

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

Marpin Telecoms and Broadcasting Company Limited, Complainant, v. Cable & Wireless, Inc., Cable & Wireless USA, Inc., and Cable & Wireless, plc, Defendants. EB-01-MD-015

ORDER ON RECONSIDERATION

Adopted: January 3, 2003

Released: January 9, 2003

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a petition for reconsideration filed by Marpin Telecoms and Broadcasting Company Limited ("Marpin") pursuant to section 405 of the Communications Act of 1934, as amended ("Communications Act" or "Act") and section 1.106 of the Commission's rules. Marpin seeks reconsideration of the Commission's order denying a formal complaint that Marpin filed against Cable & Wireless, Inc. ("CWI"), Cable & Wireless, USA, Inc. ("CW USA"), and Cable & Wireless, plc ("CW plc") pursuant to section 208 of the Communications Act. The Commission denied Marpin's Complaint in its entirety, because Marpin failed as a matter of law to allege

1 Marpin Telecoms and Broadcasting Company, Limited Petition for Reconsideration, File No. EB-01-MD-015 (filed May 20, 2002) ("Reconsideration Petition").

2 47 U.S.C. § 405.

3 47 C.F.R. § 1.106.

4 Marpin Telecoms and Broadcasting Company Limited v. Cable & Wireless, Inc., et al., Memorandum Opinion and Order, 17 FCC Rcd 7601 (2002) ("Order").

5 Formal Complaint, File No. EB-01-MD-015 (filed Aug. 9, 2001) ("Complaint").

6 CW USA formerly operated under the name CWI, and the entity previously known as CWI ceased to exist as a separate entity prior to the filing of this action. Order, 17 FCC Rcd at 7602, ¶ 4 & n.11. Accordingly, as in the Order, we refer to CWI and its successor CW USA collectively as "CW USA" in discussing Marpin's allegations in this case. Id.

7 47 U.S.C. § 208.

facts sufficient to state the claims it purported to assert.⁸

2. As grounds for reconsideration, Marpin argues that (1) in issuing the Order, the Commission failed to follow its own procedures;⁹ (2) the Order conflicts with the record;¹⁰ and (3) the Order conflicts with clearly-established legal precedent.¹¹ For the reasons discussed below, we conclude that Marpin's grounds for reconsideration lack merit and deny the Reconsideration Petition.

II. BACKGROUND

3. The Order set forth the background of this dispute, which we incorporate by reference here.¹² As discussed in the Order, Marpin provides telecommunications, Internet, and cable television services in the Commonwealth of Dominica, West Indies ("Dominica") pursuant to licenses granted by the government of Dominica.¹³ CW USA is authorized pursuant to section 214 of the Act to provide international telecommunications services between the United States and various foreign points, including Dominica.¹⁴ CW USA is an indirect, wholly-owned subsidiary of CW plc, a corporation organized under the laws of England and Wales that does not operate any communications facilities in the United States.¹⁵ Non-party CW Dominica, another subsidiary of CW plc, is the dominant telecommunications carrier in Dominica.¹⁶

4. In its Complaint, Marpin alleged that the defendants violated section 214 of the Act,¹⁷ and the terms and conditions of CW USA's section 214 authorization,¹⁸ by failing to restrain allegedly anticompetitive conduct of non-party CW Dominica in Dominica.¹⁹ Marpin asserted that this allegedly anticompetitive conduct by CW Dominica has impeded Marpin's efforts to offer competing telecommunications service in Dominica, and has adversely affected domestic communications within Dominica, and international communications between Dominica and the United States.²⁰

5. The Commission denied the Complaint based on Marpin's "fail[ure] to allege facts sufficient to support its claims that CW USA and CW plc violated section 214 of the Act, or the terms and conditions of the order under which CW USA received authorization to operate pursuant to section

⁸ Order, 17 FCC Rcd at 7608, ¶ 18. Specifically, the Order denied Marpin's claims against CW USA and CW plc. *Id.* Because the entity formerly known as CWI had merged with CW USA and ceased to exist as a separate entity prior to the filing of this action, the Commission did not enter a separate ruling denying Marpin's claims against CWI. *See* Order, 17 FCC Rcd at 7602, ¶ 4 & n.11.

