

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

*In the Matter of*

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

IB Docket No. 00-106

**REPLY COMMENTS OF TYCOM NETWORKS (US) INC.**

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20 September 2000

## SUMMARY

TyCom Networks (US) Inc. (“TyCom”) and almost every other commenter in this proceeding have urged the Commission to adopt a simplified streamlining of submarine cable licensing to encourage the infrastructure investment that will meet ever-increasing consumer demand for bandwidth capacity while lowering prices. While the commenters, including TyCom, have strongly supported the Commission’s objectives, they remain concerned that the Commission’s three streamlining options would be difficult to administer and could delay the processing of cable landing license applications. Most commenters have therefore supported bright-line streamlining rules that would minimize the regulatory burden on the applicants and the Commission staff.

In addition to those points made in its initial comments, TyCom addresses the following matters in its reply comments. *First*, there is broad support for a simplified streamlining process for licensing submarine cables, and concern that the Commission’s proposals would be difficult to administer and might result in substantial processing delays. *Second*, TyCom argues that the Commission’s proposal to grant cable landing licenses by public notice is both legally proper and desirable as a policy matter. This proposal also received broad support in the initial comments. *Third*, TyCom argues that the Commission’s three streamlining options may violate U.S. obligations under the WTO agreements. In particular, the three streamlining options may violate U.S. obligations and commitments with respect to market access, national treatment, most-favored nation, and the WTO Reference Paper. *Fourth*, TyCom supports the proposal of various commenters to permit *pro forma* transactions without prior Commission approval. Because the current rules for *pro forma* transactions are burdensome and provide no clear interest benefit, the Commission should replace them with a simple notification requirement.

## TABLE OF CONTENTS

	<b>PAGE</b>
I. The Commission Should Adopt a Simplified Streamlining Proposal .....	2
II. The Commission Has the Authority to Grant Cable Landing Licenses Via Public Notice .....	5
III. The Commission’s Streamlining Proposals May Be Inconsistent with U.S. WTO Obligations .....	8
IV. The Commission Should Permit <i>Pro Forma</i> Transactions Without Prior Approval .....	13
Conclusion.....	15

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**REPY COMMENTS OF TYCOM NETWORKS (US) INC.**

TyCom Networks (US) Inc. (“TyCom”) urges the Commission to adopt a simplified streamlining of submarine cable licensing to encourage infrastructure investment in order to meet ever-increasing consumer demand for bandwidth capacity at lower prices. The initial comments in this proceeding demonstrate almost uniformly that to implement “pro-competitive policies” that serve consumers through “increased cable capacity and facilities-based competition,”<sup>1</sup> the Commission must adopt bright-line streamlining rules that minimize the regulatory burden on the applicants and the Commission staff.

In these reply comments, TyCom makes four points. *First*, TyCom notes that there is broad support for a simplified streamlining process for licensing submarine cables, and concern that the Commission’s proposals would be difficult to administer and might result in substantial processing

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<sup>1</sup> See *Review of Commission Consideration of Applications under the Cable Landing License Act, Notice of Proposed Rulemaking*, FCC 00-210, ¶ 5 (rel. June 22, 2000) (“NPRM”).

delays. *Second*, TyCom argues that the Commission’s proposal to grant cable landing licenses by public notice—which many other commenters have supported—is both legally proper and desirable as a policy matter. *Third*, TyCom argues that the Commission’s three streamlining options may violate U.S. obligations under the WTO agreements. *Fourth*, TyCom supports the proposal of various commenters to permit *pro forma* transactions without prior Commission approval.

## **I. THE COMMISSION SHOULD ADOPT A SIMPLIFIED STREAMLINING PROPOSAL**

New entrants<sup>2</sup> and established international carriers<sup>3</sup> alike agreed in their comments that the Commission should adopt a simplified streamlining proposal. There is broad consensus among the commenters that, without modification, the Commission’s three streamlining options could disserve consumers by constraining competition and slowing infrastructure development.<sup>4</sup> While the commenters’ formulations of that streamlining option varied, they shared a concern that anything less than bright-line streamlining rules could actually thwart the Commission’s

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<sup>2</sup> See TyCom Comments at 4-7; FLAG Telecom Comments at 3-4; Level 3 Comments at 5-10; 360networks Comments at 4-7; Viatel Comments at 4-8.

