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December 15, 2000

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Magalie Roman Salas, Secretary
Federal Communications Commission
224 12th Street, SW,
TW-B204
Washington, DC 20554

Re: Review of Commission Consideration of Applications under the Cable Landing License Act (IB Docket No. 00-106)

Dear Ms. Salas,

Please find enclosed an original and two copies of the Ex Parte Comments of AT&T Corp. and affiliates Concert Global Crossing Networks USA L.L.C. and Concert Global Network Services Ltd. for filing in the above-referenced docket. Also enclosed is an additional copy of the Ex Parte Comments, which we request you date-stamp and return to out messenger.

If you have any questions regarding the enclosed, please feel free to contact me at (202) 736-8224. Thank you for your assistance in this matter.

Sincerely,

C. Frederick Beckner III

Enclosures

cc: The Honorable William E. Kennard
The Honorable Harold Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael Powell
The Honorable Gloria Tristani
Clint Odom
Bryan Tramont
Mark Schneider
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Adam Krinsky
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Elizabeth Nightingale
Marilyn Simon
Magalie Roman Salas
International Transcription Service

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	)	

EX PARTE COMMENTS OF AT&T CORP. AND ITS AFFILIATES CONCERT GLOBAL NETWORKS USA L.L.C. AND CONCERT GLOBAL NETWORK SERVICES LTD.

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Before the
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EX PARTE COMMENTS OF AT&T CORP. AND ITS AFFILIATES CONCERT GLOBAL NETWORKS USA L.L.C. AND CONCERT GLOBAL NETWORK SERVICES LTD.

AT&T Corp. ("AT&T") and its affiliates Concert Global Networks USA L.L.C. and Concert Global Network Services Ltd. (collectively "Concert") respectfully submit these *ex parte* comments on the rules the Commission should adopt to streamline review of applications to land submarine cables pursuant to the Cable Landing Licensing Act.

INTRODUCTION

Global Crossing Ltd. ("Global Crossing") made little attempt to defend its proposal of intrusive and burdensome entry regulation of rival submarine cable ventures advocated in its opening comments in this proceeding. Rather, Global Crossing waited until the reply stage to attempt to support with economic testimony the unprecedented and entirely unwarranted new regulatory scheme it seeks. In particular, Global Crossing submitted with its reply comments a new declaration by economist Dr. Andrew Joskow.[1] In addition, Global Crossing resubmitted in their entirety prior declarations by Dr. Joskow and Mr. Wallace Dawson that were filed in the

[1] Declaration of Andrew Joskow on Behalf of Global Crossing (filed Sept. 2000) ("Joskow Dec.").

Japan-US ("JUS") cable landing license proceeding.[2] As demonstrated below, neither Dr. Joskow's new theories nor the old ones he advanced last year in the JUS proceeding remotely establish any public interest in endorsing Global Crossing's self-interested attacks on its open investment cable rivals. Indeed, Global Crossing's reply comments now confirm that its efforts to handicap competitors rest on an obviously false factual premise the Commission has already repeatedly rejected – *i.e.*, that carriers have the ability to use *U.S. end* landing stations and backhaul to impede international transport competition.

These *ex parte* comments are divided into two parts. Part I summarizes the accompanying *Ex Parte* Declaration by Professors Janusz Ordover and Robert Willig ("Ordover-Willig Ex Parte Dec.") (attached hereto as Exhibit A), which rebuts the economic arguments that Global Crossing has now advanced in this proceeding, including those originally made in the JUS proceeding (which Global Crossing, by attaching Dr. Joskow's JUS testimony, appears to be reasserting). Part II addresses a number of additional misrepresentations made by Global Crossing in its latest filing. In particular, Part II corrects numerous factual misstatements made by Global Crossing in its attempts to prove that open investment cables are anticompetitive and that foreign firms have incentives to discriminate unfairly against Global Crossing and other closed investment cable operators.

[2] Affidavit of Andrew Joskow (filed in File No. SCL-LIC-19981117-0025, March 15, 1999) ("Joskow JUS Dec."); Affidavit of Wallace Dawson (filed in File No. SCL-LIC-19981117-0025, March 15, 1999) ("Dawson JUS Dec.").

ARGUMENT

I. THE ACCOMPANYING DECLARATION OF PROFESSORS JANUSZ ORDOVER AND ROBERT WILLIG CONCLUSIVELY DEMONSTRATES THAT GLOBAL CROSSING HAS PROVIDED NO JUSTIFICATION FOR ITS INTRUSIVE REGULATORY PROPOSAL.

