

62. All submarine cables were originally operated on a common carrier basis. In addition to obtaining a cable landing license, common carriers also obtained authority from the Commission to construct and operate the cable pursuant to Section 214 of the Communications Act.¹¹⁶ As a common carrier, a cable landing licensee is subject to the requirements of Title II of the Communications Act.¹¹⁷ The obligations of a common carrier include offering facilities and service at reasonable rates on a nondiscriminatory basis.¹¹⁸ Common carriers are also subject to the complaint process set forth in Section 208 of the Communications Act.¹¹⁹

63. Since 1985, the Commission has allowed submarine cables to be operated on a non-common carrier basis.¹²⁰ The Commission has used this "private submarine cable policy" to promote competition in the provision of international transmission facilities.¹²¹ In the *Tel-Optik Order*, the Commission found that private systems in which bulk transmission capacity is sold or leased on a non-common carrier basis would result in increased competition in the provision of North Atlantic transmission capacity, and would provide the same user benefits that were offered by the private sale of domestic satellite transponders and would further stimulate technology and service development to the benefit of international users.¹²² In concluding that allowing non-common carrier cable systems would provide the same benefits to users that were offered by non-common carrier domestic satellite transponder sales,¹²³ the Commission found that non-

carrier cable) (*MAYA-1 Cable Landing License Order*).

¹¹⁶ 47 U.S.C. § 214. See, e.g., *AT&T Corp., BellSouth Communications, Inc., MCI WorldCom, Inc., RSL COM U.S.A., Sprint Communications, L.P., Star Telecommunications, Inc., Teleglobe USA, Inc., Tricom USA, Inc., WorldxChange Communications, Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire, and Operate Capacity in a Digital Submarine Cable Network, the MAYA-1 Cable Network*, File No. ITC-214-19990325-00153, Memorandum Opinion, Order and Authorization, 14 FCC Rcd 19449 (IB/TD, rel. Nov. 18, 1999) (*MAYA-1 214 Order*).

¹¹⁷ 47 U.S.C. § 201 *et seq.*

¹¹⁸ 47 U.S.C. §§ 201, 202. See *AT&T Corp., MCI International, Inc., SBCI-Pacific Networks, Inc., Sprint Communications Company, L.P., Teleglobe USA, Inc., Joint Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the United States, China, Taiwan, Japan, South Korea, and Guam*, File No. SCL-98-002, Cable Landing License, 13 FCC Rcd 16232, 16237, para. 15 (IB/TD, rel. Aug. 28, 1998) (*China-U.S. Order*).

¹¹⁹ 47 U.S.C. § 208.

¹²⁰ See *Tel-Optik Order*.

¹²¹ See *Japan-U.S. Order*, 14 FCC Rcd at 13080, para. 38; *Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, File No. SCL-96-005, Cable Landing License, 12 FCC Rcd 8516, 8520, para. 11 (1997) (*Cable and Wireless Order*).

¹²² *Tel-Optik Order*, 100 FCC 2d at 1053, para. 43.

¹²³ *Id.*, 100 FCC 2d at 1041, para. 19, citing *Domestic Fixed-Satellite Transponder Sales, Applications of Hughes Communications, Inc., Southern Pacific Communications Company, RCA American Communications, Inc., Western Union Telegraph Company, for Modification of Domestic Fixed Satellite Space*

common carrier cable systems would provide users with new alternatives to satisfy their capacity needs and any special operational or technical requirements, and could also stimulate technological development in cable systems.¹²⁴ The Commission further found that there was no need to require submarine cable systems to operate as common carriers.¹²⁵

64. In determining whether a cable system qualifies to be operated on a non-common carrier basis, the Commission uses the two-part test set forth in *NARUC I*.¹²⁶ The test first looks to whether there is a legal compulsion on the applicant to serve the public indifferently, and, if not, then to whether there are reasons implicit in the nature of the operations of the submarine cable system to expect an indifferent holding-out to the eligible user public.¹²⁷

65. In applying the first prong of the *NARUC I* test to submarine cable authorizations, the Commission has stated that there will be no legal compulsion to serve the public indifferently where there is no public interest reason to require facilities to be offered on a common carrier basis.¹²⁸ This public interest analysis has generally focused on the availability of alternative common carrier facilities.¹²⁹ Where there are sufficient alternatives, the Commission has found that the public interest does not require the licensee to offer capacity on the proposed cable on a common carrier basis, but rather that, in those circumstances, the public interest would be served by allowing a submarine cable to be operated on a non-common carrier basis.¹³⁰ Although this

Station Authorizations to Permit Non Common Carrier Transponder Sales, CC Docket No. 82-45, File Nos. 995-dss-mp/ml-(3)-82 996-dss-mp/ml-(4)-82 997-dss-mp/ml-82 998-dss-MP/ML-(3)-82, Memorandum Opinion, Order and Authorization, 90 FCC 2d 1238, 1251-52, paras. 33-34, 1255, para. 41 (1982) (*Domestic Fixed-Satellite Transponder Sales Order*), *aff'd*, *World Communications Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

¹²⁴ *Tel-Optik Order*, 12 FCC Rcd at 1041-42, paras. 19-20.

¹²⁵ *Id.*, 12 FCC Rcd at 1034, para. 4, 1041 para. 18.

¹²⁶ *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (*NARUC I*), *cert. Denied*, 425 U.S. 992 (1976). The D.C. Circuit recently affirmed the continuing use of the *NARUC I* test in light of the addition of the terms "telecommunications carrier" and "telecommunications service" in the Communications Act as part of the Telecommunications Act of 1996. See *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

¹²⁷ *NARUC I*, 525 F.2d at 642. See also *Japan-U.S. Order*, 14 FCC Rcd at 13080, para. 38; *Cable & Wireless Order*, 12 FCC Rcd at 8522, para. 14.

¹²⁸ See, e.g., *Japan-U.S. Order*, 14 FCC Rcd at 13080, para. 39; *Cable & Wireless Order*, 12 FCC Rcd at 8522-23, paras. 14-15.

¹²⁹ *Cable & Wireless Order*, 12 FCC Rcd at 8522-23, paras. 15-17.

¹³⁰ *Id.* In the context of satellite services, the Commission has found that if the barriers to entry for new satellite operators are low and alternative competitive sources of satellite services are available to consumers, satellite operators will have an incentive to offer service efficiently at low rates. In such an environment, the Commission has held that it is not necessary to compel space station operators to offer their services indifferently to the public as common carriers because competition will achieve the same result for purchasers of space segment capacity as regulation, that is, efficient service at low prices. See *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d at 1254-

public interest analysis has generally focused on the availability of alternative common carrier facilities,¹³¹ the Commission has not limited itself to that reasoning. For example, in the *Japan-U.S. Order*, the Commission found that competing non-common carrier facilities will at least partially constrain the operations of the Japan-U.S. Cable Network.¹³² The International Bureau has also found that alternative means to the destination point can also constrain the ability of a licensee to engage in anti-competitive practices, and thus satisfy the first prong of the *NARUC I* test.¹³³

66. If the Commission finds that there is no public interest reason to require the submarine cable facilities to be offered on a common carrier basis, then, under the second prong of the *NARUC I* test, the Commission considers whether there is reason to expect an indifferent "holding-out" to the eligible user public. In making this determination, the Commission generally relies on a statement of the applicant's intentions in this regard (including the language of any applicable terms for control of the cable system, such as a C&MA). If the Commission finds that an applicant has shown that it will make individualized decisions whether and on what terms to provide service and will not undertake to serve all people indifferently, the Commission has held that the second prong of the test has been met.¹³⁴ In the *Japan-U.S. Order*, the Commission found that it is reasonable to conclude that competition will require parties selling capacity to make flexible offers and not to offer capacity indifferently, and concluded that there is no reason to expect an indifferent holding-out to the eligible user public.¹³⁵

67. Notwithstanding a Commission decision not to require a submarine cable system to be operated on a common carrier basis, the Commission retains the ability to impose common carrier or common-carrier-like obligations on the operations of that cable system if the public interest so requires.¹³⁶ Furthermore, the Commission has always maintained the authority

55. paras. 39-41.

