proposed restrictions on the building of backhaul facilities and other restraints on cable licensees.[125]

Enforcement of the WTO Reference Paper provides yet another constraint on the ability of foreign carriers with market power to use their control of submarine cables and cable stations to engage in discriminatory behavior.[126] The WTO Reference Paper requires public telecommunications network and services providers with market power to provide cost-based, nondiscriminatory and unbundled interconnection arrangements at any technically feasible point in their networks – which necessarily include submarine cables, cable stations and associated backhaul facilities.[127] It thus requires cable station operators with market power to provide collocation and cost-based backhaul services and to allow collocated operators to provide backhaul services to themselves and to others.[128]

[125] *See USTR Objects to Taiwan Limits on Undersea Cable Licenses,* Telecommunications Reports Daily, June 9, 2000.

[126] *Foreign Participation Order* ¶ 27. The WTO Reference Paper has been adopted, in whole or in part, by 65 WTO Member countries, including all 52 WTO Member countries that have made commitments to allow international facilities-based market entry.

[127] *See WTO Reference Paper,* 36 I.L.M. 367 (1997). *See also, e.g.*, Mexico, Schedule of Specific Commitments, Supplement 2, WTO Doc. GATS/SC/56/Suppl.2, Apr. 11, 1997, p. 7, Section 2.

[128] To further ensure that WTO Member countries provide the unbundled, cost-based and non-discriminatory cable station access arrangements required under the Reference Paper obligations, the Commission should explore ways to assist USTR enforcement efforts, such as by encouraging the formation of cross-agency teams including Commission staff with relevant expertise to work on specific cases or subject areas, and Congress should be encouraged to dedicate additional funds for this purpose. The Commission should also highlight these Reference Paper requirements in its on-going educational activities with foreign regulators.

E. The Commission Should Hold That All Submarine Cable Landing Licenses Presumptively Qualify For Expedited Treatment

The Commission's analysis of cable landing license applications should reflect the basic economics of submarine cables and the dynamic nature of the market today. That means that there should be a strong presumption that entry and the addition of capacity into this market is pro-competitive and in the public interest. *See supra* Part I. As explained above, neither the *Notice* nor proponents of entry regulation have advanced an argument that can rebut this presumption. Accordingly, the Commission should presumptively streamline all submarine cable landing license applications.

The mechanics of streamlining should be simple and follow the path laid out in the *International Section 214 Order*. Applications should be approved in 14 days upon public notice.[129] Further, "public comment [should] not be sought, and petitions to deny [should] not be entertained, on competitive and other issues."[130] The likelihood that an application raises a legitimate public policy concern is "so remote that the potential benefits of seeking such comment are outweighed by the real benefits of eliminating the possibility that such comments would render and application ineligible for streamlining."[131] The only applications that should not be approved in the 14 day time period are those that are not complete, and those very few

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[129] The *Notice* proposes a 60 day period because of the need to "coordinate closely with the Executive Branch." *Notice* ¶ 54. But the Commission can grant an application subject to ultimate approval by the Secretary of State and continue to work with the Secretary of State with regard to her approval.

[130] *International Section 214 Order* ¶ 22.

[131] *Id.* ¶ 12. Among the substantial "real benefits" identified by the Commission in the international Section 214 context is "the added certainty that an applicant would have as a result of knowing its application cannot be held up by a vaguely drafted petition to deny filed by its competitors." *Id.*

applications that Commission Staff identify as "rais[ing] extraordinary issues suggesting a need for public comment."[132] This safety net ensures that the Commission can pull out of the streamlining queue those few applications that it believes raise truly extraordinary competitive issues and that require public comment.

III. THE THREE STREAMLINING OPTIONS PROPOSED IN THE *NOTICE* ARE UNDULY NARROW AND CONFLICT WITH THE REQUIREMENTS OF REASONED DECISIONMAKING

Rather than start with the presumption that new entry and capacity expansion are pro-competitive, the *Notice* instead would permit streamlining in only a few, narrowly defined circumstances that are untethered from any reasoned competitive analysis. Not only would this approach consign numerous applications that were in fact in the public interest to regulatory purgatory, it would encourage applicants to conform to standards that, at best, do nothing to further the public interest and, at worst, are affirmatively contrary to the public interest.

In this regard, the harm that the *Notice* would inflict goes far beyond simply delaying pro-competitive entry. Despite its disclaimer that "an applicant that does not qualify for streamlining . . . would be reviewed on a non-streamlined basis . . . without prejudice,"[133] the *Notice* repeatedly implies that applications that do not qualify under one of the three proposed "streamlining options" raise concerns.[134] Such competitive concerns would presumably not vanish because of the extra months that would pass for processing of non-streamlined applications. Thus, streamlining options would do more than determine what applications will

[132] *International Section 214 Order* ¶ 16.

