

of an international route [does not] have the ability to leverage that market power into the U.S. market to the detriment of competition and consumers.”⁶⁹ Thus, if a carrier has obtained such Section 214 authorization, then the Commission has already effectively determined that the carrier would be unable to act in an anticompetitive manner with respect to submarine cables. Accordingly, it is entirely wasteful and duplicative to require such carriers to repeat the regulatory process.

Third, streamlined processing of applications to serve WTO Member countries is not merely appropriate, but arguably required by the MFN obligation to which the United States and all other WTO Members have agreed.⁷⁰ As described above and in AT&T and Concert’s comments (at 62-63), the MFN obligation requires any WTO Member to be treated on terms that are as favorable as those granted to any other WTO Member. Accordingly, the Commission may be precluded from treating applicants from WTO Members, and applications for cables owned by WTO Member country carriers and their U.S. affiliates, under different procedures. Moreover, as further described above, because any competitive issues raised by the ownership and operation of international facilities by already-authorized U.S. international facilities-based carriers are addressed by their Section 214 authorizations, there is also no basis for denying equal treatment to these carriers under the Commission’s open entry presumption for submarine cable applicants from WTO Member countries.

Fourth, the presence of dominant foreign carriers on these cables raises no competitive concerns that are not already fully addressed by existing rules and policies. As noted, many such carriers are regulated as dominant carriers under their Section 214 authorizations, which helps to

⁶⁹ Report and Order and Order on Reconsideration, *1998 Biennial Regulatory Review – Review of Int’l Common Carrier Regulations*, 14 FCC Rcd. 4909, ¶ 21 (1999) (“*International Section 214 Order*”).

⁷⁰ See AT&T-Concert at 62-64.

limit the risk of any anticompetitive behavior. The Commission's No Special Concessions rule operates broadly to preclude U.S. international carriers from entering into certain arrangements that allow those carriers to receive favored treatment (*i.e.*, special concessions) from any foreign carrier with market power.⁷¹ The Commission's other conduct regulations – like the International Settlement Policy, which requires U.S. international carriers to pay nondiscriminatory rates for the termination of traffic in foreign countries – also help to eliminate any competitive concerns from participation by dominant foreign carriers in cable landing licenses. And beyond its own existing safeguards, the Commission has found that “the WTO Basic Telecom Agreement will significantly reduce the opportunities for carriers with bottleneck control on the foreign end of a cable to harm competition in the U.S. market by acting anticompetitively.”⁷² As the Commission emphasized in the *Foreign Participation Order*, any failure to implement the market access and Reference Paper commitments made under the WTO Agreement by WTO Member countries should be addressed by USTR actions under WTO dispute resolution procedures rather than by Commission limitations on market entry.⁷³

III. THE COMMISSION SHOULD REJECT GLOBAL CROSSING'S SELF-SERVING AND ANTICOMPETITIVE ATTEMPTS TO IMPEDE COMPETITION FROM OPEN INVESTMENT CABLES.

A. Global Crossing's “35% Proposal” Is An Anticompetitive Attempt To Raise Its Rivals' Costs.

Global Crossing has proposed that the Commission should approve a submarine cable landing license application only if the “landing parties on the U.S. end of the cable do not have a combined share of more than 35 percent of active half circuits . . . on the U.S. side of the route

⁷¹ *See id.* at 34-35.

⁷² *Foreign Participation Order* ¶ 94.

⁷³ *Id.* ¶ 39.

served by the cable.”⁷⁴ Global Crossing’s “35% proposal” received no support from the industry (other than, of course, Global Crossing itself). That is because, as AT&T and Concert show (at 30-34), the 35% proposal is a naked attempt to enlist the Commission to protect Global Crossing from competition from its rivals. And, as the courts have held, “[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors.”⁷⁵

Global Crossing’s proposal would harm competition in two independent respects. First, by its plain terms, any carrier (or group of carriers) would be presumptively forbidden from taking an ownership position in any new cable if that carrier (or group of carriers) controlled more than 35% of the existing capacity on a route. Because large carriers are often the driving force behind new submarine cable projects, this restriction will have the predictable effect of reducing the number of open investment submarine cables deployed in the future. Second, the open investment cables that could be built under Global Crossing’s regime would undoubtedly be inefficiently sized because many carriers that own existing capacity would be excluded to avoid the ownership cap.

The self-serving nature of Global Crossing’s proposal is evident from the fact that, as structured, it would apparently have *no* impact on Global Crossing’s closed investment cables despite the fact that Global Crossing is the largest Trans-Atlantic provider with approximately 40% of the capacity in that region – almost twice the size of WorldCom (with 23.3%) and almost four times the size of Concert (with 11.5%).⁷⁶ By its express terms, Global Crossing’s proposal

⁷⁴ Notice ¶ 37.

⁷⁵ *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (citation omitted). See also *Hawaiian Tel.*, 498 F.2d at 776.

