

the voting rules set out in the NPRM.⁵¹ The analysis provided in the NPRM pays no attention to the complicated economics involved in making capacity expansion decisions, including the potentially crippling free rider problem discussed above (at ¶ 56). As previously explained, if a subset of the owners are empowered to force a capacity upgrade and purchase capacity at the incremental cost, carriers potentially would have an incentive to make a smaller initial investment than otherwise. The likely result would be underinvestment—if the construction of the cable survived these misincentives in the first instance.

102. The NPRM’s proposal for the micromanagement of the price carriers pay for buying capacity on submarine cables is also problematic. The NPRM would require applicants, in order to qualify for the “pro-competitive arrangements” streamlining option, to include in their construction and management agreements provisions designed to equalize the prices paid by small and large carriers for capacity on submarine cables. NPRM ¶ 49.

103. But there are perfectly valid reasons why some carriers pay more per unit of capacity than do others. 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.”⁵² Such discounts are also often necessary to “match capacity prices in alternative cable systems.”⁵³ Volume discounts are an effective way to encourage efficient

⁵¹ NPRM ¶ 47.

⁵² *Columbus III Section 214 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).

⁵³ *Id.*

decisions with respect to capacity allocation and sizing where scale economies in the construction of capacity are important. In unregulated competitive markets, firms that provide a disproportionate share of the volume needed to achieve potential economies of scale often pay lower prices per unit of capacity.

104. Further, an efficient pricing structure must account not only for how much capacity a carrier is buying, but also *when* the carrier commits to buying it. Discounts can properly compensate for increased risk of early investment. The owners making the investment necessary to secure construction of the submarine cable are taking a larger risk than later investors. In today's environment, carriers wishing to build new consortium cables must put up the construction money in advance, even though customer demand may not always develop in the manner , or to extent forecasted. Requiring the owners that provided the funding necessary to get the submarine cable project underway to pay the same amount as other carriers who wait until after the cable is constructed and financed could harm the public by leading to underinvestment in cable capacity.

105. The purpose of the preceding comments is not to suggest that, if voluntarily adopted by submarine cable owners, the proposed "pro-competitive arrangements" would be anticompetitive or improper. To the contrary, market forces can be expected to generate sufficient incentives for owners to negotiate fair and efficient arrangements. Carriers that are dissatisfied with the price or other terms offered for capacity on a proposed consortium cable are free to negotiate with the other parties, participate in a competing cable project, purchase an ownership interest in existing cables, or lease capacity from private cables. Unlike the Commission, these parties are decentralized market participants who have their concomitant

perceptions, knowledge, judgements and expertise with which to weigh the various considerations and factors that must be taken into account in deciding how to structure the ownership and governance rules of submarine cables. In the absence of persuasive empirical evidence (or theory) that a market failure prevents the parties from reaching mutually beneficial competitive outcomes that serve the public interest, the Commission should encourage the market to determine how submarine cable ownership arrangements are structured, with a minimum of regulatory delays and uncertainties

VIII. THE COMMISSION SHOULD REJECT GLOBAL CROSSING'S PROPOSED RESTRICTIONS ON CONSORTIUM CABLES

106. The Commission should also reject Global Crossing's proposal to disallow submarine cable landing license applications whenever the "landing parties on the U.S. end of the cable . . . have a combined share of more than 35 percent of active half circuits . . . on the U.S. side of the route served by the cable."⁵⁴ This restriction would be anticompetitive.

107. This restriction would prevent any carrier (or group of carriers) with more than 35% of the existing capacity on a route from taking an ownership position in any new cable. Because large carriers often are the prime sponsors of new cable projects, this restriction would tend to reduce both the number and the capacity of any future consortium cables. This outcome would injure consumers in several ways: by depriving them of capacity that they would be willing to pay for, by forgoing the potential economies of scale available from optimally sized cables, and by weakening the impact of consortium cables as a powerfully competitive set of

⁵⁴ NPRM ¶ 37.

alternatives to closed investment cables like those owned by Global Crossing. Construction of additional capacity by firms with a 35% or greater market share is likely to be socially beneficial, regardless of whether or not it raises the measure of market concentration. Moreover, the Global Crossing proposal would restrict construction even if the project would *reduce* the “market share” of the firms, and even reduce it to less than 35%. There is no coherent economic justification for this arbitrary restriction on competitive entry. The 35% ceiling cannot be justified as a safeguard against horizontal market power: the Commission found AT&T to be non-dominant when its market share for many international services was nearly twice that level because of elastic supply and low barriers to entry⁵⁵ – factors that are present in the “market” for wet link transport.⁵⁶

108. There is no rationale for restrictions that apply specially to consortium cables on the allegation that they facilitate “collusion.” As we explained in detail above, the structure of open investment cables generally ensures that the carriers that participate in those cables compete independently in the services that they offer.

