing's proposed transfer of a sixty-one-percent beneficial interest in the ACN preferred to Hutchison Telecom and ST Telemedia, Applicants have failed to offer GCB's shares to ACN under the provisions of the shareholder agreement giving ACN the right of first refusal. Moreover, Applicants have declined even to consider ACN's right of first refusal prior to the closing under

the plan of reorganization in Global Crossing's Chapter 11 bankruptcy, SDNY Nos. 02-40187 through -40241.

The dispute between Applicants and ACN over ACN's right of first refusal is not a mere contractual dispute, but it has significance for the public interest in the competitive provision of telecommunications services. Other provisions of the agreements constrain free competition in the marketplace, *e.g.*, (1) Global Crossing's option to convert its preferred stock into a substantial block of ACN voting shares; (2) ACN's commitment to purchase a minimum percentage of services resold from Global Crossing; **(3)** restriction on any IPO by ACN; (4) security interests: and (5) a super-majority requirement for certain actions by ACN's board. These provisions in their totality, if not individually, materially constrain ACN's ability to compete freely

III. THE ADVERSE EFFECTS ON COMPETITION OF GLOBAL CROSSING'S AGREEMENTS WITH ACN ARE PERPETUATED BY APPLICANTS' REFUSAL TO RECOGNIZE ACN'S RIGHT OF FIRST REFUSAL.

The three agreements, individually and collectively, constrain ACN's ability to freely compete in the marketplace, thereby precluding the Commission's unqualified finding that the transfer proposed by Global Crossing is in the public interest. Their constraints need not rise to the level of violations of the antitrust laws in order to preclude an affirmative finding of the public interest sought here by Applicants. *U.S.* v. *FCC*, 209 U.S. App. D.C. 79, 95, 652 F.2d 72, 88 (D.C. Cir. 1980); *Equipment Distributors' Coalition* v. *FCC*, 263 U.S. App. D.C. 217, 221, 824 F.2d 1197, 1201 (1987); *Northern Nut. Gus Co.* v. *FPC*, 130 U.S. **App.** D.C. 220, 228, 399 F.2d 953, 961 (1968); *Yankee Network* **v.** *FCC*, 71 App. D.C. 11, 107 F.2d 212 (D.C. Cir. 1939): *Mackey Radio & Tel.*

Co. v. *FCC*, 68 App. D.C. 336, 339, 97 F.2d 641, 643 (1938). ***See*** *ulso,* ***Merger of Worldcom*** *and MCI*, 13 F.C.C. Rcd 18,025, 18,032-33, 13 P&F C.R. 477,482 (Sept. 14, 1998).

On April 28,2000, ACN and Global Crossing Bandwidth ("GCB") entered into a Stock Purchase Agreement through which GCB's investment would be conditioned on ACN's purchase of certain guaranteed annual minima of communications services from GCB. Under this agreement Global Crossing purchased all of the newer Series A Convertible Preferred Stock, aggregating 18,455.76 shares. Series A is a voting stock and currently represents ten percent of ACN's voting shares. Under Section 3 of the associated Shareholder's Agreement of May 1,2000, between ACN and GCB, ACN obtained a right of first refusal to buy hack the Series A Convertible Preferred Stock purchased by GCB.[5] Pursuant to subsection 3(a) of that Agreement, a "Sale Notice" should have been given ACN of Global Crossing's intent to sell its stock to Hutchison Telecom, ST Telemedia, and certain creditors. The required Sales Notice has not been received, and Global Crossing has declined to entertain ACN's attempt to exercise right of first refusal prior to the closing, wherein all of Global Crossing's assets (with certain specific items) are to he conveyed to New GX.[6]

By the terms of the Shareholder Agreement, together with the Restated Articles of Incorporation of ACN which were adopted concurrently with the Stock Purchase

[5] GCB still holds all the shares of the preferred stock.

[6] Under the Plan of Reorganization and Purchase Agreement pending in the Bankruptcy Court for the Southern District of New York, all of the assets of Global Crossing's bankrupt companies (with certain specified exceptions) are to be transferred to New GX at a closing to take place after the Plan is approved at a court hearing, now scheduled for December 4"'. It does not appear that schedules of such assets have **so** far been filed with the bankruptcy court.