⁷⁶ *AT&T-BT JV Order* ¶ 48.

would only apply to “active” circuits – thereby excluding capacity that Global Crossing owns but has not yet leased to a carrier. And because Global Crossing asserts (at 25) that those carriers that lease active circuits from it on an IRU basis are the true “owners” of that capacity, Global Crossing’s active capacity would presumably not count against it either. Put simply, “Global Crossing’s so-called ‘structural solution’ is no more than a formula to divide the submarine cable market between private submarine cables and traditional consortium systems. As such, it would deprive carriers of the option to self-supply, an important control on the ability of third party providers to overcharge.”⁷⁷

Other commenters – many of whom participate in both open investment and closed investment cables – reveal additional flaws in Global Crossing’s proposal. These commenters show that Global Crossing’s proposal would not result in any actual “streamlining” for numerous applications. Level 3, for example, demonstrates (at 8) that Global Crossing’s proposal would impose burdensome new informational requirements on the Commission and cable applicants. Viatel explains (at 8 n.17) that Global Crossing’s proposal “requires the submission of market share and market power data, including (in the so-called ‘forbearance option’) a demonstration that ‘the regional market is competitive because of effective hubbing or timely and cost-effective interconnection.’ These vague, fact-intensive requirements would involve the Commission and the parties in lengthy disputes and prevent streamlined treatment of the applications to which these requirements are applied.” More fundamentally, Global Crossing’s proposal would “ultimately disincite next generation cable providers from deploying high-capacity systems

⁷⁷ Sprint at 13.

because such higher capacity cable will quickly become embroiled in non-streamlined review . . . [and] will actually undermine the Commission's goal of encouraging market opening abroad."⁷⁸

Global Crossing offers only speculation to support its proposal. First, Global Crossing asserts (at 27) that "dominant foreign carriers with interests in a consortium submarine cable have granted operating agreements only to carriers who use the consortium cable."⁷⁹ However, to the knowledge of AT&T and Concert, no foreign carrier has refused to grant an operating agreement to a U.S. carrier merely because it was using a private cable. In fact, there are closed investment cables in existence today in which Concert owns half of the cable and a dominant foreign carrier owns the other half and traffic is exchanged pursuant to an operating agreement between them.⁸⁰ Concert also has arrangements for the exchange of voice traffic under operating agreements with three foreign carriers using Global Crossing's closed investment cable AC-1.⁸¹

⁷⁸ Level 3 at 8-9. *See also* FLAG at 10 (Global Crossing's proposal is likely to have the "effect of discouraging rather than promoting infrastructure investment and deployment").

⁷⁹ Indeed, Global Crossing even goes as far as claiming (at 27 n.11) that "in the *US-Japan* proceeding, it was not disputed that U.S. carriers desiring a correspondent relationship were required by the applicants in that proceeding to be on applicants' consortia cable." In fact, smaller U.S. carriers participating in that proceeding fully rebutted this claim by making clear that they were not "required" to be on the consortium cable to avoid discriminatory treatment by any Japanese carrier and that they instead had chosen the JUS cable over Global Crossing's PC-1 because it was the more attractive economic alternative. *See* Supplemental Reply Comments of PSINet at 6 (filed Mar. 15, 1999) ("the notion that PSINet participated in JUS Network to avoid discriminatory treatment in the home markets of consortium members or to secure the benefits of the larger members' supposed market power is entirely false. . . JUS Network is simply cheaper and offers more than Global Crossing"); Comments of Qwest Communications Corp., at 5 n.9 (filed Mar. 8, 1999) ("Qwest had no concern that it would encounter discrimination in input markets in Japan if Qwest obtained cable capacity from Global Crossing"); Reply Comments of SBCI-Pacific Networks, Inc., at 6 (filed Mar. 16, 1999) (rejecting "anticompetitive influence" alleged by Global Crossing; JUS was "economically superior" to PC-1); Supplemental Comments of Viatel, Inc., at 4 (filed Mar. 8, 1999) (JUS will cost Viatel "approximately one-quarter of what the same amount of capacity would have cost on PC-1").

⁸⁰ Supplemental Declaration of Thomas McInerney ("McInerney Supp. Dec.") ¶ 3 (attached hereto as Exhibit A)

⁸¹ *Id.*

Moreover, it is undisputed that KDD – which was a participant in the US-Japan cable and operated one of its landing stations and, therefore, according to Global Crossing’s logic, would have no incentive to deal with closed investment cables – *has* bought capacity on Global Crossing’s rival PC-1 cable.⁸² The facts are that U.S. and foreign carriers purchase capacity on private cables whenever it makes economic sense to do so, as further shown by purchases on Global Crossing’s AC-1 by Concert and at least two dominant foreign carriers and by AT&T Latin America’s August 31, 2000 announcement that it has purchased \$46.5 million in capacity on Global Crossing’s cables serving Latin America.⁸³

At bottom, Global Crossing is simply playing a game of semantics. For a U.S. carrier to enter into an “operating agreement” with a foreign carrier, both carriers must be on the cable. That is because, under operating agreements, the U.S. and foreign carriers hand-off traffic to each other at the mid-point and each terminates the other’s traffic at the settlement rate.⁸⁴ However, there is no “requirement” that operating agreements can be reached only with carriers using open investment cables, as shown by Concert and AT&T’s use of closed investment cables for this purpose.