In its reply comments, Global Crossing has abandoned many of the arguments that it had previously advanced. First, Global Crossing no longer contends that open investment cables raise "horizontal" competitive issues. Global Crossing Reply at 22 n.40. Second, Global Crossing no longer claims that a new submarine cable raises competitive issues simply because it lands in a closed foreign market. *Id.* at 16. In fact, Global Crossing expressly acknowledges that no competitive concerns are raised if *either* end of a proposed cable lands in a competitive market. *Id.* But in a remarkable display of broken field running, Global Crossing now argues that the Commission should strictly scrutinize new open investment cable landing license applications in order to ensure that *domestic* carriers cannot leverage their control over "bottleneck" inputs in order to gain power in the downstream retail international telephone services market. *Id.* at 12, 16.

Although Global Crossing has clearly tried to reposition its case in its reply comments, it still cannot quite let go of its prior theories. Thus, for example, Dr. Joskow continues to assert the same horizontal "collusion" theory that he advanced in the JUS proceeding, even while Global Crossing claims it has abandoned this theory. *See* Joskow Dec. ¶ 23. Likewise, Dr. Joskow renews his clustering and foreclosure arguments even though those arguments are premised on foreign-end competitive concerns, not the U.S.-end issues upon which Global Crossing now focuses. *Id.* ¶¶ 8, 24.

Thus, it is ultimately unclear what economic theories Global Crossing is actually advancing in this proceeding. Accordingly, in their accompanying declaration, Professors

Ordover and Willig provide a comprehensive response to the economic arguments in both the new Joskow declaration and Dr. Joskow's prior JUS declaration.

Professors Ordover and Willig show that the starting point of Global Crossing's analysis – that entry by new open investment cables is presumptively anticompetitive – is contrary to basic economics. Ordover-Willig Ex Parte Dec. ¶¶ 18-21. Entry of new capacity in an existing market is presumptively beneficial. *Id.* ¶ 18. This is true regardless of whether firms independent of the incumbents control the new capacity or the new capacity is added by incumbent firms that will use it to expand output. *Id.* By contrast, entry regulation is an extremely costly process. Indeed, the risks, costs and delays of the regulatory process may deter potential entrants from seeking regulatory approval in the first place. *Id.* ¶¶ 18-19.

With regard to Dr. Joskow's specific "horizontal" claims, Professors Willig and Ordover show that, consistent with the *AT&T Int'l Non-Dominance Order*, 11 FCC Rcd. 17963 (1996) and the *AT&T Int'l Non-Dominance Recon. Order*, 13 FCC Rcd. 21501 (1999), no U.S. carrier controls "bottleneck" inputs necessary to providing retail international services. *See* Ordover-Willig Ex Parte Dec. ¶¶ 34-60. Professors Ordover and Willig likewise demonstrate that there is no merit to Dr. Joskow's assertion that U.S. landing station owners of open investment cables impede competition through collusion with regard to landing station access and backhaul pricing. *Id.* ¶¶ 22-33. Indeed, not only do landing station owners lack the incentive to undertake collusion as postulated by Dr. Joskow, they have no ability to do so because non-landing station owners collocate at cost-based rates and provide backhaul services to themselves and to other carriers. *Id.* ¶ ¶ 25-31; Ex Parte Declaration of Thomas K. McInerney ¶ 14 ("McInerney Ex Parte Dec.") (attached hereto as Exhibit B).

Dr. Joskow's "vertical" theories fare no better. As an initial matter, Dr. Joskow's "clustering" and foreclosure arguments are premised on foreign-end competitive concerns, not the U.S.-end issues on which Global Crossing now focuses. Ordover-Willig Ex Parte Dec. ¶¶ 14-16. But more fundamentally, both theories are internally inconsistent and are premised on flawed assumptions. *Id.* ¶¶ 61-74.

For example, Dr. Joskow claims that open investment cables can force small carriers to "cluster" on them, because those carriers need operating agreements (and return traffic) in order to reduce the effective costs of having their traffic terminated at the foreign end. But neither Global Crossing nor Dr. Joskow has been able to cite any evidence whatsoever to support this speculation. To the contrary, AT&T expert Mr. McInerney is unaware of a single instance of a U.S. carrier being required to transport traffic on a particular cable in order to secure an operating agreement or interconnection. McInerney Ex Parte Dec. ¶ 8; Supplemental Declaration of Thomas K. McInerney ¶ 3 (filed Sep. 20, 2000) ("McInerney Supp. Dec.").

