

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

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In the Matter of )	IB Docket No. 02-286
GLOBAL CROSSING, LTD. )	File Nos. ISP-PDR-20020822-0029;
(Debtor-in-Possession), Transferor, )	ITC-T/C-20020822-00406
and )	ITC-T/C-20020822-00443
GC ACQUISITION LIMITED, )	ITC-T/C-20020822-00444
Transferee )	ITC-T/C-20020822-00445
Application for Consent to Transfer )	ITC-T/C-20020822-00446
Control and Petition for Declaratory )	ITC-T/C-20020822-00447
Ruling )	ITC-T/C-20020822-00449
)	ITC-T/C-20020822-00448
)	SLC-T/C-20020822-00068
)	SLC-T/C-20020822-00070
)	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
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**OBJECTIONS TO AMENDED APPLICATIONS AND PETITION  
FOR DECLARATORY RULING**

**I. INTRODUCTION**

ACN files these objections to the Applicants' Third Amendment<sup>1</sup> to highlight the Applicants' continued disregard for the rules and regulations regarding the transfer of FCC licenses. Each of the identified violations outlined herein, in and of itself, is grounds for the denial of the requested transfers and declaratory ruling. When taken in the aggregate, combined

<sup>1</sup> Third Amendment to Application for Consent to Transfer Control and Petition For A Declaratory Ruling and Request for Expedited Treatment filed by Global Crossing Ltd. and GC Acquisition Limited filed May 13, 2003 ("3rd Amendment or "Application").

with the historic perspective that Applicants have had almost a year to perfect their applications, the Commission's conclusion can only be that it is well past time that the applications and request for Declaratory Order be denied with prejudice.

## **II. INCORPORATION BY REFERENCE AND ALTERNATIVE RELIEF**

ACN has been an active participant in these proceedings and incorporates by reference its substantial and substantive objections to the proposed transfers as outlined in our previous filings.<sup>2</sup> In this filing, ACN will limit its comments to new issues raised by the Applicants in the 3rd Amendment. While ACN assumes that the Commission would include these previous statements, we specifically incorporate them by reference as Applicants allege at p. 3 (footnote 5) that "The Amended Transaction renders moot the second amendment and the informal comments submitted in response to it." We disagree.

## **III. APPLICATION OFFENDS THE CFIUS AND FCC'S PROCESSES AND JURISDICTION.**

While ACN was not privy to the deliberations and conclusions of the Committee on Foreign Investments in the United States ("CFIUS"), the CFIUS' denial or anticipated denial of the Applicants' original and amended applications is well-documented in the Applicants' Second and Third Amendments.<sup>3</sup> From Applicants' own words and press accounts, which ACN shared

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2. *See*: Statement in Support of Objections To Applicants' Petition For Declaratory Ruling filed November 5, 2002. Further Comments in Opposition to Applicants' Petition to Declaratory Ruling filed March 6, 2003; Supplemental Filing to March 18th Objections filed March 24, 2003; Response to Applicants' filing of April 7, 2003 filed April 9, 2003; Letter from William Malone filed April 18, 2003. In these filings ACN documented:

1. 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
2. The requested transfers are prohibited by Section § 310; and
3. Applicants are not entitled to an unqualified declaratory ruling that the indirect ownership interests in New GX would be in the public interest.

<sup>3</sup> Second Amendment to Application for Consent to Transfer Control and Petition For A Declaratory Ruling filed by Global Crossing Ltd. and GC Acquisition Limited filed April 7, 2003 ("Second Amendment").

with the Commission,<sup>4</sup> the CFIUS seemed to have concerns regarding the participation of Hutchison Whampoa as a 30.75% owner in the new Global Crossing. The Second Amendment sought to address these concerns by means a receivership board populated by exemplary American citizens. The filing of this Third Amendment appears to reflect that the CFIUS' concerns were of such a magnitude as to render even such an extraordinary structural safeguard as unacceptable to the risk posed by Hutchison Whampoa's ownership and control of the license in question.

Yet despite the objections of the CFIUS to Hutchison being a 30.75% owner, even when guided by the insights and discipline of a panel of exemplary Americans, the Applicants nevertheless, request that Hutchison have the right to be a 25% owner of the new Global Crossing without any safeguards.<sup>5</sup>

The Applicants, by requesting pre-approval of the 25% additional foreign ownership without specifically barring Hutchison from being the investing party, would result in the removal of any regulatory obstacles for selling Hutchison a 25% interest post transfer, despite the CFIUS' objections. One can hardly believe that CFIUS' objections would be assuaged simply by having the Hutchison ownership interest reduced by slightly less than six percent and the removal of the structural safeguards already found to be wanting.