Agreement, GCB holds one of nine places on the ACN Board of Directors and is entitled to designate one of three members of an Audit Committee of the Board. These provisions, however. tell only part of the story of GCB's involvement in ACN:

- Under the shareholder agreement, GCB has the right, at any time, to convert its preferred shares into common stock or debt of ACN, under a formula which would transform the current investment in preferred stock into common stock or debt valued at roughly $27 million.'

- Under the Carrier Services Agreement reflecting ACN's telecommunications service commitments to its investor, GCB, ACN must purchase $ 2 million in services per month, $24 million per year, $ 120 million over the five-year life of the contract, as amended subsequent to Global Crossing's abandoning its facilities build-out in Europe.

- Under a Security Agreement associated with the Stock Purchase Agreement, ACN and its subsidiaries each granted to GCB "a continuing security interest in all of its tangible and intangible property," further agreeing that GCB must approve any sale or encumbrance of the collateral to or by any third party, thereby potentially inhibiting ACN's ability to secure necessary operating financing.[8]

- Similarly, under Section 6(c) of the Shareholder Agreement, GCB has veto power over any budget relating to businesses other than telecommunications or ACN Utility Services," thereby potentially constraining ACN's ability to enter new unregulated markets or territories, *e.g.*, local resale.

The constraints imposed by GCB on ACN under the Stock Purchase Agreement, w ic 1 were tolerable under the ownership of Global Crossing in the year 2000, are no longer acceptable under the proposed ownership of New Global Crossing. The impact of Hutchison and Singapore Telecom's control of the Series A preferred have profound operational implications for ACN as stated above. In 2000 when the agreements were entered into, ACN was dealing with Global Crossing with whom an established relationship and course of dealing existed. The agreements

[7] By comparison, ACN is currently valued at considerably less.
[8] By way of illustration, should ACN seek to change a lender whose loan is secured by receivables, GCB must effectively approve.

were entered into in contemplation of GC's projected expansion into Europe, which was abandoned in the face of its financial difficulties. The supermajority for budget approvals, built on GC's member on the ACN board under the shareholder agreement, becomes quite a different animal. The transfer would give that limitation on ACN's ability to compete with foreign-controlled competitors. Similarly, the security agreement forecloses ACN's ability to replace a hank lender without an agreement to subordinate by the foreign entities.

In the Spring, 2000, agreements ACN chose to protect itself against the potential drawbacks of a major investor's change of ownership by insisting on the right of first refusal. Applicants' refusal to address the buy-out prior to closing would allow the Global Crossing limitations to pass into the hands of these entities. If allowed to exercise the buy-back option in Section 3(b) of the Shareholder Agreement, ACN would be freed of many of the competitive constraints arising from the set of agreements discussed below.

The Shareholder Agreement

Under Section 7 of the Shareholder Agreement, termination occurs when GCB owns less than 15% of the shares of the preferred stock. Thus, ACN's exercise of its option to repurchase the shares would eliminate a voting agreement and certain restrictive covenants in the Shareholder Agreement which currently enable GCB to:

- Control ACN budgets for any activities other than telecommunications services or ACN Utility Services.
- Limit payment of dividends, repayment of debt, and incurring of new debt.
- Exercise veto power over number and composition of the ACN Board of Directors.

[9] ACN Utility Services **is** engaged in energy **resale.**

The Carrier Services Agreement

Both parties are vulnerable to termination of the Carrier Services Agreement, whose triggers include insolvency (GCB) and breach of the monthly and annual commitments (ACN). Since the CSA was the principal bargain for GCB's investment, the termination of the investment through ACN's buy-back of the shares would allow the parties to negotiate a more realistic set of mutual expectations.

The Security Agreement

Under the Security Agreement, GCB must approve any sale or encumbrance of ACN's tangible and intangible property. Given the Agreement's principal purpose of protecting GCB's investment, the reversal of the investment through ACN's exercise of the buy-back option would allow termination or modification of GCB's authority over encumbrance of tangible and intangible property. This authority, together with the non-communications budget authority discussed below, is the chief obstacle to the rapid corporate decision-making required of ACN in the dynamic environment of competitive telecommunications and to refinancing as discussed above.

