

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Review of Commission Consideration  
of Applications under the Cable Landing  
License Act

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) IB Docket No. 00-106  
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)

**COMMENTS OF AT&T CORP.  
AND ITS AFFILIATES CONCERT GLOBAL NETWORKS USA L.L.C. AND  
CONCERT GLOBAL NETWORK SERVICES LTD.**

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ORIGINAL

## SUMMARY

The submarine cable industry of today bears no resemblance to the submarine cable industry of 1954, the year that the Commission was delegated authority to review submarine cable landing licenses.<sup>1</sup> Then, only a handful of cables controlled by telegraph monopolies and designed to carry telegraph traffic existed. Demand was growing slowly and predictably, and new cables were added rarely and only after years of planning. The first submarine cable for voice (TAT-1) became operational in 1956.

In the Internet age, things are very different. The oceans are today criss-crossed by dozens of competing private (or “closed investment”) and consortium or (“open investment”) cables that carry massive amounts of voice, data, video and other Internet-focused traffic for hundreds of competing carriers. Worldwide submarine cable capacity has increased by several *thousand* percent in the past few years alone.<sup>2</sup> And newer, bigger, and more efficient submarine cables are being deployed as fast as the daunting task of obtaining necessary regulatory approvals can be completed.

The one constant in this remarkable evolution has been the *ad hoc* review of submarine cable license applications by the Commission and the State Department, a sometimes unpredictable and costly affair which can take many months. That may have caused little harm in 1954 when cable deployment was scheduled many years in advance and technology advanced at a relative snail’s pace. Today, “as new technological developments make speed to market

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<sup>1</sup> See Executive Order No. 10530.

<sup>2</sup> Declaration of Thomas McInerney (“McInerney Dec.”) ¶ 20 (attached hereto at App. A).

crucial for firms competing in the ever changing Internet-driven communications market,”<sup>3</sup> however, regulatory delay is a potent entry barrier that denies U.S. consumers enormous benefits in the form of the lower prices, better quality and new services facilitated by cable entry and competition.

AT&T Corp. (“AT&T”) and its affiliates Concert Global Networks USA L.L.C. and Concert Global Network Services Ltd. (collectively “Concert”) therefore support the Commission’s goal of regulatory “streamlining that reflects pro-competitive policies” designed to “promote consumer benefits from increased cable capacity and facilities-based competition.”<sup>4</sup> Unfortunately, the actual rules proposed in the *Notice* fall far short of – and in several instances conflict with – this important goal. Rather than the pro-competitive framework that the Commission has adopted in analogous contexts – one that recognizes that regulation which limits or delays entry or capacity expansion is almost always harmful to the public interest, and therefore promotes entry with quick and automatic license approvals – the *Notice* proposes to ration “streamlined” entry approval to applicants that fit favored profiles or agree to abide by misguided and inflexible government views of the “best” way to operate a submarine cable.<sup>5</sup> The end result would be a complex, uncertain and highly regulatory process that, without any legitimate justification, would favor some carriers over others in ways that could only harm competition and consumers.

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<sup>3</sup> Notice of Proposed Rulemaking, *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, ¶ 5 (June 22, 2000) (“*Notice*”).

<sup>4</sup> *Id.* ¶ 3.

<sup>5</sup> *Id.* ¶¶ 38-50.

Indeed, the harm that the *Notice* would inflict goes far beyond simply delaying pro-competitive entry. Despite its protestations to the contrary,<sup>6</sup> the *Notice* repeatedly implies that applications that do not qualify under one of the three proposed “streamlining options” raise competitive concerns.<sup>7</sup> As recent experience confirms, the scheme proposed in the *Notice* would effectively brand those applications that do not qualify for streamlining as presumptively anticompetitive and invites competitors to invoke the regulatory process to oppose them.