⁹ Reconsideration Petition at 1, 9-13; Reply to Opposition, File No. EB-01-MD-015 (filed June 11, 2002) ("Reconsideration Reply") at 2-5.

¹⁰ Reconsideration Petition at 4-9; Reconsideration Reply at 2, 5-6.

¹¹ Reconsideration Petition at 1, 13-17; Reconsideration Reply at 2, 7-9.

¹² Order, 17 FCC Rcd at 7602-04, ¶¶ 2-9.

¹³ Order, 17 FCC Rcd at 7602, ¶ 3.

¹⁴ Order, 17 FCC Rcd at 7602, ¶ 4.

¹⁵ Order, 17 FCC Rcd at 7602-03, ¶ 5.

¹⁶ Order, 17 FCC Rcd at 7603, ¶ 6.

¹⁷ 47 U.S.C. § 214.

¹⁸ *Cable & Wireless, Inc.*, Order, Authorization and Certificate, 13 FCC Rcd 17933 (Int. Bur. 1998) ("section 214 authorization" or "1998 Section 214 Order").

¹⁹ Order, 17 FCC Rcd at 7603, ¶ 8 & n.22.

²⁰ Order, 17 FCC Rcd at 7603-04, ¶ 8 & nn. 24, 25.

214.”²¹ The Commission held that, “*even assuming the facts alleged by Marpin are true ... Marpin cannot establish a violation of section 214 or CW USA’s section 214 authorization.*”²² Specifically, the Commission held that the conditions of CW USA’s section 214 authorization on which Marpin based its claims imposed obligations on CW USA only with respect to Jamaica and St. Kitts and Nevis, and therefore did not apply to conduct in Dominica.²³ Further, the Commission found that, even if the conditions in the section 214 authorization covered conduct by CW USA outside of Jamaica and St. Kitts and Nevis, Marpin could not establish a violation of these conditions, because Marpin failed to allege that CW USA had engaged in any affirmative anticompetitive conduct, or that CW USA had participated in the allegedly anticompetitive conduct of CW Dominica.²⁴

III. DISCUSSION

A. The Commission Followed Its Procedures.

6. After the parties had filed their initial pleadings (*i.e.*, a complaint, answer and reply),²⁵ Commission staff directed the parties to engage in discovery and briefing regarding only certain jurisdictional issues.²⁶ Following this briefing, the Commission released the Order concluding that Marpin’s Complaint failed to state a claim and declining, therefore, to reach the jurisdictional issues.²⁷

7. Marpin contends that the Commission violated Marpin’s due process rights by ruling on the “merits” of the Complaint following discovery and briefing of only the jurisdictional issues.²⁸ According to Marpin, the staff’s ruling allowing discovery on the jurisdictional issues “made clear that, if [the Enforcement Bureau] made an affirmative finding on jurisdiction, the Bureau would have ordered discovery on the substantive issues”²⁹ Marpin argues that the Commission’s decision to “bypass” the jurisdictional issues and rule on the merits, without allowing briefing or discovery on the merits, was a departure from the “procedural framework” established by the staff for this proceeding that fatally “taints” the Commission’s entire ruling.³⁰

8. Marpin’s due process arguments lack merit. First, neither discovery nor briefing is a matter of right in all Commission complaint proceedings,³¹ and the Bureau’s procedural rulings in this case established no such right, nor any expectation that discovery and briefing would necessarily be allowed before any ruling on the merits.³² Indeed, Marpin concedes that discovery is not a matter of right

²¹ Order, 17 FCC Rcd at 7608, ¶ 18.

²² Order, 17 FCC Rcd at 7608 n.52 (emphasis added).

²³ Order, 17 FCC Rcd at 7605-06, ¶ 13.

²⁴ Order, 17 FCC Rcd at 7605-06, ¶ 13.

