

**Sprint**

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January 19, 1999

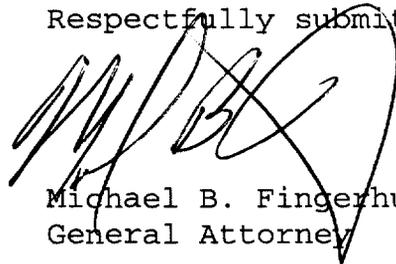
Magalie Roman Salas,  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.,  
Washington D.C. 20554

**Re: Comments of Sprint in IB Docket No. 98-212.**

Dear Ms. Salas:

Enclosed herewith is a 3.5 inch diskette containing the Comments of Sprint Corporation in the above-referenced proceeding. If you have any questions, please call me at 828-7438.

Respectfully submitted,



Michael B. Fingerhut  
General Attorney

Enclosure

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

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In the Matter of )  
)  
AT&T Corporation )  
VLT Co. L.L.C. )  
Violet License Co. LLC )  
TNV (Bahamas) Limited )  
)  
Applications for Grant of Section 214 Authority, )  
Modification of Authorizations and Assignment )  
of Licenses in Connection with the Global Joint )  
Venture Between AT&T and British )  
Telecommunications plc. )  
\_\_\_\_\_ )

IB Docket No. 98-212

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

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January 19, 1999

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Venture Between AT&T and British	)	
Telecommunications plc.	)	
_____	)	

**COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.**

Sprint Communications Company L.P. ("Sprint"), pursuant to the Commission's *Public Notice* (DA 98-2412), released November 27, 1998 and the Commission's *Order*, DA-99-124 released January 8, 1999, hereby respectfully submits its comments in the above-captioned proceeding.

**I. INTRODUCTION AND SUMMARY.**

AT&T, VLT Co. L.L.C. (VLT), Violet License Co. LLC (Violet) and TNV (Bahamas) Limited (TNVT), collectively Applicants, request the necessary authority from the Commission under Sections 214 and 310(d) of the Act, 47 U.S.C. §§214 and 310(d), to enable VLT, Violet and TNVT to enter the U.S. international market by taking control of AT&T's international cable facilities, cable landing licenses, earth station licenses and correspondent relationships. Such request is being made in connection with the proposed global joint venture between AT&T and British Telecommunications, plc (BT). Under such venture, BT will have a 50 percent

ownership stake in the U.S. entities that will gain control of AT&T's facilities, licenses and correspondent relationships.

As further set forth below, Sprint believes that, if the Commission decides to grant the applications at issue, it must, at a minimum, condition its approval by imposing certain regulatory safeguards. Specifically, the Commission must (1) classify all U.S. subsidiaries of the joint venture as dominant carriers in the provision of services in the U.S.-U.K. market because of their affiliation with BT; (2) condition BT's entry into the U.S. international market through its joint venture with AT&T on BT's implementation of equal access in the U.K. as mandated by the European Union (EU); and (3) require AT&T and its joint venture successor to AT&T's submarine cable landing stations to provide greater transparency to parties with IRU interests in AT&T's cable stations.

These safeguards are necessary to help ensure that the BT/AT&T joint venture not be able to exploit BT's continuing market power in the U.K. and AT&T's control of U.S. cable landing stations to adversely affect competition in the U.S. international market. Absent the imposition of such safeguards, the proposed applications cannot be justified as being in the public interest.

**II. THE U.S. CARRIERS THAT WILL ASSUME CONTROL OF AT&T'S INTERNATIONAL FACILITIES LICENSES, AUTHORIZATIONS AND CORRESPONDENT RELATIONSHIPS MUST BE REGULATED AS DOMINANT.**

In its *Foreign Participation Order (Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign affiliated Entities*, 12 FCC Rcd 23891 (1997)), the Commission established the regulatory framework that it would apply to U.S. carriers affiliated with foreign carriers from WTO member countries. Specifically, the Commission will "classify any U.S. international carrier ... as dominant on a

route where it is affiliated with a foreign carrier that has sufficient market power in a relevant market on the foreign end to affect competition adversely in the U.S. market." 12 FCC Rcd at 23995-96 (¶231). A U.S. carrier is considered to be affiliated with a foreign carrier if such foreign carrier holds a greater than 25 ownership interest or a controlling interest at any level in the U.S. carrier. 47 C.F.R. §63.18(h)(1)(i). A foreign carrier is presumed to be dominant if it has a market share of 50 percent or greater in "any relevant market on the foreign end." *Foreign Participation Order* at 23996 (¶232). The relevant markets are those "input markets on the foreign end of a U.S. international route ... that involve services or facilities necessary for the provision of U.S. international services" and "generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end." *Id.* at 23953 (¶145).

There is no question that the three carriers seeking to acquire AT&T's international authorizations and licenses will be affiliated with BT. These carriers will be under the control of a Dutch Holding Company -- TNV [Netherlands] BV -- in which BT will own a 50 percent stake. *See* Application, Attachment 3 at 4; Attachment 4 at 4; Attachment 5 at 3; Attachment 6, Exhibit C at 1.