¹³¹ See, e.g., *Cable & Wireless Order*, 12 FCC Rcd at 8522-23, paras. 15-17; *Tel-Optik Order*, 100 FCC 2d at 1047, para. 29; *Optel Communications, Inc., Application for a license to land and operate in the United States a submarine cable extending between Canada and the United States*, File No. SCL-92-004, Conditional Cable Landing License, 8 FCC Rcd 2267, 2268, para. 11 (1993).

¹³² *Japan-U.S. Order*, 14 FCC Rcd at 13080, para. 39. The Commission noted that the U.S.-Japan route is also served by a number of existing and planned fiber optic cable systems, as well as by satellite capacity. *Japan-U.S. Order*, 14 FCC Rcd at 13080 n.56.

¹³³ *China-U.S. Order*, 13 FCC Rcd at 16236, para. 13. In the *Japan-U.S. Order*, the Commission also noted that U.S.-Japan traffic can also be carried indirectly over alternative cable systems, such as FLAG, which connect Japan to the United Kingdom. *Japan-U.S. Order*, 14 FCC Rcd at 13080 n.56.

¹³⁴ See *Cable & Wireless Order*, 12 FCC Rcd at 8522, para. 14.

¹³⁵ See *Japan-U.S. Order*, 14 FCC Rcd at 13081, para. 41.

¹³⁶ See, e.g., *id.*, 14 FCC Rcd at 13080-81, para. 40. See also Cable Landing License Act, 47 U.S.C. § 35 (providing that a license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.").

subsequently to classify facilities as common carrier facilities subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently.¹³⁷

68. At the Public Forum and in subsequent presentations, several parties addressed the issue of whether there continues to be a rationale for maintaining the distinctions between cable systems that are operated on a common carrier or non-common carrier basis. AT&T argued that there continues to be merit in distinguishing between common carrier and non-common carrier cable systems and stated that there is no reason to change the Commission's approach at this time.¹³⁸ Level 3, in its comments, disagreed and suggested that the Commission should eliminate the common carrier/non-common carrier distinction.¹³⁹ Level 3 suggested that instead, the Commission could create meaningful categories of licensing conditions that can be applied based on market conditions at the foreign end of the cable and in the U.S., and on the ownership structure of the cable system.¹⁴⁰ PSINet argued that there is no reason to require a common carrier operation of a cable system where there is competition on the route, but noted that it may be appropriate to require nondiscrimination on "thin routes" where there is lack of facilities-based competition.¹⁴¹ AT&T argued that its "concern would be that private cables, by their very nature, are unregulated, required to discriminate, and that could be a very dangerous precedent when you [are] creating what you describe as a bottleneck facility. . . . [A]nd if there is no competition on the route, the obligation to hold oneself out indifferently would appear to be a fundamental requirement."¹⁴² Facilicom, on the other hand, argued that even on thin routes there is competition from alternative technologies such as satellite services.¹⁴³ Global Crossing cautioned that common carrier regulation provides remedies that are valuable as safeguards against anti-competitive behavior by the cable operator.¹⁴⁴

69. Since the Commission espoused its private submarine cable policy in the 1985 *Tel-Optik Order*, the Commission has not denied non-common carrier status to a submarine

¹³⁷ See, e.g., *Foreign Participation Order*, 12 FCC Rcd at 23934, para. 95; *Cable & Wireless Order*, 12 FCC Rcd at 8530, para. 39; *China-U.S. Order*, 13 FCC Rcd at 16237, para. 15.

¹³⁸ AT&T Statement in *Forum Transcript* at 13-14.

¹³⁹ See Level 3 Comments at 17-18 (asserting that the Cable Landing License Act makes no distinctions between common carrier and non-common carrier licenses, that the legal distinctions between the two categories of carriers is vague, which leads to uncertainty in the marketplace as to what regulations will apply to a given proposed submarine cable system).

¹⁴⁰ See *id.* at 18.

¹⁴¹ PSINet Statement in *Forum Transcript* at 16.

¹⁴² AT&T Statement in *Forum Transcript* at 21.

¹⁴³ Facilicom Statement in *Forum Transcript* at 18.

¹⁴⁴ Global Crossing Statement in *Forum Transcript* at 14.

cable applicant that has requested it. We intend to continue our private submarine cable policy, in order to further stimulate competition in the market. We do not, however, propose to abandon the distinction between submarine cable systems which operate on a common carrier and a non-common carrier basis. Maintaining both types of bases for operating a submarine cable system provides both licensees and the Commission flexibility in determining how a cable system will be operated. For example, although most recent cable systems have been licensed to operate on a non-common carrier basis, some applicants have continued to propose to operate their cable system on a common carrier basis.¹⁴⁵ We also believe that there may be limits to our ability to forgo from considering a licensee a common carrier if it does not meet the *NARUC I* test; in other words if it holds itself out to serve the public indifferently or if there is a public policy reason to require it to do so.¹⁴⁶ In addition, under Section 35 of the Cable Landing License Act, the Commission, under the authority delegated to it, may grant cable landing licenses "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."¹⁴⁷ We seek comment on this tentative conclusion to maintain our private submarine cable policy and retain the distinctions between cables operated on a common carrier and a non-common carrier basis.

70. As discussed above, some participants in the Public Forum stated that there may be some situations, particularly thin routes,¹⁴⁸ where the imposition of nondiscrimination requirements on a cable operator may be warranted. We seek comment on whether, in a situation in which an applicant is proposing to serve previously unserved routes, we should impose conditions, such as a nondiscrimination requirement, on the license, regardless of whether we grant the license on a streamlined basis. We also seek comment on the types of situations in which it might be appropriate for the Commission to require a cable to be operated on a common carrier basis. Commenters are also asked to address whether the Commission should consider indirect means to a destination point in determining the level of competition on a route and whether a route is a thin route. We note that under the competitive route streamlining option proposed above, we state that, to demonstrate the existence of competition on a particular destination route, an applicant could choose to show that there are other economically

¹⁴⁵ See *MAYA-I Cable Landing License Order; AT&T Corp., MCI International, Inc., Pacific Gateway Exchange (Bermuda) Limited, the St. Thomas and San Juan Telephone Company, Inc., Star Telecommunications, Inc., Startec Global Communications, Inc., Telefonica Large Distancia de Puerto Rico, Inc., Teleglobe USA, Inc., WorldxChange Communications, Joint Application for a license to land and operate a digital submarine cable system between Hollywood, Florida, in the United States, Italy, Spain and Portugal, the Columbus III Cable System*, File No. SCL-98-005, Cable Landing License, 14 FCC Rcd 13428 (IB/TD, rel. Aug. 20, 1999) (*Columbus III Cable Landing License Order*), application for review pending.

¹⁴⁶ See *NARUC I*, 525 F.2d at 642.