The *Notice* suggests that continuation of intrusive and competition-detering entry regulation is warranted by problems associated with monopolies in foreign countries where some submarine cables land. The underlying premise behind the *Notice* is that restricting U.S. cable landing licenses is a proper mechanism to combat these foreign market problems. Although AT&T and Concert share the *Notice*’s concern that some foreign monopolists retain bottleneck control over incoming and outgoing traffic (although the World Trade Organization (“WTO”) Basic Telecom Agreement (“WTO Agreement”) and other factors are beginning to erode that power), the sweeping entry regulations proposed in the *Notice* are not the answer to this problem. Such regulation threatens to deny U.S. consumers the benefits of increased submarine cable competition. At the same time, making it more time-consuming and costly for carriers to land cables in the U.S. will do little to induce closed WTO Member countries to adopt pro-competitive reforms in view of the ease with which those countries’ traffic may be sent to the U.S. *via* routing through third countries. For cables landing in these countries, the Commission instead should, as it has held in the past, continue to rely on its existing conduct regulations, the

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<sup>6</sup> *Id.* ¶ 19.

<sup>7</sup> *Id.* ¶¶ 3, 19, 25, 33, 39.

obligations imposed under applicable trade agreements, and for those applicants with market power in a non-WTO destination market, the effective competitive opportunities (“ECO”) test.

Attempting to solve foreign end problems in the cable landing license process would, as the Commission made clear in its *Foreign Participation Order*,<sup>8</sup> also raise significant issues under the General Agreement on Trade in Services (“GATS”). There, the Commission eliminated the ECO test – which required, as a condition of foreign 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<sup>9</sup> – for cable landing license and Section 214 applications for carriers from WTO Member countries. The Commission found that “engag[ing] in [the] in-depth, fact-intensive analysis” of foreign markets that the ECO test required “could be viewed as inconsistent with our international obligations” to give most favored nation treatment to any WTO Member.<sup>10</sup> In sharp contrast, the *Notice* would effectively reinstate an ECO-like test for WTO Member countries and subject foreign market access conditions to Commission review.

AT&T and Concert urge the Commission instead to take a hard look at the current state of submarine cable competition to determine whether the public interest demands true regulatory reform and broad-based streamlining of entry. Toward that end, AT&T and Concert submit with their comments declarations and evidence demonstrating that submarine cable markets are regional, not point-to-point, and are, for the most part, already highly competitive. With few

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<sup>8</sup> Report and Order and Order on Reconsideration, *Rules and Policies on Foreign Market Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891 (1997) (“*Foreign Participation Order*”).

<sup>9</sup> *Foreign Participation Order* ¶ 5.

<sup>10</sup> *Id.* ¶¶ 37, 40, 42.

exceptions, prices are declining, concentration is decreasing, technology is advancing and demand is increasing.

The recent increase in submarine cable capacity has been a tremendous success story, driven by the desire of more and more carriers to provide international data and Internet access services. Undersea cable capacity on transatlantic and transpacific routes has been increasing exponentially between 1995 and 1998. Such capacity growth is expected to continue at least for the next few years. At the same time, market prices for both transatlantic and transpacific bandwidth have fallen dramatically with increased supply.<sup>11</sup>

As Professors Janusz Ordoover and Robert Willig explain, these conditions place an extremely heavy burden on any proponent of entry regulation.

Global Crossing and the other proponents of selective entry regulation have not remotely met that burden. Unable to claim that submarine cables are a natural monopoly – the traditional justification for entry regulation – Global Crossing attacks open investment cables as a mechanism for collusion and for facilitating the leveraging of market power by dominant foreign carriers. Global Crossing fails to substantiate, however, the chain of events through which authorizing a new open investment cable (and thereby *increasing* capacity, competition, and choice) could, in the “long run,” harm competition. Nor can Global Crossing’s theories be squared with the Commission’s repeated factual findings that no U.S. carrier can exercise market power through its ownership of cable landing stations<sup>12</sup> and that U.S. carriers are “able to obtain

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<sup>11</sup> Notice, Separate Statement of Commission Susan Ness (“Ness Statement”), at 1.