109. There is no valid rationale for the Global Crossing proposal as a means to restrict “clustering” by ensuring that only a limited number of carriers will be able to invest in any particular cable. As discussed above, competitive concerns about the “clustering” scenario are unfounded – even for the shrinking share of undersea circuits that carry IMTS traffic.

⁵⁵ *AT&T Intern’l Non-Dominance Order* ¶ 37.

⁵⁶ *See above at* ¶¶ 44-54.

110. Finally, it is inconsistent with the basic tenets of competition analysis that Global Crossing proposes that the 35% apply to each “point-to-point” route served by a proposed submarine cable.⁵⁷ These are not relevant markets for the assessment of concentration and market power (indeed, Global Crossing concedes that the 35 percent ceiling would not apply to competitive regional routes⁵⁸). As noted above, the relevant markets for routes are regional, not point-to-point. And, as explained elsewhere by AT&T, each relevant region is highly competitive.

111. Global Crossing’s proposal to base the ownership limit on *active* circuits owned by carriers, rather than capacity that is currently available or that can be achieved in the near future, is also economically invalid and contrary to the standards of competition analysis.⁵⁹ Unused capacity is highly relevant for competitive analysis in this context. Ownership of excess capacity makes collusion much more difficult because market participants with excess capacity have a powerful incentive to cheat on any scheme that requires them to reduce output, incur the costs of even greater excess capacity, and forego the net revenues from the potential sale of expanded output. Ownership of excess capacity also undermines or eliminates the effects of any other firm’s attempt to exercise market power, since it enables competitive offers to serve those customers otherwise subjected to supracompetitive pricing. The incentives to utilize procompetitively any spare capacity in the submarine cable industry would be particularly

⁵⁷ NPRM ¶ 37.

⁵⁸ See NPRM ¶ 37.

⁵⁹ See *id.*

strong, because the first carrier to break ranks could lock up valuable business customers with long term contracts, thereby ensuring full use of its capacity into the future.

CONCLUSION

112. It is time for the Commission to adopt standards and procedures for approval of submarine cable applications that reflect the rapid growth, technological dynamism, and vigorous competitiveness of the submarine cable industry. To do so, the Commission should end its time-consuming and ad hoc review of submarine cable license applications, a delaying, costly and uncertain process for applicants that can become a major deterrent to entry. Unfortunately, the specific rules proposed in the NPRM fail to achieve this important goal.

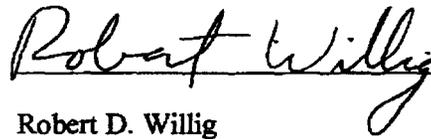
113. Rather than the cumbersome, intrusive, and economically arbitrary “streamlined” procedures for regulating entry proposed in the NPRM, the Commission should apply here the procompetitive regulatory reforms it has adopted for both domestic and international Section 214 authorizations, and for regulating foreign participation in the United States telecommunications market. In light of the generally competitive conditions and low entry barriers in the relevant markets, the Commission should give expedited approval to any cable landing license application.

114. If the Commission nonetheless persists with the flawed streamlining approach set forth in the NPRM, the categories identified in the NPRM should be substantially revised.

VERIFICATION

I, Robert D. Willig, declare under penalty of perjury that the foregoing is true and correct.

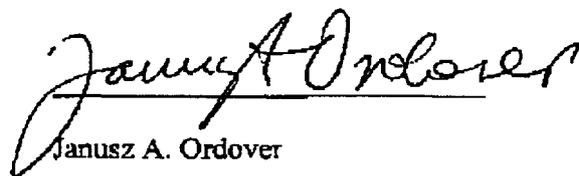
Executed on August 17, 2000.

A handwritten signature in cursive script that reads "Robert D. Willig". The signature is written in black ink and is positioned above a horizontal line.

Robert D. Willig

VERIFICATION

I, Janusz A. Ordover, declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 2000.