²⁵ See 47 C.F.R. §§ 1.721, 1.724, and 1.726.

²⁶ Letter from David A. Strickland, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Eric Fishman, counsel for Marpin, and Robert L. Pettit, counsel for CW USA and CW plc, File No. EB-01-MD-015 (rel. Sept. 25, 2001) (“Status Conference Order”) at 2, ¶¶ III.3, III.4; at 4, ¶¶ V.12, V.14.

²⁷ Order, 17 FCC Rcd at 7608, ¶ 18 & n.51.

²⁸ Reconsideration Petition at 1, 9-13; Reconsideration Reply at 2-5.

²⁹ Reconsideration Petition at 11.

³⁰ Reconsideration Reply at 3.

³¹ See, e.g., 47 C.F.R. §§ 1.733(a)(5); 1.720 (a); 1.732 (c), (d).

³² See Status Conference Order.

under the Commission's formal complaint rules.³³ The Commission eliminated self-executing discovery in 1997.³⁴ That decision comported with the Commission's adoption of "fact pleading" rules – which require a complainant to know, and to plead, "the specific facts necessary to prove its claim at the time of filing" – instead of "notice pleading" rules (used in federal district court) – which "anticipate[] the use of discovery to obtain evidence of the facts to support a complainant's claims."³⁵ Thus, rather than mandating discovery in every case, the formal complaint rules allow the Commission to determine, based on the particular circumstances, "[w]hether discovery is necessary and, if so, the scope, type and schedule for such discovery."³⁶ As to briefing, although briefs may be filed as a matter of right in cases in which discovery is conducted,³⁷ the Commission may limit the scope of any authorized briefs to certain subjects or issues.³⁸ The status conference order on which Marpin relies merely stated that the Enforcement Bureau "deferred ruling" on Marpin's interrogatories directed to the merits,³⁹ it did not state that discovery or briefing on the merits necessarily would be permitted at some future point.⁴⁰ Thus, by releasing the Order when it did, the Commission did not breach any procedural rules or orders governing the conduct of this proceeding.

9. The Commission has broad discretion to manage cases brought before it.⁴¹ The

³³ Reconsideration Petition at 10-11; Reconsideration Reply at 4.

³⁴ *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22547, ¶ 115 (1997) ("*Formal Complaints Order*").

³⁵ *Formal Complaints Order*, 12 FCC Rcd at 22550, ¶ 120. *See id.* at 22547, ¶ 115 (stating that the formal complaint rules require parties to "exercise diligence in compiling and submitting facts to support their complaints and answers," and discourage "reliance on the ... discovery process as a means to identify or develop information needed to support a complaint or answer"). *See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5695, ¶ 32 (2001) ("*Formal Complaints Reconsideration Order*") ("Complaints and answers filed at the Commission ... should not resemble their counterparts filed in federal courts Instead, if anything, complaints and answers filed here should resemble a combination of complaints/answers filed under Fed. R. Civ. P. 8, motions to dismiss (and oppositions thereto) filed under Fed. R. Civ. P. 12(b), and motions for summary judgment (and oppositions thereto) filed under Fed. R. Civ. P. 56.").

³⁶ 47 C.F.R. § 1.733(a)(5). *See, e.g.*, 47 C.F.R. § 1.720 (a) ("Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings *may* also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.") (emphasis added). *See also Formal Complaints Order*, 12 FCC Rcd at 22547, ¶ 115 (amended formal complaint rules "provide Commission staff with more control over the discovery process").

³⁷ 47 C.F.R. § 1.732(d). *See, e.g.*, *Formal Complaints Order*, 12 FCC Rcd at 22606, ¶ 267 ("parties may ... file briefs as a matter of right in cases in which discovery is conducted").

³⁸ 47 C.F.R. § 1.732(b). *See, e.g.*, *Formal Complaints Order*, 12 FCC Rcd at 22607, ¶ 270 ("The Commission may limit the scope of any authorized briefs where appropriate, and set timetables for the filing of such briefs.").