<sup>12</sup> See Memorandum Op. and Order, *AT&T Corp., et al.*, 14 FCC Rcd. 19140, ¶ 100 (1999) (“*AT&T-BT JV Order*”); Order on Reconsideration, *Motion of AT&T Corp. to be Declared Non-Dominant for Int’l Serv.*, 13 FCC Rcd. 21501, ¶¶ 25-27 (1998) (“*AT&T Int’l Non-Dominance Recon. Order*”); Memorandum Op. and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd. 18025, ¶¶ 115-17 (1998) (“*MCI-WorldCom Merger Order*”).

operating agreements or establish alternative arrangements” with foreign carriers in order to provide international services.<sup>13</sup>

Even if Global Crossing had the economics right – but its analysis is, in fact, seriously flawed – such speculative concerns, supported by *no* evidence, could not conceivably justify the enormous competitive harms that would necessarily flow from the *Notice*’s proposal to relegate whole categories of applicants and applications to the regulatory “back burner.” In short, the efforts of Global Crossing and its brethren must be seen for what they are – a shameless attempt to use the Commission’s regulatory process to handicap more efficient rivals.

The Commission should decline the invitation and instead encourage entry with the same types of sweeping regulatory reforms it has endorsed with respect to both domestic and international Section 214 authorizations and in the context of regulating foreign participation in the United States telecommunications market.<sup>14</sup> In light of the competitive conditions and low entry barriers, the Commission should give expedited approval (*i.e.*, 14 days after public notice) to any cable landing license application (other than the limited category of applicants with market power in non-WTO destination markets that continue to require analysis under the ECO test).

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<sup>13</sup> See *AT&T-BT JV Order* ¶ 50; *AT&T Int’l Non-Dominance Recon. Order* ¶ 18; *MCI-WorldCom Merger Order* ¶ 117 n.339; *Foreign Participation Order* ¶ 94; Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶¶ 50-51 (1995) (“*AT&T Int’l Non-Dominance Order*”).

<sup>14</sup> See Report and Order, *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, 14 FCC Rcd. 11364, ¶ 7 (1999) (“*Domestic Section 214 Order*”); Report and Order and Order on Reconsideration, *1998 Biennial Regulatory Review – Review of Int’l Common Carrier Regulations*, 14 FCC Rcd. 4909, ¶¶ 19-40 (1999) (“*International Section 214 Order*”); *Foreign Participation Order* ¶¶ 87-96.

If, however the Commission nonetheless persists with the flawed streamlining approach set forth in the *Notice*, the three “safe harbors” identified in the *Notice* must be radically revised if they are to be consistent with the requirement of reasoned decisionmaking.

*“Competitive Route” Proposal.* This proposal stands public policy on its head. It would give expedited treatment to routes that are sufficiently served to be competitive but not to those for which there is little competition and that would benefit the most from new entry.<sup>15</sup> But if even it were appropriate public policy to discourage entry where it is needed most, the framework proposed in the *Notice* for determining which routes are sufficiently “competitive” is fundamentally flawed and would arbitrarily deny streamlined treatment to the vast majority of applications that proposes cables on competitive routes. In this regard, there should be no serious consideration of point-to-point competitive analysis. Well-established Commission precedent, sound economic theory and the basic engineering principles that underlay submarine cable transport dictate that “it is appropriate . . . to adopt a regional approach to analyzing the international transport market.”<sup>16</sup>

Likewise flawed is the *Notice*’s “propos[al] that an applicant demonstrate that there are at least three independently controlled cables, including the applicant’s proposed cable, serving the route on which the applicant wishes to operate the proposed cable.”<sup>17</sup> The Commission has

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<sup>15</sup> *Notice* ¶ 25. For example, this option would impose barriers to the stated goal of the Commission to overcome the “Digital Divide” that spans developing countries, particularly those in Africa and Southeast Asia, by imposing requirements on cables to those areas where competition has not yet taken hold.

<sup>16</sup> *MCI-WorldCom Merger Order* ¶ 84.

<sup>17</sup> *Notice* ¶ 28.

repeatedly made clear that a well-reasoned competitive analysis requires considerations of supply *and* demand elasticities.<sup>18</sup> The inflexible “three cables” criteria ignores both.

Finally, this option would effectively deny streamlining to entities that control the only landing station in a particular country on the assumption they could charge the carriers using that cable supracompetitive prices.<sup>19</sup> But the various owners of an open investment cable have the ability to protect themselves *ex ante* through contractual arrangements. A particular landing station is used only when the project sponsors agree, before construction, on that selection, and none of the other owners would agree to anticompetitive landing arrangements.