[133] *Notice* ¶ 19.

[134] *Id.* ¶¶ 3, 19, 25, 33, 39.

be expedited, they also effectively would determine the standards against which applications for approval would be judged.

A. The "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.[135] As explained by Professors Ordover and Willig, market forces, not regulators, should dictate where entry should occur. Instead of trying to micro-manage entry decisions, the Commission should adopt policies that reduce entry barriers and encourage investment so that cables can be built to serve any location where investors are willing to risk their capital.[136] But even if 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 propose cables on competitive routes.

Point-to-Point vs. Regional Routes. As the Commission's prior decisions confirm, there should be no serious consideration of point-to-point competitive analysis. As the Commission explained, in the *MCI-WorldCom Merger Order*, "it is appropriate . . . to adopt a regional approach to analyzing the international transport market. . . . [A]lthough [international submarine cables] terminate in a select number of countries, they tend to serve entire regions. For example, the TAT-12/13 cable system terminates in the United Kingdom and France, but

[135] *Id.* ¶ 25.

[136] Ordover-Willig Dec. ¶ 84.

carriers use this cable system to carry traffic destined for points throughout Europe."[137] The Commission subsequently reaffirmed that approach in the *AT&T-BT JV Order*.[138]

A regional approach is also the only approach consistent with the competitive realities. Even apart from the fact that submarine cables generally land in multiple countries in a region, there are multiple routes to other countries from any particular landing station. As the Commission has recognized, widespread use of switched hubbing, refile, reorgination and transit services renders any point-to-point analysis meaningless. Thus, in rejecting arguments advanced by Cable and Wireless that AT&T and BT should be required to divest transit capacity on "thin" routes to secure approval of their joint venture, the Commission expressly held that:

> the global transit market is highly competitive. [T]here are thousands of routes to the 240 countries of the world. In addition . . . there is no dearth of capacity on most transit routes and . . . there are no barriers to firms with excess capacity to provide transit services . . . .[139]

TeleGeography reports that new international carriers "now refile 30 to 50 percent of their total international traffic" and that the world's largest international carriers will be refiling 20 to 25 percent of their traffic this year.[140] Indeed, these alternative arrangements have become so prevalent that a "spot market" for re-routing traffic has emerged, and many geographic regions advertise that they are "hubbing" points that can efficiently direct traffic from particular locations to other areas in the region.[141]

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[137] *Id.*

[138] *AT&T-BT JV Order* ¶¶ 47-51.

[139] *Id.* ¶ 75.

[140] M. Scheele & C. Woodall, *The Market for Refile and Transit Services*, TeleGeography 1997/1998.

[141] McInerney Dec. ¶ 26.

And there can be no doubt that each of the regions the Commission has identified in the past – the "Atlantic, Pacific and Caribbean/Latin America" regions[142] – is vigorously competitive. Indeed, the Commission has expressly found that each of these three regions is served by numerous providers, that "additional capacity will be provided by a growing number of suppliers," and that barriers to entry are low.[143]

Consistent with the Commission prediction, the Atlantic, Pacific and Caribbean/Latin America regions have all experienced substantial new entry in the intervening years. As discussed above, since 1997, existing and planned capacity in these three regions has grown by an unprecedented 12,300 percent.[144] By the end of this year, the Trans-Atlantic region alone will have almost 5 terabits per second of capacity. Likewise, by next year, the Trans-Pacific region will be served by 11 separate cables with 990 Gbps of capacity and the Trans-Americas region will be served by 10 separate cables with over 300 Gbps of capacity.[145] In short, any competitive routes safe harbor should employ regional analysis and, consistent with the Commission's prior decisions, should establish a presumption that the Atlantic, Pacific and Caribbean/Latin America routes are competitive and that applications to deploy a cable on those routes qualify for streamlining.

The "Three Independent Cable" Criteria. The *Notice* "propose[s] that an applicant demonstrate that there are at least three independently controlled cables, including the

[142] *MCI-WorldCom Merger Order* ¶ 94

[143] *Id.* ¶¶ 86-114; *AT&T-BT JV Order* ¶¶ 47-51.

[144] McInerney Dec. ¶ 20.

[145] *Id.* ¶ 36.

applicant's proposed cable, serving the route on which the applicant wishes to operate the proposed cable."[146] But simplistically using the number of cables on a particular route as a proxy for wet link competition is contrary to well-established economics and Commission precedent. The Commission has repeatedly made clear that a well-reasoned competitive analysis requires considerations of supply *and* demand elasticities.[147] The inflexible "three cables" criterion ignores both.