Not only is this clustering argument unsupported by any evidence, it is without any economic foundation. It is undisputed that *over 95 percent* of new submarine cable capacity requirements are for private line circuits rather than International Message Toll Service ("IMTS") traffic. Declaration of Thomas K. McInerney ¶ 10 (filed Aug. 21, 2000) ("McInerney Dec."). This non-IMTS traffic (*i.e.*, traditional private line data traffic and Internet data traffic) is not subject to settlement rates and does not earn return traffic. McInerney Ex Parte Dec. ¶¶ 4-7. Thus, even a dominant foreign firm has no way to "leverage" its control over outbound traffic to force a U.S. carrier to participate in a particular cable.

Recognizing that this fact is fatal to its position, Global Crossing claims that Mr. McInerney's analysis is "contradicted" by Commission "data show[ing] that IMTS traffic

continues to represent a substantial share of total undersea cable circuits." Global Crossing Reply at 24. Data concerning the usage of total existing undersea circuits is irrelevant, however, because new submarine cable systems – the subject of this proceeding – are planned and constructed in response to *incremental* demand. McInerney Ex Parte Dec. ¶ 3. Thus, if Global Crossing wishes to support its contention that operating agreements and correspondent relationships are key inputs that will supposedly lead carriers to choose open investment rather than closed investment cables, then it must show that carriers are building *new* systems to carry IMTS traffic – and they are not. Indeed, AT&T and Concert have shown that the new submarine capacity required to satisfy the volume of IMTS traffic is now so insignificant compared to that required for Internet, data and other private line traffic that IMTS is generally *ignored* in planning new systems. McInerney Dec. ¶ 10. In the Internet age, at least 95 percent of the circuits on future cables will be for private lines, which are not subject to traditional correspondent relationships, do not earn return traffic, do not need to be on the same cable as IMTS circuits, and may be terminated with any facilities-based carrier at the foreign end. *See* McInerney Supp. Dec. ¶ 3.

Global Crossing nonetheless claims that return traffic "remains important" with respect to the tiny fraction of new capacity that is used for IMTS traffic. Global Crossing Reply at 24; *see also* Joskow Dec. ¶ 14. Even that irrelevant claim is overstated, as settlement rates for the vast majority of IMTS traffic continue to fall rapidly toward cost. Today, 75 percent of all U.S.-outbound traffic is already terminated at benchmark rates, and 88 percent of all U.S.-outbound traffic terminates in upper and middle-income countries required to provide benchmark rates by January 1, 2001. *See 1998 Section 43.61 International Telecommunications Data* (Jan. 2000),

Table A1; *IMTS Accounting Rates of the United States*, 1985-2000 (Dec. 1, 2000) (http://www.fcc.gov/ib/td/pf/artsweb.xls).

The Commission already recognizes that return traffic has no competitive significance at these low settlement rates. Under Commission rules, International Simple Resale ("ISR") arrangements are allowed with all World Trade Organization ("WTO") Member countries once their settlement rates are reduced to the levels required by the *Benchmarks Order*, 12 FCC Rcd. 19806 (1997). *See* AT&T-Concert Reply at 30. ISR arrangements are exempt from International Settlements Policy requirements, including those for the equal division of rates between the U.S. and foreign carrier and the proportionate return of inbound traffic, and often establish inbound traffic rates that are at, or close to, cost-based levels. McInerney Ex Parte Dec. ¶ 9. ISR is already authorized with 33 countries, including all of the fully liberalized countries that are the landing points for most closed investment cables. *See* ISR Approved Countries (http://www.fcc.gov/ib/isr.html). Under Commission rules, all WTO Member countries are scheduled to be eligible for ISR by January 1, 2003, when all countries are required to meet benchmarks.