Janusz A. Ordover



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October 1998

JANUSZ ALEKSANDER ORDOVER

Department of Economics
New York University
269 Mercer Street
New York, New York 10003

Office: (212) 998-8956
Fax: (212) 995-3932
Home: (203) 966-3788
Fax: (203) 972-3615
e-mail: ordoverj@fasecon.econ.nyu.edu

EDUCATION

- 1968-1973 Columbia University, New York, New York
Graduate Department of Economics and European Institute of the School of International Affairs
Doctoral Dissertation: Three Essays on Economic Theory, May 1973
- 1967-1968 McGill University, Montreal, Canada
Departments of Economics and Political Science
- 1963-1966 Warsaw University, Warsaw, Poland
Department of Political Economy

HONORS

- 1973 Columbia University: Highest distinction for the doctoral dissertation
- 1971-1972 Columbia University: Honorary President's Fellow
- 1969-1971 Columbia University: President's Fellow
- 1967-1968 McGill University: Honors Student
- 1964, 1965 Warsaw University: Award for Academic Achievement, Department of Political Economy
- Who's Who in the World
Who's Who in America
Who's Who in the East

PROFESSIONAL EXPERIENCE

- June 1982 - present Professor of Economics
Department of Economics, New York University, New York, New York
- Sept. 1996 - present Director of Masters in Economics Program
Department of Economics, New York University
- Summer 1996- present Lecturer
International Program on Privatization and Reform
Institute for International Development, Harvard University, Cambridge, Massachusetts

Professional Experience (continued)

- Aug. 1991 - Deputy Assistant Attorney General for Economics
Oct. 1992 Antitrust Division
United States Department of Justice, Washington, D.C.
- Sept. 1989 - Visiting Professor of Economics
July 1990 School of Management and Organization, Yale University, New Haven, Connecticut
- Lecturer in Law
Yale Law School
- Mar. 1984 - Visiting Professor of Economics
June 1988 Universita Commerciale "Luigi Bocconi", Milan, Italy.
- June 1982 - Director of Graduate Studies
Feb. 1985 Department of Economics, New York University
- Sept. 1982 - Adjunct Professor of Law (part-time)
June 1986 Columbia University Law School, New York, New York
- Feb. 1982 - Acting Director of Graduate Studies
June 1982 Department of Economics, New York University
- June 1978 - Associate Professor of Economics
June 1982 Department of Economics, New York University
- Sept. 1979 - Lecturer in Economics and Antitrust
May 1990 New York University Law School
- Sept. 1977 - Member, Technical Staff
June 1978 Bell Laboratories, Holmdel, New Jersey
- Associate Professor of Economics
Columbia University
- Visiting Research Scholar
Center for Law and Economics, University of Miami, Miami, Florida
- Sept. 1973 - Assistant Professor of Economics
Aug. 1977 New York University
- Summer 1976 Fellow
Legal Institute for Economists, Center for Law and Economics, University of Miami
- Summer 1976 Visiting Researcher
Bell Laboratories, Holmdel, New Jersey

OTHER PROFESSIONAL ACTIVITIES

- 1997 - present Consultant
Inter-American Development Bank, Washington, D.C.
- 1997 - present Board of Editors
Antitrust Report
- 1995 - present Consultant
The World Bank, Washington, D.C.
- 1995 - present Senior Affiliate
Cornerstone Research, Inc., Palo Alto, California
- Fall 1995 Testimony, Hearings of the Federal Trade Commission
"Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace,"
Washington, D.C.
- 1994 - 1996 Senior Affiliate
Law and Economics Consulting Group, Emoryville, California
- 1994 - present Senior Affiliate
Consultants in Industry Economics, LLC, Princeton, New Jersey
- 1993 - 1994 Director
Consultants in Industry Economics, Inc., Princeton, New Jersey
- 1992 - 1993 Vice-Chair (*pro tempore*)
Economics Committee, American Bar Association, Chicago, Illinois
- 1992 - 1995 Senior Consultant
1990 - 1991 Organization for Economic Cooperation and Development, Paris, France
- 1991 Member
Ad hoc Working Group on Bulgaria's Draft Antitrust Law
The Central and East European Law Initiative
American Bar Association
- 1990 - 1991 Advisor
Polish Ministry of Finance and Anti-Monopoly Office
Warsaw, Poland
- 1990 - 1991 Member
Special Committee on Antitrust
Section of Antitrust Law, American Bar Association
- 1990 - 1991 Director and Senior Advisor
Putnam, Hayes & Bartlett, Inc., Washington, D.C.