<sup>3</sup> See AT&T-Concert Comments at 10-34; Sprint Comments at 8-19; WorldCom Comments at 6-8.

<sup>4</sup> See TyCom Comments at 4-7; AT&T-Concert Comments at 2, 4-9 (noting that the Commission’s proposals threaten “to deny U.S. consumers the benefits of increased submarine cable competition”); FLAG Telecom Comments at 2 (noting that the Commission’s proposals could “stymie” application processing and construction of facilities on underserved routes) Level 3 Comments at 2-3 (noting that the Commission’s streamlining proposals would “undermine the objectives of the streamlining process”); Sprint Comments at 8 (noting that the Commission’s proposals would “limit the ability of international carriers to obtain facilities rapidly at favorable prices”); 360networks Comments at 3-4 (noting that the Commission’s proposals are “not the optimum vehicle” for increasing undersea capacity and enhancing competition); Viatel Comments at 2 (noting that the Commission’s proposals are “inconsistent with the Commission’s goals of expediting its processes and promoting competition”).

streamlining objectives. The commenters also provided a wealth of information regarding the state of competition and construction in the submarine cable market, allowing the Commission to tailor its proposals more closely to address legitimate competitive concerns.

*First*, the commenters generally agree that Commission's proposals could result in substantial delays in processing, particularly in placing cable landing license applications on public notice. Given the complexity of the Commission's streamlining proposals, it would take the Commission's staff a significant amount of time to apply these proposed rules. And because the Commission has not proposed a timeline that includes the processing time between the filing of an application and the placing of such an application on public notice, there is no guarantee that the Commission's proposals would expedite the processing of such applications. As TyCom noted in its initial comments, the Commission has proposed to address through its streamlining proposals concerns that are already addressed through the Commission's common carriage analysis under the *NARUC I* test.<sup>5</sup>

*Second*, the Commission's streamlining proposals must account for the realities of competition in the submarine cable marketplace. As numerous commenters have demonstrated, the availability of additional capacity drives down prices.<sup>6</sup> But the Commission risks delaying or deterring the roll-out of additional capacity by imposing streamlining procedures that are time consuming both for applicants and Commission staff. Moreover, the commenters have shown that the Commission's approach in its three streamlining options does not account for existing competition, even on so-called thin routes. In particular, there is substantial competition even

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<sup>5</sup> TyCom Comments at 4-5.

<sup>6</sup> See AT&T-Concert Comments at 4-6; Cable & Wireless USA Comments at 7-8 & App. A.

within individual submarine cable systems, where the owners of capacity compete with each other on the same route.<sup>7</sup> But the Commission's proposals do not yet account for this fact because they would count the number of stand-alone submarine cable systems.<sup>8</sup> Finally, the commenters supported a broader assessment of competition by supporting the Commission's regional—instead of a route-based—approach to competition. They noted that the regional approach addresses the variety of alternative routing options and the risk of third-country by-pass.<sup>9</sup>

*Third*, there was little support for any regulation of the ownership structures of submarine cable systems.<sup>10</sup> As the commenters demonstrated, consortium or “open investment” cables are cumbersome and increasingly disfavored.<sup>11</sup> Moreover, as noted above, they actually foster competition by allowing numerous facilities-based carriers to compete in the market for capacity using the same submarine cable system.<sup>12</sup> Global Crossing's argument for regulation of ownership structures was based largely on a concern about its ability to enter into correspondent relationships for the exchange of international message telephone services.<sup>13</sup> But this is an outmoded method of selling capacity, particularly when the vast majority of traffic—including, presumably, the traffic

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<sup>7</sup> See Level 3 Comments at 5-6; AT&T Comments at 25-30.