And even if this were not the case, most modern submarine cables are served by multiple landing stations. The *Notice* recognizes that where carriers on a particular cable have at least two landing stations to choose from, it is unlikely that either station will be able to charge excessive rates.<sup>20</sup> However, the *Notice* incorrectly limits this analysis to those situations where the landing stations are in the same country.<sup>21</sup> Competition is *regional*, not country-pair specific. Thus, as the *AT&T-BT JV Order* makes clear, even an entity that controlled the only landing station in a particular country could not charge excessive rates where carriers can use other landing stations in that region and then use terrestrial transit facilities to route traffic into the destination market.<sup>22</sup>

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<sup>18</sup> *AT&T Int’l Non-Dominance Order* ¶48; *AT&T Non-Dominance Order* ¶ 38.

<sup>19</sup> *See Notice* ¶ 30.

<sup>20</sup> *Id.*

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

<sup>22</sup> *AT&T-BT JV Order* ¶ 75.

*“Competitive Capacity Expansion” Proposal.* This option too is fundamentally flawed because it would discriminate among non-dominant carriers – who, by definition, lack market power and thus can only *increase* competition by adding new capacity – based upon whether they can claim a “new entrant” status that is untethered from any competitive analysis.<sup>23</sup> As the Commission has recognized, “restricting the competitiveness” of larger carriers “only reduces competitive performance in the market.”<sup>24</sup> It is precisely because of that fact that the D.C. Circuit has repeatedly held that the Commission cannot give preferences to one group of non-dominant carriers at the expense of another.<sup>25</sup> Put simply, “[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors.”<sup>26</sup>

This option is also flawed in the way that it would use cable landing station ownership to determine “new entrant” status. The *Notice* proposes (i) to treat a carrier as being a “key applicant” and therefore in “control” of a submarine cable if it owns “50 percent or more of the equity in a landing station on the proposed cable” and (ii) to attribute existing wet link ownership to that carrier in direct proportion to cable landing station ownership in a particular country.<sup>27</sup> But, as noted, numerous Commission precedents foreclose any rule that is premised on the claim that U.S. cable stations are “bottleneck” facilities. Further, as explained above, the fact that

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<sup>23</sup> See *Notice* ¶¶ 33-57.

<sup>24</sup> *AT&T Int’l Non-Dominance Order* ¶ 8.

<sup>25</sup> *Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

<sup>26</sup> *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (citation omitted).

<sup>27</sup> *Notice* ¶¶ 33, 35.

routes are regional means that no single foreign-end landing station owner has the ability to exercise market power.

*“Pro-Competitive Arrangements” Proposal.* The Commission should also decline the *Notice’s* invitation to micro-manage the cable industry through the “pro-competitive arrangements” proposal.<sup>28</sup> Market forces can be counted on to give owners the incentive to negotiate arrangements that are fair and efficient in the particular circumstances, while inflexible government pre-conditions to streamlining could skew these decisions in ways that would deter entry. If a carrier (or group of carriers) believes that proposed open investment cable terms are unfair, they are free to build a competing cable, purchase an ownership interest in existing cables, or lease capacity from a “private” or closed investment cable. And these parties have the knowledge and expertise to weigh the various considerations and factors that must be taken into account in deciding how to structure the ownership and governance of submarine cables.

The Commission should also, at a minimum, add three additional streamlining “safe harbors.” The Commission should give streamlined treatment to any submarine landing application: (1) by nondominant carriers; (2) by carriers that have already obtained international Section 214 authorizations to operate international facilities; and (3) for a cable that lands in WTO Member countries. There is simply no possibility that applications that satisfy these standards can have anything but a positive impact on competition.

AT&T and Concert are in general agreement with the remaining aspects of the *Notice*. AT&T and Concert fully support the *Notice’s* proposal that the Commission continue to permit submarine cables to be operated either on a common carrier or non-common carrier basis. As

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<sup>28</sup> *Id.* ¶¶ 38-50.

the Commission recognized in the *Japan-US Cable Order*,<sup>29</sup> the ability to tailor arrangements is essential in a competitive environment. Also, the conditions the Commission has routinely been imposing on cable landing licenses remain necessary to permit coordination with other branches of government.<sup>30</sup> Finally, AT&T and Concert do not oppose the proposal to require those entities holding more than a 5% ownership interest to be included in a landing license application.