¹⁴⁷ Cable Landing License Act, 47 U.S.C. § 35. For delegation of authority to the Commission, see Exec. Ord. No. 10530 § 5(a).

¹⁴⁸ As noted above, for purposes of this NPRM "thin routes" refer to routes where there currently is little or no cable capacity.

comparable means to access the destination route through a landline or submarine connection using another cable or facility stemming from a point-to-point route other than the destination route (*i.e.*, hubbing).¹⁴⁹

71. We also seek comment on what effect, if any, the imposition of common carrier regulations or common carrier-like obligations may have on a company's business decision whether to build a cable.

VI. Conditions Routinely Imposed on Cable Landing Licenses

72. The Commission grants cable landing licenses with a number of routine conditions.¹⁵⁰ For example, one condition requires that the location of a cable system within U.S. territorial waters be in conformity with plans approved by the Secretary of the Army, and allows for the Secretary of the Army to request that the licensee move the cable for purposes of national defense or for the maintenance or improvement of harbors for navigational purposes.¹⁵¹ In addition, if the licensee does not provide the precise landing points in the application, it must do so no later than 90 days prior to commencing construction at that landing location.¹⁵²

73. We seek comment on whether any of the routine conditions currently imposed on cable landing licenses should be eliminated or modified. At the Public Forum, Sprint recommended that we look at whether it is still necessary to include a condition that the licensee must move the cable at the request of the Secretary of the Army.¹⁵³ Sprint also suggested that we review the requirement that the licensee file a letter with the Commission's Secretary accepting the terms and conditions of the license within 30 days after grant.¹⁵⁴ AT&T, on the other hand, asserted that the conditions are not causing any problems in the market.¹⁵⁵ We note that substantial change to some of the conditions may require consultation with the Executive Branch, *i.e.*, the State Department and Department of Defense. Parties arguing that specific conditions are not sufficiently clear or precise should submit specific suggestions as to how the Commission might amend the conditions.

¹⁴⁹ See Section III. A *supra*.

¹⁵⁰ See, e.g., *Japan-U.S. Order*, 14 FCC Rcd at 13082-84, para. 45; *Level 3 Order*, 15 FCC Rcd at 847-848, para. 16; *Worldwide Telecom Order*, 15 FCC Rcd at 770-772, para. 16.

¹⁵¹ See *International 214 Streamlining NPRM*, 10 FCC Rcd at 13490-91, para. 39.

¹⁵² See *International 214 Streamlining Order*, 11 FCC Rcd at 12907, para. 54.

¹⁵³ See Sprint Statement in *Forum Transcript* at 86.

¹⁵⁴ See *id.* at 86-87.

¹⁵⁵ See AT&T Statement in *Forum Transcript* at 87.

74. Level 3 requested that the Commission develop clear and publicly available standard conditions and urged the Commission to place them in a rule, as is currently done with Section 214 authorizations.¹⁵⁶ Level 3 further suggested that if the conditions are publicly available so that the applicant knows them in advance, the Commission could eliminate the requirement that the applicant notify the Commission within 30 days of grant of the application that it accepts the terms of the license.¹⁵⁷ We seek comment on whether we should codify the routine conditions in a rule. We note that even if we decided to codify a set of conditions in a rule we would still retain the ability to impose unique conditions on particular licenses if we were to deem it necessary. We also seek comment on whether we should continue to require the applicant to submit a letter affirmatively accepting the terms and conditions of the cable landing license or whether we should 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.

75. In addition, Level 3 suggested that the Commission develop special conditions for the licenses of submarine cables whose participants include carriers that are "major suppliers," regardless of whether those carriers are U.S.-licensed carriers.¹⁵⁸ Level 3 defines a "major supplier" as that term is defined in the Reference Paper to the WTO Basic Telecom Agreement: "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of : (a) control over essential facilities; or (b) use of its position in the market."¹⁵⁹

76. Specifically, Level 3 argued that to prevent such carriers from acting anticompetitively in the submarine cable market, the Commission should impose conditions relating to: (1) cable station access (requiring a major supplier to provide competing carriers with, for example, physical collocation at the cable station, circuit provisioning and interconnection intervals);¹⁶⁰ (2) backhaul (requiring a major supplier to allow competing carriers to negotiate a backhaul contract with the major supplier on a timely and reasonable basis with nondiscriminatory pricing);¹⁶¹ and (3) procedures (requiring a major supplier to expedite orders

¹⁵⁶ See Level 3 Comments at 12-13, *citing* 47 C.F.R. §§ 63.21-23.

¹⁵⁷ See *id.* at 13. See, e.g., *Japan-U.S. Order* at 13084, para. 45 (stating that "[t]he terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554 within 30 days of the release of the cable landing license.")

¹⁵⁸ See Level 3 Comments at 19-22.

¹⁵⁹ See *id.* at n.1, *citing* Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), 36 I.L.M. 354, 367 (1997).

¹⁶⁰ See *id.* at 20.

¹⁶¹ See *id.* at 21.

for service with reasonable times and reasonable charges, to ensure freely available information, and, for consortium cables, to separate submarine cable and related operations from terrestrial operations).¹⁶²

77. We seek comment on Level 3's suggestions. Commenters advocating that we adopt Level 3's suggestions should indicate whether we should define "major supplier" as Level 3 defines the term, or whether we should adopt an alternative definition, and explain how the proposed definition would work in practice.

VII. Who Should be Required to be Included in Application as Licensee

78. To provide more certainty to potential cable landing license applicants, we propose below a method for determining who should be included as an applicant for a cable landing license. Through the International Bureau's Public Forum and its meetings with individual parties, it became clear that companies considering building submarine cable systems would benefit from a Commission statement on this issue.

79. For this reason, at the Public Forum, representatives of the International Bureau asked participants who they thought should be required to be included as an applicant for a cable landing license.¹⁶³ Sprint argued that only landing station owners should be required to be licensees.¹⁶⁴ Sprint argued that ownership does not need to be licensed because, the Cable Landing License Act "requires a license to land the submarine cable."¹⁶⁵ Sprint argued, therefore, that only the "terminal parties" (or the owners of the landing stations) should be required to be licensees, and noted that, on consortium cables, a review of C&MAs reveals that the owner of the landing station also owns "all the way down to what they call the beach joint, which is where the cable comes out of the water."¹⁶⁶ In its comments, Level 3 also argued that only U.S. landing parties should be licensees.¹⁶⁷ According to Level 3, "in large consortium cables, it no longer makes sense to require all carriers with ownership interests to be co-applicants [because] non-landing parties generally tend to be small U.S. and WTO member country carriers with little market power and a non-controlling interest in the consortium."¹⁶⁸ According to Level 3, while landing parties may control facilities, such as cable landing stations, and potentially possess the

¹⁶² See *id.* at 21-22.

¹⁶³ See *Forum Transcript* at 24-33 for the complete discussion of this issue at the Public Forum.

¹⁶⁴ See Sprint Statement in *Forum Transcript* at 24-25.

¹⁶⁵ See *id.* at 24.

¹⁶⁶ See *id.* at 24-25.

¹⁶⁷ See Level 3 Comments at 11-12.