Likewise, there can be no dispute that BT continues to exercise substantial market power in the U.K. market. In its decision approving BT's acquisition of MCI, *The Merger of MCI Communications Corporation and British Telecommunications plc* (Docket No. GN -96-245), 12 FCC Rcd 15351 (1997) (*BT/MCI II*), the Commission found that "BT retains market power in the United Kingdom through its ownership of the only ubiquitous local and intercity networks in the United Kingdom." 12 FCC Rcd at 15461 (¶286). BT's market power in the intercity and local U.K. markets has not substantially eroded since the Commission made such finding.

Indeed, the November 1998 Market Information Update (Table 3) issued by Oftel shows that for the quarter ending March 1998, BT's shares in the intercity and local markets (as measured by retail call revenues) stood at 74 percent and 84 percent respectively. Moreover, BT supplied 87 percent of the local exchange lines in the U.K.<sup>1</sup> With respect to the U.K. international market, BT's overall market share (as measured by retail call revenues) was 51.5 percent as of March 1998. Oftel November 1998 Market Information Update (Table 3).<sup>2</sup> See also Section IV *infra*.

AT&T and the other Applicants do not present any evidence showing that, despite such market shares, BT cannot exercise market power in its home market. See 47 CFR §63.10(a)(3). Nor have they attempted to demonstrate that they qualify for non-dominant regulatory treatment. See 47 CFR §§63.10(a) and 63.18(e)(8). On the contrary, Applicants appear to concede that they should be regulated as dominant since they state that will file the quarterly traffic reports required of dominant carriers by Section 43.61(c) of the Commission's Rules. 47 CFR §43.61(c).

AT&T and the other Applicants suggest, however, that the Commission need not be concerned about the risk that BT would discriminate in AT&T's favor, in large part, because "the instant transaction is an international services joint venture and BT will have no financial stake in AT&T." Application at 4. That AT&T would advance such argument here is, of course, surprising given its hostility to other joint ventures between other U.S. carriers and dominant foreign carriers. In particular, AT&T vehemently opposed and continues to oppose the

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<sup>1</sup> See also "Operators with Significant Market Power for the application of detailed rules under purposes of the EC Voice Telephony and Universal Service Directive (October 1998) in which Oftel concluded that BT has significant market power. This statement can be found at <http://www.oftel.gov.uk/competition/rvtd1098.htm>.

<sup>2</sup> These market share figures understate BT's actual position in the U.K. marketplace since they do not include revenues from BT's wholesale operations, *i.e.*, provision of facilities to other U.K. licensees for resale.

Commission's grant of Section 214 authority for the provision of international switched resale services to Telmex/Sprint Communications, L.L.C., (TSC) a Telmex-Sprint joint venture. *See Telemex/Sprint Communications, L.L.C.*, (File No. ITC-97-127), *Order*, DA 98-1585 (released August 7, 1998). Despite the facts that Telmex-Sprint venture is primarily "an international services joint venture" and does not involve a "financial stake" in Sprint by Telmex, AT&T insists that "the mere existence of TSC will more closely align the economic incentives of Telmex and Sprint" to the ultimate detriment of other U.S. carriers and consumers. AT&T's Petition For A Stay Pending Review filed August 10, 1998 in File No. ITC 97-127 at v.

AT&T's claim of economic harm to U.S. carriers and consumers in the U.S.-Mexico market rests upon the notion that Telmex will exploit its dominance with respect to accounting rates to discriminate in favor of Sprint. In contrast, according to AT&T, BT cannot use the accounting rate process to "distort competition" in the U.K. international market "[b]ecause BT's settlement rates are now at cost." Application at 5. But even if BT's settlement rates are "at cost" -- and AT&T presents no data to establish this -- BT's ability to exploit its dominance to "distort competition" in the U.K.-U.S. market remains. As AT&T argued in the BT/MCI merger proceeding, the fact that BT does not provide equal access presubscription seriously impedes the ability of U.S. carriers to compete with BT in the U.S.-U.K. market. *See* AT&T's Comments filed January 24, 1997 in Docket No. GN 96-245 at 22-26 and AT&T's Reply Comments filed March 17, 1997 in Docket No. GN 96-245 at 11-13.

Moreover, the BT/AT&T transaction is not a joint venture where two or more entities are starting a "new business" which merely complements their existing lines of businesses (as is basically the case with the Telmex/Sprint joint venture). What we have here with the BT/AT&T deal is the merger of BT's and AT&T's international businesses at the wholesale level and, in

certain instances, at the retail level. BT and AT&T have carved out significant portions of their businesses and assigned such portions to their joint venture.

BT will have every economic incentive to maximize the return of the international business assets it is contributing to the venture just as it would if such assets remained with BT. And, given its continuing market power in the U.K. market, it will have the ability to act on such incentive by discriminating in favor of the U.S. entities created by the venture to the detriment of other U.S. carriers and their customers.