But even if one had to join an open investment cable to enter into an “operating agreement,” that has no competitive significance in the Internet age in which the overwhelming majority of new submarine cable circuits are used for Internet, data and other traffic carried on private line circuits that is exempt from the settlement process and has never earned proportionate return. AT&T and Concert estimate that *more than 95%* of new submarine

⁸² See http://www.globalcrossing.com/pressreleases/pr_010500.htm.

⁸³ McInerney Supp. Dec. ¶ 4.

⁸⁴ AT&T-Concert at 24.

capacity requirements are for private line circuits rather than International Message Toll Service (“IMTS”) traffic.⁸⁵ Thus, as AT&T and Concert explain (at 20), new planning systems do not ordinarily take IMTS traffic into account when planning new systems. This is confirmed by Commission statistics showing that, even before the full emergence of demand for Internet capacity, only 17% of new active international submarine circuits from 1997-1998 were IMTS circuits.⁸⁶ Moreover, industry experts estimate that that this trend will accelerate still further.⁸⁷

Thus, even if every incumbent foreign firm announced that it would enter into correspondent relationships only with those carriers that used the submarine cables that they preferred, the vast majority of the international transport traffic would remain open to those carriers that would decide to use different cables. There is no planning, technical, economic or other reason why private line circuits need to be on the same cable as IMTS circuits.⁸⁸ Accordingly, incumbent foreign firms would have no incentive to refuse to deal with closed investment cables because that would simply shift traffic onto private lines operated by their competitors (including, in an increasing number of countries, U.S. firms that have been authorized to enter the foreign market).

In all events, the Commission has made clear that operating agreements are not “bottleneck” inputs. “Generally, U.S. carriers are able to obtain operating agreements or

⁸⁵ *Id.* at 34; *id.*, McInerney Dec. ¶ 10.

⁸⁶ 1998 Section 43.82 Circuit Status Data, Table 2 (Dec. 1999). Since 1998, all of these trends have continued at an accelerating pace with the increasing Internet-fueled global demand for private line capacity. *See* AT&T-Concert at 20-21.

⁸⁷ *See* The Economist, Mar. 13, 1999, at 82.

⁸⁸ McInerney Supp. Dec. ¶ 3.

establish alternative arrangements to provide international services.”⁸⁹ The Commission has repeatedly found that multiple U.S. carriers have operating agreements to nearly all countries and that U.S. carriers will be able to obtain operating agreements from new entrants and incumbent carriers as a result of the market access commitments made under the WTO Agreement.⁹⁰

U.S. carriers may also take advantage of these lower foreign entry barriers by establishing their own affiliates and terminating their own traffic through self-correspondence arrangements. The Commission has further encouraged U.S. carriers to enter into commercial arrangements with new entrant carriers in foreign markets by removing the ISP and related filing requirements from all foreign carriers that lack market power.⁹¹ A significant element in that decision was the Commission’s desire to encourage competition by “[r]emoving the regulatory link between the inbound and outbound traffic markets.”⁹² Lastly, as shown by AT&T and Concert (at 22-23), under the Commission’s settlement rate benchmark and ISR policies, the termination rates paid on IMTS traffic governed by operating agreements are fast being lowered toward cost, particularly in the liberalized countries that allow competitive cables, thus rendering any return traffic provided under operating agreements largely or entirely irrelevant.

Second, Global Crossing asserts (at 5) that its proposal (or comparable regulation) is necessary to combat “alliances” – particularly the Concert joint venture – which, according to

⁸⁹ *MCI-WorldCom Merger Order* ¶ 117.

⁹⁰ *AT&T-BT JV Order* ¶ 50; *AT&T Int’l Non-Dominance Recon. Order* ¶ 18; *MCI-WorldCom Merger Order* ¶ 117, n.339; *Foreign Participation Order* ¶ 94. See also *TeleGeography 2000*, Figure 2 (44 countries had two or more international carriers as of July 1999, up from 23 countries with two or more carriers in July 1997. Twenty-six countries in July 1999 had 10 or more international carriers).

⁹¹ Report and Order and Order on Recon., *1998 Biennial Regulatory Review Reform of Int’l Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd. 7963, ¶ 21 (1999) (“*ISP Reform Order*”).

⁹² *Id.* ¶ 25.