The application, in making such a blanket request, equally disregards the limitations of the FCC's authority to pre approval such investments due the congressional mandates found in

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<sup>4</sup> See note 2 supra for ACN's list of filings in this matter.

<sup>5</sup> In the Application at p. 3 footnote 6, ST Telemedia requests permission for an additional 25% investment by foreign interests over and above that made by ST Telemedia without needing to come back to the Commission or CFIUS, one would assume that if the Applicants did not want parties to draw the conclusion that this was reserving a future investment by HW, that they would have suggested that such post-transfer authority not include HW.

Sections 214, and 310.

- Applicant bears the burden of proving, by a preponderance of the evidence, that any proposed transaction serves the public interest.<sup>6</sup>
- While there may be a rebuttable presumptions that certain foreign investment is in the public (*See Foreign Participation Order*<sup>7</sup>) such a presumption is not automatic and applies only when the applicant can demonstrate that it is from a WTO country. The Third amendment offers no such limitation that the proposed investment would be limited to WTO countries.

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;<sup>8</sup>
- 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);
- Diminish the requirement that all licensee respect U.S. law;<sup>9</sup>
- Waive the need to address national security, law enforcement, foreign policy, and trade policy concerns;<sup>10</sup> nor

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<sup>6</sup> *Ameritech Corp. and SBC Communications, Inc.*, 14 FCC Rcd 14,712, 18 P&F C.R. 1 (Oct. 8, 1999) (SBC/AMT Order); *WorldCom and MCI Communications Corporation*, 13 FCC Rcd 18025, 13 P&F C.R. 477 (1998) (WorldCom/MCI Order); *NYNEX Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19, 985, 9 P&F C.R. 187 (1997) (Bell Atlantic/NYNEX Order); *Telecommunications, Inc. and AT&T Corp.*, 14 FCC 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).

<sup>7</sup> *Foreign Participation Order on Reconsideration*, 12 F.C.C. Rcd 23,891, 10 P&F C.R. 750 (1997)(“*Foreign Participation Order*”).

<sup>8</sup> *Id.* at paragraph 44.

<sup>9</sup> “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

- Permit a transfer when such a transfer would jeopardize competition.<sup>11</sup>

The Applicants in Footnote 6, at page 3 ask 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.

#### **IV. THIRD AMENDMENT FAILS TO DEMONSTRATE THAT APPLICATIONS ARE NOT BARRED UNDER 47 U.S.C. § 310 (a).**

In 47 U.S.C. § 310 (a) Congress made it crystal clear that the FCC is not permitted to grant a license to a foreign government or the representative thereof. 47 U.S.C. § 310 (a) states: “The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.” The Third Amendment fails to certify for the Commission that STT is not a foreign government or representative thereof.

At page 9, the Applicants state only that they “*understand* that the Government of Singapore exercises no control over ST Telemedia’s commercial strategy or activities and holds no veto right or ‘golden share’ in the company (emphasis added).”

When asking the FCC to grant a license based upon a finding that the transfer is both in

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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.

<sup>10</sup> “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.

<sup>11</sup> 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.”

the public interest and permitted by law, the Commission is entitled to more than a mere “understanding” by an applicant. The Commission rules require that such eligibility requirements be stated in declaratory statements that are affirmed under oath by a party with the requisite knowledge (See 47 C.F.R. § 63.18 et seq.).

No such simple declaratory statements establishing the Applicants’ eligibility are present in the Third Amendment. Applicants offer only that it is their “understanding” that ST Telemedia, controlling party in the applications, is not controlled by a foreign government.

It is also interesting to note that in Attachment H, which addressees the Anti-Drug certification, a representative of ST Telemedia files a certification on behalf of the company but there is no such certification from ST Telemedia as to the veracity of the assertions in the Third Amendment. Such an omission is even more remarkable given that ST Telemedia will be the controlling interest in the new Global Crossing. The Commission should ask itself whether the right party has even filed this application or certified its content.

Should the Commission choose to forgive the omission of a ST Telemedia’s certification as to the allegations and assertions of the Third Amendment, the Commission still has a factual question unresolved. Would the Commission, in granting ST Telemedia the request licenses, be violating Section 310 (a) of the Act as ST Telemedia is “held by [a]...foreign government or [is] the representative there?”