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<sup>29</sup> *AT&T Corp., et. al*, 14 FCC Rcd. 13066, ¶ 41 (1999) (“*Japan-US Cable Order*”).

<sup>30</sup> *See Notice* ¶ 72.

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**COMMENTS OF AT&T CORP.  
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CONCERT GLOBAL NETWORK SERVICES LTD.**

Pursuant to the *Notice* issued by the Commission on June 22, 2000, AT&T and Concert hereby respectfully submit their comments on the rules the Commission should adopt to streamline applications to land submarine cables pursuant to the Cable Landing License Act (“Landing Act”).

**INTRODUCTION**

AT&T and Concert support the Commission’s goal of regulatory “streamlining that reflects pro-competitive policies” designed to “promote consumer benefits from increased cable capacity and facilities-based competition.”<sup>1</sup> “Expanded capacity is inherently good news for consumers. Regardless of the circumstances, more capacity expands consumer choice and drives down prices.”<sup>2</sup> In contrast, regulation of entry increases the costs and risks of entering a market and reduces the potential returns of entering.

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<sup>1</sup> *Notice* ¶ 3.

<sup>2</sup> *Notice*, Dissenting Statement of Commission Harold Furchtgott-Roth, at 2.

Unfortunately, the actual rules proposed in the *Notice* fall far short of – and in several instances conflict with – these fundamental principles. The *Notice* suggests that continuation of burdensome entry regulation is warranted by problems associated with monopolies in foreign countries where some submarine cables land. The underlying premise behind the *Notice* is that restricting U.S. cable landing licenses is a proper mechanism to combat problems associated with lack of competition in these foreign markets.

Although AT&T and Concert share the *Notice*'s concern that some foreign monopolists retain significant bottleneck control over incoming and outgoing traffic, the sweeping entry regulations proposed in the *Notice* are not the answer to this problem. Such regulation threatens to deny U.S. consumers the benefits of increased submarine cable competition. At the same time, making it more time-consuming and costly for carriers to land cables in the U.S. will do little to induce closed foreign countries to adopt pro-competitive reforms. The Commission should, as it has in the past, continue to rely on its existing conduct regulations and the obligations imposed under the WTO Agreement.

The harm that the approach proposed in the *Notice* would inflict goes well beyond simply delaying pro-competitive entry (although that alone is reason enough to reject that approach). The *Notice* repeatedly stresses that applications that do not qualify under one of the three proposed “streamlining options” raise competitive concerns.<sup>3</sup> Thus, industry participants seeking to evade competition would undoubtedly seize upon a proposed cable’s failure to qualify for streamlining as the basis for attempting to block those applicants’ entry altogether.

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<sup>3</sup> *Notice* ¶¶ 3, 19, 25, 33, 39.

In this proceeding, the Commission should rule – consistent with basic economic theory and the entry policies that it has adopted in the related Section 214 context – that submarine cable landing licenses are presumptively pro-competitive and qualify for expedited treatment, *i.e.*, approval in 14 days upon public notice. Further, the Commission should, as it does in the Section 214 context, refuse to entertain petitions to deny. As a safety net – albeit one that should rarely be invoked – the Commission should allow Staff to pull out of the streamlining queue those few applications that it believes raise truly extraordinary competitive issues and that require public comment. Unlike the approach proposed in the *Notice*, this approach will dramatically decrease existing regulatory entry barriers but also preserve the Commission’s flexibility to address extraordinary circumstances.

The remainder of these comments are organized as follows. Part I sets forth the economic framework that should inform the Commission’s entry policies. Part II shows that neither U.S.-end competitive issues, foreign-end competitive issues nor concerns regarding the ownership structure of open investment cables provide a basis for restricting submarine cable entry and, therefore, that the Commission should presumptively streamline all submarine cable landing license applications. Part III discusses the shortcomings in the “targeted” streamlining approach set forth in the *Notice*. Part IV sets forth the streamlining criteria the Commission should instead adopt to guide its review of submarine cable landing license applications. Finally, Parts V, VI and VII respond respectively to the *Notice*’s request for comments on whether the Commission should maintain its current distinction between common and non-common carrier cables, the appropriateness of the conditions that the Commission routinely imposes on cable landing licenses, and what parties should be included in an application as licensees.