<sup>8</sup> See NPRM ¶¶ 28-31.

<sup>9</sup> See *id.* ¶ 27; TyCom Comments at 12; AT&T Comments at viii. The Commission should adopt this approach at the outset, rather than allow an applicant to challenge the country-pair route approach, as Global Crossing suggests. See Global Crossing Comments at 15-16.

<sup>10</sup> See TyCom Comments at 6-7; AT&T Comments at 25-34; Level 3 Comments at 7-9; Sprint Comments at 13.

<sup>11</sup> TyCom Comments at 6-7; Sprint Comments at 4-6.

<sup>12</sup> See Level 3 Comments at 5-6; AT&T Comments at 25-30.

<sup>13</sup> NPRM ¶ 37.

on Global Crossing's submarine cables—is for Internet, data, and other private line circuit services.<sup>14</sup>

TyCom continues to urge the Commission to adopt streamlined submarine cable licensing rules that will encourage infrastructure investment without picking winners and losers in the marketplace. In particular, TyCom continues to advocate its original streamlining rule, which would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market for that cable.<sup>15</sup> By focusing on this core competitive concern, the Commission would avoid burdening its staff with unwieldy rules that could delay processing of applications. In doing so, the Commission would also encourage cable owners to structure their own ventures to manage the costs and risks of submarine cable projects, expediting infrastructure build-out that would provide consumers with more timely capacity expansion and attendant lower prices.

## **II. THE COMMISSION HAS THE AUTHORITY TO GRANT CABLE LANDING LICENSES VIA PUBLIC NOTICE**

TyCom joins other commenters in supporting the Commission's proposal to grant cable landing license applications by public notice.<sup>16</sup> This proposal is proper under the Cable Landing License Act, which bars the landing and operation of submarine cables in the United States

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<sup>14</sup> See, e.g., AT&T Comments at 20-21.

<sup>15</sup> See TyCom Comments at 3-4.

<sup>16</sup> See NPRM ¶ 56; Cable & Wireless USA Comments at 11-12; AT&T-Concert Comments at 38; 360networks Comments at 8; Comments of WorldCom at 14.

“unless a written license to land or operate such cable has been issued by the President of the United States.”<sup>17</sup> This “written license” requirement ensures both that there has been a review of the proposed submarine cable by the U.S. Government and that the terms and conditions of the authorization are made explicit, thereby simplifying compliance and enforcement. By issuing a granting cable landing licenses via public notice, the Commission would ensure U.S. Government review while explicitly conditioning the authorizations, much as the Commission does with its grant of Section 214 authorizations. The Commission would also reduce the burden on its staff to produce separate written orders for each authorization. Notably, none of the Executive Branch agencies has objected to this proposal. Only Global Crossing objected to licensing via public notice. While Global Crossing noted that Commission written orders are useful sources of information, it did not otherwise address the policy or legal implications of the Commission’s proposal.<sup>18</sup>

There is no legal impediment to granting cable landing licenses by public notice. For purposes of determining the meaning of an Act of Congress, a writing includes “printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolded, or otherwise,” unless the context indicates otherwise.<sup>19</sup> A Commission-issued public notice granting a cable landing license would certainly constitute a writing. And there is nothing contextual in the Cable Landing License Act to suggest that such a writing would be inconsistent with the “written license” requirement. Similarly, the Administrative Procedure Act—which

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<sup>17</sup> 47 U.S.C. § 34.

<sup>18</sup> Global Crossing Comments at 30.

<sup>19</sup> 1 U.S.C. § 1. *See also* Cable & Wireless Comments at 11-12.

governs Commission actions—defines a “license” to include “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”<sup>20</sup> As a form of permission, a Commission-issued public notice granting a cable landing license would certainly be a license. And there is nothing contextual in the Cable Landing License Act to suggest that such a license would be inconsistent with the “written license” requirement.