¹⁶⁸ See *id.*

power and incentive to act anticompetitively by charging monopoly rents and ultimately discouraging additional capacity from being constructed, the same is not true for non-landing parties who are rarely in a position to deter the construction of additional capacity (which, according to Level 3 is a central focus of the Commission's cable landing license public interest analysis).¹⁶⁹ Level 3 also argued that, in the same vein, the Commission should eliminate the requirement for prior approval to add new, non-landing parties.¹⁷⁰

80. Global Crossing agreed with Sprint that the landing parties are the most significant for purposes of regulating the market in a procompetitive manner, but also noted the importance of issuing a license as a means of obtaining "key market information that is relevant to judging the nature of concentration of market power."¹⁷¹ PSINet agreed with Global Crossing about the importance of this information.¹⁷² PSINet also argued that if "you have anything to do with control or operation of the system, then you have to be a licensee."¹⁷³ PSINet cautioned, however, that it is important to consider whether a company is in fact terminating capacity for use in the United States or is really only passing through (such as landing a cable on the seashore in the United States to get to Mexico with another cable).¹⁷⁴ PSINet expressed concern over such a situation in which the United States would be "assert[ing] its jurisdiction over carriers that are simply terminating in the United States just to interconnect [because] it would cause an issue for us overseas, where it would allow other countries to assert jurisdiction over us, where we're simply using that for transit services."¹⁷⁵ Sprint concurred with PSINet and noted that the Commission does not regulate traffic that neither originates nor terminates in the United States, but that merely proceeds to another location.¹⁷⁶ AT&T argued that not every United States owner of a cable system should be required to be a licensee, and, in fact, the Commission should allow the parties to decide who should be on the license.¹⁷⁷

81. We propose that an entity should be included as an applicant for a cable landing license for a proposed cable system (regardless of whether the entity also is a Section 214 licensee) if the entity is a landing station owner or: (1) the entity has a five percent or greater ownership interest in the proposed cable which includes voting rights (except if the ownership is exclusively at foreign points on the cable system); and (2) the entity will use the U.S. points of

¹⁶⁹ *Id.* at 12, citing *Japan-U.S. Order*, 14 FCC Rcd at 13076, para. 25.

¹⁷⁰ See Level 3 Comments at 12.

¹⁷¹ See Global Crossing Statement in *Forum Transcript* at 25-26.

¹⁷² See PSINet Statement in *Forum Transcript* at 25.

¹⁷³ *Id.*

¹⁷⁴ See *id.* at 28-29.

¹⁷⁵ *ID* at 29.

¹⁷⁶ See Sprint Statement in *Forum Transcript* at 30.

¹⁷⁷ See AT&T Statement in *Forum Transcript* at 31.

the cable system in any capacity (unless the capacity merely is "hard-patched" through and is not dropping traffic in the U.S. or using the U.S. points of the cable system to re-originate traffic). Under this proposal, if an entity, at the time it files the application and the license is granted does not plan to use the U.S.-points of the cable system, but later decides to do so, that entity would need to file an application to be added to the license.

82. We note that the greater a firm's investment in a cable system, the greater ability the firm has to influence the way in which a cable is operated. This falls squarely within the ambit of the Cable Landing License Act which requires a license to "land or operate" a submarine cable.¹⁷⁸ Firms with a greater ability to affect the operation of a cable system would expect to be subject to all conditions and responsibilities that that come with the right to land or operate the cable system. Entities with minimal investment in a cable system, on the other hand, do not have the same ability to affect the operation of the cable system. There is not the same need, therefore, to subject these entities to the conditions and responsibilities that come with a cable landing license. We seek comment, therefore, on whether a five percent or greater ownership interest would ensure that we include entities with a significant ability to affect the operation of a cable system, but that we not burden smaller carriers or investors. We note that, under a five percent or greater ownership threshold, fewer entities will be required to obtain licenses than under the current practice. This means that fewer entities will be subject to the conditions and responsibilities that come with the right to land or operate a cable. We seek comment on whether a different percentage would be appropriate to accomplish these goals. We note that, even if, at the time of the application, an entity is not a Section 214 licensee, if the proposed cable would operate as a common carrier, the entity, in addition to applying for a cable landing license, also would need to obtain Section 214 authority.

83. In addition, if an entity meets the standard proposed above for requiring a cable landing license for a cable either for which there is a pending application or for which there is an existing license, we seek comment on whether all initial applicants or licensees should be required to amend the application or modify the license, respectively, in order to add this new entity as an applicant or licensee. We also seek comment on whether we should require the initial licensees to modify an existing license to add a licensee in the following scenario: an entity whose ownership is exclusively at foreign points on the cable system, that was an initial owner but not a joint applicant or licensee at the time the license was granted and was not providing service on the cable at the time the license was granted, now decides to provide service over the cable on an end-to end basis. We seek comment whether this entity should be added to the license for the U.S.-portion of this end-to-end service. Finally, under this proposal, an entity that is a licensee for an existing submarine cable but does not own a landing station and has less than a five percent ownership interest in the cable, may file with the Commission a request that its license be relinquished.

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See Cable Landing License Act, 47 U.S.C. § 34 (emphasis added).

VIII. Licensing and Regulatory Fees

84. Level 3, in its comments, asserted that licensing, regulatory and other fees should be non-recurring, reasonable, and related to recovering the actual administrative cost of licensing.¹⁷⁹ Level 3 therefore urged the Commission to waive or forbear from applying licensing and regulatory fees on submarine cable license applications, or to modify the fee structure. For the reasons discussed below, we decline to propose modifying or waiving licensing or regulatory fees.

85. Level 3 acknowledged the Commission's efforts to address licensing fees in the *1998 International Common Carrier Biennial Regulatory Review Order*, but asserted that the Commission did not address the more general issue of the reasonableness of all the fees, including the recurring regulatory fees, assessed on cable landing licenses.¹⁸⁰ Level 3 asserted that, although Section 8 of the Communications Act¹⁸¹ details fees applicable to cable landing licenses, "it also permits the Commission to waive or defer payment of an application fee in any specific instance for good cause shown, where such an action would promote the public interest."¹⁸² Level 3 argued that the fees included in Section 8 are supposed to reflect the Commission's cost of processing an application, and that the process of reviewing submarine cable applications has been streamlined with no corresponding reduction in fees.¹⁸³ According to Level 3, in light of the reduced costs to process applications with the streamlining the Commission is contemplating, we would be justified in waiving or forbearing from applying licensing fees assessed on submarine cable license applicants.¹⁸⁴

86. Level 3 also urged the Commission to modify the regulatory fee structure as it applies to international bearer circuits on submarine cables.¹⁸⁵ Level 3 argued that the annual fee of \$7.00 per 6- KB active circuit on submarine cables that the Commission charges carriers is excessive and puts a disproportionate burden on the owners of submarine cables.¹⁸⁶ In addition, Level 3 argued that "in today's world of high capacity submarine cables, carrying both voice,

¹⁷⁹ See Level 3 Comments at 14.

¹⁸⁰ See *id.* at 15.

¹⁸¹ 47 U.S.C. § 158.

¹⁸² See Level 3 Comments at 15.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 15-16.

¹⁸⁵ See *id.* at 16.