³⁹ Status Conference Order at 2.

⁴⁰ *See* Status Conference Order. Indeed, even Marpin recognizes that discovery on the merits would not inevitably have been ordered, because the Reconsideration Petition asserts that "had the Bureau known that the Commission intended to bypass the jurisdictional issues in this case and rule directly on the merits, it would have *entertained, if not granted*, Marpin's requests for substantive discovery." Reconsideration Reply at 3 (emphasis added).

⁴¹ *See* 47 U.S.C. §§ 208 (The Commission shall investigate complaints under § 208 "in such manner and by such means as it shall deem proper"); 154(i) (The Commission may "perform any and all acts ... and issue such orders ... as may be necessary in the execution of its functions"); 154(j) (The Commission may "conduct its

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Commission appropriately exercised this case management discretion in issuing the Order without first allowing discovery or briefing on the merits. The Order concludes that, even assuming the truth of all of the Complaint's allegations, the Complaint failed to state a claim, *i.e.*, Marpin "failed to allege facts sufficient to support its claims" against the defendants.⁴² Marpin was not entitled under our rules to seek to cure this facial pleading deficiency through the discovery process.⁴³ Further, Marpin suffered no unfair prejudice from the Commission's decision not to order briefing on the merits. The formal complaint rules require complainants to make thorough factual and legal presentations in their complaints and replies.⁴⁴ Thus, Marpin had two full opportunities to present its arguments on the merits (*i.e.*, in its 28-page Complaint and 20-page Reply).

10. Marpin misreads the Order in suggesting that the Commission unfairly faulted Marpin for failing to *prove* facts as to which it was denied discovery.⁴⁵ Specifically, the Commission's observation in the Order that "[n]othing in the record suggests that CW USA participated in the conduct of CW Dominica"⁴⁶ merely underscored the point, made elsewhere in the Order, that Marpin's pleadings did not even *allege* – much less prove – defendants' active involvement in CW Dominica's purported wrongdoing.⁴⁷ Similarly, the Commission's observation in the Order that "Marpin has not identified any 'arrangement' between CW USA and CW Dominica that has not been offered to similarly situated U.S.-licensed carriers" does not amount to a denial of Marpin's claim under 47 C.F.R § 63.14 based on a failure of proof.⁴⁸ Rather, the Commission made it clear in the sentence directly preceding the quoted passage that its ruling stemmed from Marpin's "fail[ure] to *allege* the essential elements of a claim under section 63.14," and not a failure to *prove* such a claim.⁴⁹

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proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"). *See also High-Tech Furnace Sys., Inc. v F.C.C.*, 224 F.3d 781, 789 (D.C. Cir. 2000) (Courts view Commission determinations regarding discovery with "extreme deference").

⁴² Order, 17 FCC Rcd at 7608, ¶ 18 & n.52.

⁴³ *See, e.g.*, 47 C.F.R §§ 1.720(b) (a complaint is required to "contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation"); § 1.721(a)(5) (complaints must contain a "complete statement of the facts which, if proven true, would constitute a violation" of a statutory provision, order, or regulation, "relevant affidavits and documentation" supporting such factual allegations, and a "detailed explanation of the manner and time period" in which the defendant committed the alleged violations).

⁴⁴ 47 C.F.R. §§ 1.720, 1.721(a), 1.726(c). *See Formal Complaints Order*, 12 FCC Rcd at 22607, ¶ 270 (under the formal complaint rules, all parties are "given the opportunity to file ... a complete legal analysis on the issues they deem relevant with their complaint, answer and any necessary reply").

⁴⁵ Reconsideration Petition at 11 (citing Order, 17 FCC Rcd at 7605-06, ¶¶ 13, 14 and 16), 12-13.

⁴⁶ Order, 17 FCC Rcd at 7606, ¶ 13.

⁴⁷ Order, 17 FCC Rcd at 7608, ¶ 18.