BT will also have the incentive and the ability to exploit its market power to discriminate in favor of its merger partner, AT&T, in order to enhance AT&T's competitive position in the U.S. international market. As stated, AT&T will be contributing most of its international assets to the entities established by the joint venture and then will be using such joint venture entities, *inter alia*, as a wholesale supplier of services provided by AT&T on a retail level, *e.g.*, AT&T's traditional bilateral services. If BT discriminates in favor of such services, it is discriminating not only in favor of AT&T -- an entity on whose profits BT has no claim -- but also in favor of its joint venture with AT&T. Since AT&T will use the joint venture entities to carry its traffic, its services effectively are jointly provided by AT&T (the downstream provider) and the joint venture entities (the upstream or wholesale supplier). In effect, AT&T and the joint venture entities jointly produce the service by providing complementary inputs. Discrimination in favor of this jointly produced service increases the profits available to the joint producers, both upstream and downstream. It is a simple matter to arrange wholesale prices such that increased profits realized by AT&T at the retail level as a result of BT discrimination are transferred upstream to the joint venture entities. Because BT will have a direct claim on such revenues, it can profit directly from its discrimination in favor of AT&T's international services that in turn

use the joint venture as the wholesale supplier of transport (or any other service). In short, by using its market power in the U.K. to strengthen AT&T's competitive position *vis-à-vis* AT&T's U.S. carrier rivals, BT will be able to increase the return of the assets BT has transferred to the joint venture entities.<sup>3</sup>

The dominant carrier regulatory scheme adopted by the Commission in its *Foreign Participation Order* is designed to help the Commission to detect and possibly deter any anticompetitive behavior in the U.S. market by a foreign carrier with market power and its affiliated U.S. carriers. Thus, by classifying the BT-affiliated entities that acquire control of AT&T's international facilities, authorizations, licenses and correspondent relationships as a result of the AT&T/BT transaction as dominant, the Commission at least will be in a better position to prevent BT from harming U.S. competition and U.S. consumers.<sup>4</sup>

### **III. THE CONTINUED LACK OF EQUAL ACCESS IN THE U.K. MARKET GIVES BT AND ITS U.S. AFFILIATES IN THE JOINT VENTURE A SIGNIFICANT COMPETITIVE ADVANTAGE OVER OTHER U.S. CARRIERS.**

In the BT/MCI merger proceeding, AT&T demonstrated that in order "to minimize the harm to U.S. customers from BT's exercise of market power," it was of critical that BT's acquisition of MCI be subject to a number of competitive safeguards. AT&T Comments filed January 24, 1997 in GN-96-245 at 4. Among such critical safeguards suggested by AT&T was

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<sup>3</sup> Sprint's joint ventures with France Télécom and Deutsche Telekom and with Telmex do not create the same incentives for these foreign carriers to discriminate in Sprint's favor since Sprint does not use the joint ventures in the provision of its bilateral services.

<sup>4</sup> The Commission should make clear that AT&T and the other Applicants are prohibited from accepting special concessions from BT or any of BT's UK affiliates. See 47 CFR §63.14; see also *Foreign Participation Order* at 23957-65 (¶¶156-170). Moreover, since TNV (Bahamas) Limited will acquire certain of BT's facilities as well as BT's correspondent agreements, the Commission should also make clear that the ban on acceptance of special concessions from BT extends to this Bahamian BT affiliate as well.

the implementation of equal access, including carrier preselection and dialing parity, in the U.K.

*Id.* at 7. AT&T explained that equal access was important because

[e]ven with cost-based accounting rates from BT and notwithstanding opportunities for U.S. carriers to correspond with others in the U.K., BT/MCI will continue to enjoy unrivaled cost efficiencies on the U.S.-U.K. route for so long as equal access to BT's network is unavailable. As shown in AT&T's Comments, without equal access, BT will continue to control the dominant share of U.K.-U.S. outbound traffic. This outcome, however is not, as BT suggests, a matter simply for U.K. resolution. The lack of equal access in the U.K. has a direct consequence for competitors of BT/MCI in the U.S. and the prices U.S. customers will pay to U.S. carriers for U.S.-U.K. calls.

Simply put, AT&T and other unaffiliated U.S. carriers have international facility networks for service to the U.K. and the cost of operating those networks declines, on a per unit basis, with volumes. Market barriers -- here or there -- that limit the opportunities for some end-to-end competitors, but not all, in the two-way service market will skew the relative cost positions of competing carriers -- here and there. Inevitably, carriers denied equal access in the U.K. will experience higher unit costs of providing end-to-end U.S./U.K. two-way services, and their pricing in the U.S. as well in the U.K. will reflect this fact.

AT&T Reply Comments filed March 17, 1997 in Docket No. GN-96-245 at 11-12 (footnote omitted).