As the Commission has recognized, vigorous competition can exist with only a very few suppliers where demand elasticity – *i.e.*, the willingness of customers to switch carriers in response to changes in price or quality of supply – is high.[148] Demand elasticities are high where – as here – customers are large, sophisticated business entities that are well informed of their alternatives.[149] Moreover, because open investment cables allow multiple independent suppliers to exist on a single cable, the relevant criterion is not "independent" cables, but "independent" suppliers.

Likewise, supply elasticities are high, and markets competitive, "if existing competitors have or can easily acquire significant additional capacity in a relatively short time."[150] Thus, simply looking only at the number of cables ignores that the relevant fact for competitive analysis is the amount of capacity that is available to fulfill demand.[151] Because fractional

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[146] *Notice* ¶ 28.

[147] *AT&T Int'l Non-Dominance Order* ¶ 48; *AT&T Non-Dominance Order* ¶ 38.

[148] *AT&T Int'l Non-Dominance Order* ¶ 42.

[149] *AT&T Non-Dominance Order* ¶ 65.

[150] *AT&T Int'l Non-Dominance Order* ¶ 48.

[151] *See* Ordover-Willig Dec. ¶¶ 86-89.

ownership interests on open investment cables are independently controlled, competition can exists among the participants of a single consortium cable.[152] Hence, everything else being equal, there is likely to be a higher elasticity of supply where there is a single open investment cable with 100 Gbps of capacity than three cables with 25 Gbps of capacity.

Further, the Notice's proposal would consider only existing supply when the Commission has repeatedly recognized the critical importance of barriers to entry and future sources of supply.[153] "Supply elasticities tend to be high *even if existing suppliers lack excess capacity* if new suppliers can enter the market relatively easily and add to existing capacity."[154] In the *AT&T Non-Dominance Order*,[155] for example, the Commission rejected claims that AT&T could exercise market power in the domestic long distance market at a time when AT&T served significantly more than half of all long distance customers. Despite AT&T's high market share, the Commission concluded that it lacked market power because other long distance providers could and would "expand to serve additional AT&T customers should AT&T attempt to charge a supra-competitive price."[156]

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[152] *Id.* ¶ 95.

[153] *AT&T Int'l Non-Dominance Order* ¶¶ 48-50. Tellingly, while the *Notice* describes this option as applying to a route that "is, or will become, competitive," *Notice* ¶ 25, its application is entirely backwards-looking and does not allow for consideration of future entry, *see id.* ¶ 28 ("We propose that an applicant rely *only* on cables that have become operational within 36 months of the filing of the current application.") (emphasis added).

[154] *AT&T Int'l Non-Dominance Order* ¶ 48 (emphasis added).

[155] *AT&T Non-Dominance Order* ¶¶ 40-54.

[156] *See id.* ¶ 62. *See also id.* ¶ 57; Second Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Servs. Originating in the LEC's Local Exchange Area*, 12 FCC Rcd. 15756, ¶ 28 (1997).

Here, barriers to entry are low.[157] Absent entry regulation delays, projects can go from the drawing board to completion in about two to three years.[158] A new entrant can reduce its risks by lining up customers and partners and securing operating and interconnection agreements prior to construction. And expansion of capacity can be particularly quick and easy for existing fiber optic submarine cables.

Satellite-based transport is also beginning to emerge as a full-fledged alternative to cable submarine transport. Although satellite systems have not traditionally been viewed as complete substitutes for voice traffic, they are well suited, and increasingly being used, for data traffic because the "delay" problems that plague voice transmission over satellite are not relevant to data transmission.[159] As discussed below in Part II.C.1, data traffic has already overwhelmed voice traffic and this trend is accelerating. And because of this increased demand, satellite providers are moving aggressively to expand capacity and launch new systems.[160] Thus, any reasoned analysis of wet link competition must also reflect the emergence of satellite competition.

The "New" Cable Criterion. Even if it made sense to look only at existing submarine cables systems – and not future entry, viable alternative forms of transportation and the relative sophistication of customers – it is patently arbitrary to consider only those cables that have become operational in the last 36 months. The *Notice* asserts that it adopted this time period

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[157] *See* Ordover-Willig Dec. ¶¶ 44-54.

[158] *See* McInerney Dec. ¶ 13. *See also MCI-WorldCom Order* ¶ 101.

[159] *See* McInerney Dec. ¶¶ 11-13.

[160] *See id.* ¶ 13.

because "cables built with older technologies may not support significant capacity expansion."[161] That claim is as ironic as it is unfounded.