¹⁸⁶ See *id.*

data, broadband and IP-based services, it does not make sense to charge regulatory fees that are based on a 64 KB circuit model . . . [and] ultimately these excessive fees discourage the building of private cables . . . [and] serve as bad precedent to foreign regulators that might be looking for ways to increase government revenues."¹⁸⁷

87. Under our current rules, applicants for common carrier cable landing licenses are required to file two applications: a cable landing license application under Section 1.767 of the Commission's rules¹⁸⁸ and a Section 214 application for the construction of new lines under Section 63.18(e)(6) of the Commission's rules. As noted above, the Cable Landing License Act, which the Commission is charged with executing, requires that a cable landing license be obtained for any submarine cable directly or indirectly connecting the United States with any foreign country. In the *1998 International Common Carrier Biennial Regulatory Review NPRM*, the Commission proposed to eliminate the requirement that a carrier that is authorized to serve a given route on a facilities basis must apply for additional Section 214 authority for the construction of a new submarine cable on that route. The Commission acknowledged, however, that if it were to adopt this proposal, a change in the application fees for cable landing licenses and Section 214 authorizations would be necessary, and that these fees, which are set by Congress cannot be changed by the Commission.¹⁸⁹ Specifically, the Commission noted that, if it were to eliminate the requirement that carriers apply for the accompanying Section 214 authorization, the application fee for a common carrier cable landing license would be approximately one-tenth of the fee for a non-common carrier cable landing license. The Commission stated that it would consider asking Congress to consolidate the application fees for cable landing licenses, and may not be able to adopt the proposal without such a fee change.¹⁹⁰

88. At the time the Commission issued the *1998 International Common Carrier Biennial Regulatory Review Order*, the application fee for a non-common carrier cable landing license was \$12,975, while the fee for a common carrier cable landing license was only \$1,310.¹⁹¹ The application fee for a Section 214 authorization for "overseas cable construction" was \$11,665, bringing the total of the application fees for a common carrier submarine cable to \$12,975. In the *1998 International Common Carrier Biennial Regulatory Review Order*, the Commission stated that it believed that the fact that the total fees are the same is not happenstance, but is a good indication of congressional intent that the application fees be the

¹⁸⁷ *Id.*

¹⁸⁸ *See* 47 C.F.R. § 1.767.

¹⁸⁹ *See 1998 Biennial Regulatory Review — Review of International Common Carrier Regulations*, IB Docket No. 98-118. Notice of Proposed Rulemaking, 13 FCC Rcd 13713, 13725-27, paras. 29-33 (1998) (*1998 International Common Carrier Biennial Regulatory Review NPRM*).

¹⁹⁰ *Id.*, 13 FCC Rcd at 13727, para. 33.

¹⁹¹ *Id.*, 14 FCC Rcd at 4936-37, para. 66.

same whether the applicant intends to construct a common carrier or non-common carrier cable system.¹⁹² The Commission noted that there was no change in the application fees since it issued the *1998 International Common Carrier Biennial Regulatory Review NPRM*, and noted also that no commenter suggested a way to reconcile the fee disparity with elimination of the Section 214 application.¹⁹³

89. Therefore, in order to fulfill the intent of Congress to collect comparable application fees for comparable applications, the Commission did not adopt its proposal to eliminate the requirement that a carrier that is authorized to serve a given route on a facilities basis must apply for additional Section 214 authority for the construction of a new submarine cable on that route. Instead, the Commission directed its Office of Legislative and Intergovernmental Affairs to submit a legislative request to Congress recommending that there be only one application fee for cable landing licenses and that the separate application fee for "overseas cable construction" be eliminated.¹⁹⁴ This direction to the Commission's Office of Legislative and Intergovernmental Affairs in the *1998 International Common Carrier Biennial Regulatory Review Order* was consistent with the Commission's statement in the *1998 International Common Carrier Biennial Regulatory Review NPRM* that it would consider asking Congress to consolidate the application fees, consistent with its proposal, albeit not adopted, to eliminate the requirement that a carrier that is authorized to serve a given route on a facilities basis must apply for additional Section 214 authority for the construction of a new submarine cable on that route.

90. In the meantime, in the *1998 International Common Carrier Biennial Regulatory Review Order*, the Commission "encourage[d] applicants for common carrier cable landing licenses to file a single application seeking authority under both the Cable Landing License Act and Section 214 of the Communications Act . . . [noting that] [i]nformation required in each application need not be repeated [and that] [t]he applicant should submit both of the applicable fees with its consolidated application."¹⁹⁵ There is no need for applicants to be burdened with filing the same information twice.

91. The applicable statutory provision does not permit the waiver of application fees that Level 3 proposes. Neither Section 8 of the Communications Act (which establishes the schedule of application fees) nor the Commission's rules implementing that Section, allows us

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*, 14 FCC Rcd at 4936-37, para. 66 and n.132, citing 47 U.S.C. § 154(k)(4) (which directs the Commission to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable.").

¹⁹⁵ See *1998 International Common Carrier Biennial Regulatory Review Order*, 14 FCC Rcd at 4936-37, para. 66.

take such action. The only way the Commission may change the application fees set forth in Section 8 of the Communications Act, other than on a per-application basis as described below, is through Section 8(b)(1), which directs that "the Schedule of Application Fees established under this section shall be reviewed by the Commission every two years after October 1, 1991, and adjusted by the Commission to reflect changes in the Consumer Price Index."¹⁹⁶ Under Section 8(d)(2), the Commission may "waive or defer payment of an [sic] charge in any specific instance for good cause shown, where such action would promote the public interest."¹⁹⁷ Section 1.1117 of the Commission's rules addresses petitions for waiver or deferral of application fees.¹⁹⁸ Under this section, a waiver or deferral of a fee will only be possible on a per-application basis, and only after the fee has been paid by the entity seeking a waiver or deferral.¹⁹⁹ Section 1.1117 explicitly states that "requests for waivers or deferrals of entire classes of services will not be considered."²⁰⁰ We, therefore, decline to propose an elimination or waiver of application fees for all cable landing licenses.

92. The Commission may modify the regulatory fee structure set in Section 9 of the Act²⁰¹ in the circumstances described below. This NPRM, however, is not the proper vehicle to propose a modification of the regulatory fees set by Congress in Section 9 as Level 3 requests. A proposal to change this regulatory fee would be dependent on the outcome of this rulemaking proceeding. Moreover, the Commission ordinarily proposes changes in regulatory fees through an annual rulemaking process specifically designated for this purpose.²⁰²

93. There are two ways the Commission may change the regulatory fee schedule set by Congress in Section 9 of the Communications Act, other than on a per-application basis. The first is under Section 9(b)(2), entitled "Mandatory Adjustment of Schedule": "[f]or any fiscal year after fiscal year 1994, the Commission shall, by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with paragraph 1(B), changes in

¹⁹⁶ See 47 U.S.C. § 158(b)(1). See also 47 U.S.C. 158(g) (stating that, "[u]ntil modified pursuant to subsection (b) of this section, the Schedule of Application Fees which the Federal Communications Commission shall prescribe pursuant to Section (a) of this section shall be as follows . . . ")

¹⁹⁷ 47 U.S.C. § 158(d)(2) (emphasis added) (footnote omitted).

¹⁹⁸ 47 C.F.R. § 1.1117.

¹⁹⁹ 47 C.F.R. § 1.117(a)-(e).

²⁰⁰ 47 C.F.R. § 1.117(b).

²⁰¹ 47 U.S.C. § 159.

²⁰² See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Report and Order, FCC 99-146 (rel. June 18, 1999).

the amount appropriated for the performance of the activities described in subsection (a) of this section for such fiscal year."²⁰³ The second way the Commission may change the regulatory fee schedule set in Section 9, other than on a per-application basis, is under Section 9(b)(3), entitled "Permitted Amendments":

[I]n addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment In making such amendments, the Commission shall add, delete, or reclassify service in the Schedule to reflect the additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law"²⁰⁴

Although we decline at this time to propose a modification for the regulatory fees set for international bearer circuits on submarine cables as Level 3 requests, we seek comment generally on whether, if we ultimately adopt the streamlining measures proposed in this NPRM, it would be in the public interest to propose, pursuant to Section 9(b)(3), a modification of the regulatory fees.