While the GCB rights and privileges above were carefully drafted to avoid control of ACN's telecommunications services, taken together they constitute serious impediments to the potential of ACN's total company enterprise and its ability to freely compete as an international and domestic carrier. At the company's present valuation, ACN's multi-million-dollar exposure to GCB is wildly unrealistic and must be rationalized. GCB's control over non-telecommunications businesses budgets restricts possible sources of funds for telecommunications services which are not otherwise restricted by state or federal regulation of ACN. Similarly, GCB-

enforced limitations on shareholder dividends and distributions and on repayment or acquisition of debt are constraints on the company's flexibility to deal with the highly-fluid sector of competitive telecommunications

The anti-competitive constraints need not rise to the level of violations of the antitrust laws in order to preclude the affirmative finding of public interest sought here by Applicants. See cases cited at *ante* at 6-7.

Applicants' refusal to recognize ACN's right of first refusal perpetuates the constraints on ANC's ability to freely compete in the market for telecommunications services.

IV. PETITION FOR DECLARATORY RULING FAILS TO MEET THE STATUTORY STANDARD.

As CWA at 2 and Applicants at 7 point out, pursuant to Sections 214(a) and 310(d) of the Communications Act, before even addressing the issues of foreign investment limitations, the Commission must first determine that the proposed merger and transfer of assets is in the public interest. Having determined that such transfers are in the public interest, the Commission then must determine whether the transaction is otherwise prohibited by the Congress under section 310 (a) or (b).

The Commission outlined this standard succinctly in its recent *Vodaphone'"* order as:

> In considering the transfer of control applications, the Commission must determine, pursuant to section 214(a) and section 310(d) of the Act, whether the proposed transfers of control will serve the public interest. In addition, because of the foreign ownership interests presented in this case, we also must determine whether the proposed transfer of control,.. is permissible under the foreign ownership provisions of section 310(b)(4).

[10] *Vodafone Americas Asia Inc. and Globalstar Corporation,* 17 F.C.C. Rcd 12,849 *(2002)*

Voduphone at paragraph 14.

Precedent is equally clear that it is the Applicants who bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest." In the matter at hand, rather than meeting its burden of proof, Applicants blindly and boldly rely upon the rebutabble presumptions in favor of public interest established in the *Foreign Participation Order*.[12]

By cloaking themselves in the *Foreign Participation Order,* the Applicants hope that commenters and the Commission alike will fail to address the numerous ways in which this transaction neither meets the public interest tests of Sections 214(a) and 310(d) nor is entitled to the deferential standards established by the FCC for WTO members in the *Foreign Participution Order.*

The *Foreign Participation Order* does not

- Eliminate the requirements of Sections 214(a) and 310(d) that the transaction be required to met current or future public interest, convenience, and necessity;[11]
- Void or limit the prohibition of any "foreign government or the representative thereof' to hold a license as banned by Congress in Section 310(a);
- Respect the law;[14]

[11] *Arneritech Corp. and SBC Communications, Inc*, 14 F.C.C. Rcd 14,712, 18 P&F C.R. 1 (Oct. 8, 1999) (SBCIAMT Order); *WorldCom and MCI Communications Corporation,*, 13 F.C.C. Rcd 18025, 13 P&F C.R. 477 (1998) (WorldCom/MCI Order); *NYNEX Corporation and Bell Atlantic Corporation,* 12 F.C.C. Rcd 19, 985, 9 P&F C.R. 187 (1997) (Bell Atlantic/NYNEX Order); *Telecommunications, Inc. and AT&T Corp.,* 14 F.C.C. Rcd 3168-70, 15 P&F C.R. 29 (1999) (AT&T/TCI Order); *EchoStar Communications Corporation, et al. and EchoStar Communications Corporation,* Hearing Designation and Order, FCC 02-284 (Oct. 9,2002) (EchoStar/Hughes Order).

[12] *Foreign Participation Order on Reconsideration,* 12 F.C.C. Rcd 23,891, 10 P&F C.R. 750 (1997)("*Foreign Participation Order").*

- Waive the need to address national security, law enforcement, foreign policy, and trade policy concerns;[15] nor
- Permit a transfer when such a transfer would jeopardize competition.[16]

The Application at hand asks the Commission to read the *Foreign Participation* ***Order*** to do all five of these acts. The Commission clearly can not and therefore must deny the requested relief.

A. The Applicants Fail to Demonstrate by a Preponderance of the Evidence that the Transfer Will Meet the Requirements of Sections 214(a) and 310(d).