Regardless of the form of a cable landing license, TyCom does not support the alternative of a conditional grant for a cable landing license.<sup>21</sup> This proposal would increase the price of capacity and delay infrastructure build-out by introducing substantial uncertainty into the construction and financing of submarine cable systems. By granting a cable landing license conditionally, the Commission could later impose additional regulatory requirements that would change the routing, the relationships between the various investors, or the commercial attractiveness of a proposed submarine cable. It could even revoke an authorization altogether. Admittedly, these possibilities seem remote, and the State Department has rarely imposed (on behalf of the Executive Branch departments) additional restrictions on the licensing of particular submarine cables. But from the perspective of investors and contractors, the conditional grant would introduce a risk that did not previously exist. It could therefore deter investors and discourage cable owners and their contractors from proceeding with construction until such uncertainty was eliminated. Rather than introduce additional uncertainty into the process, the

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<sup>20</sup> 5 U.S.C. § 551(8).

<sup>21</sup> NPRM ¶ 55.

Commission should establish clear rules and timetables that address the issues raised by a particular proposed system at the outset.

### **III. THE COMMISSION’S STREAMLINING PROPOSALS MAY BE INCONSISTENT WITH U.S. WTO OBLIGATIONS**

As some commenters noted,<sup>22</sup> the Commission’s proposals risk violating U.S. commitments under the WTO Basic Telecom Agreement and the General Agreement on Trade in Services (“GATS”).<sup>23</sup> As the country that led liberalization of trade in basic telecommunications services,<sup>24</sup> the United States can ill afford to be seen as backtracking on its multilateral commitments.

In making its commitment as part of that agreement, the United States abandoned its long-standing reciprocity-based approach to the licensing of submarine cables.<sup>25</sup> Under this approach—epitomized by the effective competitive opportunities (“ECO”) test—the

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<sup>22</sup> See e.g., AT&T-Concert Comments, at 16-17.

<sup>23</sup> See Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), reprinted in 36 I.L.M. 354, 366 (1997) (incorporating WTO Basic Telecom Agreement into the General Agreement on Trade in Services).

<sup>24</sup> See Laura B. Sherman, “Wildly Enthusiastic” About the First Multilateral Agreement on Trade in Telecommunications Services, 51 Fed. Comm. L. J. 60, 66, 96 (1998).

<sup>25</sup> See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Report & Order on Reconsideration, 12 FCC Rcd. 23,891, 23,933-35 (1997) (“Foreign Participation Order”) (noting that the market-opening commitments of other WTO Members would “render the ECO test unnecessary”), *aff’d Order on Reconsideration*, FCC 00-339 (rel. Sept. 19, 2000). The original U.S. offer maintained reciprocity-based restrictions on foreign ownership of submarine cables. See WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Draft Offer on Basic Telecommunications, S/NGBT/W/12/Add.3 (July 31, 1995). These restrictions were later dropped. See WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), S/NGBT/W/12/Add.2/Rev.3 (Nov. 1996).

Commission required—among other things—that there be no legal or practical restrictions on U.S. carriers’ entry into the foreign carrier’s market.<sup>26</sup> Since WTO Basic Telecom Agreement came into force, the Commission has witnessed a flurry of new submarine cable construction which has brought new state-of-the-art capacity to a wide variety of destination markets at lower prices.<sup>27</sup> But under the Commission’s streamlining proposals, the United States would re-impose—on a bilateral basis—reciprocity-based licensing requirements that would examine market access conditions in WTO Member countries. These proposals therefore risk violating the United States’ specific commitments of market access and national treatment and its general obligation of most-favored nation (“MFN”) treatment under the GATS, as well as the WTO Reference Paper.