94. We also note that the applicable statutory provision does not permit the waiver of the regulatory fee structure. Neither Section 9 nor the Commission's rules implementing that Section, allows us to take such action. Under Section 9(d) of the Act, the Commission may "waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest."²⁰⁵ Section 1.1166 of the Commission's rules addresses waivers, reductions, and deferrals of regulatory fees.²⁰⁶ Under this section, a waiver or deferral of a fee will only be possible on a per-application basis, and only after the fee has been paid by the entity seeking a waiver or deferral.²⁰⁷ Section 1.1166 explicitly states that "requests for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered."²⁰⁸ We, therefore, decline to propose modifying or waiving regulatory fees for all cable landing licenses.

IX. Conclusion

²⁰³ 47 U.S.C. § 159(b)(2).

²⁰⁴ 47 U.S.C. § 159(b)(3).

²⁰⁵ 47 U.S.C. § 159(d) (emphasis added).

²⁰⁶ See 47 C.F.R. § 1.1166.

²⁰⁷ See 47 C.F.R. § 1.1166 (a)-(d).

²⁰⁸ See 47 C.F.R. § 1.1166.

95. The proposals we adopt in this Notice of Proposed Rulemaking are intended to promote the rapid expansion of capacity and facilities-based competition, which will result in innovation and lower prices for U.S. consumers of international communications services. They also are designed to enable international carriers to respond to the demands of the market with minimum regulatory oversight and delay, saving time and money, both for industry and government, while preserving the Commission's ability to encourage competition. Finally, as we gain more experience with streamlining, we hope to expand streamlining possibilities even beyond those proposed here. We seek comment on whether we should conduct periodic reviews to determine whether, in light of changing technology or changing market conditions, our licensing scheme remains the most appropriate one.

X. Procedural Matters

A. Ex Parte Procedures

96. This NPRM is a permit but disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.²⁰⁹

B. Comment Filing Procedures

97. Pursuant to sections 1.415 and 1.419 of the Commission's rules,²¹⁰ interested parties may file comments as follows: comments are due August 21, 2000, and reply comments are due September 20, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS)²¹¹ or by filing paper copies.

98. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic copy by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

²⁰⁹ See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

²¹⁰ 47 C.F.R. §§ 1.415, 1.419.

²¹¹ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

99. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All paper filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street S.W., Room TW-A325, Washington, DC 20554.

100. Parties who choose to file by paper should also submit their comments on diskette to Elizabeth Nightingale, Telecommunications Division, International Bureau, Federal Communications Commission, 445 Twelfth Street S.W., Room 6-A729, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM-compatible format using Microsoft Word for Windows, or a compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read-only" mode. The diskette should be clearly labeled with the commenter's name, proceeding, including the lead docket number in the proceeding (IB Docket No. 00-106), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th St. N.W., Washington DC 20037.

101. Written comments by the public on the proposed and/or modified information collections are due the same day comments on the Notice of Proposed Rulemaking are due, August 21, 2000. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register of the Notice of Proposed Rulemaking. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

C. Initial Regulatory Flexibility Act Analysis

102. Pursuant to the Regulatory Flexibility Act (RFA),²¹² the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and actions considered in this NPRM. The text of the IRFA is set forth in Appendix A. Written public comments are requested on this IRFA. Comments must be

²¹² 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²¹³

D. Paperwork Reduction Act of 1995 Analysis

103. This NPRM contains either a new or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

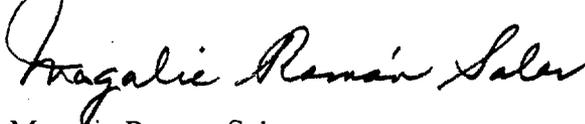
XI. Ordering Clauses

104. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i) and (j), 201-255 303(r) of the Communications Act as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-255, 303(r), and the Cable Landing License Act, 47 U.S.C. Sections 34-39 and Executive Order No. 10530, Sec. 5(a), reprinted as amended in 3 U.S.C. § 301, this NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED and COMMENTS ARE REQUESTED as described above.

²¹³ See 5 U.S.C. § 603(a).

105. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A INITIAL REGULATORY FLEXIBILITY ANALYSIS

106. As required by the Regulatory Flexibility Act (RFA),²¹⁴ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above in Section IV, Subpart C. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²¹⁵ In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.²¹⁶

A. Need for, and Objectives of, the Proposed Rules

107. In recent years, there has been explosive growth in the number and capacity of submarine cables triggered in large part by increased Internet and data traffic. Because of this increased demand for capacity, the rapid pace of technological development, and the emergence of non-traditional ownership and financing structures in the submarine cable marketplace, the International Bureau has undertaken a review of its policies for licensing submarine cables. The result of this review is the initiation of this proceeding to establish streamlined rules for processing applications for submarine cable landing licenses.

108. The streamlining proposal in the NPRM is designed to provide guidance for industry in submitting applications and for the Commission in reviewing such applications. The current precedent analyzing competitive issues in the submarine cable market is not extensive. In the absence of extensive precedent, the guidance contained in the proposed streamlining options should help ensure expeditious action on applications. In addition, the streamlining options in this NPRM seek to provide incentives for the development of facilities-based competition and capacity expansion to meet increasing demands.

109. This approach reflects broad input from participants in the submarine cable industry. In November 1999 the International Bureau held a Public Forum and has held numerous informal meetings with individual industry participants to solicit views about ways the

²¹⁴ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²¹⁵ 5 U.S.C. § 603(a).

²¹⁶ *Id.*

Commission might improve its regulation of the submarine cable landing licensing process to further promote consumer benefits from increased cable capacity and facilities-based competition. Industry participants expressed three objectives: expedited processing of applications, careful review of certain applications to guard against anticompetitive behavior, and encouragement of pro-competitive licensing procedures in other countries. To accomplish and balance these three objectives, the NPRM proposes streamlining that reflects pro-competitive policies. This approach is designed to provide more certainty and flexibility for participants in the application process, to promote increased investment and infrastructure development by multiple providers, and to decrease application processing time.

110. To achieve these goals, the NPRM proposes a mechanism under which an applicant for a submarine cable landing license will have three options to qualify presumptively for grant on a streamlined basis. The NPRM proposes the following three streamlining options: (1) a demonstration that the route on which the proposed cable would operate is or will become competitive; (2) a demonstration of sufficient independence of control of the proposed cable from control of existing capacity on the route; or (3) the existence of certain pro-competitive arrangements. We believe that, on balance, the streamlining policies proposed in the NPRM are pro-competitive, and that, if an application falls within one of these three categories, we can presume that it is unlikely that we will have competitive concerns about the cable. We note that, if an application does not qualify for streamlining, it will be reviewed on a non-streamlined basis without prejudice.

111. Our proposal to streamline the submarine cable landing licensing process is part of a continuing streamlining effort. The proposal's structure of identifying categories of applications eligible for streamlined processing is consistent with our process for streamlining Section 214 applications. The Commission continually seeks ways to grant licenses more quickly to allow parties to enter the market rapidly, especially as new technological developments make speed to market crucial for firms competing in the ever changing Internet-driven communications market.

B. Legal Basis

112. The NPRM is adopted pursuant to Sections 1, 4(i) and (j), 201-255, 303(r) of the Communications Act as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-255, and the Cable Landing License Act, 47 U.S.C. Sections 34-39 and Executive Order No. 10530, Sec. 5(a), reprinted as amended in 3 U.S.C. § 301.