Global Crossing, threaten the “reconsolidation” of retail traffic on international routes and thereby adversely affect the submarine cable market. The complete answer to Global Crossing’s argument is the Commission’s express findings of fact in *AT&T-BT JV Order*. There, the Commission held that Concert has no ability to act anticompetitively in any international transport capacity market,⁹³ on the U.S.-UK route,⁹⁴ or on any third country route.⁹⁵

Finally, Global Crossing contends (at 5, 23) that open investment cables are anticompetitive because of the vertically integrated nature of participating carriers.⁹⁶ Precisely the opposite is true. As Professors Ordober and Willig explain,⁹⁷ the structure of open investment cables is pro-competitive because it permits carriers to obtain lower cost transport, while at the same time ensuring that those carriers compete vigorously.

And even if that were not the case, Global Crossing fails to show how international facilities-based carriers’ expansion of the facilities they are already authorized to “acquire or operate” – an inherently pro-competitive activity – would raise competitive concerns in downstream international services markets that are not addressed by existing Commission regulation of facilities-based international carriers. As AT&T and Concert establish in their comments (at 34-37), any competitive issues in downstream facilities-based international services markets are already fully addressed by Commission regulation in the form of dominant carrier rules, benchmark requirements for carriers with foreign market power, the ISP for

⁹³ *AT&T-BT JV Order* ¶¶ 48, 49.

⁹⁴ *Id.* ¶¶ 62-70.

⁹⁵ *Id.* ¶¶ 71-72.

⁹⁶ Global Crossing at 5, 23.

⁹⁷ Ordober-Willig Dec. ¶¶ 52-54.

arrangements with foreign dominant carriers, and the No Special Concessions rule. Those regulations apply to all U.S. international facilities owned and operated by the authorized carrier, including submarine cable and landing station facilities.

B. The Commission Should Likewise Reject Global Crossing's Attempts To Manipulate The Proposed Options To Its Advantage.

Global Crossing's comments also vividly confirm AT&T and Concert's fear that the proposed streamlining options would become the *de facto* substantive standard by which the Commission would judge all applications. Global Crossing proposes (at 13) that the Commission simply abandon the pretense that "failure to qualify for streamlining would not" impact the normal processing of a non-streamlined application and instead urges the Commission to make clear that the streamlining options would serve the "purpose of establishing policies for reviewing applications."

However, Global Crossing recognizes that, as written, it too might run afoul of those standards. Thus, it urges the Commission to modify them in a way that would ensure that its closed investment cables receive no entry scrutiny while making it impossible for many open investment cables to be approved. Most vividly, for purposes of determining whether a party is a "new entrant," Global Crossing does not want total wet link capacity counted, because it might be the dominant carrier on some routes by that definition in light of the enormous amounts of capacity that it – and it alone – controls. Indeed, as noted, Global Crossing is the largest trans-Atlantic provider with approximately 40% of the capacity in that region, almost twice the size of WorldCom and almost four times the size of Concert.⁹⁸ Global Crossing instead would have the capacity that it leases to its customers tallied against those customers even though it retains full

⁹⁸ *AT&T-BT JV Order* ¶ 48.

ownership of the underlying facilities.⁹⁹ At the same time, Global Crossing asserts *ipse dixit* that “dark” capacity that it has not leased yet should simply be disregarded.¹⁰⁰ In effect, Global Crossing would have the Commission treat Global Crossing as owning *no* capacity on existing routes and therefore *always* qualifying as a “new entrant.”

Just as astonishing is Global Crossing’s position with regard to the Commission’s proposals regarding how it would use ownership of cable landing stations to determine whether routes are “independently operated.” The *Notice* proposes not to “attribute control of any of the cable system to an entity controlling fewer than all of the landing stations in a particular country.”¹⁰¹ As AT&T and Concert show (at 40-42), such a rule is grossly underinclusive because the relevant markets are *regional*. The now-ubiquitous presence of transit/hubbing arrangements in the three major regions means that (as is usually the case) so long as there are multiple landing stations within a *region* (as opposed to a particular country), the owner of a landing station in a particular country has no ability to charge supra-competitive rates.¹⁰²

Global Crossing, however, complains that the Commission should simply disregard the availability of multiple landing stations because

the test could actually encourage carriers to create consortium cables with as many landing parties as economically feasible. . . . This would occur because it is almost certain that an independent path could be found on any future cable. Such an outcome should be the opposite of the Commission’s goal in this proceeding to promote competition.¹⁰³

⁹⁹ Global Crossing at 25.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 18.

¹⁰² *Id.* at 40-42.

¹⁰³ Global Crossing at 20.

The only explanation Global Crossing is able to muster as to why a rule that might be said to encourage additional landing stations serving an open investment cable is “opposite of the Commission’s goal in this proceeding to promote competition” is that it would allow open investment cables to remain viable.¹⁰⁴ By way of this argument, Global Crossing vividly confirms that it is not interested in competition on the merits, but only in using regulation to impede its open investment cable rivals.

The foundation of Global Crossing’s position appears to be its bare assertion (at 20) that independent landing stations do not “compete” because “[t]he structure of consortium cables with multiple landing parties is not conducive to independent competitive behavior.” As Professors Ordover and Willig explained, that is false.¹⁰⁵ The structure of open investment cables permits carriers to obtain access to low cost capacity while at the same time ensuring that the carriers independently market and price that capacity.¹⁰⁶ Indeed, it makes no sense that the various owners of an open investment cable would participate in a conspiracy in which they agree to be charged supra-competitive rates by the various landing station owners.¹⁰⁷

¹⁰⁴ *Id.* at 20-21.