It is ironic because, as discussed above, the *Notice* (incorrectly) does not otherwise permit consideration of *future* capacity in the competitive route determination. It would be illogical to forbid consideration of "older" cables – particularly when they *in fact* compete with "new" cables by offering comparable services at comparable prices – on the grounds that they do not support easy capacity expansion at the same time refusing to consider the impact that future entry exerts on competition today.[162] And it is unfounded because there are in fact numerous submarine cables that have been operational for more than three years and that use fiber optic technology that permits significant capacity expansion.[163]

"Independence." The *Notice* compounds these errors – and further ensures that few competitive routes would actually qualify for streamlining – in proposing to promulgate new attribution criteria that the Commission would use in determining whether cables are "independent." As explained above, a well-reasoned competitive analysis would examine capacity on an independent supplier basis and not on a cable basis, as there can be (and most assuredly is) competition among the suppliers on a single cable. That a particular supplier may have capacity on more than one cable is simply irrelevant unless a proposed cable would give an individual supplier the ability to profitably raise prices.[164]

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[161] *Notice* ¶ 28.

[162] Ordover-Willig Dec. ¶ 89.

[163] *See* McInerney Dec. ¶¶ 31-38.

[164] Ordover-Willig Dec. ¶¶ 90-93.

But even if attribution served a useful purpose, the *Notice* relies on the mistaken premise that if an entity controls the only landing station in a particular country, it effectively controls the cable.[165] Tellingly, the *Notice* offers no explanation as to how an entity that controlled such a landing station for one cable could prevent other cables from competing. Nor could it. Landing stations are cable specific. Thus, controlling a landing station for cable A gives no ability to affect services offered on cable B. And even if an entity owned the landing stations used by multiple cables, it would still want those cables to compete and thereby maximize the amount of traffic using its facilities.[166]

To the extent the Commission is concerned about the ability of a landing station owner to "gouge" the carriers on the cable that use that landing station, there is also little cause for concern. As explained in the Declaration of Professors Ordover and Willig, the various owners of an open investment cable have the ability to (and do in fact) protect themselves *ex ante* through contractual arrangements.[167] A particular landing station is used only when the project sponsors agree on that selection. Clearly, none of the other owners have a desire to pay excessive rates for landing services, and these owners will establish a contract that keeps this from happening.

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[165] *See Notice* ¶ 30.

[166] Ordover-Willig Dec. ¶ 91. Should the Commission adopt a point-to-point geographic market, the proposed attribution scheme would have a perverse effect. Submarine cable owners would be penalized for landing a cable in small markets where it would make economic sense to build only a single landing station. This point is simply symptomatic of the overarching flaw in the *Notice*'s "competitive market" streamlining option – it gives carriers that build cables to "competitive" markets preference over carriers that build cables to non-competitive markets that would benefit the most by additional entry.

[167] *Id.*

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.[168] However, the *Notice* incorrectly limits this analysis to those situations where the landing stations are in the same country.[169] As explained above, competition is *regional*, not country-pair specific. Thus, even an entity that controlled the only landing station in a particular country cannot charge excessive rates if the carriers can switch traffic to other landing stations in that region. Thus, for example, although TAT-14 is served only by one landing station in France, that operator, France Telecom, could not charge supracompetitive rates. If it tried to do so, the carriers using TAT-14 would respond by shifting traffic to stations in Britain, Denmark, Germany, and the Netherlands and then using alternative transit arrangements to route the traffic into France.

Finally, even if a submarine cable were served by only a single landing station in a region, there should be no attribution where the parties have agreed to permit the cable owners to collocate at that landing station. Such competitive collocation would foreclose any ability the landing station owner might have to charge excessive prices to the other cable owners because they could simply collocate their own equipment in the landing station.[170]

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[168] *Notice* ¶ 30.

[169] *Id.*

[170] *See Japan-US Cable Order* ¶¶ 28-29.

B. "Competitive Capacity Expansion" Option

The "new entrant" competitive capacity expansion option is equally unreasoned and contrary to public policy. The *Notice* proposes arbitrarily to favor non-dominant carriers classified as "new" entrants and to disfavor non-dominant carriers that own existing capacity in a region.[171] This builds upon the favoritism already shown to "new entrants" by the "Competitive Route" option. Many carriers that serve existing routes cannot qualify for this option because their ownership interest in existing cables can disqualify that cable from being considered independent for purposes of the *Notice*'s "3 independent cables = competition" formula.[172]

There is no legitimate basis for such discrimination. As discussed above, once a carrier has been declared non-dominant in a market, there is no justification for regulating that carrier differently than any other carrier that lacks market power. "[T]hinking about competition, not in terms of primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors" is "not the objective or role assigned by law to the Federal Communications Commission."[173] Thus, the D.C. Circuit has not hesitated to strike down Commission regulations that would discriminate against of one group of non-dominant carriers in favor of another.[174] These holdings would apply with particular force here give the fact that, as explained above, expansion of capacity is inherently pro-competitive, even if some of the owners of the new cable own capacity on existing cables.

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[171] *Notice* ¶ 33.

