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

In the Matter of

Optel Communications, Inc. Application for a license to land and operate in the United States a submarine cable extending between Canada and the United States — File No. S-C-L-92-004

ORDER ON RECONSIDERATION

Adopted: December 1, 1995; Released: January 11, 1996

By the Commission:

I. INTRODUCTION

1. In this order, we deny the American Telephone & Telegraph Company ("AT&T") petition for reconsideration of our grant of a conditional cable landing license to Optel Communications, Inc. ("Optel").[1] AT&T would have us deny the cable license under the reciprocity provision of the Cable Landing License Act not for lack of reciprocal cable landing rights, but because U.S. carriers do not have routing opportunities for Canada-overseas traffic and there is a potential for diversion of U.S.-Europe traffic through Canada.[2]

2. In fact, there is no reason to believe that a U.S. carrier would not have reciprocal rights in Canada. As the Commission found in the conditional cable landing license decision, the Canadian legal and regulatory framework does not prohibit U.S. carriers from acquiring a 20 percent ownership interest, identical to the interest held by Teleglobe in Optel, in a Canadian licensee/carrier. AT&T's legitimate concerns, which stem from Teleglobe's status as the monopoly facilities carrier of overseas traffic originating or terminating in Canada, can be addressed in a more effective, targeted manner through the Section 214 application process. Accordingly, we affirm our grant of a cable landing license to Optel subject to the conditions previously imposed.[3]

II. BACKGROUND

3. On May 4, 1992, Optel filed this application for authorization to land and operate a high capacity (2.5 Gbit/s) fiber optic digital transmission submarine cable system (CANUS-1) between the United States and Canada. The cable will provide voice, video and high speed data transmission capacity between the United States and Canada. Optel proposed to operate CANUS-1 as a privately-owned system in which bulk capacity would be either leased or sold to users on a non-tariffed, non-common carrier basis.

4. CANUS-1 will be owned jointly by Optel and Teleglobe Canada, Inc. ("Teleglobe"). Teleglobe is the monopoly facilities carrier of international traffic originating or terminating in Canada, except for services between Canada and the United States. Optel is a Delaware corporation in which 80 percent of the shares are owned by K. Schaefer & Associates, and 20 percent are owned by Teleglobe. Teleglobe also will own 100 percent of the cable station in Canada and 50 percent of the international portion of the submarine cable. Optel will own 100 percent of the cable station in the United States and 50 percent of the international portion of the submarine cable. AT&T filed a petition to deny, which was supported by MCI Telecommunications Corporation.

5. On March 10, 1993, we granted Optel a conditional cable landing license to land and operate CANUS-1 in the United States pursuant the Cable Landing License Act. We found our private submarine cable policies supported authorization of Optel's application. We also concluded that Teleglobe's 20 percent ownership interest does not give rise to the kind of foreign presence that prompted Congress to enact the Cable Landing Licensing Act. Moreover, we found that there was no basis to conclude that a U.S. carrier would be unable to participate on the Canadian end in the same manner.

6. We recognized, however, that were Teleglobe to increase its ownership or participation, this could result in a foreign monopoly carrier controlling both halves of a non-common carrier facility without appropriate Commission oversight. To address this concern, we imposed a number of reporting requirements and conditions upon the grant of the license. We also found that the Canadian regulatory policy requiring "maximum use of Canadian facilities" could discriminate against U.S. carriers to the extent that it would allow CANUS-1 to be used for the routing of U.S.-international traffic, but prohibit use of CANUS-1 (or any U.S. common carrier facilities) for similar routing for Canada-overseas telecommunications traffic. We concluded, however, that such concerns did not warrant denial of Optel's application. Rather, we found that any concerns regarding routing restrictions or other discriminatory practices against U.S. carriers would be more appropriately addressed in the context of individual carriers' Section 214 applications. Finally, we withheld authorization of a final cable landing license until such time as the Commission found that Optel demonstrated that U.S. entities had been

---

[1] *Optel Communications, Inc.*, 8 FCC Rcd 2267 (1993) ("*Optel Conditional License*") and *Optel Communications, Inc.*, 9 FCC Rcd 6153 (1994) ("*Optel Final License*"). The grant of the final cable landing license was issued subject to our ruling on AT&T's petition.

[2] *See* An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (1994) ("Cable Landing License Act").