Global Crossing ultimately resorts to the claim that carriers can be forced to "cluster" despite the prevalence of data traffic because "the termination of data traffic on a full-circuit basis still requires interconnection rights." Global Crossing Reply at 24.[3] But private line data traffic does not involve the exchange of U.S. and foreign originated traffic. Thus, return traffic

[3] Relatedly, Global Crossing states that "it is not necessarily the case that data traffic will be carried on a full-circuit basis, as witnessed by the current debates at the ITU." Global Crossing Reply at 24. These highly controversial proposals are unlikely to be adopted. The U.S. and other liberalized countries strongly oppose new ITU regulations on private line circuit arrangements because they would significantly impede the global growth of the Internet. *See,* (continued . . .)

has no relevance to these arrangements and does not reduce incremental cost. The necessary foreign end arrangements for these private lines can be provisioned by any authorized facilities-based carrier at the foreign end (including U.S. carrier affiliates) that can provide an owned or leased circuit connection to the termination point. McInerney Ex Parte Dec. ¶ 4. This is equally true for Internet traffic: Return traffic also does not reduce incremental cost in arrangements for Internet traffic, whether in the form of peering arrangements, which are conducted on a sender keep all, settlements free basis, or transit arrangements, which involve payments for interconnection. *Id.* ¶ 5. [4]

In his JUS declaration, Dr. Joskow asserted that his clustering theory was supported by "evidence." Joskow JUS Dec. ¶ 9. Dr. Joskow, however, provided no evidence of any purported discrimination against U.S. carriers using closed investment cables.[5] Neither AT&T nor Concert

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e.g., *The Digital Handshake*: *Connecting Internet Backbones*, FCC OPP Working Paper No. 32, Sept. 2000, at 33-36.

[4] Because of the much greater development of the Internet in the United States, with almost 70 percent of all global Internet web hosts and more than five times the number of web users than in any other country, most foreign ISPs and backbone providers seek access to U.S. web content, and U.S. ISPs and backbone providers consequently have no difficulty in entering into peering or transit arrangements providing U.S. users with access to foreign web-content and foreign users. McInerney Ex Parte Dec. ¶ 6. The large majority of these arrangements take place in the U.S. rather than in the foreign country. *Id.* ¶ 7. Where U.S. ISPs and backbone providers extend their backbones to foreign countries, their arrangements with foreign providers are more usually transit arrangements under which the foreign provider purchases interconnection from the U.S. provider. *Id.*

[5] If anything, the testimony provided by Dr. Joskow in the JUS proceeding undercuts the clustering argument he is now advancing. There he stated: "[I]t has been reported that KDD told a number of carriers that it would be charging prices for backhaul out of KDD landing stations in the range of $1.0 to $1.2 million per circuit per year. Recently, with the advent of PC-1, one or more of the JUS landing parties have offered backhaul prices to meet PC-1's backhaul prices in Japan." Joskow JUS Dec. ¶ 81. Thus, in the JUS proceeding, Dr. Joskow contended that competition from PC-1 forced the JUS landing parties to reduce backhaul prices. This claim is in stark contradiction to a central tenet of the "clustering" theory – *i.e.*, that U.S. carriers used the
(continued . . .)

is aware of any instance where a foreign carrier has refused to grant an operating agreement or interconnection arrangement to a U.S. carrier, or a peering or transit agreement to a U.S. ISP or Internet backbone provider, because the U.S. carrier, ISP or Internet backbone provider was using, or sought to use, a private cable. McInerney Supp. Dec. ¶ 3; McInerney Ex Parte Dec. ¶ 8.[6] Indeed, Global Crossing's own press releases confirm that incumbent foreign carriers show no hesitation in purchasing capacity on Global Crossing's closed investment cables.[7] These press releases also make clear that Global Crossing and other closed investment cable operators

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JUS cable rather than using Global Crossing's purportedly cheaper PC-1 cable solely because they need to secure operating agreements, IMTS return traffic and interconnection arrangements from the "dominant" Japanese carriers. As Professors Ordover and Willig explain, if that were the case, the JUS landing parties would not have felt any need to lower their backhaul prices. Ordover-Willig Ex Parte Dec. ¶ 67.

[6] 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, two dominant foreign carriers using the NPC transpacific closed investment cable, and three foreign carriers using transatlantic capacity on Global Crossing's closed investment cable AC-1. Further, AT&T's affiliate AT&T Latin America has recently announced a purchase of $46.5 million in capacity on Global Crossing's closed investment cables serving Latin America.