As outlined in ***Vodaphone*** above, the first question the Commission must address is whether this transaction serves the public good. The only argument offered to meet this burden by the Applicants is that "[A]pproval of the Proposed Transaction will serve the public interest by ensuring the continued viability of the Global Crossing Network, including the operations of its FCC-Licensed Subsidiaries. The FCC-Licensed Subsidiaries are important competitors...as well as major providers of telecommunications facilities and services.. .." (Application at 21).

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[13] Id. at paragraph 44.

[14] "We are also concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest." Id. at paragraph 53.

[15] "We conclude we should continue to find national security, law enforcement, foreign policy and trade policy concerns relevant to our decision to grant or deny Section 214 and 310(b)(4) applications from applicants from WTO Member. **As** we found in the Foreign Carrier Entry Order, our public interest analysis would benefit from input by the Executive Branch addressing these issues." Id. at paragraph **61.**

[16] The *Foreign Participation Order* at paragraph *51* stated, "[E]ntry into the U.S. market by an applicant affiliated with a foreign telecommunications carrier from a WTO Member may pose competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market... In such circumstances, we could find it necessary to impose certain conditions on the grant of authority. Such conditions could entail additional reporting requirements, prior approval for circuit additions, or other measures designed to ensure that a carrier with the ability to exercise market power in a relevant foreign market does not use that power to harm consumers in the U.S. market."

In the instant matter, the Applicants' statement that the transfer would allow for the continued viability of the Global Crossing Network is the sum total of the evidence and argumentation offered by Applicants to justify the transfers. Such sparse assertions can hardly meet the Commissions standards for such a transfer.

While the Commission has made it clear that it is not the burden of commenters such as ACN to prove why the transfer should not be approved, ACN would assert that the transfer and continued use of these facilities may do damage to a market that is already suffering from an over-capacity of network facilities and providers

The Commission has had ample opportunity to outline the legal standards for a 214(a) or 310(d) transfer. In its *TCI-AT&T* ***Order"*** the Commission stated:

> [B]efore the Commission can approve the transfer of control of authorizations and licenses …we must find that the proposed transfers serve the public interest, convenience, and necessity. To make this finding, we must weigh the potential public interest harms and benefits...
> …This analysis must include, among other things, consideration of the possible competitive effects of the transfer.
> …The Applicants bear the burden of proving that the transaction serves the public interest.

Id. at 3168-69, 15 P&F C.R. at 35-36.

In *MCI v. FCC*, 182 U.S. **App.** D.C. 367, 378, 561 F.2d 365, 375 (1977), the United States Circuit Court of Appeals reminded all that "Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the public interest." Applicant do not posit any public interest other than resuscitating an individual competitor. The above statement is the sum total

of the evidence offered by Applicants to justify the transfers. Such sparse assertions can hardly meet the Commissions standards for such a transfer

ACN submits that, if the only public purpose cited by the Applicants is the continued viability of the Global Crossing Network, then the objections of Global Axxess and the CWA are well-pleaded. Global Axxess speaks to the potential for the continued viability of the Global Crossing Network along with invoking the challenges and policy concerns of foreign investment, while CWA asks why public purpose is served by the continued existence of the Global Crossing Network, since all its bas done from its inception is to harm others in the market, including its own employees and shareholders. The Commission has neither a statutory purpose or mandate to preserve competitors independent of competition."

Chairman Powell in his March 4, 2002 Address to COMPTEL made this point very clearly:

> The 1996 Telecommunications Act and the policies that we implement in its wake are difficult to balance the interests of incumbents and new entrants in a way that enhances consumer welfare. This isn't always easy. It's often muddled and confused and even at times internally consistent. But the goals never vary. Competition remains as critical an objective of this Commission as any that proceeded it.

The application is devoid of any showing that preserving Global Crossing will enhance competition

For its own part, ACN would offer that if preserving the competitiveness of a FCC-Licensed Subsidiary is the basis for meeting Section 214(a) and 310(d) standards, both the

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[17] *Tele-Communications, Inc. and AT&T Corp,* 14 F.C.C. Rcd 3160, 15 P&F C.R. 29 (1999).
[18] *Tele-Communications and Liberty Media Corporation,* 75 F.R. 2d 1158, 9 F.C.C. Rcd 4783 (1994) ***See*** *also Tele-Communication and Liberty Media Corporation,* 75 F.R. 2d 1158, 9 F.C.C. Rcd 4783 (1994).