[172] *See id.* ¶¶ 28, 29. For example, a nondominant U.S. carrier operating the only U.S. landing station on a cable serving a route on which there were two or less "independent" cables would be unable to obtain streamlined treatment for a third cable that it was deemed to "control."

[173] *Hawaiian Tel.*, 498 F.2d at 776. *See also SBC Communications*, 56 F.3d at 1491; *Western Union Tel.*, 665 F.2d at 1122.

[174] *Competitive Telecommunications Ass'n*, 87 F.3d at 531-32.

The patent inconsistency between this proposal to single out some non-dominant carriers for disparate treatment and sound public policy is confirmed by the *Notice*'s suggestion that the Commission might not even give streamlined treatment to applicants that would seek "to serve previously unserved routes."[175] Any reasoned approach would recognize that *some* capacity on a route is better than none and would grant streamlined approval to such applications that bring efficient submarine cable transport to a route that currently receives no such service.

Further, even if there were *some* circumstances in which discriminating against owners of existing capacity could be justified, the proposed rule – which appears to suggest that streamlined treatment will be denied whenever the members of the "key applicant group" collectively owns more than 50% of existing wet link capacity – is vastly overbroad.[176] Although not specified in the *Notice*, presumably this threshold would be met by summing the individual ownership interests of all the members of the key applicant group. For example, if there were three key applicants for a proposed cable, streamlining would be denied if the three key applicants had individual interests in existing cable systems in that region that, in aggregate, were in excess of 50% of existing capacity.

But, there is simply no economic significance to the total ownership interest by the "key applicant group" when those members make independent decisions regarding the use of that capacity.[177] For example, suppose that X, Y and Z were the "key applicant group" for a new cable and in that region there were three existing cables. Further assume that X, Y and Z each

[175] *Notice* ¶ 34.

[176] *Id.* ¶¶ 33-34.

[177] Ordover-Willig Dec. ¶¶ 95-96.

individually owned 100% of one of the three cables. While collectively, X, Y and Z would own 100% of the existing cable capacity, individually each would have approximately 33.33% of existing capacity and they would compete against each other. Accordingly, X, Y and Z as a group would have no interest in taking actions that favored any of the existing cables. Thus, for example, while X might have incentive to have the new cable take actions that would favor its existing cable (assuming such actions were even possible), Y and Z would not.[178]

Similarly flawed is the *Notice*'s conclusion that it will attribute the entire capacity of an existing system to any entity that owns 50% or more of the equity of that cable.[179] Simply because an entity owns 50% of a cable does not mean that the entity dictates pricing decisions rendered by the minority owners. Tellingly, the *Notice* offers no justification for this rule or explanation as to why it was proposed.

Such an approach would lead to absurd results.[180] Suppose, for example, that in a region served by four cables that A owned 51% of two of them, that B owned 100% of the remaining two, and that B owned 49% of the two in which A was the majority owner. Under this rule, A would be considered to control 50% of the wet link capacity in this market – and be disqualified from the "competitive capacity expansion" streamlining option – even though it would own only

[178] Nor can it be argued that the application is problematic because somehow the new cable would given A, B and C additional incentive to collude. The additional capacity would only make it more difficult to collude. As noted above, collusion becomes more difficult where there is excess capacity. Colluders want to limit the amount of available capacity, not increase it. In other words, if A, B and C wanted to restrict capacity they would not build a new cable but instead would jointly agree to refrain from such projects.

[179] *Notice* ¶ 35.

[180] Ordover-Willig Dec. ¶ 98.

approximately 25% of capacity, and would clearly have no ability to exercise market power – and by entering through a new cable would actually *decrease* concentration in the region.

Finally, the way in which the *Notice* would use cable landing station ownership to determine "new entrant" status should be squarely rejected. The *Notice* proposes (i) to treat a U.S. 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.[181] As discussed above in Part II.A, such a rule is foreclosed by the Commission's repeated factual findings that no carrier, including AT&T, is able to exercise market power through ownership of U.S. cable landing stations.

Moreover, the notion that an entity "controls" wet link capacity in relationship to its relative ownership percentage of cable stations in a particular country defies logic. Because many modern submarine cables land in multiple countries, landing stations owners would be assigned more than 100% of the actual capacity.[182] In addition, the relevant routes for submarine cables are regional, not country-pairs. As discussed, so long as there are multiple stations in a particular region, no landing station owner has any ability to charge excessive rates or otherwise

[181] *Notice* ¶¶ 33, 35. Thus, if that carrier owned one of two cable landing stations in one of the countries in which the cable landed, it would be attributed 50 percent of the capacity to that carrier. *Id.* ¶ 35 n.62.