Other Professional Activities (continued)

- 1990 - 1996 Member
Predatory Pricing Monograph Task Force
Section of Antitrust Law, American Bar Association
- April 12, 1989 Witness
Hearings on Competitive Issues in the Cable TV Industry
Subcommittee on Monopolies and Business Rights of the Senate Judiciary Committee
Washington, D.C.
- 1989 Member
EEC Merger Control Task Force, American Bar Association
- 1988 - present Associate Member
American Bar Association
- 1987 - 1989 Adjunct Member
Antitrust and Trade Regulation Committee, The Association of the Bar of the City of New York
- 1984 Speaker, "Industrial and Intellectual Property: The Antitrust Interface"
National Institutes, American Bar Association, Philadelphia, Pennsylvania
- 1983 - 1990 Director
Consultants in Industry Economics, Inc.
- 1982 Member
Organizing Committee
Tenth Annual Telecommunications Policy Research Conference, Annapolis, Maryland
- 1981 Member
Section 7 Clayton Act Committee, Project on Revising Merger Guidelines
American Bar Association
- 1980 Organizer
Invited Session on Law and Economics
American Economic Association Meetings, Denver, Colorado
- 1978 - 1979 Member
Department of Commerce Technical Advisory Board
Scientific and Technical Information Economics and Pricing Subgroup
- 1978 - present Referee for numerous scholarly journals, publishers, and the National Science Foundation

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

American Economic Association
American Bar Association

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D. Other Publications

"Predatory Pricing," in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, MacMillan (forthcoming).

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"Supervision and Social Welfare: An Expository Example," C.V. Starr Center Working Paper, January 1982.

"Should We Take Rights Seriously: Economic Analysis of the Family Education Rights Act," with M. Manove, November 1977.

"An Echo or a Choice: Product Variety Under Monopolistic Competition," with A. Weiss; presented at the Bell Laboratories Conference on Market Structures, February 1977.

GRANTS RECEIVED

Regulation and Policy Analysis Program, National Science Foundation, Collaborative Research on Antitrust Policy, Principal Investigator, July 15, 1985 - December 31, 1986.

Regulation of Economic Activity Program, National Science Foundation, Microeconomic Analysis of Antitrust Policy, Principal Investigator, April 1, 1983 - March 31, 1984.

Economics Division of the National Science Foundation, "Political Economy of Taxation," Principal Investigator, Summer 1982.

Sloan Workshop in Applied Microeconomics (coordinator), with W.J. Baumol (Principal Coordinator), September 1977 - August 1982.

Economics Division of the National Science Foundation, "Collaborative Research on the Theory of Optimal Taxation and Tax Reform," July 1979 to September 1980, with E.S. Phelps.

Division of Science Information of the National Science Foundation for Research on "Scale Economies and Public Goods Properties of Information," W.J. Baumol, Y.M. Braunstein, M.I. Nadiri, Fall 1974 to Fall 1977.

National Science Foundation Institutional Grant to New York University for Research on Taxation and Distribution of Income, Summer 1974.



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Curriculum Vitae

Name: Robert D. Willig

Address: 220 Ridgeview Road, Princeton, New Jersey 08540

Birth: 1/16/47; Brooklyn, New York

Marital Status: Married, four children

Education: Ph.D. Economics, Stanford University, 1973
Dissertation: Welfare Analysis of Policies
Affecting Prices and Products.
Advisor: James Rosse

M.S. Operations Research, Stanford University, 1968.

A.B. Mathematics, Harvard University, 1967.

Professional Positions:

Professor of Economics and Public Affairs, Princeton University, 1978-.

Principal External Advisor, Infrastructure Program, Inter-American Development Bank, 6/97-8/98.

Deputy Assistant Attorney General, U.S. Department of Justice, 1989-1991.

Supervisor, Economics Research Department, Bell Laboratories, 1977-1978.

Visiting Lecturer (with rank of Associate Professor), Department of Economics and Woodrow Wilson School, Princeton University, 1977-78 (part time).

Economics Research Department, Bell Laboratories, 1973-77.

Lecturer, Economics Department, Stanford University, 1971-73.

Other Professional Activities:

Advisory Board, Electronic Journal of Industrial Organization and Regulation Abstracts, 1996-.

Visiting Faculty Member (occasional), International Program on Privatization and Regulatory Reform, Harvard Institute for International Development, 1996-.

Member, National Research Council Highway Cost Allocation Study Review Committee, 1995-.

Member, Defense Science Board Task Force on the Antitrust Aspects of Defense Industry Consolidation, 1993-94.

Editorial Board, Utilities Policy, 1990-

Leif Johanson Lecturer, University of Oslo, November 1988.