Commission and GX may achieve such a result, at least in the case of ACN and similarly situated resellers, by simply honoring the contractually negotiated right of first refusal so that ACN might continue to compete.

B. The Dominant Position of Applicants in Their Markets Will Jeopardize Competition.

The proposed transfer would create a new affiliation between Global Crossing and the identified foreign interests, which control essential facilities in their respective countries, thereby potentially jeopardizing competition in the international telecommunications market. Such an entity must meet the higher standards for review as a "dominant carrier." Applicants fail to meet their burden of proof in addressing these heightened requirements.

The Commission most recently in *Voduphone* stated:

> As part of our public interest analysis under section 214(a), we also consider whether, pursuant to the proposed transaction, [Transferee] will be, or will be affiliated with, a foreign carrier that has market power on the foreign end of a U.S. international route that [Transferee] has authority to serve. Under rules adopted in the Foreign Participation Order, the Commission classifies a U.S. carrier as a "dominant" international carrier on a particular route if it is, or is affiliated with, a foreign carrier that controls essential facilities on the foreign end of that route.

Voduphone at paragraph 56

In light of *Voduphone,* ACN is hard pressed to understand how Applicants can assert that the transfer will not have an impact on competition. Further, ACN submits that Applicants have failed to met their burden of proof that such a transfer meets the public interest tests of Sections 214(a) and 310(d)

ST Telemedia by the Applicant's own admission is a state-owned utility with control over essential facilities in Singapore. Hutchinson Telecom is a wholly owned subsidiary of

Hutchison Whampoa Ltd. is a Hong Kong holding company.'" Another subsidiary, Hutchinson Global Communications Ltd., is a fixed line voice and data services provider in Hong Kong. (See Application at 9-10, ***23,* 24)** The new CX would be affiliated with foreign carriers that control essential facilities on the foreign end of that route such that the new entity formed by the transfers requested would be a "dominant" international carrier under the *Voduphone* test.

Should the Commission choose not to deny the transfer due to the resulting dominant characteristics of the new entity, the details provided by the Applicants are none the less inadequate to provide the Commission with insights and guidance into what types of safeguards or conditions might be placed upon the transfer so as to protect consumers and competition.

It is not the responsibility of the Commission to provide such details, rather it is the responsibility of the Applicants. In fact the applicant always bears the burden of proof on the ultimate issue of whether they have the requisite qualifications to be, or to remain, Commission licensees, and whether a grant of an application would serve the public interest, convenience and necessity. *See LeFlore Broadcasting Co.,* 66 F.C.C.2d 734, 736-37 (1975).

V. THE PROPOSED INVESTMENTS ARE NOT PRESUMPTIVELY IN THE PUBLIC INTEREST.

In the *Foreign Purticiputon Order* the Commission concluded that "national security and law enforcement concerns have long been treated as important public interest factors by this Commission."[20] In the case at hand, the Applicants recognize that such issues are in play and are being discussed with the various Executive Branch agencies with subject matter jurisdiction:

[19] Relevant characteristics of Hutchison are discussed in greater detail in the following section of this response.
[20] *Foreign Participation Order* at paragraph *63*.

> The Applicants have held preliminary discussions with the Department of Defense (DOD), Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and other Executive Branch Agencies.. .and understand that there are law enforcement, national security, and public safety issues that the Agencies want to review in connection with this application...."

Application at 20.

ACN asserts that the filing" of the Department of Justice on October 21st on behalf of the Department of Defense, Federal Bureau of Investigations and itself requesting that the Commission defer action on this matter until they may be heard from clearly calls into question the ability of the Commission to rule favorably on any public interest test under Sections 214(a) and 310(d) of the Act.

Further, ACN and others similarly situated wonder what are these issues that are of concern to these Executive Agencies. And in light of these considerations, how can anyone accept the Applicant's declaration that there are no facts that rebut the presumption in favor of the transaction as outline on page 18 of the Application?

How can any transfer that raises in the words of the applicants, " law enforcement, national security and public safety issues'' that the Executive Agencies seek to address be presumptively in the public interest?

[21] *See* Motion for Continued Deferral filed by the Department of Justice and Federal Bureau of Investigation on November 21,2002.