[182] For example, the above-discussed TAT-14 cable has a single landing stations in five different European countries. Under the rule proposed in the *Notice*, *each* foreign landing station operator would be treated as controlling 100% of the cable capacity (in addition to the U.S. landing station operators who would also be attributed capacity).

discriminate among the carriers using the cable.[183] Thus, where a cable is served by multiple landing stations in a region, no capacity should be attributed to landing stations owners.

C. "Pro-Competitive Arrangements" Option

By way of its final streamlining safe harbor, the *Notice* proposes to induce operators to adopt a number of policies that would, according to the *Notice*, increase competition in the submarine cable market. The proposals, however, provide a textbook example of why competitive forces are superior to centralized regulation. Many of the proposed "pro-competitive" arrangements are likely to do little to facilitate competition and may ultimately impede it.

For example, the *Notice* would like owners to agree to upgrade capacity, not on the basis of the way they think best through arm's-length agreement, but according to the voting rules set out in the *Notice.*[184] That ignores the complicated economics that should inform any sound public policy in this area. The incremental costs of initial cable deployment are much higher than the costs of deploying upgrade capacity. However, the ability to achieve the low costs of upgrade capacity is made possible by the initial deployment. This creates the potential for a classic free rider problem.[185]

Thus, if a subset of the owners are empowered to force a capacity upgrade, purchasers would have an incentive to make a smaller initial investment than they otherwise would. After the cable was deployed, these purchasers would demand the cable be immediately expanded.

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[183] *See supra* Part III.A.

[184] *Notice* ¶ 47.

[185] Ordover-Willig Dec. ¶ 101.

The other carriers, who presumably bought initial capacity sufficient for their needs, would not want to participate in the upgrade. The type of rules proposed in the *Notice* therefore increase the potential that carriers who contributed only a small amount to the initial capacity are able to dramatically increase their capacity while at the same time acquiring that capacity at a lower average cost than the other carriers who shouldered the burden of contributing the funding that enabled to project to go forward.[186] That additional risk and its expected cost will deter initial entry. This would not be solved by a requirement that carriers be given the "option" of participating in any upgrade and that only the participants be required to pay for the increased capacity.[187] Even if a carrier has a right to buy additional capacity, the capacity may be of little value if the carrier does not need the capacity.

The *Notice*'s attempt to dictate how much carriers should have to pay for buying capacity on submarine cables is also problematic.[188] The *Notice* appears to embrace the arguments advanced by WorldxChange in the COLUMBUS-III submarine cable landing license proceeding that the pricing of COLUMBUS-III was discriminatory and favored large carriers over small carriers. Based on these claims – which were *rejected* by the International Bureau in the *COLUMBUS-III Order*[189] – the *Notice* suggests that applicants, in order to qualify for the "pro-competitive arrangements" streamlining option, should include in their CM&A's certain

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[186] Similarly, the fewer votes that are needed to upgrade a cable, the more likely the upgrade will proceed without all the carriers participating. Thus, the "optimal" rule must trade-off this fact against the concern that giving a minority veto power over an upgrade might be used to prevent efficient expansion.

[187] *Notice* ¶ 47.

[188] *See* Ordover-Willig Dec. ¶¶ 102-04.

[189] *COLUMBUS-III Order* ¶ 10.

provisions designed to equalize the prices small and large carriers pay for capacity on submarine cables.[190]

To the extent the *Notice* suggests that submarine cables should permit small carriers to combine their capacity requirements for purposes of obtaining volume discounts, AT&T and Concert have no objection in principle to such arrangements on common carrier cables.[191] The *Notice*, however, would appear to impose this requirement to non-common carrier and closed investment cables. But that is contrary to the very nature of these systems. The essence of a non-common carrier cable is that the parties reach individualized agreements through contract rather than establishing an "open" system governed by strict non-discrimination principles.

But to the extent the *Notice* goes further and can be read as proposing other arrangements to "equalize" what large and small owners pay for capacity, the Commission should squarely reject this suggestion. There are perfectly valid cost-based reasons why some carriers pay more per unit of capacity than others.[192] For example, volume discounts "can be a reasonable means of attracting sufficient investment commitments by carriers to make construction of a consortium cable financially justifiable."[193] Such discounts are also often necessary to "match capacity prices in alternative cable systems."[194]

[190] *Notice* ¶ 49.

[191] As explained below, however, AT&T and Concert believe there is no principled grounds for the Commission to attempt to dictate such arrangements, even if they are reasonable.

[192] Ordover-Willig Dec. ¶¶ 102-04.

[193] *COLUMBUS-III Order* ¶ 10. *See also* Memorandum Op. and Order and Notice of Proposed Rulemaking, *Personal Communications Indus. Association's Broadband Personal Communications and Personal Communications Servs. Alliance's Petition for Forbearance for Broadband Personal Communications Servs.*, 13 FCC Rcd. 16857, ¶ 29 (1998).