¹⁰⁵ Ordover-Willig Dec. ¶¶ 52-54.

¹⁰⁶ *Id.*

¹⁰⁷ *See* Sprint at 12 (“Sprint has no interest in being overcharged for backhaul or otherwise exploited, and has campaigned vigorously for rights to co-location in all cable stations and for access to competitive backhaul. It could hardly attempt to exploit its ownership of a TAT-14 cable stations to extract monopoly rents while calling for co-location and competitive backhaul on other cable systems where it is an owner.”). Concert is equally forthright in requesting all cable station operators to provide it nondiscriminatory collocation and backhaul arrangements, but also believes that intervention by foreign regulators is necessary only to ensure access to cable stations operated by dominant carriers. *See* Concert Comments on the Hong Kong Telecommunications Authority Consultative Paper, *Access to and Co-location at Cable Landing Stations* (filed June 8, 2000). In this regard, Concert has emphasized to foreign regulators that cable station access and collocation arrangements for cable stations operated by nondominant carriers should be treated as contractual rather than regulatory matters and governed by the relevant C&MA or other commercial agreements among the parties arrived at in a competitive marketplace. *Id.*

Global Crossing would also amend the “pro-competitive arrangements” option so that all C&MAs must include a condition preventing dominant foreign carriers from denying operating agreements to carriers using competing closed investment cables.¹⁰⁸ Because, as explained above, operating agreements require carriers to match circuits on a submarine cable and hand off traffic at the mid-ocean point, Global Crossing’s proposed condition would effectively require dominant foreign carriers to lease circuits on competing closed investment cables. Global Crossing provides no justification for such an unnecessary and self-serving requirement, even assuming that the Commission could impose such a condition on foreign carriers. All or virtually all countries allowing competitive cables have accepted the WTO Reference Paper requiring dominant carriers to provide cost-based, nondiscriminatory interconnection at any technically feasible point in their networks to all U.S. carriers, including those using competing cables. As AT&T and Concert explain in their comments (at 36-37), the Commission has determined that any failure to meet these WTO obligations is properly addressed by USTR trade enforcement action rather than by restricting U.S. landing licenses. Further, while the No Special Concessions Rule precludes any U.S. carrier from accepting exclusive operating agreements from any dominant foreign carrier,¹⁰⁹ the Commission has always declined to seek to require foreign carriers “to make correspondent agreements freely available.”¹¹⁰ Instead, it has relied on market forces and the global market-opening resulting from the WTO Agreement to

¹⁰⁸ Global Crossing at 28.

¹⁰⁹ See, e.g., *AT&T-BT JV Order* ¶¶ 92-95.

¹¹⁰ *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd. 3873, 3970 (1995).

provide new operating agreements and alternative traffic termination opportunities to U.S. carriers, and Global Crossing puts forward no evidence that this reliance is misplaced.¹¹¹

Global Crossing also seeks to use informational requirements and related regulatory proceedings to advantage itself and raise its rivals' costs. Thus, Global Crossing asks the Commission to "adopt reporting requirements that would . . . [mandate that] the owners of U.S. landing stations for cables licensed under the pro-competitive arrangement test . . . submit semi-annual performance reports regarding their pricing for circuits on the cable, the provisioning times for services at their landing stations, and the number of backhaul providers, including whether any backhaul provider has been refused space at a landing station."¹¹² Global Crossing, however, makes no attempt to reconcile such a enormous burden with the Commission's repeated findings of fact in the *AT&T Int'l Non-Dominance Order*,¹¹³ the *AT&T Int'l Non-Dominance Recon. Order*,¹¹⁴ the *BT-MCI Merger Order*,¹¹⁵ the *MCI-WorldCom Merger Order*,¹¹⁶ and, most recently the *AT&T-BT JV Order*¹¹⁷ that U.S. cable landing and backhaul

¹¹¹ See *AT&T-Concert* at 34-37.

¹¹² *Global Crossing* at 28-29.

¹¹³ *Id.* ¶ 26 (findings that "owners of a submarine cable can choose to land the cable at any one of several cable landing stations," that cable landing stations were not "bottlenecks," and that arrangements regarding cable station access were "contractual" matters).

¹¹⁴ *Id.* ¶ 26 (affirming that cable station access concerned "contractual arrangements").

¹¹⁵ *Id.* ¶ 163 n.224 (observing that merger opponents offered *no* evidence or theory that would even purport to show that "either BT or MCI possesses or exercises market power in any U.S. input market" or could "obtain market power in any such input market).

¹¹⁶ *Id.* ¶ 115 (finding barriers to entry were sufficiently low that even if the MCI-WorldCom were to attempt to raise prices for backhaul, that would simply shift customers to alternative backhaul providers).