Member, New Jersey Governor's Task Force on Market-Based Pricing of Electricity, 1987-89.

Co-editor, Handbook of Industrial Organization, 1984-89.

Associate Editor, Journal of Industrial Economics, 1984-89.

Director, Consultants in Industry Economics, Inc., 1983-89, 1991-94.

Fellow, Econometric Society, 1981-.

Organizing Committee, Carnegie-Mellon-N.S.F. Conference on Regulation, 1985.

Board of Editors, American Economic Review, 1980-83.

Nominating Committee, American Economic Association, 1980-1981.

Research Advisory Committee, American Enterprise Institute, 1980-1986.

Editorial Board, M.I.T. Press Series on Government Regulation of Economic Activity, 1979-93.

Program Committee, 1980 World Congress of the Econometric Society.

Program Committee, Econometric Society, 1979, 1981, 1985.

Organizer, American Economic Association Meetings: 1980, 1982.

American Bar Association Section 7 Clayton Act Committee, 1981.

Principal Investigator, NSF grant SOC79-0327, 1979-80; NSF grant 285-6041, 1980-82; NSF grant SES-8038866, 1983-84, 1985-86.

Aspen Task Force on the Future of the Postal Service, 1978-80.

Organizing Committee of Sixth Annual Telecommunications Policy Research Conference, 1977-78.

Visiting Fellow, University of Warwick, July 1977.

Institute for Mathematical Studies in the Social Sciences, Stanford University, 1975.

Consulting: Bell Laboratories, 1978-79; AT&T, 1978-89, 1991-; Conrail 1978-87, 1991-97; Federal Trade Commission, 1979-82, 1994-96; Pennsylvania Bell, 1980; Simpson Thatcher Bartlett, 1980, 1993-98; American Association of Railroads, 1981, 1985; Math-tech, 1981; Union Pacific Railroad, 1981, 1995-; Family Lines Rail System, 1982; Pepper, Hamilton, and Scheetz, 1981-87, 1991-98; Siemens Corp., 1982; Board of Governors of U. S. Postal Service, 1981; OECD, 1983-85, 1991-95; Sidley & Austin, 1983-89, 1991-98; U.S. Postal Service, 1983-84; Echlin Inc., 1982-83; United Airlines, 1983, 1991-98; Consultants in Industry Economics, 1983-89, 1991-; Wiley, Malehorn & Sirota, 1983-89; City of Newark, 1984; Arnold & Porter, 1986-89, 1991-; Howrey & Simon, 1985-88, 1993-; Kodak, 1987-89; Crowell & Moring, 1988; Viacom 1989, 1991-98; Bell Atlantic, 1991-94; Intel, 1991-93; AOPL, 1993; IBM, 1993-96; Merck, 1993-1995; Harkins Cunningham, 1993-96; Boeing, 1993-98; Niagra Mohawk, 1994; PSE&G, 1994-1996; Microsoft, 1994; Coca-Cola Co., 1994-; Digital Equipment Corp. 1997-98; World Bank 1994-; Inter-American Development Bank, 1997-; Air Transport Association of America, 1998.

Published Articles and Book Chapters:

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"Access and Bundling in High-Technology Markets," (with J. A. Ordover), forthcoming in Competition, Convergence and the Microsoft Monopoly, T. Lenard editor.

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"Restructuring Regulation of the Rail Industry," (with Ioannis Kessides), in Private Sector, Quarterly No. 4, September 1995, pp. 5 - 8. Reprinted in Viewpoint, October, 1995, The World Bank. Reprinted in Private Sector, special edition: Infrastructure, June 1996.

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"Economic Rationales for the Scope of Privatization," (with Carl Shapiro), reprinted in The Political Economy of Privatization and Deregulation, E. E. Bailey and J. R. Pack (eds.), The International Library of Critical Writings in Economics, Edward Elgar Publishing Co., 1995, pp. 95-130.

"Weak Invisible Hand Theorems on the Sustainability of Multi-product Natural Monopoly," (with W. Baumol and E. Bailey), reprinted in The Political Economy of Privatization and Deregulation, E. E. Bailey and J. R. Pack (eds.), The International Library of Critical Writings in Economics, Edward Elgar Publishing Co., 1995, pp. 245-260.

"Economists' View: The Department of Justice Draft Guidelines for the Licensing and Acquisition of Intellectual Property," (with J. Ordover), Antitrust, V. 9, No. 2 (spring 1995), 29-36.