The Commission agreed that the availability of equal access in the U.K. was necessary if non-BT-affiliated U.S. carriers were to have the opportunity to fairly compete with the BT/MCI combination in the U.S.-U.K. market. *See BT/MCI II*, 12 FCC Rcd at 15464 (¶293) where the Commission stated that "the swift implementation of equal access is necessary to eliminate the unfair competitive advantage BT and MCI would enjoy in providing end-to-end services between the United States and the United Kingdom after the merger." Nonetheless, the Commission did not impose AT&T's suggested equal access requirement as a condition precedent to the BT/MCI merger. Rather, based on "the U.K. Government's proven record of

implementing European Union telecommunications directives promptly and completely," the Commission stated that it expected that the U.K. Government would rapidly implement and vigorously enforce any European Union equal access requirement. Thus, the Commission decided to impose a condition subsequent on its grant of MCI license transfer to BT under which MCI would not be able to accept "BT traffic originated in the United Kingdom to the extent that BT is found to be in non-compliance with the U.K. regulations implementing the European Union's equal access requirements." *Id.* at 15465 (¶294).

Unfortunately, the Commission's expectations in this regard may not be met. Although the Applicants claim that the U.K. Government "has adopted additional regulations requiring BT to provide carrier preselection by 2000" and that consequently the condition imposed on the BT/MCI "would [not] be appropriate here," Application at 33, the fact is that OFTEL has stated that it may be necessary to delay full implementation of equal access in the U.K. until sometime in 2001 instead of by January 1, 2000 as required by the EU directive. *See* OFTEL Consultative Document on Carrier Pre-selection in the UK, issued July 21, 1998.

As AT&T previously recognized, until full equal access becomes a reality in the U.K. "BT will continue to control the dominant share of U.K.-U.S. outbound traffic" and will, together with its joint venture affiliates both in the U.K. and the U.S., enjoy "unrivaled cost efficiencies on the U.K.-U.S. route" in the provision of end-to-end services. Unaffiliated U.S. carriers will thereby be at a significant competitive disadvantage in the market *vis-à-vis* the BT/AT&T joint venture. And such disadvantage could extend well into the year 2001, and perhaps longer.<sup>5</sup>

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<sup>5</sup> With the formation of the joint venture and the self dealing of BT and AT&T through such venture, BT and its joint venture entities will become a relatively unattractive supplier of the U.K. termination services needed by U.S. carriers to provide end-to-end services in the U.S.-U.K. market. Although there are other U.K. suppliers of termination services, the lack of equal access in the U.K. limits the reach of their U.K. networks and their ability to provide terminating services to U.S. carriers on a ubiquitous and economic basis. In effect, the lack of equal access

Footnote continues on next page.

Thus, contrary to the argument of the Applicants, the same condition adopted by the Commission in *BT/MCI II* is entirely "appropriate here." If, as now seems likely, BT will not implement equal access by the January 1, 2000 deadline established by the EU, and absent any extension in such deadline by the EU, BT should be "found to be in non-compliance" with the EU's "equal access requirements" and AT&T and the other Applicants should not be allowed to accept any traffic from BT or any of BT's U.K. affiliates. Such ban should continue until full equal access throughout the U.K. becomes a reality.

**IV. THE COMMISSION SHOULD TEMPORARILY REQUIRE AT&T AND ITS JOINT VENTURE SUCCESSOR TO AT&T'S SUBMARINE CABLE LANDING STATIONS TO PROVIDE GREATER TRANSPARENCY TO PARTIES WITH IRU INTERESTS IN AT&T'S CABLE STATIONS.**

Under the terms of the proposed joint venture, AT&T will contribute its submarine cable stations as well as its submarine cable capacity to VLT. Currently, AT&T and BT own the vast majority of the cable stations located in the United States and the United Kingdom, respectively. AT&T has used its position as the dominant owner of U.S. cable stations to benefit itself at the expense of the other consortia cable station co-owners, who are also rivals to AT&T in the U.S. international services market. Specifically, AT&T has sold property in which the consortia owners have an ownership interest without 1) seeking the owners' consent; 2) providing the owners with an accounting of the transaction; or 3) compensating the other owners for the sale of consortia-owned assets. The joint venture raises the possibility that the successors to AT&T and

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suggests that such alternative providers suffer scale diseconomies and this in turn requires U.S. carriers to rely on BT and its joint venture affiliates for the provision of end-to-end services. But such reliance affords BT and its affiliates the market power to increase the costs of unaffiliated U.S. carriers competing with BT's joint venture partner, AT&T.

BT will coordinate to continue and expand this anticompetitive behavior to both sides of the Atlantic.<sup>6</sup>

As demonstrated below, AT&T's unilateral self-dealing violates the terms and spirit of the cable systems' Construction & Maintenance Agreements ("C&MAs"). In addition, it has enabled AT&T to deny, delay or degrade the international services provided by the consortia co-owners. In effect, AT&T has leveraged its bottleneck control over U.S. cable stations to raise the costs of rival U.S. international carriers.