C. Description and Estimate of the Number of Small entities to Which the Proposals will Apply

113. The RFA directs agencies to provide a description of, and, where feasible, estimate of the number of small entities that may be affected by the proposals, if adopted.²¹⁷ The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.²¹⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²¹⁹

114. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such companies that had been operating for at least one year at the end of 1992.²²⁰ According to the SBA's definition, a wireline telephone company is a small business if it employs no more than 1,500 persons.²²¹ All but 26 of the 2,321 wireline companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 wireline companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 of these wireline companies are small entities that might be affected by these proposals.

115. Specifically, the streamlining options contained in the NPRM apply to entities applying for a license to land or operate submarine cables under the Cable Landing License Act, (or entities applying to transfer control of existing submarine cable landing licenses). The proposals, however, may affect other entities as well, including users of submarine cable service such as Internet service providers (ISPs) that lease capacity or purchase indefeasible rights of use (IRUs) on cable systems. The Commission, therefore, encourages these entities to comment on the proposals in the NPRM. The proposals are intended to reduce the burden on all applicants

²¹⁷ 5 U.S.C. § 603(b)(3).

²¹⁸ 5 U.S.C. § 601(3).

²¹⁹ 5 U.S.C. § 632.

²²⁰ U.S. Department of Commerce, *Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995).

²²¹ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

regardless of size, by permitting applicants to seek to have their applications qualify presumptively for grant on a streamlined basis. At this time, we are not certain as to the number of small entities that will be affected by the proposals. Agency data indicates there have been approximately 50 cable landing applications filed with the Commission since 1992, but the total number of licensees is difficult to determine, because many licenses are jointly held by several licensees. Based on this information, we would estimate that there could be 50 or fewer applicants that might be a small entity.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

116. The reporting requirements proposed in the NPRM are voluntary and should not impose specific burdens on small entities. If an applicant for a submarine cable landing license wishes its application to qualify presumptively for a grant on a streamlined basis, the applicant could demonstrate that its application conforms to any one of the three streamlining options described in the NPRM. The NPRM seeks comment on the kinds of demonstrations an applicant could make to qualify for streamlining under the proposals.

117. The documentation proposed by the NPRM is not standardized. The information unique to the applicant. Although the information could be submitted in a standardized format, creating such a format would impose a burden on an applicant because the applicant has several options from which to choose for streamlined processing. For example, the NPRM suggests types of documentation including cable landing license applications, Commission Orders, the International Bureau's annual Circuit Status Report, the various C&MAs or capacity purchase agreements for the cables, and industry press releases. The NPRM also seeks comment on other types of documentation that would be useful for applicants seeking to qualify for the streamlining options proposed in the NPRM.

118. In addition, it is not possible or practical to estimate the costs and burdens associated with the documentation applicants would need to submit to demonstrate satisfaction of the streamlining options. We believe that the applicant's documentation would be information that is maintained by the applicant in the normal course of business, and as such would not impose a significant burden on the applicant. We are seeking comments on possible costs and burdens associated with the documentation applicants would need to submit to qualify for streamlining under the options outlined in the NPRM.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

119. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or

timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage or the rule, or any part thereof, for small entities.²²²

120. The proposals in this NPRM are designed to provide more certainty and flexibility for applicants, encourage investment and infrastructure development by multiple providers, expand available submarine cable capacity, and decrease application processing time. This may benefit small entities especially because the proposals would facilitate entry into the submarine cable market and expand international services. As described above, the Commission has proposed the following three options from which an entity may choose to qualify presumptively for streamlined processing: (1) a demonstration that the route on which the proposed cable would operate is or will become competitive; (2) a demonstration of sufficient independence of control of the proposed cable from control of existing capacity on the route; or (3) the existence of certain pro-competitive arrangements. We request comment on these three streamlining options.

121. We request comment on whether small entities would be adversely affected by the proposals herein and whether the proposals will enable small entities to respond to the demands of the market with minimum regulatory oversight, delays, and expenses. We believe that our proposals will promote the rapid expansion of capacity and facilities-based competition, which will result in innovation and lower prices for U.S. consumers of international telecommunications services. We believe that our proposals would have either no impact, or would reduce, any economic burdens on small entities.

122. The NPRM seeks comment on policies of particular benefit to small entities. First, with respect to the proposal regarding which entities need to apply for cable landing licenses, the NPRM notes that the greater a firm's investment in a cable system, the greater ability the firm has to influence the way in which a cable is operated. The NPRM further notes that firms with a greater ability to affect the operation of a cable system would expect to be subject to all conditions and responsibilities that that come with the right to land or operate the cable system. The NPRM notes that entities with minimal investment in a cable system, on the other hand, do not have the same ability to affect the operation of the cable system. There is not the same need, therefore, to subject these entities to the conditions and responsibilities that come with a cable landing license. Under the proposal in the NPRM, therefore, other than landing station owners, entities with less than a five percent ownership interest in a cable system would not need to be included as an applicant for the cable landing license for a proposed cable. The NPRM notes that, under a five percent or greater ownership threshold, fewer entities will be required to obtain licenses than under the current practice. This means that fewer entities will be subject to the conditions and responsibilities that come with the right to land or operate a cable. The NPRM seeks comment on whether a different percentage would be appropriate to

²²² 5 U.S.C. § 603(c).

accomplish these goals. In addition, the NPRM provides that an entity that is a licensee for an existing submarine cable but does not own a landing station and has less than a five percent ownership interest in the cable, may file with the Commission a request that its license be relinquished.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

123. None.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

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

Last July, the Commission granted a submarine cable landing license for the Japan-U.S. Cable Network ("JUS CN").¹ During the proceeding, it was alleged that the entities involved in the consortium controlled key inputs for other undersea cable systems serving the same routes, including access to landing stations, backhaul facilities, and local interconnection.² It was also alleged that such entities had the incentive and ability to deter construction of additional capacity. In granting the JUS CN cable license,³ the Commission recognized the value of commencing a broader proceeding to examine the licensing of submarine cables and the best manner to promote competition and benefit consumers.⁴

The recent increase in submarine cable capacity has been a tremendous success story, driven by the desire of more and more carriers to provide international data and Internet access services. Undersea cable capacity on transatlantic and transpacific routes has been increasing exponentially between 1995 and 1998.⁵ Such capacity growth is expected to continue at least for the next few years.⁶ At the same time, market prices for both transatlantic and transpacific bandwidth have fallen dramatically with increased supply.⁷ It therefore seems truly appropriate to adopt policies that would streamline our procedures to expedite granting cable landing authority.

For these reasons, I support this initiation of a proceeding to identify ways to promote competition in the operation of undersea cable systems, and at the same time streamline our submarine cable licensing process. The International Bureau has expended significant thought and effort in crafting very specific proposals that would permit more expeditious authorization of certain cable landing applications. I do not view these proposals as the end product of our process. Instead, in opening this proceeding, I hope that comment on these proposals will result

¹ *AT&T Corp. et al.*, 14 FCC Rcd. 13066 (1999) (*JUS Order*).

² *Id.* at 13070-13073 ¶¶ 9-18.

³ The Commission granted JUS CN its authorization after the applicants amended their Construction and Management Agreement to reduce the potential for competitive harms arising from the consortium structure. *Id.* at 13076-13079 ¶¶ 28-32.

⁴ *Id.* at 13079 ¶ 36.

