

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF 360NETWORKS INC.

WILLKIE FARR & GALLAGHER
Stephen R. Bell
Jennifer D. McCarthy
Sophie J. Keefer
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Its Attorneys

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360networks inc. (“360networks”) hereby files its Reply Comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY.

In these Reply Comments, 360networks supports the conclusion reached by the majority of other parties in this proceeding that the streamlining options proposed in the *Notice* are overly complex and likely will create extensive delays and costly burdens in the application process. 360networks submits that a streamlined review process should presume that the addition of a new cable on any route will promote competition unless the Commission perceives valid anticompetitive concerns about granting the application. The Commission should issue a license by public notice within sixty (60) days.

¹ *In re Review of Commission Consideration of Applications Under the Cable Landing License Act*, IB Docket No. 00-106, *Notice of Proposed Rulemaking*, FCC 00-210 (released June 22, 2000) (“*Notice*”).

360networks believes that the Commission's proposal with respect to who should be required to be included in the application as a licensee may limit the flexibility of submarine cable operators to structure their ownership to maximize tax and financing opportunities. Accordingly 360networks proposes that only applicants that are U.S. landing parties, and parties who are unaffiliated with the U.S. landing parties but who own 25% or more of the cable, should be required to be licensees.

In addition to commenting on these specific issues, 360networks highlights five additional proposals that it supports: (1) simplification of *pro forma* transfers; (2) the grant of licenses by public notice; (3) election of non-common carrier status; (4) adoption of a "negative option" rule; and (5) adjustment of regulatory fees.²

II. A SAFE HARBOR APPROACH THAT INITIALLY INCLUDES ALL APPLICATIONS IN THE SAFE HARBOR IS AN EFFECTIVE MEANS FOR ESTABLISHING AN EXPEDITIOUS STREAMLINED APPLICATION PROCESS.

In proposing the streamlining of submarine cable license applications, the Commission's policy objectives were to create an application process that is expeditious but, where appropriate, allows the Commission to scrutinize the effects the grant of a license would have on competition. Although the *Notice* acknowledged the significance of these policy objectives, the streamlined application process proposed by the Commission is not the vehicle for accomplishing these objectives. Other commenters agree.³ Commenters generally praised the Commission's safe

² See *infra* Section V.

³ Comments of AT&T at 39-40; Comments of Cable & Wireless at 2 (arguing that the proposed "threshold demonstrations" will give rise to factual and interpretative disputes); Comments of FlagTelecom at 4 (arguing that a streamlined process will only be effective "if the criteria for qualifying for streamlined review are simple and easy to apply"); Comments of Global Crossing at 12-13 (arguing that the Commission's proposed safe harbors should be modified because they involve complex criteria); Comments of Level 3 at iii, 2 (arguing that the

harbor approach; however, the “streamlining options” for reaching the safe harbor were criticized as complex, cumbersome, fact intensive, and potentially costly. The comments make clear that the Commission’s goal should be to impose fewer regulatory burdens in the application process while decreasing the time it takes to process the application. Accordingly, commenters endorsed the Commission’s safe harbor approach but offered their own proposals for safe harbor criteria.

360networks, along with AT&T and Cable & Wireless, propose that all applications be placed automatically in streamlined review.⁴ The premise for such a proposal is the intuitive proposition that the addition of a new cable increases capacity and competition.⁵ The only arguments to the contrary are hypothetical anticompetitive concerns that were expressed in the

proposed safe harbors are “too unwieldy and will not result in faster licensing”); Comments of Sprint at 8 (arguing that the proposed safe harbors “are a complicated solution in search of a problem”); Comments of TyCom at 3 (expressing concern over the complexity of the Commission’s proposals and arguing that they could lengthen the review process); Comments of Viatel at 2 (commenting that the proposed safe harbors require “complex factual showings” and “invite lengthy disputes”); Comments of WorldCom at 10-11.

⁴ Comments of 360networks at 8 (urging the Commission to “start from the presumption that all applications for the addition of a new cable qualify for streamlined review”); Comments of AT&T at 38 (advocating that “the Commission should presumptively streamline all submarine cable landing license applications”); Comments of Cable & Wireless at 10 (arguing that a “more wholesale adoption of the Section 214 autogrant process” is in order); *see also* Comments of Sprint at 18 (noting that “[i]t is difficult to conceive of a situation where additional capacity would present competitive or other public interest concerns”).