⁴⁸ Reconsideration Petition at 11 (quoting Order, 17 FCC Rcd at 7607, ¶ 16).

⁴⁹ Order, 17 FCC Rcd at 7607, ¶ 16 (emphasis added). Marpin also misinterprets the Commission's comment in paragraph 14 of the Order that Marpin had not "presented any facts" demonstrating that the safeguards against competitive abuses set forth in the Commission's rules, and in the conditions of CW USA's section 214 authorization, were insufficient to protect "against harm to competition ... by CW USA's foreign affiliates." Reconsideration Petition at 11 (citing Order, 17 FCC Rcd at 7606, ¶ 14). The comment responded to Marpin's unsupported allegation made in its Reply that the construction of paragraph 19 of the section 214 authorization adopted by the Commission would give defendants' foreign affiliates "free rein" to engage in market abuses. 17 FCC Rcd at 7606, ¶ 14. In any event, such factual support, even if presented, would not have changed the Commission's construction of paragraph 19, which was compelled by the plain language of that paragraph, read in the context of the entire section 214 authorization.

B. The Order Is Consistent with the Record.

11. Marpin contends that the Order conflicts with the record in two respects. First, according to Marpin, the Commission erroneously found that Marpin had properly alleged only that defendants violated the terms and conditions of the section 214 authorization.⁵⁰ Marpin asserts that it actually alleged in its Complaint that defendants violated section 214 of the Act and “long-standing Commission policies,” as well as the terms and conditions of the section 214 authorization,⁵¹ and that it additionally alleged violations of sections 201 and 202 of the Act in its brief on jurisdictional issues.⁵² For the following reasons, Marpin’s contentions lack merit.

12. Regarding the alleged violation of section 214 itself, in the first paragraph of the Order, the Commission expressly noted that Marpin had alleged both a violation of section 214 of the Act and a violation of the section 214 authorization.⁵³ Because the claimed violation of the section 214 authorization was the only violation of section 214 that Marpin ever had alleged, however, the Order treated the two claims as coterminous.⁵⁴ This approach was fully justified.

13. Regarding the alleged violation of “long-standing Commission policies,” the Commission did not directly address this claim in the Order because Marpin failed to plead it in the Complaint.⁵⁵ In any event, as discussed below,⁵⁶ even assuming that the allegation was sufficiently specific to satisfy the pleading requirements in our formal complaint rules, we deny this claim because Marpin is mistaken in concluding that Commission precedent establishes a policy of penalizing U.S. carriers based solely on the anticompetitive conduct of their foreign affiliates.⁵⁷

⁵⁰ Reconsideration Petition at 1, 4-6.

⁵¹ Reconsideration Petition at 2.

⁵² Reconsideration Petition at 6; Reconsideration Reply at 6. Marpin argues that its jurisdictional brief also identified “Part 64 of the Commission’s rules” as a legal basis for its claims. *Id.* Neither Marpin’s pleadings nor brief asserted claims under “Part 64” of the rules, however. The Order did address Marpin’s contention that CW USA violated the terms and conditions of the section 214 authorization by accepting a special concession in contravention of 47 C.F.R. § 63.14, which is included in Part 63 of our rules (not Part 64). *See* Order, 17 FCC Rcd at 7606-07, ¶¶ 15-16.

⁵³ Order, 17 FCC Rcd at 7601, ¶ 1 (noting that Marpin claimed that “the defendants’ failure to restrain the allegedly anticompetitive activities of their affiliate/subsidiary operating in the Commonwealth of Dominica, West Indies ... violates section 214 of the Act, and the Commission order under which CWI and its successor, CW USA, received authorization to operate in the United States pursuant to section 214”).

⁵⁴ Order, 17 FCC Rcd at 7601 n.2. Marpin’s pleadings on reconsideration, like its original pleadings, also fail to identify any separate violation of section 214, apart from the alleged violation of CW USA’s section 214 authorization.