A. There are Facts that **Would** Rebut the Presumptions **of** the ***Foreign Participation Order.***

The Applicants at 18 state that there are no facts that would rebut the presumptions of the Foreign Participation Order, yet on the very next page acknowledge "ST Media is ultimately owned and controlled by the Government of Singapore."

This declaration alone should be fatally prejudicial to the Application,

Applicants seem to want to confuse the statement by next stating that "Nothing in the Communications Act, its legislative history, the Commission's Rules, or applicable case law provides any authority for treating an indirect investment by a government-owned carrier differently from one made by a private company" (Application at 19).

First the application appears to have an internal conflict. If as it says, "ST Media is ultimately owned and controlled by the Government of Singapore," then under standard of *Storer Broadcasting Co.* ***v.*** *U.S.*, 95 U.S. App. D.C. 97, 220 F.2d 204 (D.C. Cir. 1955), ***reversed,*** 351 U.S. 192 (1956), the application should be denied without further hearing.

There are also serious allegations regarding the relationship of Hutchison Whampoa and the Government of China. The allegations were serious enough that on November 22, 1999, twenty four members of the United States House of Representatives sent a letter to then-President Clinton requesting an investigation of "Hutchison Whampoa, a Chinese company with close ties to the Chinese Military.[22] The press also reported that Senator Trent Lott of Mississippi, in his role as the Majority Leader of the United States Senate, sent similar letters to

[22] The letter may be found at www.house.gov/bachus/pr112299.htm.

the U S . Department of Defense and the U.S. Senate Armed Services Committee asking them to clarify the relationship between the Company and the Chinese government.[23]

While the Commission has decided to act contrary to the directions of the Congress in determining that the WTO agreement voided the prohibitions of Section 310(b)(4), nowhere does the *Foreign Participation Order* void the prohibition of Section **3** 10(a) which provides that no wireless license "shall be granted to or held by any foreign government or the representative thereof." ***See*** *Starsys Global Positioning,* 10 F.C.C. Rcd 9392, 78 P&F R.R.2d 1154 (1995)

In the *Foreign Participation Order,* the Commission found that such a lack of respect for the law and rules of the Commission provides grounds for denying a transfer: the disinclination of GX to honor the right of first refusal held by ACN may be read as a reflection of the Applicant's refusal to honor or recognize the contract laws of the United States.

> We are also concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of a carrier that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct.

Foreign Participation Order at paragraph *53*.

[23] ***See*** "Save our Panama Canal" available at **http://www.nationalsecurietycenter.orgi991022/page2.html.**

VI. ANY CONCLUSIONS REACHED WITH RESPECT TO THE ELIGIBILITY OF APPLICANTS SHOULD NOT ESTOP ACN AND OTHER SIMILARLY SITUATED PARTIES FROM OBJECTING TO FUTURE TRANSFER REQUESTS.

If the Commission does not deny the transfer applications, it should make clear that ACN's and any similarly situated carriers' certificates are neither involved in this proceeding nor are such carriers estopped on the merits in respect of any future transfer of their certificates by any other Commission action herein. If necessary, the Bureau should publish a new notice and establish a new pleading schedule so that the current holder of Section 214 certificates implicated by, but not identified in, the Application have the opportunity to make their concerns known to the Bureau. Otherwise they may be unfairly and improperly estopped.

ACN and other similarly situated carriers are aware that while their certificates are not the subject of the instant application, courts have held that it is not a violation of Section 214(a) for the Commission to rely upon prior determinations of eligibility. In *Lincoln Tel. & Tel. v FCC, 212 U.S. App. D.C.* 208, 659 F.2d 1092 (1981) the court held:

> There is thus little doubt that the FCC may satisfy Section 214(a)'s requirement of a public interest finding through a single rulemaking proceeding. Section 214(a) does not specify any particular procedure for making public interest determinations. And by not specifying the procedure to be employed, Congress allowed the Commission flexibility to mold its procedures to the needs of the situation.

Lincoln at 217, 659 F.2d at 1101 (emphasis supplied; footnote omitted).

And while Section 214 (c)[24] preserves ACN and others' rights to judicially challenge such a transfer, the standard for overturning such a determination is not easily reached. In

[24] 47 U.S.C. § 214 (c) provides "Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission; any State affected, or any party in interest."