[3] These conditions are enumerated in *Optel Conditional License*, 8 FCC Rcd at 2272-2273 and *Optel Final License*, 9 FCC Rcd at 6153.

provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable system.[4]

7. On May 3, 1993, AT&T filed a petition for reconsideration in response to the Commission's grant of the conditional license.[5] Optel opposed AT&T's petition.[6] On October 20, 1994, the International Bureau granted and issued a final license to Optel. The Bureau found that Optel had complied with the Commission's condition regarding the procurement of the proposed cable system.[7] The Bureau granted the final license to Optel without prejudice to, and expressly subject to, any Commission action on the issues raised in AT&T's petition for reconsideration.[8]

III. DISCUSSION

8. **Reciprocity**. In its petition, AT&T first argues that we have misconstrued the reciprocity provision of the Cable Landing License Act. The Act authorizes the Commission to withhold or revoke a cable landing license if such action would assist in securing rights for the landing or operating of cables in foreign countries, or "in maintaining the rights or interests of the United States or of its citizens in foreign countries...."[9] AT&T asks us to deny this facility because U.S. carriers do not have Canada-overseas routing opportunities and because of traffic diversion concerns.

9. AT&T disagrees with our finding that Teleglobe's 20 percent ownership interest in Optel does not raise the issue of reciprocity under the Cable Landing License Act.[10] AT&T concedes that the denial of a landing license based on the reciprocity standard is discretionary and requires the exercise of judgment. AT&T contends, however, that the judgment required is whether such action will assist in securing reciprocal rights abroad rather than whether the foreign interest in the applicant is sufficient to constitute foreign entry into the U.S. market.[11]

10. AT&T also objects to our finding that, even if Teleglobe's investment could be seen as a form of entry into the United States, there is no basis to conclude that a U.S. carrier would be unable to participate on the Canadian end in the same manner. AT&T argues that Teleglobe is the only carrier in Canada legally entitled to provide international services to Canadian customers over submarine cable facilities. Thus, AT&T asserts, while a Canadian carrier with 20 percent U.S. ownership could build and land a cable from the United States to Canada, it would have no authority to operate it in competition with Teleglobe.[12]

11. In opposition, Optel states that AT&T's reciprocity concerns are premature at best. Optel notes the Commission's findings that Teleglobe's interest is limited to a minority, non-controlling interest in the U.S. half of a submarine cable between the United States and Canada. The licensee, Optel notes, is a U.S. company, controlled by U.S. shareholders, with U.S. officers. Optel further states that prior Commission approval is required before Teleglobe may increase its ownership interest, and any use of the cable by common carriers is subject to Section 214 licensing by the Commission.[13]

12. Optel also states that U.S. companies have rights in Canada that are roughly equivalent to the rights of Canadian companies in the United States. Optel asserts that U.S. companies have the opportunity to acquire a minority interest in a Canadian company, and indeed, AT&T has acquired a 20 percent ownership interest in Unitel, a Canadian carrier. Optel further states that the largest Canadian international traffic stream involves traffic to and from the United States, and AT&T, through its Unitel operations, can compete for that business.[14]

13. We are unpersuaded by AT&T's claim that the Commission should have determined whether denial of the application and Teleglobe's 20 percent non-controlling ownership interest in Optel would assist in securing reciprocal rights abroad. We affirm our conclusion that Optel, the owner of the U.S. end of CANUS-1, is a U.S. entity. As we noted in the Optel Conditional License decision, Optel is 80 percent owned by U.S. citizens, and all of its officers and two-thirds of the directors are U.S. citizens.[15] We conclude that the Commission properly found, in consultation with the State Department, that the level of Teleglobe's interest in Optel is not sufficient to raise the issue of reciprocity under the Cable Landing License Act.[16]

14. In any event, AT&T's conception of reciprocity is far more expansive than we ever have applied in the past. AT&T would have us consider an issue, Canada-overseas routing opportunities, which is well beyond the scope of a reciprocity analysis of cable landing policies under the Cable Landing License Act. Under a traditional reciprocity analysis of Canada's cable landing policies, there is no basis to conclude that a U.S. carrier would be unable to participate on the Canadian end in the same manner. As we found in our Optel Conditional License decision, the

---

[4] *See Optel Conditional License*, 8 FCC Rcd at 2273.

[5] Petition for Reconsideration of AT&T Company, File No. S-C-L-92-004 (filed May 3, 1993) ("AT&T Petition").

[6] Opposition of Optel Communications, Inc. to AT&T Petition for Reconsideration, File No. S-C-L-92-004 (filed May 14, 1993) ("Optel Opposition").

[7] As noted in the Optel Final License decision, this condition was satisfied because AT&T was awarded the contract for the planning, manufacture and installation of CANUS-1. *See Optel Final License*, 9 FCC Rcd at 6153.

[8] *See id.* at 6153-6154.

[9] *See* AT&T Petition at i; 47 U.S.C. § 35.

[10] *See Optel Conditional License*, 8 FCC Rcd at 2269-2270.

[11] AT&T Petition at 4-5.

[12] *I d.* at 6-8.

[13] Optel Opposition at 4.

[14] *Id.* at 6-7.

[15] *See Optel Conditional License*, 9 FCC Rcd at 2270. As the Commission noted in the Conditional Cable Landing License decision, the Department of State has indicated that the foreign ownership component of Optel was consistent with the limitations it had previously imposed. *See id.* at n.23; Letter from Steven W. Lett, Acting Deputy United States Coordinator and Director, Bureau of International Communications and Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (Dec. 16, 1992). We do not agree with AT&T that it is impossible to determine the rights of Teleglobe without additional information, including Optel's charter documents. *See* AT&T Petition at n.9. There is no evidence in the record to indicate that the ownership and management information regarding Teleglobe provided by Optel is misleading or inaccurate.

[16] This finding, made pursuant to our mandate under the Cable Landing License Act, does not prejudge our review of applications which may be filed under the Communications Act of 1934.

Canadian legal and regulatory framework does not prohibit U.S. carriers from acquiring a 20 percent ownership interest, identical to the interest held by Teleglobe in Optel, in aCanadian licensee/carrier. We are not aware of any such U.S. interest in a Canadian licensee/carrier that has been sought and denied. Indeed, as Optel has noted, AT&T holds a 20 percent interest in Unitel, which is authorized to provide intra-Canada and Canada-U.S. traffic. The Canadian regulatory framework permits such carriers to provide Canada-U.S. facilities in competition with CANUS-1.

15. Although we believe that the issue of Canada-overseas routing opportunities is beyond the scope of the reciprocity analysis under the Cable Landing Act, we share AT&T's concern that, although a Canadian carrier with up to 20 percent U.S. ownership could build and land a cable from the United States to Canada and provide transborder services, Teleglobe's legally conferred monopoly would preclude such Canadian carrier from using the cable to provide Canada-overseas traffic. Similarly, we are troubled that, although Teleglobe would be able to carry U.S.-European traffic through its Canada-Europe facilities, U.S. carriers would not have the same opportunities to carry Canada-Europe traffic through U.S. facilities. In our Optel Conditional License decision, we found that the Canadian regulatory policies requiring "maximum use of Canadian facilities" and permitting only Teleglobe to provide Canada-overseas telecommunications traffic discriminate against U.S. carriers. We found such discrimination because these policies would allow CANUS-1 to be used for the routing of intra-U.S. or U.S.-overseas traffic, but prohibit use of CANUS-1, or any U.S. common carrier facilities, for similar routing opportunities for intra-Canada or Canada-overseas international traffic.[17]

16. We affirm that these discrimination concerns about the ability of U.S. carriers to compete for Canadian telecommunications customers are more properly addressed in the Section 214 process than in a cable landing license proceeding, particularly in light of the Commission's recent initiatives in this regard.[18] We see no reason to depart from the approach taken in our Optel Conditional License decision, in which we agreed with AT&T's concerns regarding Canadian routing restrictions, but decided that such constraints should be addressed in the context of individual carriers' Section 214 applications. We reiterate that Teleglobe's ability to market and provide service directly to U.S. customers in the United States via CANUS-1 -- whether provided on a common carrier or non-common carrier basis -- is subject to prior Commission approval under Section 214.[19]

17. **Diversion of U.S.-European Traffic.** AT&T asserts that CANUS-1 will be used to divert U.S.-European traffic through Canada to the detriment of U.S. carriers and their customers. First, AT&T suggests that CANUS-1 would be used to route Europe-U.S. International Message Telephone Service ("IMTS") traffic via Canada so that it appears to be Canada-U.S. traffic, thereby circumventing the normal U.S.-European settlements process. Second, AT&T states that CANUS-1 would allow European customers to use international private lines to bypass the settlements process completely by employing private line facilities from Teleglobe, which are then interconnected to the U.S. public switched network. AT&T notes that U.S. customers are prohibited from interconnecting with the European switched networks via private lines and must therefore pay the switched rates set to recover above-cost accounting rates. Third, AT&T asserts that, as traffic is diverted via CANUS-1 from U.S. transatlantic cables to Canadian transatlantic cables, the unit costs of providing switched transatlantic service to Canadian customers will decrease at the expense of U.S. carriers and their customers.[20]