***Market Access Commitment.*** A WTO Member bound by a basic telecom services commitment must ensure market access, *i.e.*, provide treatment no less favorable than that provided for in the terms, limitations, and conditions agreed and specified in that Member’s schedule of commitments.<sup>28</sup> In its most simple terms, market access means that at a minimum, the United States must permit foreign investment on the terms and conditions that it promised in its schedule of commitments, and no less. But the Commission’s streamlining proposals would defer or deny access to foreign-owned submarine cables that did not meet its streamlining criteria in an effort to provoke further liberalization abroad. This reciprocity-based approach to market access could

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<sup>26</sup> Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, 11 FCC Rcd. 3873, 3890 (1995).

<sup>27</sup> See NPRM, Ness Statement, at 1.

<sup>28</sup> General Agreement on Trade in Services, art. XVI, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), *reprinted in* 33 I.L.M. 1167 (1994).

violate U.S. market access obligations, as the U.S. commitments do not provide any carve-outs for such bilateral safeguard measures.

***National Treatment and MFN Obligations.*** A WTO Member bound by a basic telecom services commitment must also ensure national treatment, *i.e.*, treat like services and service suppliers no less favorably than it treats its own services and service suppliers.<sup>29</sup> Similarly, a WTO Member bound by a basic telecom services commitment must also ensure MFN treatment, *i.e.*, offer the same treatment to like services and service suppliers from all other WTO Members.<sup>30</sup> Essentially, national treatment and MFN are non-discrimination rules that requires the United States to treat like services and service suppliers from all other WTO Members, as well as its own services and service suppliers, similarly.<sup>31</sup> As the Commission has noted, “The critical aspect of an MFN or national treatment analysis is whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers.”<sup>32</sup> But the Commission’s streamlining proposals could do just that by delaying and restricting the licensing of submarine cables without any corresponding competition or public interest benefits. Instead, they would selectively favoring certain—mainly U.S.—facilities owners. The Commission has proposed to deny streamlined processing where the facilities owner proposes to

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<sup>29</sup> GATS art. XVII.

<sup>30</sup> GATS art. II.

<sup>31</sup> See *Foreign Participation Order*, 12 FCC Rcd. at 24,037.

<sup>32</sup> *Id.* at 24,038.

serve an underserved route,<sup>33</sup> is not a “new entrant,”<sup>34</sup> and has not committed to “procompetitive arrangements” regarding cable landing station and backhaul access and capacity use and upgrades.<sup>35</sup> As numerous commenters have demonstrated, these proposals would not achieve any demonstrable public interest benefits, as they would delay infrastructure build-out, denying consumers the benefits of increased capacity and lower prices.<sup>36</sup> They would also function as back-door market opening measures—the very approach that the United States abandoned in making its WTO basic telecom commitment and which the Commission acknowledged in the *Foreign Participation Order* in abandoning the ECO test for applicants from WTO Members.

***Reference Paper Commitment on Competitive Safeguards.*** The Commission’s streamlining proposals may also be inconsistent with the Reference Paper, which the United States adopted as part of its schedule of commitments.<sup>37</sup> The Reference Paper requires WTO Members who adopt it to maintain appropriate measures to prevent suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.<sup>38</sup> But as noted above, a broad range of commenters have shown that the Commission’s proposals would not serve to prevent any competitive harms, and might in fact constrain competition. Without a competition

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<sup>33</sup> NPRM ¶¶ 25-32.

<sup>34</sup> *Id.* ¶¶ 33-37.

<sup>35</sup> *Id.* ¶¶ 38-50.

<sup>36</sup> See TyCom Comments at 4-7; AT&T-Concert Comments at 2, 4-9; FLAG Telecom Comments at 2; Level 3 Comments at 2-3; Sprint Comments at 8; 360networks Comments at 3-4; Viatel Comments at 2.

<sup>37</sup> See Reference Paper, Fourth Protocol to the General Agreement on Trade in Services 436 (WTO 1997) (emphasis added), *reprinted in* 36 I.L.M. 354, 367 (1997); WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), S/GBT/W/1/Add.2/Rev.1 (Feb. 12, 1997).

justification, these proposals could be construed to violate the Reference Paper commitment on competitive safeguards.