To remedy this situation, and to help ensure that VLT cannot continue and expand this anticompetitive behavior to the benefit of AT&T and BT, the Commission should impose a disclosure requirement as a condition of approval of the instant transaction.<sup>7</sup> More specifically, this condition would compel AT&T and VLT to make available to all requesting consortia cable owners any and all documents concerning AT&T/VLT's use (past, present and future) of consortia-owned and financed assets associated with AT&T/VLT's cable stations. This disclosure requirement should continue for a minimum of two years following the close of BT/AT&T transaction.

While the Commission has found that the market for cable capacity on the transatlantic

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<sup>6</sup> In *BT/MCI II*, the Commission recognized that BT had market power over the U.K. cable station input market. However, the Commission found that there was not a credible threat of increased anticompetitive conduct against unaffiliated carriers in large part due to OFTEL regulation of BT and the conditions contained in BT's licenses. 12 FCC Rcd at 15416 (¶ 168). By contrast, there is no assurance that OFTEL will regulate the U.K. subsidiary that will acquire BT's international facilities and authorizations in the same manner as it regulates BT. Consequently, the Commission cannot assume that the ability of the BT/AT&T joint venture to discriminate on the U.K.-end will be at all mitigated through OFTEL regulation.

<sup>7</sup> Given the fact that the joint venture successors to AT&T's international licenses, correspondent relationships and facilities will ultimately be under the control of an offshore entity, the ability of the Commission (and U.S. authorities in general) to oversee the joint venture's activities may be reduced. With the disclosure condition being suggested by Sprint here, the Commission at least will be in a better position to be attentive to AT&T/VLT's cable station activities.

route is competitive,<sup>8</sup> the market for cable landing stations is much less so. Current technology allows for relatively easy cable system construction. As a result, the construction of new cable systems has resulted in an explosion of available cable capacity as well as capacity ownership by new and existing carriers. By contrast, the construction of cable stations has remained virtually flat in comparison with the growth in cable capacity.

AT&T's continued dominance over U.S. cable stations is due in part to AT&T's historic role as the dominant international service provider, but also due to the difficulties of building cable stations. In order to construct a cable station, a would-be owner must procure access to rights of way as well as appropriate environmental, zoning, construction and other necessary local and state permits and authorizations. Because cable stations are located in environmentally sensitive coastal areas, the procurement of environmental permits can be particularly costly and time consuming.<sup>9</sup> Under these conditions, it is not surprising that building a cable station can require more time and effort than stringing a cable across an ocean. It is also not surprising to see clusters of new cable systems landing at existing AT&T's cable stations, which also continue to serve existing cables.

AT&T continues to own and control the vast majority of cable stations located in the United States. For example, on the East Coast, AT&T owns seven of the eleven existing cable stations.<sup>10</sup> These cable stations are terminal points for the most important cable systems serving

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<sup>8</sup> See *BT/MCI II*, at 15405-06 (¶¶ 139-141); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, FCC 98-225 (1998) at ¶¶ 102-108 (*WorldCom/MCI*).

<sup>9</sup> See *infra* discussion concerning AT&T sale of cable station co-owners' assets to MAC-I and AC-I cable systems.

<sup>10</sup> AT&T owns the cable stations at Greenhill, RI; Shirley, NY; Manahawken, NJ; Tuckerton, NJ; Vero Beach, FL; West Palm Beach, FL; and Hollywood, FL. The remaining four stations are owned by Global Crossing (Brookhaven, NY); MCIW (Manasquan, NJ and Charleston, RI); and Sprint (Manasquan, NJ).

European and the Latin America/Caribbean regions, including TAT-12/13, Americas I & II, and Columbus II. In the Caribbean, AT&T owns three of the four existing U.S. cable stations.<sup>11</sup> These cable stations are terminal points for all of the most important cable systems serving the Latin American/Caribbean region, including Pan American, Americas I & II, Columbus II, Taino-Carib, and Antillas I.

Cable stations occupy a bottleneck position within cable systems. *Terminal Railroad Association v. U.S.*, 224 U.S. 383 (1912). International carriers that own capacity on a cable system must send, exchange, or receive all of their traffic at that system's cable stations. If co-owners are dissatisfied with the conduct of the cable station owner, they cannot efficiently move their capacity onto a competing cable system with a more responsive cable station owner. Co-owners' investments in cable capacity represent sunk costs that cannot be easily transferred to competing cable systems. In addition, the cable station itself contains other bottleneck elements that are also under the exclusive control of the cable station owner. These elements include the direct access cross-connect, or DACS,<sup>12</sup> cable station ducts, conduits, rights of way and easements, as well as local zoning, environmental and construction permits obtained for the construction of the cable station.

Under the terms of the consortia cables' Construction and Maintenance Agreements ("C&MAs"), AT&T owns the cable stations, but other co-owners may also have an ownership

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<sup>11</sup> AT&T owns the cable stations at Miramar, PR; St. Thomas, USVI; and St. Croix, USVI. TUPR owns the only other U.S. cable station in this region, located in Isla Verde, PR.