⁵ Comments of 360networks at 3, 8 (arguing that “a streamlined review process should presume that the addition of a new cable on any route will promote competition”); Comments of AT&T at 38 (arguing that “there should be a strong presumption that entry and the addition of capacity into [the submarine cable] market is pro-competitive and in the public interest”); Comments of Cable & Wireless at 8 (“As a general principle, the grant of an application to construct a new cable adds capacity and encourages production of competing facilities.”).

proceeding that led to the *Japan-U.S. Order*.⁶ There is no evidence that the submarine cable market is not competitive or that licensees are engaging in anticompetitive practices. Although there may be potential for such anticompetitive conduct or effects, this mere potential should not be used to handicap all applications for submarine cable licenses.

III. A STREAMLINED PROCESS SHOULD BALANCE THE NEED FOR EXPEDITIOUS PROCESSING WITH THE COMMISSION'S INTEREST IN ASSURING THAT APPLICATIONS DO NOT POSE ANTICOMPETITIVE CONCERNS.

360networks encourages the Commission to place all applications for new submarine cable licenses on streamlined review. Under 360networks's proposal, parties will have fourteen (14) days after issuance of the public notice announcing the filing of the application to file an opposition specifying the anticompetitive concerns raised by the grant of the license. The Commission can, based on its own review or an opposition, determine whether the application should be removed from streamlined review because it warrants closer scrutiny.⁷ 360networks believes such a limited review could be accomplished within fourteen (14) days.⁸ If no

⁶ 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*, Cable Landing License, 14 FCC Rcd. 13066 ¶¶ 9-18 (1999) ("*Japan-U.S. Order*").

⁷ See *In re Telefonica SAM USA, Inc. and Telefonica SAM de Puerto Rico, Inc. Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Network Extending Between Florida, Puerto Rico, Brazil, Argentina, Chile, Peru, and Guatemala*, Cable Landing License, DA 00-1826 (released Aug. 10, 2000) ("*Telefonica*"). In *Telefonica*, the Commission on its own initiative determined that the grant of a license posed anticompetitive concerns. See *id.* ¶ 18. Accordingly, the Commission placed conditions on the grant of the license that "should serve to address [its] concerns that Telefonica SAM's foreign affiliates with market power in Argentina, Chile, and Peru might favor Sam-1 or affiliated telecommunications and information service providers on these routes, or . . . favor its affiliates to the detriment of unaffiliated U.S. service providers." *Id.* ¶ 30.

⁸ Applications removed from streamlined review should be reviewed under the existing review process thereby allowing comments and oppositions to be filed. These applications should not be deemed to be presumptively anticompetitive.

oppositions are filed and/or the Commission determines that no anticompetitive concerns are present, the Commission should grant the application by issuing a public notice within sixty (60) days of the public notice announcing the filing of the application.⁹ This process properly balances the Commission's interest in (1) assuring that applications that pose anticompetitive concerns are not granted without close scrutiny and (2) expediting the approval process. Moreover, unlike the process proposed in the *Notice*, this process will not impose any new information burdens or additional costs on applicants.

IV. ONLY UNITED STATES LANDING PARTIES AND OTHER UNAFFILIATED PARTIES WHO OWN 25% OR MORE OF THE CABLE SHOULD BE REQUIRED TO BE INCLUDED IN THE APPLICATION AS A LICENSEE.

In the *Notice*, the Commission proposed

that an entity should be included as an applicant . . . if the entity is a landing station owner or: (1) the entity has 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 the cable system in any capacity.¹⁰

The Commission expressed concern that the greater an entity's investment in a cable, the greater the ability for the entity to control operations. The Commission sought comment on whether the five percent threshold was sufficient.

⁹ See Comments of Cable & Wireless at 12-13 (supporting the Commission's proposed time frame of sixty days); Comments of Sprint at 17 (same); Comments of WorldCom at 13 (same). Although a shorter time frame is preferable, a sixty day time frame should provide the State Department with ample time to complete its review and provide its consent to the Commission, particularly as applicants for cable landing licensees routinely serve the appropriate State Department personnel with the application at the same time it is filed at the Commission.

¹⁰ *Notice* at ¶ 81.