Atlantic Tele-Network v. FCC, 313 US. App. D.C. 396, 400-01, 59 F.3d 1384, 1388-89 (1997) the D.C. Circuit found:

> We must affirm the Commission's conditional grant of authorization unless the agency's order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988). Under the arbitrary and capricious standard, our review is highly deferential, *National Cable Television Ass'n, Inc. v. FCC,* 747 F.2d 1503, 1507 (D.C. Cir. 1984), and we are not to substitute [our] judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983). Rather, our duty is to ensure that the Commission has examined the relevant data and articulated a satisfactory explanation for its action based on the materials that were before the Commission at the time its decision was made. *Florida Cellular Mohil Communications Corp. v. FCC,* 28 F.3d 191, 197 (D.C. Cir. 1994).

Id. at 313 U.S. App. D.C. at 401, 59 F.3d at 1389 (internal quotation marks and citation omitted). *See ulso Lincoln Tel. & Tel. v. FCC,* 212 U.S. App. D. C. 208, 659 F.2d 1092 (1981)

The Commission's power to condition its consent is informed by *Telephone & Datu Systems v. FCC,* 305 U.S. App. D.C. 195, 19 F.3d 42 (1994). There the petitioner's option to purchase a controlling interest in a cellular system then under construction had been vitiated by the effective acquisition of control by another buyer and the transaction's approval by the FCC. Challenging petitioner's standing to appeal the approval, the agency noted that even if the second transaction were shown to be an unlawful transfer under Section 310(d), Commission policy would require "outright denial" of the underlying license. The denial would destroy the option. Id. At 200, 19 F.3d at 47

The appellate court found otherwise, because the Commission conceded that it had the power to undo the second transaction rather than punish the transferor by the outright denial. Such a course would preserve petitioner's otherwise vitiated option to purchase. Similarly here, the agency has the power to preserve ACN's option to buy back the GCB investment by a suitable condition on any approval of the Applications

Also of interest is *L.B. Wilson, Inc. v. FCC*, 130 U.S. App. D.C. 156, 397 F.2d 717 (1968), where the court remanded an FCC decision for further inquiry into whether an unlawful transfer of a broadcast construction permit had occurred. The court suggested the FCC must also inquire into the manner in which shares had been sold to non-family participants in the permittee pursuant to the terms of a stock purchase agreement:

> The Commission, having been alerted to the problem of corporate control, had a duty to explore any related matters which might hear upon the public interest, whether urged by the parties or not.

L.B. Wilson, 130 U.S. App. D.C. at 160, 397 F. 2d at 721 (internal citation omitted).

So, here, the Commission has been alerted to a "problem of corporate control," albeit not an allegation of unlawful transfer. The Commission has the duty to explore the "related matter" of ACN's buy-back rights, which "bear upon the public interest" for the reasons discussed above

Conclusion

For the reasons stated above and in the objections filed by others the Commission should deny the subject petition by Global Crossing Ltd. and GC Acquisition Limited for a declaratory ruling in connection with the proposed transfer of control. Alternatively, if the Commission does not deny the transfers and declaratory ruling, then the Commission should declare that the exercise by Global Crossing or its successors of any of the powers and options granted Global Crossing in connection with its purchase of preferred stock in ACN, Inc., and transactions of this nature with other resellers not be in the public interest. In default of the foregoing, the Commission should expressly qualify any declaratory ruling in connection with the transfer to

specify that the ruling does not authorize the exercise by Global Crossing or its successors of any of the powers and options granted Global Crossing in connection with its purchase of preferred stock in ACN, Inc., or similar provisions with respect to other carriers. The Commission should afford ACN such further and different relief as may be just and appropriate.

Respectfully submitted,

AMERICAN COMMUNICATIONS NETWORK, INC.

by _____
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November 5, 2002

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Verification

I hereby certify under the penalties of **perjury** that the facts in the foregoing statement not subject to official notice **are** true and correct to the best of my knowledge and belief.

W. Jeffrey Swenson
Chief Operating Officer

Farmington **Hills,** Michigan
Novcrnber 5,2002

Certificate of Service

I hereby certify that I have caused to be mailed (and also e-mailed where indicated) this day copies of the foregoing statement to the following:

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I further certify that I have caused to be e-mailed copies of the foregoing statement to the following persons as prescribed in Part VI of Public Notice DA 02-2299:

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