¹¹⁷ *Id.* ¶ 100 (rejecting the claim advanced by Sprint that AT&T had "bottleneck control over cable landing stations in the U.S." and could use its "position as a cable station owner to benefit itself at the expense" of the carriers landing traffic at stations it owned).

markets are competitive and barriers to entry into those input “markets” are low. Further, the self-serving nature of this request becomes plain once it is recognized that carriers using Global Crossing’s cables buy a “bundled” package that includes cable landing station and backhaul services. Global Crossing, therefore, would be exempt from the reporting because Global Crossing does not provide carriers collocation in its cable landing stations; rather these carriers rely on Global Crossing to provision cable landing stations and backhaul.

Second, Global Crossing asks the Commission to “monitor” changes in cable ownership in order to “review significant changes that raise competitive concerns on the route in question.”¹¹⁸ Again, this new requirement is the sleeves off a vest to Global Crossing because, under Global Crossing’s proposed formulation, it does not “own” any capacity.

On the other hand, Global Crossing seeks exceptions from existing *informational* requirements in order to shield from public scrutiny critical information regarding what entities actually own and lease capacity on Global Crossing cables. For example, Global Crossing proposes that it should not have to disclose the names and citizenship of entities that own up to 20% of any closed investment cable it operates.¹¹⁹ Similarly, Global Crossing asks the Commission to excuse it from having to disclose publicly its “interlocking directorates,” although it encourages the Commission to require open investment cables to provide that information.¹²⁰ Global Crossing also asks the Commission to reduce the amount of information it would have to file regarding its affiliations with foreign carriers.¹²¹ Global Crossing’s claims

¹¹⁸ Global Crossing at 18.

¹¹⁹ *Id.* at 32.

¹²⁰ *Id.*

¹²¹ *Id.* at 34.

that such relatively minor – but highly relevant – informational disclosures are unduly burdensome simply cannot be squared with the complex regime it would have the Commission impose on its open investment cable rivals.

IV. ALTERNATIVE “STREAMLINING” OPTIONS PROPOSED BY OTHER COMMENTERS EITHER DO NOT GO FAR ENOUGH OR WOULD AFFIRMATIVELY IMPEDE PRO-COMPETITIVE ENTRY.

Although, as discussed above, virtually no commenter fully supports the *Notice*’s proposed streamlining options, many of the alternatives proposed by the commenters, although preferable to the proposed rules, would not serve the public interest as well as a rule that presumptively streamlines all submarine cable license applications. FLAG, for example, would simply eliminate the most obvious defects in the rules proposed in the *Notice*.¹²² But as explained above and in AT&T and Concert’s comments (at 10-37), there is no justification for “targeted” entry regulation, and no amount of tweaking can salvage the “new entrant” and “pro-competitive arrangement” options. Any regime which attempted to discriminate against non-dominant carriers could not withstand appeal.¹²³ And there is no legitimate basis for the Commission to dictate how submarine cable ownership arrangements are structured.¹²⁴

360Networks would presumptively streamline all applications, but permit applications to be pulled on basis of “well-founded competitive concerns.”¹²⁵ That is simply too vague a standard to allow would-be entrants to plan on whether applications would qualify for

¹²² FLAG at 3-9. Viatel argues (at 10-11) the Commission should abandon the “competitive route” and “new entry” options and instead grant streamlining only to those applicants that agree to pro-competitive conditions that go even beyond those suggested in the *Notice*. As AT&T and Concert explained above, and in their comments (at 53-57), permitting streamlined entry only to those applicants that agree to adhere to inflexible government regulations as to the optimal ownership structure and operational procedures is not in the public interest.

¹²³ AT&T-Concert at 49-50.

¹²⁴ *Id.* at 56-57.

¹²⁵ 360Networks at 8.

streamlining. Level 3 advocates clear rules, but its “statement of principles” provides no guidance as to precisely which applications would qualify for streamlining. Clear standards “should be established as to when a submarine cable will be subject to more stringent regulation because of an owner’s affiliation or exclusive arrangements with a foreign provider with market power.”¹²⁶

Tycom and WorldCom agree that there is no basis for imposing entry regulations designed to remedy U.S.-end concerns, but propose that the Commission regulate entry to prevent foreign-end market power abuses.¹²⁷ The Commission should reject these proposals. As an initial matter, Sprint shows (at 14) that there is a strong argument that the Commission has no jurisdiction to restrict entry on the basis of foreign-end market conditions. Such regulation also would be unlikely to be effective because U.S. applicants have no ability to dictate what backhaul/collocation arrangements foreign countries should adopt, and monopoly foreign countries could simply accommodate demand for U.S. traffic by routing that traffic through third countries such as Canada.¹²⁸ Indeed, in many countries foreign carriers have legal monopolies and allowing collocation in foreign cable stations is simply irrelevant.¹²⁹

¹²⁶ Level 3 at 10. Level 3 appears to have abandoned its proposal that the Commission impose mandatory market access conditions on any submarine cable in which one of the participants is a major supplier. *See Notice* ¶ 76. Level 3 now argues that the Commission should use trade negotiations and rely on market forces fostered by the WTO Agreement to help open closed foreign markets to competition. Level 3 at 14-15. AT&T and Concert agree.