<sup>12</sup> The DACS serves as the cross-connect between traffic carried over the "wet side" and "dry side" of a cable facility.

interest in the AT&T cable stations in the form of an Indefeasible Right of Use ("IRU").<sup>13</sup> In return for the IRU interests, the co-owners are required to pay AT&T for their share of the capital, operation and maintenance costs attributable to the AT&T cable stations.<sup>14</sup> As IRU owners, co-owners have no control over the cable stations, but must rely on AT&T to act as a fiduciary for their interests in the cable station. In contravention of its fiduciary duty, AT&T has taken advantage of its bottleneck control of consortia-owned and financed cable stations to discriminate against its rival co-owners.

**A. AT&T's Sale Of Consortia Financed Assets To MAC Cable.**

On October 30, 1998, MAC Landing Corp., a Global Crossing subsidiary, filed an application with the Commission to land and operate a private submarine cable to be known as the "Mid-Atlantic Crossing" or MAC cable.<sup>15</sup> The applicants state that its cable system will have terminal landings in Brookhaven, NY, Hollywood, FL and St. Croix, USVI. Hollywood, FL is the location of an AT&T cable station, the construction, operation and maintenance of which will soon be financed retroactively by the Americas II, MAYA I and Columbus III cable system co-owners. St. Croix is the site of another AT&T cable station, the construction, operation and maintenance of which was financed by the Americas II and Pan American cable system co-

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<sup>13</sup> As the Commission has recognized repeatedly, an IRU is essentially a perpetual leasehold over a particular asset. See *WorldCom/MCI* at ¶ 86 (citations omitted).

<sup>14</sup> See e.g., "Americas-II Cable System Construction and Maintenance Agreement" at §§ 2.2.2 and 4.1 (indicating that AT&T owns the cable stations at St. Croix, USVI, Hollywood, FL and Miramar, Puerto Rico); § 2.2.2(i) (indicating that the cable stations shall consist of an appropriate share of the land, buildings, cable station, rights of way, ducts, and common services and equipment); §§ 16.1.1 and 16.1.4 (indicating that AT&T will grant an IRU interest to consortium owners in the AT&T-owned cable stations and that for the IRU interests, and the consortium owners will pay AT&T their share of capital cost, operation and maintenance costs attributable to the cable station); and § 16.1.3 (defining capital costs as including the costs of constructing and installing the cable stations, which include, *inter alia*, the purchase costs of land, building costs, access road and cable rights of way).

<sup>15</sup> *MAC Landing Corp. Application*, File No. SCL-LIC-19981030-00023, filed Oct. 30, 1998; *Amendment to Application*, filed Nov. 5, 1998.

owners. Finally, the application states that MAC's land cables will join its submarine cables at Shirley, NY. Shirley is the site of yet another AT&T cable station, the construction, operation and maintenance of which was financed by the TAT-12/13 cable system co-owners.

At all of these cable stations, it appears that AT&T has sold MAC the right to use consortia-owned and financed assets. At Hollywood, AT&T appears to have sold MAC consortia-owned and financed conduit space. At St. Croix, AT&T appears to have sold MAC the right to use property subject to governmental and environmental permits. These permits were acquired at substantial cost and effort and are financed and owned by the Americas II and Pan American co-owners. At Shirley, AT&T appears to have sold MAC access to a double beach manhole, all or part of which is financed and owned by the TAT-12/13 co-owners. AT&T also appears to have sold MAC the right to lay its cable alongside TAT-12/13 from Shirley to a sandbar at Fire Island. In doing so, AT&T appears effectively to have sold MAC a portion of the consortium-owned and financed environmental permits that were acquired, again at great effort and expense, to gain access to the Shirley beach property and the sandbar at Fire Island.

Before AT&T sold the above-mentioned assets to MAC, AT&T was required, under the procedures established in the cable consortia C&MAs to: 1) provide the other consortia owners all relevant information regarding the terms of the proposed transactions; 2) obtain the consent of a majority of the consortia owners before closing the transactions with the MAC owners; and 3) refund to the cable consortia owners their proportionate share of the sale of the consortia assets to the MAC cable.<sup>16</sup> AT&T failed to comply with any of these requirements and instead profited

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<sup>16</sup> See "Americas-II Cable System Construction and Maintenance Agreement" at § 2.2.2(i) (indicating that the cable stations shall consist only of "an appropriate share" of the land, buildings, cable station, rights of way, ducts, common services and equipment); § 6.4 (requiring the cable system's General Committee to meet and make decisions based on majority vote of the total voting interests); and § 16.1.2 (requiring IRU owners to pay their share of only that portion of the capital, operating, supervision and maintenance costs that are allocable to Americas-II).

unlawfully from its unilateral sale of consortia-owned and financed assets to the MAC cable system.

All of the co-owners of the cables systems mentioned above contribute, or will contribute, a substantial sum of money for the construction, operation and maintenance of the cable stations located at the Shirley, Hollywood and St. Croix cable stations. For the carriers whose traffic goes through these cable stations, these charges are a cost of providing international telecommunications services. This is as true for AT&T (which is also supposed to pay for its share of the cable stations) as it is for the other co-owners.