⁵⁵ The formal complaint rules require a complaint to separately and clearly identify each legal ground on which the complainant’s claims are based. *See, e.g.*, 47 C.F.R. §§ 1.723(b) (“Two or more grounds of complaint ... should be separately stated and numbered”); 1.720(a) (“Pleadings must be clear, concise and explicit. All matters concerning a claim ... should be pleaded fully and with specificity.”); 1.721(a) (5), (6) (complaints must contain “[c]itation to the section of the Communications Act and/or order and/or regulation ... alleged to have been violated” and “legal analysis” relevant to the complainants’ claims and arguments). To the extent that Marpin intended to allege a violation of Commission policy as a separate legal ground for relief, it did not do so in conformity with these rules. Marpin’s Complaint did not allege a violation of Commission policy as a separate count in the Complaint, and did not clearly indicate that the assertions concerning “Commission policy” that Marpin included in the Complaint were intended to state a separate grounds for relief, distinct from the alleged violation of CW USA’s section 214 authorization.

⁵⁶ *See* Section III.C., *infra*.

⁵⁷ *See* discussion *infra* at ¶¶ 17-21.

14. Regarding the section 201 and 202 allegations, the Commission did not err in declining to address these allegations, because Marpin failed to assert them in its initial pleadings, and raised them for the first time in its brief on jurisdiction.⁵⁸ As stated in the Order,⁵⁹ Marpin’s attempt to assert new legal claims in its brief was plainly barred by our rules, which require a complaint to include citations to each statutory provision, order, or rule alleged to be violated,⁶⁰ together with a “detailed explanation” of the manner in which the alleged violation occurred.⁶¹

15. As a second ground for claiming that the *Order* conflicts with the record, Marpin contends that the Commission erroneously concluded that Marpin alleged “no affirmative anticompetitive conduct” by defendants, but only a “failure to restrain” CW Dominica.⁶² Marpin argues that, “[b]ecause the Commission’s policy is that a failure by a U.S. Affiliate to control the anti-competitive activities of its foreign affiliate is itself anticompetitive conducts [sic], this finding is not consistent with the record.”⁶³ As discussed below, Marpin misstates Commission policy. In any event, Marpin’s real quarrel is with the Commission’s decision not to characterize defendants’ alleged “failure to restrain” CW Dominica’s alleged anticompetitive activities as “affirmative anticompetitive conduct.” Marpin does *not* dispute the Commission’s finding that Marpin never alleged that defendants directly participated in CW Dominica’s alleged misconduct.⁶⁴ Accordingly, we find no “inconsistency” between the record of Marpin’s claims and the description of those claims in the Order.

C. The Order Is Consistent with Commission Precedent.

16. Marpin takes issue with the Order’s holding⁶⁵ that the conditions contained in paragraph 19 of the section 214 authorization⁶⁶ imposed obligations on CWI (and its successor, CW USA) only with

⁵⁸ Reconsideration Petition at 6. *See* Order, 17 FCC Rcd at 7607 n.48.

⁵⁹ Order, 17 FCC Rcd at 7607 n.48 (citing cases in which the Commission declined to address issues raised for the first time in briefs).

⁶⁰ 47 C.F.R. § 1.721(a)(4).

⁶¹ 47 C.F.R. § 1.721(a)(5). *See, e.g.*, 47 C.F.R. §§ 1.720; 1.721(a)(6); 1.727(h) (“Amendments or supplements to complaints to add new claims or requests for relief are prohibited.”).

⁶² Reconsideration Petition at 6. *See* Order, 17 FCC Rcd at 7604, ¶ 10; at 7606, ¶ 13.

⁶³ Reconsideration Petition at 6.

⁶⁴ *See, e.g.*, Reconsideration Petition at 13 (arguing that the Commission erred in “refusing to take action against Defendants on the basis of the anticompetitive activities of their wholly owned foreign affiliate”); *id.* at 17 (arguing that Marpin’s Complaint and Reply “presented dozens of documents supporting its contentions that Defendants failed to restrain the anti-competitive conduct of their wholly owned Dominican affiliate”); Reconsideration Reply at 8 (arguing that defendants “mistakenly insist that, in order for the Commission to take corrective action against a U.S. carrier or its foreign parent, the agency must make a finding of ‘affirmative wrongdoing’”).