## ARGUMENT

### I. REGULATION OF ENTRY IN THE HIGHLY COMPETITIVE AND DYNAMIC SUBMARINE CABLE BUSINESS IMPOSES SIGNIFICANT PUBLIC INTEREST COSTS

Economic theory teaches that entry regulation is rarely in the public interest. As Professors Ordover and Willig explain, new entry and the provision of additional capacity is generally pro-competitive because, by definition, it expands the alternatives available to consumers.<sup>4</sup> Regulation of entry, on the other hand, usually reduces competition and consumer welfare.<sup>5</sup>

This is particularly true here. “[N]ew technological developments make speed to market crucial for firms competing in the ever changing Internet-driven communications market.”<sup>6</sup> For example, recent technological advances in fiber optic technology have permitted carriers to achieve huge increases in transmission capacity – and reduction in costs – on submarine cables.<sup>7</sup> This has a profound impact on entry decisions, because a putative entrant must reflect expected future deployments of lower cost cables into its present value calculations. Any significant delay between design and expected deployment will greatly reduce expected returns, particularly where, as the *Notice* proposes, competitors that fit the Commission’s streamlining “profiles” will not face such delays. Absent the ability to move quickly from design to deployment, a putative entrant risks the possibility of entry by subsequent cables that employ faster technology

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<sup>4</sup> Declaration of Janusz A. Ordover and Robert D. Willig (“Ordover-Willig Dec.”) ¶ 25 (attached hereto at App. B).

<sup>5</sup> *Id.* ¶¶ 26-28.

<sup>6</sup> *Notice* ¶ 5.

<sup>7</sup> *McInerney Dec.* ¶¶ 7-18.

permitting even greater transmission speeds. Accordingly, regulations that artificially delay the ability of operators to deploy cables – or even make it more difficult to estimate how long it will take to gain the necessary regulatory approvals – pose a significant entry barrier in this industry.<sup>8</sup>

Regulation of entry is also an invitation for strategic misuse by competitors.<sup>9</sup> Indeed, Global Crossing's advocacy in the Japan-US Cable landing license application proceeding provides a clear case for the potential of competitors to abuse the entry regulation process. There, Global Crossing sought to delay the Japan-US Cable based largely on arguments that the owners of that cable would engage in conduct that would have *benefited* Global Crossing. For example, Global Crossing alleged that open investment cables charged excessive prices for wet link capacity and landing station access.<sup>10</sup> But if true, this would have made Global Crossing's competing closed investment PC-1 cable more attractive to carriers that might otherwise wish to purchase capacity on the Japan-US Cable. It simply strains credibility to believe that Global Crossing was spending enormous sums of money to advocate policies that were intended to benefit the public, but at its own expense. Rather, the more credible explanation is that Global Crossing was attempting to gain an artificial competitive advantage by delaying a significant rival.

To be sure, entry regulation can, in limited circumstances, be consistent with the public interest when that entry, while adding capacity in the short run, would decrease competition over the long run. For example, entry regulation was traditionally used in industries considered to be

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<sup>8</sup> See Ordoover-Willig Dec. ¶¶ 26-32.

<sup>9</sup> *Id.* ¶ 29.

<sup>10</sup> Petition to Defer of Global Crossing Ltd., File No. SCL-LIC-19981117-00025, at 4-6 (Jan 4, 1999).

“natural monopolies.” The incumbent monopolist was protected from “destructive” competition, but in return subject to rate of return regulation.<sup>11</sup>

No such considerations are present here. To the contrary, even a cursory review of the empirical evidence demonstrates vigorous and sustainable competition among many competing providers of international transport. Capacity has exploded, “driven by the desire of more and more carriers to provide international data and Internet access services.”<sup>12</sup> In 1997, the three primary international regions could provide 48 gigabits per second (“Gbps”) of capacity. By 2001, there should be 6.4 terabits per second – an 12,300 percent increase.<sup>13</sup>

At the same time that wet link capacity has exploded, concentration in the market has declined as cheaper capacity costs have dramatically lowered barriers to entry.<sup>14</sup> In 1995, there were fewer than 65 U.S. carriers that were authorized to provide facilities based international services.<sup>15</sup> By July of 1999, there were more than 679 U.S. carriers authorized to provide such services.<sup>16</sup> Spurred by the WTO Agreement, the number of international carriers worldwide is likewise exploding. Industry experts expect that by the end of the year 2000, there will be 2200 facilities-based international telecommunications carriers, all with growing needs for submarine cable capacity.<sup>17</sup>

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<sup>11</sup> Ordover-Willig Dec. ¶¶ 30-31.