The only certification on the issue of government control is offered by Mr. Kouroupas, a staff vice president for Global Crossing and GC Acquisitions, the non-controlling minority interest in the Application. We are not told if Mr. Kouroupas is an officer of the companies, or whether he will have an officer role in the new companies, or what if any is basis for his

knowledge of the relationship between ST Telemedia and the government of Singapore. The Applicants tells us none of this information and offer as the level of certification by someone that we are not sure has ever been to Singapore or talked to anyone at ST Telemedia that he “understands” that ST Telemedia is not controlled by the government of Singapore.

Finally, the Commission need not run the risk of violating the prohibition of 47 U.S.C. § 310 (a) based on Mr. Kouroupas “understanding.” For as the Applicants explain at 9, “the Government of Singapore has agreed to establish a plan to divest its majority share in ST Telemedia.” If this statement is true, then why not simply wait until such divestiture has occurred and then request the relief outlined in the Third Amendment.<sup>12</sup>

**V. APPLICATION FAILS TO SUPPLY ADEQUATE DISCLOSURE STATEMENTS UNDER SECTION 5301 OF THE ANTI-DRUG ABUSE ACT OF 1988 AND 47 C.F.R. § 1.2002.**

On December 27, 1991 the Commission unleashed its first salvo in the war on drugs when it adopted 47 C.F.R. § 1.2001 et. sq.<sup>13</sup> The rules state in part:

- (a) In order to be eligible for any new, modifies, and /or renewed instrument of authorization from the Commission including but not limited to, authorizations issued pursuant to Sections 214, 301, 302, 303(1), 308, 310 (d)... of the Communications Act of 1934, as amended, by whatever name that instrument may be designated , all applicants shall certify that neither the applicant nor any party to the application is subject to a denial of Federal benefits that included FCC benefits ....
- (b) A party to the application, as used in paragraph (a) of this section shall include:
  - (1) ...
  - (2) if the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting and /or non-voting) of the applicant....

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<sup>12</sup> It is interesting to note that the Applicants do not offer the divestiture by the Singapore government as a condition for approval of the transfer, leading one to question the timing and commitment for such a transfer.

<sup>13</sup> See *Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti-Drug Abuse Act of 1988*, 6 FCC Rcd 7551 (1991).

*In Re Farmers Cellular Telephone, Inc*, 18 FCC Rcd 3848 (March 2003) the Commission established that compliance with this section requires that *every individual* subject to certification be at least identified in the certification:

Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including benefits. *This certification must also include the names of individuals specified by section 1.2002(b) of the Commission's rules.*" (Emphasis added, footnotes omitted)

*In Re Farmers Cellular Telephone, Inc* at ¶ 14.<sup>14</sup>

In previous filings ACN pointed out to the Commission that the Applicants' inability to identify with certainty the composition of its ownership structure, including all persons holding 5% or more of the outstanding stock or shares (voting and/or non voting), undermined the Applicants' ability to provide the Commission with the necessary certifications required pursuant to the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862 and the Commission's regulations enacted pursuant to the legislation. *See* 47 C.F.R. §§ 1.2001, 1.2002, 1.2003 (2002).

In the Third Amendment (Attachment H), Applicants provide the Commission with certifications on behalf Global Crossing, Ltd., GC Acquisitions Limited and Singapore Technologies Telemedia Pte Ltd., but these certifications fall far short of the requirements for such certifications. The rules are clear that every individual subject to 47 C.F.R. § 1.2002 (b) must be identified on such a certification. The certifications found in Attachment H fail to meet this standard and are but another example of the Applicants' disregard of the FCC's rules and jurisdiction in this proceeding.

## VI. BURDEN OF CARRYING THE APPLICATION

It is long settled policy that is not the responsibility of the Commission to provide details or elements of a applicant's eligibility. It is the responsibility of an applicant. 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). Applicants after three tries and a year of the Commission's time have failed to meet their burden. While it has been years since the Washington DC has had a professional baseball team, we are all still aware of America's game and its rule of "Three strikes and your out."

### Conclusion

For the reasons stated above and in the objections filed by others the Commission should deny the subject transfers and petition 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

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<sup>14</sup> In a number of recent Petitions for Designation as Eligible Telecommunications Carrier which required an identical stand. *See In Re Cellular South License, Inc* 17 FCC Rcd 24393 at ¶37 (December 2002); *In Re RCC Holdings, Inc* 17 FCC Rcd 23532 at ¶43 (November 2002).

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 relief as may be just and appropriate.

Respectfully submitted,

AMERICAN COMMUNICATIONS NETWORK, INC.

by \_\_\_\_\_

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June 16, 2003

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Certificate of Service

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