The majority of parties commenting criticized the Commission’s proposal to include entities with a “5% or greater ownership interest.”¹¹ 360networks also urges the Commission to reject the proposal in the *Notice* and, instead, require that applicants include only those parties owning the U.S. landing station and the U.S. portion of the cable together with entities owning 25% or more of the cable who are unaffiliated with the U.S. owners/applicants. By including the U.S. owners as applicants, the Commission can ensure that the requirements and responsibilities associated with a license are fulfilled without jurisdictional obstacles. Moreover, by including entities owning 25% or more of the cable as licensees, the Commission includes as licensees those entities “with a significant ability to affect the operation of a cable system” while not “burden[ing] smaller carriers or investors.”¹² 360networks believes that the Commission’s current proposal may have the unintended effect of limiting the flexibility of submarine cable operators to structure the ownership of the cables to maximize tax and financing opportunities. For example, imposing licensee obligations on a foreign carrier that owns 5% of a cable but does not otherwise conduct business in the United States may raise tax issues.¹³

¹¹ Comments of AT&T at 68 (disagreeing that a five percent ownership interest necessarily constitutes “operation”); Comments of Cable & Wireless at 24-25 (arguing that only landing station owners should be licensees); Comments of Flag Telecom at 14-15 (commenting that the threshold should be ownership of a landing station, *de facto* control of the cable, or a twenty-five percent or greater ownership); Comments of Level 3 at 17-18 (arguing that “[n]on-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”); Comments of TyCom at 17 (urging the Commission to “require only that the parties owning the portion of the submarine cable in U.S. territorial waters be applicants”); Comments of Sprint at 20-21.

¹² *Notice* at ¶ 82.

¹³ This problem is impacted by the nature of the obligations imposed on business.

V. ADOPTION OF CERTAIN PROPOSALS SUGGESTED IN THE NOTICE AND THE COMMENTS WILL FURTHER STREAMLINE THE APPLICATION PROCESS.

360networks urges the Commission to adopt the following proposals:

- Permit cable landing licensees to complete *pro forma* transactions without seeking prior approval.¹⁴ Once an initial license for a cable has been obtained, there is no reason to require Executive Branch approval of *pro forma* transactions and few anticompetitive concerns arise from these predominantly intra-corporate transfers. Accordingly, the Commission should permit licensees to provide subsequent notifications of *pro forma* transfers.
- Applications should be granted by public notice. The public notice method employed in the Section 214 application process is an expedient and efficient means for the Commission to grant cable landing licenses. As the Commission notes, “granting a submarine cable landing license by Public Notice would reduce substantially the amount of time between the filing of an application and the issuance of the license.”¹⁵ Moreover, the Commission can include any vital information, such as routine conditions, in the public notice.¹⁶
- Applicants should be permitted to elect private carrier status without making a circular showing that they are eligible for such treatment.¹⁷
- Adopt a “negative option whereby the license automatically takes effect within 30 days after grant of the application unless the applicant notifies [the Commission] that it does not accept the terms and conditions of the license.”¹⁸ This will eliminate an applicant’s burden of affirmatively accepting the terms and conditions of the license.
- Initiate a new proceeding to modify regulatory fees to harmonize the fees with the new streamlined review process.

¹⁴ See Comments of 360networks at 10-11; Comments of Global Crossing at 35-36. *Pro forma* transactions do not include substantial transfers of control or assignment of cable landing licenses. Such substantial transfers and assignments would continue to be subject to Executive Branch and Commission approval.

¹⁵ Notice at ¶ 56.

¹⁶ Granting an application by public notice will satisfy the requirement under the Cable Landing License Act that grants be issued by “written license” if the public notice includes the routine conditions for grant of such licenses.

¹⁷ Comments of Global Crossing at 37-38.

¹⁸ Notice at ¶ 74.

VI. CONCLUSION.

For the foregoing reasons, 360networks respectfully urges the Commission to streamline the cable landing license application process consistent with the reply comments herein.

Respectfully submitted,

360NETWORKS INC.

By: Sophie J. Keefer
Stephen R. Bell
Jennifer D. McCarthy
Sophie J. Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W. Suite 600
Washington, D.C. 20036
Tel. (202) 328-8000
Its Attorneys

September 20, 2000

CERTIFICATE OF SERVICE

I, Trisha McLean, do hereby certify that on this 20th day of September, 2000, copies of the foregoing Reply Comments were delivered by hand, unless otherwise indicated, to the following parties:

Rebecca Arbogast, Chief
Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

George Li, Deputy Chief
Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Jackie Ruff
Associate Division Chief
Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Claudia Fox, Chief
Policy and Facilities Branch
Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Elizabeth Nightingale
Telecommunications Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

International Transcription Service
1231 20th Street, NW
Washington, DC 20037

Trisha McLean