<sup>12</sup> Ness Statement at 1.

<sup>13</sup> McInerney Dec. ¶ 20.

<sup>14</sup> *Id.* ¶¶ 8-18, 31-38.

<sup>15</sup> *Id.* ¶ 19.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

And as the number of carriers continue to grow, more and more carriers are purchasing or leasing capacity on submarine cables thereby increasing the number of cables being deployed and decreasing concentration of wet link ownership. The Trans-Atlantic region is now served by 12 separate cable systems and five new competitors are currently deploying cable systems that should soon come on line.<sup>18</sup> The Trans-Pacific region is expected to be served by 11 separate cables by early next year,<sup>19</sup> and the Trans-Americas Region by 10 separate systems by early next year.<sup>20</sup>

The beneficiaries of lower bandwidth costs have not been limited to cable owners. As the market has grown more competitive, prices for wholesale capacity have fallen dramatically.<sup>21</sup> And these savings have been passed on to consumers – international long distance prices have plummeted in the last few years.<sup>22</sup> Thus, by any measure – concentration, capacity growth, prices – this is a vigorously and irreversibly competitive business.

As international transport entry and competition have exploded, the Commission has generally responded by removing unnecessary and burdensome regulations. For example, the Commission for many years regulated the manner in which AT&T distributed circuits between submarine cables and satellite transmission facilities.<sup>23</sup> In eliminating this scheme, the

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<sup>18</sup> *Id.* ¶¶ 31-32.

<sup>19</sup> *Id.* ¶ 34.

<sup>20</sup> *Id.* ¶ 36.

<sup>21</sup> Ness Statement at 1 & n.7 (citing <http://www.band-x.com>).

<sup>22</sup> McInerney Dec. ¶ 7.

<sup>23</sup> Report and Order, *Policy for Distribution of U.S. Int'l Carrier Circuits Among Available Facilities During the Post-1988 Period*, 3 FCC Rcd. 2156 (1988).

Commission observed that such restrictions deter entry and are “inconsistent with the development of a policy that permits carriers and users to make facilities and service decisions free from unnecessary regulatory interference.”<sup>24</sup>

Shortly thereafter, the Commission found that market forces made it unnecessary for the Commission to continue to hold up new submarine cables to ensure that there would be “sufficient” demand for the new cables.<sup>25</sup> Most recently, the Commission did away with its strict regulations that governed the prices that owners could charge for conveying their ownership interests in submarine cables.<sup>26</sup> The Commission found that permitting the terms of such conveyances to be determined by market forces would lead to greater investment in submarine cable facilities and encourage new entry.<sup>27</sup>

The Commission has recognized the high costs that entry regulation imposes in related areas as well. The Commission recently extended blanket Section 214 entry authority to dominant domestic carriers.<sup>28</sup> Likewise, the Commission found that “the great majority of international Section 214 applications do not raise public interest issues that warrant Commission scrutiny.”<sup>29</sup> Accordingly, the Commission now approves most international Section 214

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<sup>24</sup> *Id.* ¶ 26.

<sup>25</sup> Memorandum Op. and Order, *American Tel. & Tel. Co., et al.*, 4 FCC Rcd. 8042, ¶ 29 (1989) (“[T]he presence of an increasingly competitive market in the provision of international facilities and services helps to ensure that carriers will invest prudently in international facilities.”).

<sup>26</sup> Report and Order, *Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers*, 7 FCC Rcd. 4561, ¶ 9 (1992) (“*Conveyance of Capital Interest Order*”).

<sup>27</sup> *Id.* ¶¶ 3, 4, 9.

<sup>28</sup> *Domestic Section 214 Order* ¶ 7.