By selling consortia-owned and financed cable station assets to MAC-I, AT&T has lowered its cost of providing international services at the expense of its co-owners. By refusing to share the proceeds of the sale of these assets with the other co-owners, AT&T effectively raises the other co-owners' costs of providing international services. AT&T's conduct in leveraging its bottleneck control over cable stations to enrich itself and raise its rivals' costs therefore negatively impacts competition in the U.S. international telecommunications market.

**B. AT&T Sale Of Consortia Financed Assets To AC-I.**

AC-I is a private cable system also owned and operated by Global Crossing. Like MAC, AC-I has a terminal station at Brookhaven and goes through Shirley and Fire Island before reaching the Atlantic. The TAT-12/13 cable system includes four ducts extending from Shirley to Fire Island. Under the TAT-12/13 C&MA, these assets are considered part of the Shirley cable station. As such, the consortium owners have IRU interests in the ducts, but AT&T exerts complete control over these ducts.<sup>17</sup>

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<sup>17</sup> See "TAT-12/TAT-13 Cable Network Construction and Maintenance Agreement," at §§ 16(a), (d) and (f) (granting parties an IRU in the AT&T cable stations; establishing that in return for the IRUs, parties are responsible

Footnote continues on next page.

On its own, and without seeking the consent of the TAT-12/13 consortia owners, AT&T sold two of these ducts to AC-I. While AT&T credited the owners a total of \$2.1 million for the sale, AT&T never provided a full and transparent accounting for the transaction. Because AT&T refuses to provide such an accounting for the conduit sales transactions, co-owners such as Sprint have no way of knowing whether they received a fair share of the transaction's proceeds. For all Sprint knows, AT&T merely returned to Sprint the book value of Sprint's investment in these facilities but kept a profit for itself.

In addition, because AT&T presented this transaction to the co-owners as a *fait accompli*, other new cable providers who might have liked to negotiate for the use of the ducts were never given the opportunity to do so. For its own reasons, AT&T decided to favor AC-I. It is not surprising that AT&T's former submarine cable construction company, AT&T Submarine Systems, Inc. ("SSI," now known as Tyco Submarine Systems Ltd. or "TSSL") played a major role in the AC-I cable system. According to the AC-I application, TSSL is the indirect parent of SSI Atlantic Crossing, which in turn is one of the co-applicants for the cable system. The entity that was formed to construct and operate AC-I, known as Atlantic Crossing Ltd. ("ACL"), entered into a contract with TSSL (AT&T's former subsidiary), for the development, design, construction, and installation of AC-I.<sup>18</sup>

### **C. Abuse Of TAT-9 Consortia Assets.**

As Sprint and MCI have described in a previous letter to the Commission, AT&T has, on

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for bearing their share of the capital, operating and maintenance costs of the cable station; and defining capital costs to include cable station ducts.)

<sup>18</sup> See *SSI Atlantic Crossing LLC, Assignor and GT Landing Corp., Assignee Joint Application for Consent to Assignment of the AC-I License to Land and Operate a Submarine Cable System*, File No. SCL-ASG-19981207-00028 (filed Dec. 7, 1998).

more than one occasion, used the TAT-9 cable, including the cable station and associated cable station equipment, for restoration of the CANTAT-3 cable.<sup>19</sup> In doing so, AT&T derived substantial compensation from the use of the co-owners' assets and kept the proceeds for itself. The TAT-9 co-owners, including Sprint, have paid substantial sums for the operation and maintenance of that cable, cable station and associated equipment. Nevertheless, AT&T has refused for almost three years now to answer Sprint's and other co-owners' requests for a full accounting of AT&T's unilateral decision to use and profit from consortium-owned and financed assets for the benefit of a competing cable system. AT&T still refuses to reimburse the co-owners for their share of the proceeds from AT&T's use of TAT-9 for restoration of the CANTAT-3 system. This is yet another example of AT&T's abuse of its position as cable station owner for its own enrichment.

**D. AT&T's Dilatory Tactics In Granting DACs IRU Interests.**

In the AT&T international nondominance proceeding<sup>20</sup>, the Commission found that AT&T's motion was in the public interest only after AT&T agreed to make certain voluntary commitments. One of those commitments was that AT&T agreed to provide, at the option of each owner, the dry-side portion of the DACS on an IRU basis retroactive to the start of service for the TAT-12/13 and TPC-5.<sup>21</sup> As mentioned above, the DACS occupies a bottleneck position within the cable station. The co-owners insisted on the IRU commitment in order to ensure that they would utilize the DACS on the same, nondiscriminatory basis as AT&T, *i.e.*, that they

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<sup>19</sup> See Letter to Diane Cornell from John Scorce, MCI and Kent Nakamura, Sprint, dated January 22, 1997.

<sup>20</sup> *Motion of AT&T to Declared Non-Dominant for International Service*, 11 FCC Rcd 17963 (1996).

<sup>21</sup> *Id.* at 18003.

would be charged only for their proportionate share of the capital, operating and maintenance costs of the DACS.