⁶⁵ Order, 17 FCC Rcd at 7605-06, ¶ 13.

⁶⁶ Paragraph 19 provides, in pertinent part:

In light of the continuing unresolved disputes between Sprint and CWJ, and the apparent delay in SKANTEL’s initiation of return traffic to Sprint, we condition grant of this authority expressly on the applicants, SKANTEL and CWJ not engaging in anticompetitive actions that will give the applicants an unfair advantage in the U.S. international services market. If we find evidence of such anticompetitive conduct, we reserve the right to impose substantial forfeitures or suspend or terminate this authorization for failure to meet the conditions of the grant.

respect to Jamaica and St. Kitts and Nevis, not *all* foreign affiliates or *all* foreign countries.⁶⁷ Marpin's arguments in this regard duplicate those made in its initial pleadings and rejected in the Order. We therefore reject them again here, for the reasons stated in the Order.⁶⁸

17. One argument merits further mention, however. Marpin argues that the Commission's construction of paragraph 19 of the section 214 authorization conflicts with a "long standing commitment" by the Commission "to take decisive action against U.S. carriers based on the anticompetitive activities of their foreign affiliates outside the U.S."⁶⁹ Marpin contends that three FCC orders evidence such a policy⁷⁰ – the *Foreign Participation Order*,⁷¹ the *KDD America Order*,⁷² and the *Telmex/Sprint Order*.⁷³ Marpin's reliance on these orders is misplaced.

18. Marpin contends that a Commission policy of taking action against U.S. carriers based on the misconduct of their foreign affiliates is evidenced by language in the *Foreign Participation Order* affirming the Commission's authority to revoke a section 214 authorization in cases of "adjudicated misconduct."⁷⁴ Although the *Foreign Participation Order* does affirm the Commission's authority to revoke a U.S. carrier's section 214 authorization in cases where *the U.S. carrier* has engaged in "adjudicated misconduct"⁷⁵—which would include a violation of the terms of an authorization, the Act, or a Commission rule or order—nothing in that order supports Marpin's theory that the Commission may revoke a U.S. carrier's authorization based solely on the misconduct of its foreign affiliate. Because Marpin's complaint does not allege that CW USA engaged in any "adjudicated misconduct," even with all asserted facts taken as true, its reliance on the *Foreign Participation Order* is unavailing.

19. In the *KDD America Order*, the International Bureau granted KDD America's section 214 authorization to resell certain private lines services, after finding that U.S. carriers had "effective competitive opportunities" to resell such services in Japan.⁷⁶ The Bureau reserved the right to "revisit"

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1998 Section 214 Order, 13 FCC Rcd at 17941-42, ¶ 19 (footnotes omitted).

⁶⁷ Reconsideration Petition at 15-16; Reconsideration Reply at 7 n.22.

⁶⁸ Order, 17 FCC Rcd at 7605-06, ¶ 13.

⁶⁹ Reconsideration Petition at 7, 13-14.

⁷⁰ Reconsideration Petition at 7-8; Reconsideration Reply at 8.

⁷¹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

⁷² *KDD America, Inc.*, Order, Authorization and Certificate, 11 FCC Rcd 11329 (Intl. Bur. 1996) ("*KDD America Order*").

⁷³ *Telmex/Sprint Communications, LLC*, Order to Show Cause, 13 FCC Rcd 24990 (Intl. Bur. 1998) ("*Telmex/Sprint Order*").

⁷⁴ Reconsideration Petition at 13-14 (citing *Foreign Participation Order*, 12 FCC Rcd at 24023, ¶ 295).