18. Optel responds that these same bypass concerns and incentives would presumably exist for terrestrial links. Optel also states that such routing decisions will be made by the customers, not by Optel. These issues, according to Optel, are more appropriately raised in connection with any Section 214 applications that may be filed by common carriers seeking to use the cable for such purposes.[21]

19. Our rules already address AT&T's concern that CANUS-1 will be used to circumvent the normal U.S.-European settlements process. To the extent common carriers acquire capacity on CANUS-1 and carry IMTS traffic over those circuits, such traffic is subject to our international settlements policy. In addition, we emphasize that we do not currently permit resold international private lines between the United States and Canada to carry basic public switched services to or from countries other than the United States and Canada except on a "switched hubbing" basis.[22] Any violation of these policies is unlawful and subject to enforcement action.[23] Enforcement of our rules is a more effective way to respond to AT&T's concerns.

20. As for AT&T's claim that CANUS-1 will be used by European customers to interconnect international private lines to the U.S. public switched network and bypass the accounting rate process completely, end user private lines do not implicate the accounting rate process because the traffic carried over such lines is not currently subject to the international settlements process. Moveover, our rules do not currently restrict end users from interconnecting private lines to the public switched network (assuming no

---

[17] *See Optel Conditional License*, 8 FCC Rcd at 2270-71.

[18] In our *Optel Conditional License* decision, we noted that the Section 214 application process would afford us the opportunity to take steps necessary to protect U.S. carriers if the record in a Section 214 proceeding indicated that Canadian routing restrictions or other practices discriminated against U.S. carriers. *See id.* at 2271 n.35.

[19] On November 28, 1995, we adopted rules affecting the Section 214 application process which are specifically tailored to address, among other things, concerns regarding asymmetric entry in the U.S. international basic services market by foreign-affiliated carriers. The new rules establish an effective competitive opportunities analysis as an important element in the Commission's public interest analysis of Section 214 applications filed by foreign carriers or their affiliates seeking to provide U.S. international services on routes where the foreign carriers have market power on the foreign end. Under this analysis, the Commission will examine, on a route-by-route basis, the ability of U.S. carriers to compete effectively as international carriers in destination markets where the foreign carrier has market power. *See Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95-22, at ¶ ¶ 19-123 (released Nov. 30, 1995) (*"Foreign Carrier Entry Order"*).

[20] *See* AT&T Petition at 8-11.

[21] *See* Optel Opposition at 5-6.

[22] *See Foreign Carrier Entry Order, supra* note 19, at ¶ ¶ 169-170.

[23] *See fONOROLA/EMI Order*, 7 FCC Rcd 7312 n.5 (1992).

resale of private lines for the provision of switched, basic services), whether via non-common carrier cable, terrestrial links or other means.[24]

21. Finally, AT&T may be correct that the operation of CANUS-1 will result in the diversion of U.S.-European IMTS traffic through Canada. To the extent that U.S. common carriers find it more cost effective to route U.S.-European traffic through CANUS-1, we do not necessarily view such routing as harmful. Indeed, CANUS-1 should enhance U.S. international facilities competition. Although AT&T speculates that diversion may result in increased unit costs incurred by U.S. carriers and customers for switched transatlantic services, AT&T has not supplied any additional evidence to demonstrate potential harm to U.S. carriers or ratepayers from such competition. We will revisit this issue and take corrective measures necessary through the Section 214 process if it is demonstrated that traffic diversion via CANUS-1 is harming U.S. carriers or ratepayers.[25]

IV. ORDERING CLAUSE

22. Accordingly, IT IS HEREBY ORDERED that the petition for reconsideration filed by AT&T is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[24] We note, however, that the Commission has pending before it a notice of proposed rulemaking which requests comment addressing whether end user interconnections at U.S. carriers' central offices are undermining our international settlements policies such that an equivalency requirement should be applied to such interconnections. *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, 7 FCC Rcd 7927, 7930 (released Nov. 27, 1992).

[25] *See Optel Conditional License*, 8 FCC Rcd at 2270-71.