***Reference Paper Commitment on Processing Time.*** The Commission’s streamlining proposals may also be inconsistent with the Reference Paper commitment regarding the processing time for the issuance of licenses. The Reference Paper requires the United States to make publicly available “all the licensing criteria *and the period of time normally required to reach a decision* concerning an application for a license.”<sup>39</sup> Nevertheless, neither the Commission’s current licensing regime nor its streamlining proposals establish a “period of time normally required” to license a submarine cable. For non-streamlined applications, the Commission’s proposals would not make publicly available any processing timeline.<sup>40</sup> And even for streamlined applications, the Commission’s proposals would establish a timeline only for the public notice period.<sup>41</sup> As noted in part I above, the Commission’s proposals do not account for the risk of substantial delays before an application is placed on public notice—a matter of particular concern given the complexity of the proposed streamlining rules. To meet its obligations under the Reference Paper, the Commission must establish a clear processing timeline for streamlined and non-streamlined applications, regardless of the nature of those streamlining rules. And if the period of time that precedes the issuance of a public notice period for a given application is expected to be

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[Footnote continued from previous page]

<sup>38</sup> Reference Paper § 1.1.

<sup>39</sup> Reference Paper § 4.

<sup>40</sup> NPRM ¶ 54 (requiring only that a public notice be issued if consideration of the application were delayed).

<sup>41</sup> *Id.*

substantial, as it well could be under the Commission's streamlining proposals, then the timeline should include the time period prior to the issuance of the public notice.

#### **IV. THE COMMISSION SHOULD PERMIT *PRO FORMA* TRANSACTIONS WITHOUT PRIOR APPROVAL**

TyCom strongly supports the proposal by some commenters to permit *pro forma* transactions without prior Commission approval.<sup>42</sup> Presently, the Commission requires that the holder of a cable landing license seek prior Commission approval to consummate a *pro forma* transaction. This means that a licensee seeking to complete a corporate reorganization or securities offering must first seek Commission consent for a *pro forma* assignment or transfer of control. Such filings burden the Commission staff needlessly. There is no discernable public interest benefit in requiring a separate application for advance approval of a transaction that does not change the identity of the licensee in a manner that would raise competition, national security, or other concerns. In some cases, it is not even possible for the licensee to obtain such consent in advance, as the exact details of a *pro forma* transaction—particularly those involving the offering of securities—are not settled until the transaction is actually consummated. As a result, the licensees resort to filing *nunc pro tunc* requests for Commission approval of transactions, further burdening the Commission staff.

Instead, the Commission should conform its submarine cable rules to those of its Section 214 rules for international common carriers. Under those rules, the Commission requires notification within 30 days of *pro forma* assignments but does not require any notification for *pro*

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<sup>42</sup> See 360networks Comments at 10-11; Global Crossing Comments at 35-36.

*forma* transfers of control.<sup>43</sup> As the Commission noted in adopting those rules, “Regulatory review of these transactions yields no significant public interest benefits, but may delay or hinder transactions that could provide substantial financial, operational, or administrative benefits to carriers.”<sup>44</sup> The same reasoning applies to the licensing of submarine cables. Given that the Cable Landing License Act does not preclude such a rule for submarine cables,<sup>45</sup> the Commission should adopt it.

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<sup>43</sup> See 47 C.F.R. § 63.25.

<sup>44</sup> See *1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Notice of Proposed Rulemaking*, 14 FCC Rcd. 4909, 4929 (1998)

<sup>45</sup> See 360networks Comments at 10-11.

## CONCLUSION

For the reasons stated above and in its initial Comments, TyCom urges the Commission to adopt a simplified streamlining of the licensing process for submarine cables.

Respectfully submitted,

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20 September 2000

## CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that copies of the foregoing Comments of TyCom Networks (US) Inc. have been sent by hand(\*) or first-class mail on this 20th day of September, 2000, to the following:

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