⁷⁵ *Foreign Participation Order*, 12 FCC Rcd at 24023, ¶ 295. The *Foreign Participation Order* also established a rule, codified as 47 C.F.R. § 63.21(g), enabling the Commission to review a carrier's authorization and, if warranted, impose additional requirements where it appears that harm to competition is occurring on U.S. international routes. *Id.* at 24023, ¶ 295 & n.631. As Marpin notes, the *1998 Section 214 Order* includes a citation to 47 C.F.R. § 63.21(g). Reconsideration Reply at 7 (citing *1998 Section 214 Order* at 17940-41, ¶ 16). In its Complaint, however, Marpin did not request that the Commission impose additional conditions on CW USA's section 214 authorization. Instead, Marpin took the position that the defendants had violated the *existing* terms and conditions of the authorization. Complaint at 26-28, ¶¶ 62-63.

⁷⁶ *KDD America Order*, 11 FCC Rcd at 11330, ¶ 1. The Commission adopted the "effective competitive opportunities" (ECO) test in the *Foreign Carrier Entry Order, Market Entry and Regulation of Foreign-affiliated*

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this decision if changed circumstances placed the effectiveness of these competitive opportunities “in serious doubt.”⁷⁷ The Bureau did not, as Marpin suggests, impose a general condition holding KDD America responsible for any anticompetitive actions by its Japanese parent company.

20. In the *Telmex/Sprint Order*, the International Bureau ordered Telmex/Sprint Communications to show cause why it should not be found to have violated an existing, specific condition of its section 214 authorization.⁷⁸ By contrast, in this case, the Commission found that the Complaint did not allege a violation of the terms and conditions of CW USA’s section 214 authorization, even assuming all alleged facts to be true.

21. In sum, the cited orders do not, as Marpin suggests, establish a general policy of holding section 214 licensees liable for any anti-competitive conduct by a foreign affiliate anywhere outside the United States that affects United States telecommunications. The Order in this case in no way conflicted with Commission policy, but simply dealt with specific conditions in the section 214 authorization, which were limited to anticompetitive conduct by CW USA and two foreign affiliates, CWJ and Skantel, in Jamaica and St. Kitts and Nevis.⁷⁹ The Commission properly construed the section 214 authorization and concluded, correctly, that Marpin failed to allege a violation of its conditions. Nothing in the Order or our decision here should be construed to condone the alleged anticompetitive conduct of CW Dominica. We believe that under these circumstances competition policy in Dominica is a matter best left to the Dominican government and regulator.

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Entities, Report and Order, 11 FCC Rcd 3873. (1995); see *KDD America Order*, 11 FCC Rcd at 11331, ¶ 4 (“*Foreign Carrier Entry Order*”). The ECO test required, as a condition of foreign carrier entry into the U. S. market, that there be no legal or practical restrictions on U. S. carriers’ entry into the foreign carrier’s market. See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3875-6; ¶¶ 1-3; *Foreign Participation Order*, 12 FCC Rcd at 23894-95, ¶ 5. Subsequently, in the *Foreign Participation Order*, the Commission replaced the ECO test with an open entry standard for applicants from World Trade Organization (“WTO”) Member countries. 12 FCC Rcd at 23896, ¶ 9.

⁷⁷ *KDD America Order*, 11 FCC Rcd at 11349, ¶ 46. The Bureau noted that such doubts could arise, for example, if KDD America’s Japanese parent company were to obtain regulatory approval to offer additional services in Japan. *Id.* The Commission retains the authority to impose additional conditions on an authorization should the demonstrated need arise. See 47 C.F.R. § 63.21(g).

⁷⁸ *Telmex/Sprint Order*, 13 FCC Rcd at 24992-93, ¶ 6. The Enforcement Bureau issued a Notice of Apparent Liability (“NAL”) in the matter, which the Bureau later canceled. *Telmex International Ventures USA, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 714 (2000); *Telmex International Ventures USA, Inc.*, Memorandum Opinion and Order, File No. EB-00-IH-0040, DA 01-1752 (rel. July 25, 2001).

⁷⁹ See *Order*, 17 FCC Rcd at 7606, ¶ 13.

IV. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 214, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 214, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Marpin Telecoms and Broadcasting Company Limited IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary