regulations designed to preclude the ability of foreign carriers to "restrict[] its rivals' output through the control of an input that is necessary for the provision of service."[214]

Accordingly, when the Commission has granted a carrier an international Section 214 authorization, it has determined that permitting the carrier to enter the international market raises no public interest concerns – particularly those relating to the ability of a dominant foreign carrier to exercise market power or otherwise discriminate against U.S. carriers. And when the Commission grants a carrier a facilities-based, international Section 214 authorization, it has determined that no competitive issues are raised by that carrier constructing and operating international facilities (as opposed to operating simply as a reseller). Thus, it simply defies logic – and the requirements of reasoned decision-making – to subject that carrier to the *additional and stricter* review that the *Notice* proposes when the carriers seeks to purchase the assets that the carrier has been previously authorized by the Commission to "construct[]" and "acquire or operate."[215]

C. All Cables To WTO Member Countries Should Also Qualify For Streamlining

As discussed in detail above, conditioning the availability of streamlined procedures on foreign market access conditions would mark a significant departure from the nondiscriminatory treatment of WTO Member countries the Commission has followed since the conclusion of the WTO Agreement in April 1997. The Commission emphasized in the *Foreign Participation Order* that "Article II of the GATS requires WTO Members to accord 'service and service

[214] *Foreign Participation Order* ¶ 144.

[215] 47 U.S.C. § 214(a).

suppliers of any other Member treatment no less favorable treatment than that it accords to like services and service suppliers of any other country.'"[216] It further noted that "[a]dopting a policy that limits access to the U.S. market by telecommunications carriers purely based on the existence or quality of a country's commitment would be viewed by many WTO Members as a violation of the GATS."[217] The Commission emphasized that this MFN obligation is "[t]he most important of the general obligations and disciplines that apply to all WTO Members" and that it applies "no matter what specific commitments a WTO Member has made."[218]

Not only would the *Notice*'s attempt to condition cable landing licenses to serve WTO Member countries on the basis of market access conditions in those countries be contrary to the United State's trade obligations and Commission precedent, but such review is ultimately unnecessary. As described above, the Commission's existing conduct rules and USTR trade enforcement procedures are more than adequate to address the speculative concerns raised about the ability of dominant foreign carriers to foreclose cables that compete with cables in which they have an ownership interest or to force a carrier to "cluster" on cables in which they operate landing stations in order to charge supracompetitive prices.

Finally, support for streamlining of all applications to serve WTO Member countries is provided by the Commission's repeated findings that the increased global competition and more effective foreign regulatory regimes resulting from the WTO Agreement will reduce the market power of foreign carriers. Indeed, in addressing submarine cable licensing in the *Foreign*

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[216] *Foreign Participation Order* ¶ 40.

[217] *Id.*

[218] *Id.* ¶ 337.

Participation Order, the Commission anticipated that "the WTO Basic Telecom Agreement will significantly reduce the opportunities for carriers with bottleneck control on the foreign end of a cable to harm competition in the U.S. market by acting anticompetitively."[219]

The *Foreign Participation Order* thus treated submarine cables as being no different from the other areas in which it expected "a shift away from monopoly provision of telecommunications services and toward competition, open markets and transparent regulation."[220] Accordingly, it found that "the procompetitive changes in global telecommunications markets resulting from the WTO accord substantially reduce the need to engage in a detailed analysis of the competitive conditions of the applicant's market."[221]

The *Foreign Participation Order* also rejected the argument that continued foreign end scrutiny was required at least until WTO commitments were fulfilled. It responded that "increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications markets, including those that have made no commitments or limited commitments."[222] Foreign governments that had not liberalized would be pressured "not to tolerate anticompetitive abuses," and "as members of the global trading regime, WTO Members will be subject to this pressure to a greater degree than non-WTO countries."[223] The order also noted that non-liberalized WTO Member countries represented less than five percent

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[219] *Id.* ¶ 94.

[220] *Id.* ¶ 9.

[221] *Id.* ¶ 56.

[222] *Id.* ¶ 38.

[223] *Id.*

of the telecommunications revenues of all WTO Member countries and thus threatened less harm to the U.S. market.[224]

The Commission has similarly emphasized in other recent proceedings that it may reasonably rely on increased competition in WTO Member countries to promote pro-competitive submarine cable arrangements. For example, in the *MCI-WorldCom Merger Order*, it found that the WTO Agreement has "further facilitated" new submarine cable entry by "resulting in the removal of foreign investment restrictions and licensing hurdles that previously hampered the rapid deployment of new cable systems."[225] The Commission reaffirmed that finding in the recent *AT&T-BT JV Order*, where it observed "as countries implement their market access commitments made part of the WTO Basic Telecom Agreement, U.S. carriers will be able to obtain operating agreements from new entrants as well as incumbents in these countries."[226] Reliance on these new market forces and lower entry barriers in WTO Member countries resulting from the WTO Agreement is equally pertinent in this proceeding.

V. COMMON CARRIER/NON-COMMON CARRIER DISTINCTION

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. This policy comports with the nature of this market. Most submarine cables are owned by carriers that use that capacity for their own services and do not indifferently offer capacity to the

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[224] *Id.*

[225] *MCI-WorldCom Merger Order* ¶ 105.

[226] *AT&T-BT JV Order* ¶ 50. *See also AT&T Int'l Non-Dominant Recon. Order* ¶ 18; *BT-MCI Merger Order* ¶ 45.

public. Further, as the Commission recognized in the *Japan-US Cable Order*, the ability to tailor unique arrangements is essential in a competitive environment.[227]

Nor can there be any claim that allowing non-common carrier cables is contrary to the public interest. As the *Notice* recognizes, since the Commission permitted submarine cables to be operated on a non-common carrier basis, "most recent cable systems have been licensed to operate on a non-common carrier basis."[228] And during this time, there has been explosive growth in the deployment of submarine cables and a dramatic decrease in the costs carriers must pay for capacity on these cables.[229]

Finally, the Commission should reject proposals that it eliminate the distinction between common carrier and non-common carrier submarine cables.[230] Given that the Commission has routinely licensed non-common carrier submarine cables, there is simply nothing to be gained by eliminating these regulatory classifications. Carriers that wants to avoid regulation under Title II can do so by operating submarine cables on a non-common carrier basis. In contrast, Title II of the Communications Act necessarily applies to any submarine cable that operates as a common carrier. The Commission has no authority to simply refuse to apply the applicable provisions of Title II to a common carrier.[231]

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[227] *Japan-US Cable Order* ¶ 41.

[228] *Notice* ¶ 69.

[229] *See supra* Part I.

[230] *Id.* ¶¶ 68-69.

[231] The Commission, of course, has authority to forbear under Section 10(a) of the Communications Act from applying particular provisions of Title II. However, in order to do so, it must find such forbearance is in the public interest. *See* 47 U.S.C. § 160(a). Accordingly, if particular provisions of Title II were preventing common carrier cables from competing (continued . . .)

VI. CONDITIONS ROUTINELY IMPOSED ON CABLE LANDING LICENSES

As AT&T and Concert explained in the Public Forum, the conditions that the Commission routinely imposes in cable landing licenses are not causing problems in the market. These conditions are necessary to permit coordination with other branches of government so that they can fulfill their duties.[232]

Nonetheless, AT&T and Concert do not object to Level 3's suggestion that the Commission "develop clear and publicly available standard conditions."[233] Obviously, developing a clear set of standard rules with well-established meaning can only be of help to the market participants. AT&T and Concert likewise agree that it makes sense to adopt a "negative option" whereby "the license automatically takes effect within 30 days after grant of the application unless the applicant notifies us that it does not accept the terms and conditions of the license."[234] As it is AT&T's and Concert's understanding that most carriers do not dispute the routine conditions imposed by the Commission, it makes sense to adopt a default rule that presumes that conditions are accepted and eliminate the need to make an additional filing simply to accept the requirement imposed by the Commission.

However, the conditions advocated by Level 3 with regard to cable station access and backhaul are in no sense of the word "routine." Rather, these "conditions" are essentially the "pro-competitive arrangements" proposed as the basis for the third streamlining option in the

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(. . . continued)
effectively, the proper approach would be to entertain petitions for forbearance from those provisions.

[232] *See Notice* ¶ 72.

[233] *Id.* ¶ 74.

[234] *Id.*

Notice,[235] except that Level 3 would go even further and make these conditions mandatory on any submarine cable in which one of the participants was a "major supplier." Accordingly, for the reasons stated above in Part III.C, the Commission should reject Level 3's proposal.

VII. WHO SHOULD BE REQUIRED TO BE INCLUDED IN APPLICATION AS LICENSEE

AT&T and Concert do not oppose the *Notice*'s proposals regarding which entities should be required to be included in a landing license application. As the *Notice* recognizes, the only parties required to obtain a license from the Commission are those persons that "'land or operate' a submarine cable" in the U.S.[236] A bright-line rule frees smaller carriers that obviously have no influence over operation from the burden of having to be a party to a license application (although AT&T and Concert do not agree that 5% ownership necessarily provides any relevant influence over operations).

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[235] *Compare id.* ¶ 76 *with id.* ¶¶ 40-50.

[236] *Id.* ¶ 82 (quoting 47 U.S.C. § 34).

CONCLUSION

For the reasons stated above, the Commission should substantially modify the regulations proposed in the *Notice* regarding its review of submarine cable license landing applications, as detailed in these comments.

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August 21, 2000

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

In the Matter of	)	
	)	
Review of Commission Consideration	)	IB Docket No. 00-106
of Applications under the Cable Landing	)	
License Act	)	

DECLARATION OF THOMAS K. MCINERNEY

I. QUALIFICATIONS

1. My name is Thomas K. McInerney. I am Vice President, Cable and Satellite Management for Concert Global Network Services ("Concert"), a new global venture of AT&T Corp. (AT&T") and British Telecommunications, plc. Concert was launched at the beginning of this year to serve the global communications needs of multinational companies, international carriers and Internet service providers world-wide with a competitive portfolio of voice, data and Internet services. Concert operates a worldwide communications network with more than 300,000 miles of submarine cable and 6000 nodes in 52 countries. Prior to assuming my present position earlier this year, I was Deputy Director, International Cable Management for AT&T.

2. My responsibilities include the planning and purchasing of Concert's worldwide undersea cable facilities, including purchases of capacity on submarine cable systems that Concert has an ownership interest and those systems where Concert has no ownership interest, including non-consortium cables. Prior to joining Concert, I exercised similar responsibilities for over 7 years for AT&T. In my positions with Concert and AT&T, I have acquired a thorough knowledge of both the global submarine cable industry and the international services market.

II. PURPOSE OF TESTIMONY

3. I have been asked to provide testimony concerning the current and future state of competition in connection with the Federal Communications Commission's review of its submarine cable landing regulations.[1] In particular, I discuss the following:

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[1] The term international transport is used throughout this declaration to mean US to foreign country voice or data transportation.

4. *First,* recent technological innovations, unprecedented demand and foreign regulatory reforms regarding the provision of international transport have created an environment with relatively low barriers to entry with massive amounts of new submarine cable capacity being deployed each year. Regulatory delays and costs, however, remain significant barriers to entry.

5. *Second,* competition among submarine cable capacity owners occurs on a regional, rather than a point-to-point, basis, and there is already substantial competition in each of the three major regions.

6. *Third,* consortium (or "open investment") cable systems have proven particularly pro-competitive. Open investment cable systems provide competitive discipline to private cables and often provide carriers with the lowest cost of transport and, correspondingly, provide consumers with the lowest cost services.

III. RECENT EVENTS HAVE DRASTICALLY REDUCED BARRIERS TO ENTRY INTO TRANSCONTINENTAL COMMUNICATIONS TRANSPORTATION.

7. During the past several years the market for international transport services has been characterized by unprecedented levels of growth and competition. Prices for international communications transportation are falling precipitously and capacity is increasing exponentially.[2] This growth and competition for international communications services are attributable, in great part, to recent innovations in cable technology, increased demand for

[2] *See, e.g.,* Notice of Proposed Rule Making, *Review of Commission Consideration of Applications Under the Cable Landing License Act,* IB Docket No. 00-106 (rel. June 22, 2000) ("*Notice*"), Separate Statement of Commission Susan Ness at 1; Retail Pricing Trends, 1997-1999 (Graphs), *TeleGeography 2000*; Band-X Retail Pricing Graphs available at <www.band-x.com/index.cfm>.

international calls and data services and much greater global competition resulting from the WTO Basic Telecom Agreement ("WTO Agreement").

8. *Technological Innovation.* Technological innovation has considerably lowered the costs of entry into the market for international transport services. Indeed, the Commission recently recognized that the cost of providing a single unit of capacity in 1998 was one-third the cost of providing a single unit of capacity in 1995.[3] And those costs continue to fall precipitously as new breakthroughs in fiber optic technology are deployed and as demand for capacity permits carriers to take advantage of economies of scale.[4]

9. For instance, technological advances in fiber optics permits carrier to increase capacity incrementally, at relatively low cost, by upgrading *existing* cable networks. In fact, the ability to upgrade the capacity of existing fiber optic networks is outpacing year by year improvements in computer memory, storage space and processing power.[5] Thus, international carriers can often deploy facilities with enough *potential* capacity to meet future needs without incurring the high cost of deploying all of that capacity today.

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[3] *See* Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd. 18025, 18073 ¶ 84 (1998) ("*MCI-WorldCom Order*") (explaining that the cost per unit of capacity in the AC-1 cable (deployed in 1998) was one third that of the TAT-12/13 cable (deployed in 1995)).

[4] Many of the costs of building a cable are largely unaffected b the throughput of the cable, e.g. the costs of hiring the crews and vessels needed to lay the cable, building landing stations at each end, and gaining the necessary permits and regulatory approvals. The fixed costs amount to a large share of the total cost of the cable.

[5] *See* The Bandwidth Rolls On, *TeleGeography 2000*, at 2 (2000) ("*Bandwidth Rolls On*").

10. *Demand For International Communications Services.* Demand for international communications services has also exploded during the past few years.[6] Most notably, demand has been "triggered in large part by increased Internet and data traffic."[7] In fact, in my experience, the capacity required to satisfy the volume of IMTS traffic is now so insignificant compared to Internet, data and other private line traffic that IMTS traffic is generally ignored in planning new systems. I estimate that the proportion of IMTS circuits on new cable systems (as compared to private line circuits) is generally less than 5 percent. This estimate is confirmed by FCC circuit status statistics showing that, in 1998 – the most recent year for which these statistics are available, but covering a period before the recent upsurge in Internet demand – non-IMTS circuits (used primarily for data) constituted 83 percent of all new submarine cable circuits.[8]

11. This increase in demand has substantially *reduced* barriers to obtaining the necessary financing for the deployment of new cables systems. According to a recent TeleGeography report:

> [T]he huge interest in telecommunications generated by the Internet has seen investment houses chasing after opportunities to take a position in the international market. That's made it easy for new entrants to raise money, resulting in a major construction boom.[9]

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[6] *See, e.g., Notice* ¶ 1 ("there has been explosive growth in the number and capacity of submarine cables").

[7] *Id.*

[8] *See* Cathy Hsu, Telecommunications Division, International Bureau Report, *1998 Section 43.82 Circuit Status Data* (December 1999) ("*FCC Circuit Status Report*").

[9] Bandwidth Rolls On at 2.

12. For instance, in the case of non-consortium (or "closed investment") cables, the high demand for international communications transport services has significantly improved those operators' ability to raise money for cable deployment. Indeed, I understand that customer commitments can generally be obtained *before* the cable is deployed. Consequently, new entrants can easily obtain financing, at reasonable terms, for the deployment of that cable because the risks associated with the sale of capacity are significantly reduced. Put simply, the high demand for international cable capacity allows competitors to overcome the largest hurdle to deploying a new cable – the risk that the cable will be underutilized (and the impact such risk has on the ability to obtain sufficient financing to cover the large up-front costs).

13. Open investment cable entrants enjoy similar benefits as a result of the high demand for international communications services. Higher demand translates into greater willingness on the part of carriers to purchase larger amounts of capacity. Consequently, the open investment cable system is able to deploy much higher capacity cables which, due to economies of scale, can decrease the per unit cost of capacity. And the gestation period of such cables is generally less than two years.[10]

14. For example, the TAT-14 transatlantic cable, an open investment cable authorized in October 1999 will provide capacity of 640 Gbits at a per STM-1 cost of approximately $400,000, which is less than one tenth of the $4.7 million per STM-1 cost of the preceding open investment cable on this route, TAT-12/13, authorized in July 1993, which had an initial capacity of only 10 Gbits.

[10] *MCI-WorldCom Order* ¶ 101. In addition, I understand that satellite operators are also moving aggressively to expand capacity and launch new systems in response to the increased demand for international communications services.

15. *Foreign Barriers to Entry.* The WTO Agreement has resulted in removal of many foreign investment restrictions on licensing that previously hampered the rapid deployment of new cable systems.[11] Instead, today carriers are free to deploy their own systems in many foreign countries. Also, as recognized by the Commission, U.S. "carriers are able to obtain operating agreements or establish alternative arrangements to provide international services."[12] Indeed, multiple U.S. carriers have operating agreements to nearly all countries, and more U.S. carriers are able to obtain operating agreements from new entrants and incumbent carriers as a result of the market access commitments made under the WTO Agreement.[13]

16. U.S. carriers may also take advantage of these lower foreign entry barriers by establishing their own affiliates and terminating their own traffic through self-correspondence arrangements. In addition, the Commission has encouraged U.S. carriers to enter into commercial arrangements with new entrant carriers in foreign markets by removing the ISP and related filing requirements from all foreign carriers that lack market power.

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[11] *See id.* ¶ 105.

[12] *See id.* ¶ 117; *see also* Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶¶ 50-51 (1995). Additionally, settlement rates have declined dramatically in response to the Commission's *Benchmarks Order*. Report and Order, *International Settlement Rates*, 12 FCC Rcd. 19806 (1997). For instance, between 1997 and 1999 settlement rates between the U.S. and almost all foreign countries fell, *e.g.*, U.S. to Japan rates fell from 43 cents to 14 cents per minute. *See* International Settlement Rates, *TeleGeography 2000*.

[13] Indeed, the Commission has recognized this fact on several occasions. *See* Memorandum Op. and Order, *AT&T Corp., et al.*, 14 FCC Rcd. 19140, ¶ 50 (1999) ("*AT&T-BT Order*") (WTO Agreement will provide increased opportunities for U.S. carriers to obtain operating agreements with foreign carriers); Order on Reconsideration, *Motion of AT&T to be Declared Non-Dominant for International Service*, 13 FCC Rcd. 21501, ¶¶ 18, 25-27 (1998); *MCI-WorldCom* Order ¶ 117, n.339. *See also TeleGeography 2000* (forty-four countries had two or more international carriers as of July 1999, up from twenty-three countries with two or more carriers in July 1997. Twenty-six countries in July 1999 had ten or more international carriers.)

17. As a direct result of these technological advances, increases in demand and decreases in foreign barriers, undersea cable capacity has seen exponential growth and "market prices for both transatlantic and transpacific bandwidth have fallen dramatically with increased supply."[14] Indeed, retail prices for three minute calls between the U.S. and foreign countries have declined dramatically since 1997.[15]

18. One significant barrier to entry remains – regulatory delays and costs. Indeed, 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 that can take many months. As "new technological developments make speed to market crucial for firms competing in the ever changing Internet-driven communications market,"[16] this 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.

IV. THERE IS SUBSTANTIAL COMPETITION AMONG SUBMARINE CABLE CAPACITY OWNERS

19. In July of 1995, there were 65 U.S. carriers authorized to provide facilities-based international telecommunications services and international simple resale services. By July of 1999 – just three years later – there were 679 such carriers.[17] Similarly, the global number of

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[14] *Notice*, Separate Statement of Commission Susan Ness, at 1.

[15] *See* Retail Pricing Trends, 1997-1999 (Graphs), *TeleGeography 2000*; *See also* Band-X Graphs available at <www.band-x.com/index.cfm>.

[16] *Notice* ¶ 5.

[17] *See* The Growth of International Services Competition, *TeleGeography 2000*.

carriers offering these services has increased from less than 400 to more than 1700 in the same period and is expected to grow to more than more than 2,200 by mid-2000.[18]

20. This rapid expansion in the number of competitors has been accompanied by an even larger expansion in the amount of Trans-oceanic transport capacity. In 1997, the three primary international regions could potentially provide 48 gigabits per second (Gbps) of capacity. By 2001, that number is expected to grow to 6.4 *tera*bits per second – a 12,300 percent increase in capacity in only four years.[19] Indeed, competition is fierce.

A. International Transport Markets Are Regional, Not Point-To-Point.

21. Virtually all major transoceanic cables are now constructed of self-healing "rings" to provide immediate restoration capabilities, with duplicate "wet" transoceanic transmission facilities and at least two landing stations at each end, often located in different countries. Additionally, most geographic areas are served by numerous cables even though each cable may land at particular geographic locations. Therefore, carriers typically have several alternative choices regarding how to route a call from the United States to a particular foreign location. This substitutability among cables that serve the same geographic region leads to intense competition among competing cables for data and voice traffic. Thus, any meaningful analysis of competition for international transport must consider the regions where various cables compete, not specific points where particular cables begin and end.

22. Because of these marketplace realities, I use a regional approach to plan and acquire new submarine cable facilities for Concert. In acquiring new facilities to enable Concert to meet its service forecasts, I consider all regional transport alternatives to enable Concert to

[18] *Id.*

[19] *See id.*, Capacity Totals and Projections, Table 1.

deliver traffic at the lowest possible cost. In addition, the ability to deliver traffic to a broad region is a key factor in choosing cable landing points. All modern cable systems and networks have the ability to extend their capacity to non-landing point countries and, in planning for new submarine cables, landing points are frequently chosen because of their ability to deliver traffic beyond the landing point country.

23. The Commission has endorsed this regional approach to analyzing competition.[20] The Commission, for instance, in considering whether to allow transfer of MCI's cable landing licenses to WorldCom, concluded that "[w]ith regard to U.S. international submarine cables, . . . although they terminate in a select number of countries, they tend to serve entire regions."[21] Therefore, the Commission concluded that "it is appropriate . . . to adopt a regional approach to analyzing the international transport market."[22] The Commission went on to point out, as an example, that the TAT-12/13 cable system terminates in the United Kingdom and France, but carriers use this cable system to carry traffic destined for the same geographic locations throughout Europe.[23]

24. The Commission's conclusions regarding the regional nature of international transport markets are further confirmed by the common use of multiple and indirect routes for the delivery of international services, including both switched and private line services.

25. U.S. carriers commonly provide switched services to many countries via carriers in third countries through use of switched hubbing, refile, reorigination and transit services.

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[20] *See MCI-WorldCom Order* ¶ 84

[21] *Id.*

[22] *Id.*

[23] *Id.*

While international carriers have always used transit arrangements to address temporary re-routing needs or to reach a particular country where they do not have an operating agreement, the use of these other types of third country routing arrangements has greatly increased in recent years as a result of the greater competition in the global telecommunications market stimulated by the 1997 WTO Agreement and the increased arbitrage opportunities created by lower settlement rates. These developments have been supported by the Commission, which authorized "switched hubbing" of third country traffic via countries to which it permits international simple resale (ISR) services in 1995.[24] More recently, the Commission has stated that "[l]east-cost routing mechanisms such as reorigination are an economically rational response to inflated settlement rates" and, moreover, has made clear that it has "encouraged the development of least-cost routing mechanisms as a way to put pressure on above-cost accounting rates."[25]

26. U.S. and foreign carriers now routinely engage in these third-country routing practices.[26] For example, AT&T and BT have stated that "a significant purpose of the [Concert] Global Venture is to take advantage of these emerging opportunities resulting from market liberalization and the relaxation of existing regulatory restrictions to reduce traffic costs and

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[24] *See* 47 C.F.R. § 63.17.

[25] *AT&T-BT Order* ¶ 72. *See also Benchmarks Order* ¶ 13 ("We do not believe it benefits U.S. consumers to arbitrarily restrict a carrier's ability to route traffic in the most economically efficient manner or to restrict the development of new technologies and routing methods.")

[26] As an example, a U.S. carrier might find the most cost effective method of international transport from New York City to Paris to be an indirect route that takes the communications traffic from New York City to Canada over terrestrial lines, then from Canada to the U.K. over undersea cables, then from the U.K to Paris.

consumer prices through the use of more efficient routing arrangements."[27] A recent article explains that new international wholesale carriers and alternative call termination companies "now refile 30 to 50 percent of their total international traffic" and estimated that the world's largest carriers would be refiling 20-25 percent of their international traffic by 2000.[28] As a result, an active "spot market" has mushroomed that allows carriers to "quickly re-route traffic according to the latest prevailing rates."[29] It is also clear that few countries are now invulnerable to these practices. In fact, *TeleGeography 2000* reports that the three top routes by volumes of minutes traded on the Arbinet Exchange in 1999 were to China, Vietnam and Brazil, all countries in which international competition is either prohibited or strictly curtailed. Similarly, certain geographic points now advertise that they are "hubbing" points that can efficiently direct traffic from particular locations to other areas in the general region.[30]

27. Large international private line customers, such as Internet service providers (ISPs) and large corporate users, also increasingly engage in regional hubbing. These customers serve countries in a region through lower capacity circuits from one or two central hubs and transport traffic between regions over larger capacity circuits that can potentially use any cable serving the region. The substitutability among different cables serving the same region for international private line customers is also shown by the fact that, to protect against service

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[27] *AT&T-BT Order* ¶ 41. Because carriers have choices regarding cable routes between two destinations, landing stations have no ability to exercise any market power. A landing station owner that charges supra-competitive rates will simply lose traffic to competing landing stations in the same region as carriers seek to lower the overall costs of terminating a call.

[28] Michael J. Scheele and Cathleen Woodall, The Market for Refile and Transit Services, *TeleGeography 2000*.

[29] *Id. See also, e.g.*, <http://www.arbinet.com>.

[30] *See, e.g.*, <http://www.kdd.co.jp/global-e/hub/jih.html>.

disruption, many of these private line customers specifically request redundant circuits to each international destination provisioned on multiple cables.

28. As a further demonstration, under the IP and other packet-switched technologies used by networks now being deployed by many U.S. and other leading international carriers, each message is transmitted in separate data packets that may travel over several different cables serving a region to reach its destination. These IP networks are expected to replace the circuit switched networks in service today.

29. In conclusion, the existence of these regional routing and hubbing practices for both IMTS and private line traffic confirms that the appropriate geographic area for submarine cables is not point-to-point but, regional.[31]

B. There Is Significant Competition For International Communications Services In Regions Recognized By The Commission.

30. The Commission has recognized three primary markets for US-foreign international transport: (1) the Trans-Atlantic region; (2) the Trans-Pacific region; and (3) the Trans-Americas region.[32] Any one of several cables from the US to any of these regions can serve almost every geographic area in the region.

31. *Trans-Atlantic Region.* The market for transportation in the Trans-Atlantic region is extremely competitive, and competition will only increase. The Trans-Atlantic region is currently served by twelve separate cable systems: TAT-8 (.560 Gbps), PTAT-1 (1.2 Gbps),

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[31] The behavior of multinational corporations ("MNC") further illustrates that transcontinental markets are regional and not point-to-point. MNC's accept bids from multiple international carriers (carriers whose international cables terminate at different points) and choose the lowest cost alternative. Sometimes, MNC's even choose to purchase service from multiple carriers. *See* Affidavit of John Finnegan, *Application of AT&T Corp., et al. Limited Grants of Section 214 Authority, Modification of Authorizations, and Consent to the Assignment of Licenses*, IB Docket No. 98-212 (1999).

[32] *See MCI-WorldCom Order* ¶ 84; *FCC Circuit Status Report*, Table 7.

TAT-9 (1.2 Gbps), TAT-10 (1.68 Gbps), TAT-11 (1.68 Gbps), Columbus-II (.560 Gbps), CANTAT-3 (5 Gbps), TAT-12/13 (15 Gbps), Gemini (15 Gbps), AC-1 (160 Gbps), Atalantis-2 (5 Gbps) and Columbus-III (20 Gbps).[33]

32. Together, these cable systems provide a total service capacity of 226.88 Gbps – approximately 800 percent more capacity than reported in 1996.[34] In addition, five new competitors are currently deploying cable systems in the Trans-Atlantic region: TAT-14 (640 Gbps), Level 3/AC2 (1280 Gbps), FLAG Atlantic-1 (1280 Gbps), Hibernia (160 Gbps) and Tycom Atlantic (1280 Gbps).[35] Thus, by the year 2001, there are expected to be almost 5 *tera*bits of capacity in the transpacific region, more than twenty times current capacity. And because many of these systems are upgradeable, the capacity is potentially much higher.

33. For instance, even if the only existing cable serving the entire Trans-Atlantic region was TAT-14 – a typical modern cable system in the Trans-Atlantic region – there would be 50 competing suppliers of capacity, none with appreciable market share.[36] Adding the other users of capacity on the remaining cable systems would further reduce ownership concentration.

34. *Trans-Pacific Region.* The market for transportation in the Trans-Pacific region is also very competitive. The Trans-Pacific region is currently served by eight separate cable systems: NPC (1.68 Gbps), TPC4 (1.12 Gbps), PacRim East (1.12 Gbps), PacRim West (1.12 Gbps), TPC5 (20 Gbps), GP Cable (5 Gbps), China-US (80 Gbps) and PC1 (80 Gbps). Total

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[33] These statistics are based upon my understanding of data collected by AT&T Corp. for the purposes of tracking transatlantic submarine capacity. The statistics cited below regarding the transpacific and transamericas regions are obtained from similar data.

[34] *See FCC Circuit Status Report*, Table 7.

[35] *Id.* There is currently uncertainty as to whether the Oxygen cable will be deployed. If that capacity is deployed another 2.5 terabits of Trans-Atlantic capacity would be added.

[36] *See* Ownership Interests In The Tat-14 Cable Network, attached hereto as Exhibit 1.

service capacity, therefore, exceeds 190 Gbps in the Trans-Pacific Region – about 1100 percent more than the capacity reported in 1996.[37] By the end of 2001 this total will more than triple to 990 Gbps as Japan-US (400 Gbps), Southern Cross (80 Gbps), and Australia-Japan (320 Gbps) come on line. In addition, the Tycom Pacific Cable Systems (2.56 terabits) will again almost quadruple capacity by mid-2002.[38]

35. Again, ownership of capacity in this region is extremely diffuse. Even if the only existing cable in the entire trans-pacific region was Japan-US – a typical modern cable system in the Trans-Pacific region – there would be 46 competing suppliers of capacity, none with appreciable market share.[39] Adding in the other owners of rest of the cable systems would further reduce ownership concentration.

36. *Trans-Americas Region.* Lastly, the market for transportation in the Trans-Americas region is highly competitive, and competition in that region is increasing. The Trans-Americas region is currently served by 3 separate cable systems: Americas-1 (5 Gbps), MAC (40 Gbps) and Pan American Cable systems (2.5 Gbps). By the end of the year 2001, seven new competitors will have entered the market, increasing capacity by 500 percent: Americas-2 (80 Gbps), ARCOS-1 (60 Gbps), Americas (formerly Atlantica) (20 Gbps), South America Crossing (40 Gbps), Pan American Crossing (40 Gbps), Sam-1 (40 Gbps) and MAYA-1 (20 Gbps).[40] In addition, by 2002, Mercus-1 (80 Gbps) will become available.

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[37] *See FCC Circuit Status Report*, Table 7.

[38] *See TyCom Networks (US) Inc. and TyCom Networks (Guam) L.L.C.*, SCL-LIC-20000717-00026.

[39] *See* Ownership Interests In The Japan-US Cable Network, attached hereto as Exhibit 2.

[40] ARCOS-1, Americas, SAC and Sam-1 could be upgraded to a combined final capacity of 6.76 terabits.

37. Ownership of capacity in this region is extremely diffuse. Even if the only existing cable in the entire Trans-Americas region was the Pan-American Cable System – a typical modern cable system in the Trans-Atlantic region – there would be over 50 competing suppliers of capacity, none with appreciable market share.[41] Adding in the other owners of rest of the cable systems would further reduce ownership concentration.

38. Overall, between 1996 and 1998 total capacity increased from less 100 Gbps to over 6 *tera*bits of capacity. And capacity is continuing to grow at phenomenal rates.

V. OPEN INVESTMENT CABLE SYSTEMS ARE PRO-COMPETITIVE AND FURTHER THE PUBLIC INTEREST.

39. Open investment cable systems provide many advantages that are not available from closed investment cable systems.

40. *First*, open investment cables are cost sharing arrangements that often provide the lowest cost method for carriers to acquire long-term capacity for the provision of international communications services. Closed investment systems are profit making enterprises that must set prices for capacity that are sufficient to recover the costs of deploying and operating the cable, plus whatever markup the market will bear (the mark-up represents the non-carriers' profit for operating the cable system). By contrast, open investment cables are not designed to return a profit to its owners and generally permit any and all carriers to acquire capacity for the cost of deploying and operating the cable, with no markup.

41. *Second*, open investment cables allow initial purchasers to obtain later upgraded capacity at the much lower cost of the upgrade. Included in the price of the initial capacity investment is the right to proportional participation in the full benefits of planned (or even

[41] *See* Ownership Interests In The Pan-American, attached hereto as Exhibit 3.

unplanned) changes in technology that can increase the capacity of the cable. By contrast, closed investment cables generally provide only for the use of a fixed amount of capacity for a fixed amount of time, and no rights are granted to users for the expected benefits of planned technological changes. Any upgraded capacity on closed capacity cables is the property of the cable owners and may be made available to users at market prices that are generally higher than the cost of the upgrade.

42. *Third*, the costs of open investment cables are further attenuated by efficiencies associated with the multi-ownership aspect of those cables.[42] For instance, open investment cables allow for economies of scale by allowing carriers to deploy one large cable rather than several smaller cables. Moreover, open investment cables reduce the costs of capacity by reducing the risks associated with fluctuating costs of capacity. Unlike closed investment cables, the cost of transport on open investment cables does not vary as market conditions fluctuate. This aspect of open investment cables is particularly valuable to smaller carriers who are especially sensitive to fluctuations in the price of inputs (*i.e.* capacity). In addition, competition among various owners is permitted on open investment cable systems – operators are often permitted to independently price traffic and there are generally few restrictions placed upon the volume of traffic that can be handled.

43. *Fourth*, carriers purchasing capacity on closed investment cable systems are not involved in the decision to upgrade the cable system. And closed investment cable operators face a difficult dilemma when choosing to upgrade that capacity. In particular, any new capacity competes directly with existing closed investment capacity. Therefore, the incremental cost (to

[42] In general, any carrier with an interest in an open investment cable is invited to invest, and any such carrier's interest is limited primarily only by the proportionate amount of funds that the carrier is willing to invest.

the *cable operator*) of upgrading the cable system may be more than the incremental benefit to the cable operator – even though the incremental benefit to the carriers and consumers of long distance services may be greater than the incremental cost of the upgrade. Because carriers have no power to force the upgrade, the upgrade will not occur.

44. By contrast, the carriers that use the capacity on an open investment cable system are responsible for deciding whether or not to upgrade that system. As fully discussed above, the incremental cost of a unit of capacity obtained from upgrading an existing system is far less than that of deploying new cable. Thus, where cable operators find that the incremental cost of upgrading they system is less than its incremental benefits, the carriers can initiate proceedings for such an expansion. The resulting efficiencies and cost savings can then be passed on to long-distance customers.

45. *Fifth,* recent open investment cables do not generally place restrictions on a carrier's ability to resell unused capacity. Often closed investment cable systems attempt to thwart competition by disallowing carriers that purchase capacity on a closed investment cable from reselling that capacity to third parties – even though that capacity may otherwise go unused. This behavior results in fewer competitors and in an inefficient allocation of international capacity. By contrast, open investment cable systems generally allow, and often encourage, carriers to resell unused capacity to third parties. In this way, capacity is efficiently utilized – resulting in lower cost international transport and, often, lower long distance rates.

VERIFICATION

I, Thomas K. McInerney, declare under penalty of perjury that the foregoing is true and correct. Executed on August 21, 2000.

Thomas K. McInerney