[194] *COLUMBUS-III Order* ¶ 10.

Further, an economically rational pricing structure must also not just account for how much capacity a carrier is buying, but when that carrier commits to buying it. The Commission has previously recognized that discounts can properly account for increased risk.[195] The owners making the investment necessary to secure construction of the submarine cable take more risk than later investors. In today's environment, carriers wishing to build new open investment cables must put up the construction money in advance, even though customer demand may not develop in the manner forecasted (or at all). It would clearly be contrary to public policy to require the owners that provided the funding necessary to get the submarine cable project underway to pay the same amount as other carriers who simply sat on the sidelines until after the cable was constructed, financed, and in demand.[196]

The purpose of this discussion is not to suggest that, if voluntarily adopted by submarine cable owners, the proposed "pro-competitive arrangements" would be anticompetitive or improper. Rather, the point is that market forces can be counted on to provide the owners with proper incentives to negotiate arrangements that are fair and efficient in the particular

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[195] Report and Order, *Expanded Interconnection with Local Tel. Co. Facilities*, 7 FCC Rcd. 7369, ¶ 199 (1992); Second Report and Order, *Expanded Interconnection with Local Tel. Co. Facilities*, 8 FCC Rcd. 7341, ¶ 7 (1993).

[196] The Commission recognized a closely analogous problem in the *Conveyance of Capital Interest Order*. There, the Commission found that it was necessary to permit market-based pricing policy that (i) encouraged initial investment in common-carrier systems and (ii) eliminated situations where the larger, original investors in a cable system effectively subsidized non-investors, who purchased capacity on an as-needed basis and thereby avoided the significant initial investment in the project and forced the owners to bear the costs of holding unused capacity for their competitors' future use. *Id.* ¶¶ 3-9. Similarly, the Federal Energy Regulatory Commission has upheld volume discounts for parties willing to make larger initial investments – and thus take larger risks – in construction projects under the cognate provisions of the Interstate Commerce Act. *See, e.g.*, Order Approving Lawfulness of Proposed Incentive Tariff, *Texas Deepwater Port Authority*, 8 FERC ¶ 61,167 (1979).

circumstances, and that inflexible government pre-conditions to streamlining could skew these decisions in ways that would deter entry.[197] If a carrier (or group) believes that proposed open investment cable terms are unfair, the carrier (or group) is free to build a competing cable, purchase an ownership interest in existing cables, or lease capacity from closed investment cables. 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 of submarine cables. In the absence of any suggestion that a market failure prevents the parties from reaching mutually beneficial outcomes, the Commission should let the market determine how submarine cable ownership arrangements are structured.

IV. THE COMMISSION SHOULD PRESUMPTIVELY STREAMLINE ALL SUBMARINE CABLE LANDING LICENSE APPLICATIONS OR, AT A MINIMUM, ALSO ADOPT THREE ADDITIONAL SAFE HARBORS

As explained above, in stark contrast to the complex and flawed streamlining procedures proposed in the *Notice*, the Commission should presumptively streamline all submarine cable landing license applications. If, however, the Commission decides to follow the outlines of the approach adopted in the *Notice*, it should at a minimum substantially broaden the categories of applications that qualify for streamlining. In addition to modifying the *Notice*'s three streamlining options in the manner discussed above,[198] the Commission should establish three additional streamlining categories: applications by nondominant carriers, applications by

[197] Ordover-Willig Dec. ¶ 105.

[198] While AT&T and Concert believe with the modifications suggested in Part III.A, the Competitive Route Option would establish a viable streamlining criteria, the other two options are fundamentally flawed and should be abandoned.

carriers that hold facilities-based international Section 214 authorizations and applications involving cables that land in WTO Member countries.

A. Applications Involving Cable Stations Controlled By Nondominant Carriers Raise No Competitive Concerns

There can be no argument that the Commission should not streamline all applications in which the cable stations will be controlled by nondominant carriers. If the landing stations are controlled by carriers that lack market power, there obviously can be no concern that the landing station owner can force carriers to pay supracompetitive rates or can foreclose rival cable access to inputs necessary to originate/terminate traffic. Indeed, that is precisely why the Commission made the express finding in the *AT&T Int'l Non-Dominance Recon. Order*[199] and the *AT&T-BT JV Order*[200] that AT&T's ownership of cable landing stations raised "contractual" rather than competitive issues.

The *Notice*'s failure to streamline applications in which the cable stations will be controlled by nondominant carriers is contrary to well-established Commission precedent. As noted above, the Commission has repeatedly recognized that numerous carriers provide cable landing stations and backhaul facilities in the U.S. and thus mergers and joint ventures involving such market participants raise little competitive concern.[201] The same decisions also make clear that no U.S. carrier has market power over submarine cable capacity on any route.[202]

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[199] *AT&T Int'l Non-Dominance Recon. Order* ¶ 26.