AT&T did not comply with its commitment until more than two years after the release of the Commission's decision in the AT&T international nondominance proceeding, and even then only with the intervention and insistence of the Commission. AT&T's dilatory tactics demonstrated that AT&T had no real interest in ensuring that all co-owners had non-discriminatory access to the cable stations' DACS. Instead, it attempted to continue as long as possible its ability to leverage its bottleneck control over the DACS to competitively disadvantage its rival carrier co-owners.

Prior to the joint venture, BT had no real interest in, and nothing to gain from, AT&T's misuse of U.S. cable stations. Once the joint venture is consummated, however, BT's successor will have the incentive and the ability to employ similar tactics in the United Kingdom. Then, the joint venture will be able to at least double the amount that AT&T now extracts from co-owners by leveraging its bottleneck control over U.S. cable stations. Absent Commission intervention, such a strategy would raise even higher non-affiliated U.S. international carriers' costs of providing transatlantic service, at least until the U.S. cable station markets become more competitive.

In the longer term, of course, U.S. international carriers will have the option of joining in the construction of additional cable systems with cable stations owned by entities other than AT&T. It should be noted, however, that for existing cable systems and even those which are planned for the future (*e.g.*, Japan-US and TAT-14), the landing points are already set and cannot be altered. And while civil litigation or an audit under the terms of some C&MAs are possibilities, these "solutions" are slow, cumbersome, and expensive. Until AT&T rivals can

build alternative systems that can compete with those that terminate at AT&T cable stations, Sprint respectfully requests that the Commission take certain limited steps to curtail AT&T's anticompetitive conduct.

More specifically, in order to constrain the joint venture's potential abuse of its control over U.S. cable stations,<sup>22</sup> and to remedy AT&T's past abuses, the Commission should require that, for the next two years, AT&T / VLT make available to all requesting consortia cable owners any and all documents concerning AT&T/ VLT's use of consortia-owned and funded assets associated with AT&T/ VLT's cable stations.<sup>23</sup> The imposition of this short-term requirement as a condition of the merger is absolutely necessary if the Commission is to be in the

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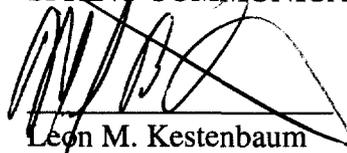
<sup>22</sup> Because the Commission lacks jurisdiction over the United Kingdom, Sprint does not request that the Commission attempt to exercise jurisdiction over the U.K. cable stations.

<sup>23</sup> Sprint believes that after two years, sufficient cable capacity that does not terminate in AT&T cable stations will become available to discipline AT&T's more egregious abuses. Sprint also would not object to a requirement that these documents be treated confidentially and disclosed to relevant parties pursuant to a protective order issued by the Commission.

position to prevent the joint venture entities from attempting to leverage their control over U.S. and U.K. cable stations to raise their rivals' costs of providing international service from both sides of the Atlantic.

Respectfully submitted,

**SPRINT COMMUNICATIONS COMPANY L.P.**

A handwritten signature in black ink, appearing to read 'LMK', is written over a horizontal line. The signature is stylized and somewhat cursive.

Leon M. Kestenbaum  
Michael B. Fingerhut  
James W. Hedlund  
1850 M Street, N.W., 11th Floor  
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(202) 828-7438

Its Attorneys

January 19, 1999

AFFIDAVIT OF WILLIAM HEIL

City )  
County of Honolulu )  
State of Hawaii )  
)

I, William Heil, being duly sworn, state under penalty of perjury as follows:

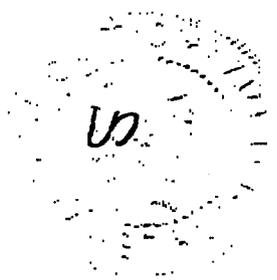
1. I am Manager, Network Planning, International Services Integration, with Sprint Communications Company, L.P. ("Sprint"). My business address is 9221 Ward Parkway, Kansas City, MO 64114.
2. I am responsible for representing the interests of Sprint regarding U.S. undersea cable system matters. I am making this affidavit based on my knowledge and personal involvement in negotiations with AT&T and other U.S. undersea cable system co-owners.
3. I have read the "Comments" regarding the applications of AT&T Corporation, VLT Co. L.L.C., Violet License Co. LLC, and TNV (Bahamas) Limited, File Nos. I-T-C 98-180 and I-T-C 98-181. The factual statements therein concerning AT&T's role as owner of U.S. cable stations are, to the best of my knowledge, true and accurate.

FURTHER AFFIANT SAYETH NAUGHT.

*William Heil*  
\_\_\_\_\_  
William Heil

Sworn to me this  
19th day of January, 1999.

Lehuanani J. Castro  
Notary Public  
Lehuanani J. Castro  
Commission expires: June 25, 2002



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Comments of Sprint Communications Company** was sent by hand or by United States first-class mail, postage prepaid, on this the 19<sup>th</sup> day of January, 1999 to the parties on the attached list.

  
\_\_\_\_\_  
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January 19, 1999

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