¹²⁷ Tycom at 4; WorldCom at 11-13. For non-competitive routes, WorldCom would permit streamlining only where the all the cable landing stations for a cable are controlled by non-dominant carriers or the foreign dominant carriers agree to “pro-competitive” arrangements analogous to those proposed in the *Notice*. WorldCom at 10-13. Tycom would deny streamlining to any cable where a “controlling owner” had “market power . . . in a destination where that cable lands.” Tycom at 3-4. Tycom does not describe what makes an owner “controlling” or how its test would apply to cables that land in multiple countries but where some of the landing stations owners were dominant and others were not.

¹²⁸ AT&T-Concert at 16; Level 3 at 14-15; Sprint at 10-11.

¹²⁹ Sprint at 10-11.

Most fundamentally, the approach suggested by these commenters is misguided because, as explained above and in AT&T and Concert's comments (at 16-18), attempting to solve foreign end problems in the cable landing license process would raise significant issues under GATS and is contrary to the *Foreign Participation Order*. The MFN obligation requires equal treatment for all WTO Member countries and applies "no matter what specific commitments a WTO Member has made"¹³⁰ Further, and again as described above, Commission conduct regulations and trade enforcement mechanisms are adequate to address foreign end concerns. The trade enforcement mechanisms, for example, are vested in the office of the U.S. Trade Representative, which has given every indication that it will press any WTO member that appears to regress in its commitments to opening telecommunications markets.¹³¹ Likewise, the WTO Reference Paper provides another pro-competitive enforcement mechanism by requiring telecommunications network and services providers to provide cost-based, nondiscriminatory and unbundled interconnection arrangements in their networks, including all of the relevant facilities used for international transport. Thus, cable station operators with market power in countries signing the WTO Reference Paper must provide collocation and cost-based backhaul services.¹³² With each of these safeguards and enforcement mechanisms in place, there is no need to adopt additional and burdensome regulatory requirements to address concerns about competition at the foreign end.

¹³⁰ *Foreign Participation Order* ¶ 37; see AT&T-Concert at 16-17.

¹³¹ See AT&T-Concert at 36-37 (noting example of pressure placed on Taiwan regarding proposed restrictions on the building of backhaul facilities and other restraints).

¹³² *Id.* at 37.

V. MISCELLANEOUS ISSUES

A. Level 3 and Sprint's Proposals Regarding Which Parties Should Be Required To Be Applicants Should Be Rejected.

AT&T and Concert disagree with Level 3 that only U.S. landing parties should be licensees. Level 3 wrongly contends (at 18) that landing party status potentially confers market power. But as explained above, no U.S. landing stations are operated by dominant carriers and the Commission has expressly found that AT&T, which operates the largest number of U.S. stations, has no market power over cable stations.

Sprint incorrectly claims (at 21) that landing parties both land and operate the cable. In open investment systems, landing party actions to power and light the system cited by Sprint are controlled by all owners of the system through the system's general (or management) committee, which consists of all owners with voting based on ownership shares, and the variety of subcommittees and working groups that also typically perform the planning, construction, operation and restoration of open investment systems.¹³³

Finally, although a 5% ownership level does not confer any obvious ability to affect the operation of an open investment cable, this threshold would provide a reasonable bright line rule to exclude smaller owners. Because of the large number of owners on open investment systems, the 25% threshold proposed by FLAG would exclude all or virtually all owners on most systems.¹³⁴

¹³³ McInerney Supp. Dec. ¶ 5. Subcommittees and working groups on open investment systems frequently include: Procurement Group; Capacity Assignment, Routing and Restoration Subcommittee; Maintenance, Operation and Engineering Subcommittee; Financial and Administrative Subcommittee; and Terminal/ Interworking Equipment Subcommittee. *Id.*

¹³⁴ See AT&T-Concert, McInerney Dec., Exhibits 1-3.

B. FLAG's Phased Streamlining Approach Should Be Rejected.

FLAG (at 3) makes the highly impractical suggestion that the Commission could apply streamlining to a cable on a segment-by-segment basis because “[a] phased streamlined grant would allow construction to begin earlier on those segments that qualify for streamlined processing.” Modern cables, however, are not planned with superfluous landing points that may be delayed in the regulatory process without potentially impacting the overall viability of the entire cable.¹³⁵ Thus, for example, carriers would be unlikely to proceed with the construction of a cable circling Latin America if immediate approval could be obtained for only five of ten planned landing points.¹³⁶ Similarly, many modern cables provide outage protection through ring systems requiring construction of the entire system, and offer portable capacity that may be used to any landing point, which would also lead carriers to delay any commencement of construction until authorizations were obtained for all segments of the planned cable.¹³⁷

C. The Commission Should Adopt 360Networks's Suggestion Treatment Of Pro Forma Transfers of Control.

360Networks suggests (at 10) the Commission should give blanket approval of pro forma transfers of control and assignments. AT&T and Concert agree. The Commission has successfully taken that approach in the international Section 214 authorization context thereby saving carriers – and consumers – from incurring needless expenses and delays with regard to transfers that, by definition, raise no competitive issues.¹³⁸ The Commission should adopt the same procedures here.