⁵ FCC International Bureau, Report No. IN99-36, *1998 Section 43.82 Circuit Status Data*, at 33-34 (1999).

⁶ *Id.*

⁷ See, e.g., Bandwidth Index compiled by Band-X (http://www.band-x.com/bandwidth_1.cfm). Band-X runs an independent virtual market for international wholesale telecom capacity, maintaining price indices for bandwidth and switched minutes (<http://www.band-x.com>).

in a simpler, and more extensive, streamlining of our processes. The Commission should try to avoid inadvertently raising the costs of entering the undersea cable market in the course of "streamlining" its processes. Thus, in addition to commenting on the efficacy of these proposals, I encourage parties to suggest ways to make these streamlining efforts more expansive.

**DISSENTING STATEMENT
OF COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Review of Commission Consideration of Applications under the Cable Landing License Act, *Notice of Proposed Rulemaking*, IB Docket No. 00-106 (adopted June 8, 2000) (rel. June 22, 2000).¹

I respectfully dissent from today's item for two reasons. First, in my view, the Commission lacks authority over undersea cable landing licenses. Second, today's order proposes a vast and unnecessary regulatory structure all in the name of "streamlining." Indeed, today's streamlining item looks more like yesterday's command and control regulation than tomorrow's deregulated and dynamically competitive marketplace.

The Commission lacks clear authority to regulate cable landing licenses. I previously detailed my concerns in the FCC's Order² finally approving the Japan-U.S. undersea cable.³ I will not repeat those arguments here. However, it bears emphasizing that the Cable Landing License Act provides that "no person shall land or operate in the United States any submarine cable...unless a written license to land or operate such cable has been issued *by the President of the United States.*"⁴ The majority has taken the position that the President may delegate such authority to the FCC. While I believe the President is free to delegate such responsibilities to the Executive Branch, it is not the President's general prerogative to assign duties to an independent agency, such as the FCC.⁵ The Commission's independence from the Executive Branch is fundamental to its existence and it is our obligation to prevent any erosion of that core principle. Therefore, I believe the FCC must resolve the threshold legal issue of our jurisdiction before running headlong into a complicated streamlining proceeding. I encourage parties with concerns about the scope of the agency's jurisdiction to file comments addressing this issue.

As I also stated in the Japan-U.S. proceeding, I am deeply troubled by the delays that

¹ My final dissenting statement differs somewhat from the version released on June 8, 2000. These changes reflect the extensive modifications this item has undergone since its adoption. Although these edits were largely in a positive direction from a substantive standpoint, extensive post-adoption edits are a disturbing Commission practice. Although minor editorial post-adoption changes may be justifiable, the public would best be served by keeping these changes to an absolute minimum.

² See *AT&T Corp. Et. Al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, 14 FCC Rcd. 13066 (1999) (*Japan-U.S. Order*).

³ See Public Statement of Commissioner Harold Furchtgott-Roth, Re: *Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr932.html (July 9, 1999).

⁴ 47 U.S.C. § 34.

⁵ This analysis may be different if there were a specific statutory provision calling for such delegation.

have been associated with issuance of cable landing licenses. However, even if the FCC had clear authority over these licenses, I would be hard pressed to support much of today's item. While I support streamlining and the goal of lending additional predictability to the FCC's consideration of these license applications, I believe today's item may fall short of these goals.

What gets lost in today's item is that applicants for cable landing licenses are, by definition, expanding overall capacity. Expanded capacity is inherently good news for consumers. Regardless of the circumstances, more capacity expands consumer choice and drives down prices. Also lost in today's item is that the undersea cable market is more competitive than ever and all signs point towards additional dramatic increases in capacity over the next few years.⁶ It seems like an odd time for the FCC to first enter this field of regulation and promulgate detailed rules, even in the name of streamlining.

If the Notice applied a simple, straightforward test for streamlined treatment, and offered some hope that even non-streamlined applications would move more quickly, then I would have far fewer concerns. Instead, the Notice proposes three complicated "options" to assess eligibility for streamlining.⁷ Each of those three options has numerous definitional elements and subparts. For example, under the third option, "pro-competitive arrangements," there are two alternatives to consider: (1) landing stations and competitive backhaul and (2) capacity upgrades and use of capacity.⁸ Under the first alternative, a license applicant would face two additional tests to show that the applicant ensures competition: sufficient collocation and lack of restrictions on who can provide backhaul.⁹ Under the second alternative, a license applicant would have to make "more specific demonstrations" as to the sufficiency of the space at the cable landing stations for potential competitors, who can use that space, and who can perform backhaul.¹⁰ Then there is the question of the second category, capacity upgrades and use of capacity. Under this second category there are two further provisions involving a voting scheme for upgrading capacity and controls on resale or transfers of capacity.¹¹ This hardly seems like streamlining.¹²

⁶ See Letter from Paul W. Kenefick, Director, International Regulatory Affairs, Cable & Wireless to Elizabeth Nightingale, International Bureau. FCC (January 13, 2000) (citing 6521% increase in Trans-Atlantic cable capacity and a 3607% increase in Trans-Pacific capacity from 1998 to 2001 corresponding to 96.7% and 90.7% decreases in the per circuit costs on the Trans-Atlantic and Trans-Pacific routes respectively from 1996 to 2001); IP Telephony Workshop, International Telecommunications Union, Geneva, ITU New Initiatives Programme, IPTTEL/03, p. 11-12 (May 29, 2000) (showing the recent "massive increase" in undersea cable capacity).

⁷ See *Review of Commission Consideration of Applications under the Cable Landing License Act*, Notice of Proposed Rulemaking, IB Docket No. 00-106 at ¶ 20 (rel. June 21, 2000) (*NPRM*)

⁸ See *NPRM*, at ¶ 39.

⁹ See *NPRM*, at ¶¶ 40-41.

¹⁰ See *NPRM*, at ¶¶ 42.

¹¹ See *NPRM*, at ¶¶ 48-50.

It is not so much that any of these components are ill conceived. I believe the majority has thought extensively about how submarine cables "should" operate. But therein lies the rub, the majority believes the FCC should consider forcing carriers to "do the right thing" in developing their submarine cable business. I am not at all confident that government can determine what the "right thing" is, and even if it could, I would be reluctant to support the level of detailed business engineering that is apparently required to achieve it. The "right thing" in regulatory engineering may be the wrong thing for consumers who may end up with nothing in expanded capacity or lower rates.

For those who believe the FCC has authority over these licenses, I encourage proposals for a more simple and easy-to-apply streamlining test. In addition, I have recently learned that many of the delays and costs imposed on undersea cable ventures may stem from the actions of other governmental entities. Thus it would be informative for commenting parties to discuss the nature of any governmental barriers to entry and what steps the Commission may take under Section 253 to preempt such barriers.¹³

These are dynamic and competitive times for the undersea cable industry, this streamlining order should focus on what this agency can do to get itself and others out of the way.

¹² There is an additional impediment to the Commission's streamlining efforts, because the license approved by the FCC must then be approved by the Secretary of State. *See id.* at ¶ 52.

¹³ *See* 47 U.S.C. § 253 (d); *see also AT & T Communications of the Southwest, Inc. v. City of Austin, Tex.*, 42 F.Supp.2d 708 (W.D. Tex. 1998) (holding the city ordinance requiring municipal consent before entrant could operate telecommunications services in the city was preempted by 47 U.S.C. § 253 and state law); *Silver Star Telephone Company*, 13 FCC Rcd. 16356 (1998).