<sup>29</sup> *International Section 214 Order* ¶ 9.

applications pursuant to a “streamlined procedure in which public comment will not be sought, and petitions to deny will not be entertained, on competitive and other issues.”<sup>30</sup> This is even true of applications by carriers in which *dominant* foreign carriers (from WTO Member countries) have substantial ownership interests and where service is to be provided to the home country. As the Commission ruled, no significant competitive issue is raised by a dominant foreign carrier owning up to a 25% interest in a domestic carrier because that level of ownership is insufficient to give the foreign carrier an “incentive to discriminate in favor of the affiliated carrier.”<sup>31</sup>

In sum, because of the dramatic changes in the industry, it is now time for the Commission to bring its submarine cable entry policies in line with those it has adopted in related areas.<sup>32</sup> By any measure, the consumer benefits of streamlined entry approval are so great and any competitive risks are so remote that the Commission should grant presumptive streamlining to all submarine cable landing license applications. At a minimum, however, the Commission should, as detailed below, significantly expand the “streamlining safe harbors” proposed in the *Notice* to reflect the strong presumption that an application to land a new submarine cable is in the public interest and should be promptly approved.

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<sup>30</sup> *Id.* ¶ 22.

<sup>31</sup> *Id.* ¶ 32.

<sup>32</sup> *See* Ordoover-Willig Dec. ¶¶ 12-14.

## II. THE *NOTICE* FAILS TO PROVIDE ANY LEGAL OR REASONED BASIS FOR NOT PRESUMPTIVELY STREAMLINING ALL SUBMARINE LANDING LICENSE APPLICATIONS

As explained below in Part III, each of the three narrow “streamlining” safe harbors proposed in the *Notice* is inconsistent with the requirements of reasoned agency decisionmaking. The fundamental defect in the proposed three streamlining options, however, is not that the *Notice* failed to rigorously implement those options, but the failure of the *Notice* to identify a coherent theory as to why such regulation is necessary at all. As demonstrated above, entry regulation simply cannot be predicated on a claim that the submarine cable business is not functioning competitively. *See* Part I. Instead, the *Notice* suggests without elaboration that the proposed regulations are necessary to address the potential problems related to lack of competition in the markets in which submarine cables land.<sup>33</sup>

As explained below, there can be no claim that Commission regulation is necessary to protect against market power abuses on the U.S. end. Indeed, the Commission has made repeated findings of fact that no U.S. carrier controls “bottleneck” inputs necessary to provide international telecommunications services.

Nor can concerns regarding foreign-end market access conditions support the *Notice*’s regulatory scheme. The Commission has previously made clear that in the wake of the WTO Agreement that it will not condition entry into the U.S. market on the basis of such foreign-end market access – even in those WTO Member countries where *all* competition is precluded as a matter of law and all communications services are provided through monopoly carriers. And even if that were not the case, refusing to license cables that would land in monopoly foreign

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<sup>33</sup> *Notice* ¶¶ 3, 30, 39.

markets (or delaying approval of such applications) is likely to do little to get those countries to open their markets to competition in view of the ease with which they may now route their U.S.-bound traffic through third countries following the WTO Agreement. It is naïve, at best, to suggest that WTO Member monopoly countries will do more because of the “threat” the Commission will slow down U.S. carrier applications to add cables between the U.S. and those countries.

The arguments advanced by proponents of entry regulation such as Global Crossing do not support a departure from this precedent. Like the *Notice*, Global Crossing’s arguments too are premised on the mistaken notion that the Commission should use its licensing authority as a tool to open closed WTO markets to competition. And to the extent Global Crossing attacks open investment cables as a vehicle for facilitating collusion independent of any foreign-end concerns, its claims are contrary to basic economics and well-established Commission precedent.

Further, the regulations proposed by the *Notice* are unnecessary because the Commission already addresses the above-cost settlement rates and potential discrimination resulting from the lack of competition in foreign monopoly markets through the ISP, the No Special Concessions rule, the *Benchmarks Order*,<sup>34</sup> dominant carrier regulation, and, for applications by carriers with market power in non-WTO Member destination markets, the ECO test.

In short, rather than preserving an outdated submarine cable entry regulatory regime modified only by the narrow streamlining safe harbors proposed in the *Notice*, the Commission should rule, consistent with basic economic theory, that submarine cable landing licenses are

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<sup>34</sup> Report and Order, *International Settlement Rates*, 12 FCC Rcd. 19806 (1997) (“*Benchmarks Order*”).