¹³⁵ McInerney Supp. Dec. ¶ 6.

¹³⁶ *Id.*

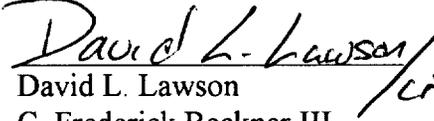
¹³⁷ *Id.*

¹³⁸ *International Section 214 Order* ¶¶ 19-40.

CONCLUSION

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

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September 20, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2000, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 20, 2000
Washington, D.C.


Peter M. Andros

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

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

SUPPLEMENTAL DECLARATION OF THOMAS K. McINERNEY

1. My name is Thomas K. McInerney. I am Vice President, Cable and Satellite Management for Concert Global Network Services Ltd. ("Concert"), a new global venture of AT&T Corp. ("AT&T") and British Telecommunications, plc.

2. I have been asked to provide additional testimony in connection with the Federal Communications Commission's review of its submarine cable regulations in response to the following issues raised by other commenters.

3. *First*, Global Crossing contends (at 27) that "[i]n the past, dominant foreign carriers with interests in a consortium submarine cable have granted operating agreements *only* to carriers who use the consortium cable." To AT&T and Concert's knowledge, no foreign carrier has refused to grant an operating agreement to a U.S. carrier merely because it was using a private cable. In fact, there are closed investment cables in existence today on which Concert owns half circuits and a dominant foreign carrier owns matching half circuits and traffic is exchanged pursuant to an operating agreement between them. Concert (and previously AT&T) has longstanding arrangements for the exchange of IMTS traffic under operating agreements with five

dominant foreign carriers using the PTAT transatlantic closed investment cable and with two dominant foreign carriers using the NPC transpacific closed investment cable. Concert also has arrangements for the exchange of IMTS traffic under operating agreements with three foreign carriers using transatlantic capacity on Global Crossing's closed investment cable AC-1. Finally, for destinations served by more than one cable, there are no planning, technical, economic or any other reasons why private line circuits need to be on the same cable as IMTS circuits. In fact, we often chose to use multiple cables on a route to provide network security and redundancy.

4. In AT&T and Concert's experience, foreign carriers are ready to purchase capacity on closed investment cables whenever this meets their business needs. KDD earlier this year purchased \$100 million in capacity on Global Crossing's cables, including PC-1, and AT&T is aware of at least two dominant foreign carriers that have purchased capacity on Global Crossing's AC-1. Concert also purchases capacity on closed investment cables whenever it makes economic sense to do so, and already owns capacity on Global Crossing's AC-1. Similarly, AT&T's affiliate, AT&T Latin America, announced on August 31, 2000 that it is purchasing \$46.5 million in capacity on Global Crossing's cables serving Latin America.

5. *Second*, Sprint (at 21) claims that landing parties both land and operate open investment cables because they "operate the electrical equipment that powers and lights the cable system as well as the multiplexers and cross-connects that allow a cable to function." In fact, the landing party actions cited by Sprint are controlled by all open investment cable owners through the general (or management) committee, which consists of all owners with voting based on ownership shares, and the variety of subcommittees

and working groups that also typically perform the planning, construction, operation and restoration of open investment cables. Subcommittees and working groups on open investment cables frequently include: Procurement Group; Capacity Assignment, Routing and Restoration Subcommittee; Maintenance, Operation and Engineering Subcommittee; Financial and Administrative Subcommittee; and Terminal/ Interworking Equipment Subcommittee.

6. *Third*, Flag (at 3) claims that the Commission could apply streamlining to a cable on a segment-by-segment basis because “a phased streamlined grant would allow construction to begin earlier on those segments that qualify for streamlined processing.” Modern cables, however, are not planned with superfluous landing points that may be delayed in the regulatory process without potentially impacting the overall viability of the entire cable. Thus, for example, carriers would be unlikely to proceed with the construction of a cable circling Latin America if immediate approval could be obtained for only five of ten planned landing points. Also, many modern cables provide outage protection through ring systems that require construction of the entire system, and offer portable capacity that may be used to any landing point, which would also lead carriers to delay any commencement of construction until authorizations were obtained for all segments of the planned cable.

VERIFICATION

I, Thomas K. McInerney, declare under penalty of perjury that the foregoing is true and correct. Executed on September 19, 2000.

A handwritten signature in black ink, appearing to read "Thomas K. McInerney", written over a horizontal line.

Thomas K. McInerney