[200] *AT&T-BT JV Order* ¶ 100.

[201] *See AT&T-BT JV Order* ¶¶ 50-51, 100; *MCI-WorldCom Merger Order* ¶¶ 115-17.

[202] *See AT&T-BT JV Order* ¶¶ 47-51; *MCI-WorldCom Merger Order* ¶ 100-18. *See also BT-MCI Merger Order* ¶¶ 137-42.

The Commission has taken the same deregulatory approach to U.S. carrier foreign-end arrangements with nondominant carriers. Notably, in 1997, it limited the No Special Concessions rule to dealings between U.S. carriers and foreign carriers that possess market power.[203] The Commission's decision to limit the No Special Concessions rule to arrangements with dominant foreign carriers was based on the finding that a special concession granted by a nondominant foreign carrier would have *no* anticompetitive effect. The Commission concluded that "[b]ecause the [nondominant] foreign carrier cannot restrict the supply of those services or facilities necessary for the provision of U.S. international services to such a degree as to raise prices, it cannot effectively leverage its market power into the U.S. market."[204] It further found that a special concession granted by a nondominant foreign carrier "would not unreasonably limit rival U.S. carriers' ability to provide international services" and "generally would not raise U.S. rivals' costs or degrade their services."[205] Accordingly, "[s]uch arrangements . . . would not raise competitive concerns."[206] These findings are flatly inconsistent with the *Notice*'s proposal to deny streamlined treatment based on the absence of particular arrangements with a nondominant foreign cable station operator.[207]

Last year, the Commission underscored its conclusion that U.S. carrier arrangements with foreign nondominant carriers can have no adverse impact on competition by removing the ISP

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[203] *Foreign Participation Order* ¶ 158.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Notice* ¶¶ 40-45 .

and related filing requirements for all arrangements between U.S. carriers and foreign carriers that lack market power.[208] The Commission found that because U.S. carriers may respond to an attempted whipsaw by a nondominant foreign carrier by entering an agreement with another foreign carrier on the route, "the ISP is not necessary to prevent whipsawing for settlement arrangements with foreign carriers that lack market power."[209] The Commission thus determined that even exclusionary arrangements between U.S. carriers and nondominant foreign carriers are unlikely to harm U.S. competition.

Significantly, the unregulated U.S. carrier arrangements with foreign nondominant carriers authorized by the *ISP Reform Order* include all types of foreign-end call termination and return traffic arrangements – and are far greater in scope and market impact than those at issue here concerning submarine cables, cable station access and backhaul. Yet the *Notice* would subject a subset of those arrangements to greater regulation that the Commission deemed appropriate in the *ISP Reform Order*. The facilities provided by submarine cable systems comprise only *one* of the three network elements used to provide IMTS, which are (1) international transmission facilities, (2) international switching facilities, and (3) national extension (domestic transport and termination).[210]

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[208] *ISP Reform Order* ¶ 21.

[209] *Id.* ¶ 22.

[210] *Benchmarks Order* ¶ 45. *See also id.*, App. E (Tariffed Components Price Methodology) ("International transmission facilities consist of international terrestrial transmission or submarine cables, international satellite transmission or a combination of these facilities. The facilities that comprise this network element include the links between the earth stations or cable landing stations and the international switching facilities.")

IMTS arrangements therefore include two network elements at the foreign end that are outside the scope of this proceeding: international switching facilities, and network extension (domestic transport and termination).[211] Moreover, in 55 of the 65 countries for which the Commission developed country-specific Tariffed Component Prices ("TCPs") in the *Benchmarks Order*, the combined prices of those two network elements which are outside the scope of this proceeding comprise more than 50 percent of the total country-specific TCP.[212] U.S. carriers are nonetheless authorized by the *ISP Reform Order* to negotiate unregulated arrangements covering all of these three network elements with all foreign nondominant carriers in both WTO and non-WTO Member countries.

B. Applications Involving Carriers That Have Already Obtained Facilities-Based International Section 214 Authorizations Raise No Competitive Concerns

The Commission should likewise approve any cable landing license application filed by carriers that have already obtained facilities-based, international Section 214 authorizations. As the Commission explained in the *International Section 214 Order*, its regulations governing applications for Section 214 authorizations ensure that "a foreign carrier with market power on the foreign end of an international route [does not] have the ability to leverage that market power into the U.S. market to the detriment of competition and consumers."[213] This includes

[211] International private line arrangements with foreign carriers for the provision of other types of international services similarly require network extension facilities (but not international switching facilities) at the foreign end.

[212] *See id.*, App. D (Tariffed Component Prices).

[213] *International Section 214 Order* ¶ 21.