[7] *See Deutsche Telekom AG Boosts Capacity on Global Crossing Network,* Global Crossing Press Release dated Feb. 29, 2000 (announcing sale of "substantial additional capacity" on AC-1 to "club member" Deutsche Telekom); *Deutsche Telekom Signs New Contract with Global Crossing for European Backbone*, Global Crossing Press Release dated July 28, 2000 (announcing sale of dark fiber, co-location and other services on Global Crossing's Pan European network to Deutsche Telekom); *Global Crossing Announces Major Fiber and Capacity Agreements with Telecom Italia*, Global Crossing Press Release dated Oct. 3, 2000 (announcing sale of capacity on Global Crossing's Pan European Crossing and South American Crossing systems to Telecom Italia); *KDD Group Purchases $100 Million in Capacity on Global Crossing Network*, Global Crossing Press Release dated Jan. 5, 2000 (announcing that KDD has purchased capacity on Global Crossing's PC-1). (These press releases are available at http://www.globalcrossing.com/pressreleases/). *See also* McInerney Ex Parte Dec. ¶ 18 (discussing a Global Crossing presentation at Submarine Communications 2000 held in Barcelona, Spain from November 6-8 2000 which describes Global Crossing as the "network of choice" for Telecom Italia, Swisscom, Cable & Wireless and Deutsche Telecom)

are major beneficiaries of the new global market access opportunities provided by the WTO Basic Telecommunications Agreement and that they have had no difficulty in obtaining "necessary inputs" or in securing entry to the foreign markets.[8]

The only "evidence" that Global Crossing has been able to muster in support of its clustering theory is the testimony of Mr. Wallace Dawson, who testified in the JUS proceeding that KDD and its cable construction subsidiary, KDD-SCS, failed to live up to its contractual obligations to the PC-1 cable because of KDD's participation in the JUS cable. *See* Dawson JUS Dec. ¶¶ 4-38. As noted, Global Crossing resubmitted in this proceeding the Dawson declaration containing these allegations with its reply comments. But even if Mr. Dawson's claims were accurate, they are irrelevant to Dr. Joskow's "clustering" theory because they do not relate to a refusal by a dominant foreign firm to enter into an operating agreement with a U.S. carrier that would prefer to use a closed investment cable.

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[8] *See Global Crossing Adds Brazil to Global Fiber Optic Network,* Global Crossing Press Release dated Nov. 20, 2000 (Global Crossing "has commenced service of its network in Brazil, connecting the cities of Rio de Janeiro and Sao Paolo"); *Global Crossing Network Lands in Chile*, Global Crossing Press Release dated Oct. 31, 2000 ("[T]he Global Crossing cable station in Valparaiso, Chile . . . will be linked to Santiago, Chile via a 200 kilometer terrestrial fiber connection"); *Global Crossing Landing Mexicana Receives License to Operate in Mexico and Completes Mexican Fiber Optic Network*, Global Crossing Press Release dated Oct. 9, 2000 (announcing completion of fiber optic ring connecting Mexico City, Guadalajara and Monterrey and grant of Mexican license); *Global Crossing Completes Major New Network Link in Argentina*, Global Crossing Press Release dated July 25, 2000 (announcing landing of Global Crossing network in Argentina and that Global Crossing "will soon complete connections for its global network to virtually every city in Argentina"); *Global Crossing Expands Pan European Network to Spain and Scandinavia*, Global Crossing Press Release dated Mar. 13, 2000 (announcing expansion of Pan European Crossing network to include eight new cities in Spain and Scandinavia for a total of 41 major European metropolitan centers); *Hutchison Whampoaa and Global Crossing Complete Telecom Joint Venture in Hong Kong*, Global Crossing Press Release dated Jan. 12, 2000 ("Global Crossing gains entry into attractive markets in Hong Kong and, when regulations permit the Greater China region"). (These press releases are available at http://www.globalcrossing.com/pressreleases/).

In all events, Global Crossing has subsequently disavowed reliance on this aspect of the Dawson declaration, *see* Global Crossing Opp., at 2 (filed Nov. 24, 2000), and the reason is obvious: Since the Dawson Affidavit's initial filing in 1999, Global Crossing has made a number of statements that show beyond a doubt that the allegations made in the Affidavit regarding KDD are false.

A Global Crossing press release, dated December 21, 1999, announced that "initial cable connections have been completed on the northern section of . . . Pacific Crossing-1 (PC-1)" and that the company expected PC-1 to be ready for service "three months *ahead* of schedule and *approximately one year before* the next cable system linking the U.S. and Japan [*i.e.*, the JUS cable] will begin service."[9] Just two days later, Global Crossing's CEO, Bob Annunziata, again emphasized that "KDD-SCS . . . delivered Phase 1 of Global Crossing's Pacific Crossing-1 system *on budget and ahead of schedule*."[10] Indeed, in that press statement Global Crossing stated that it was so pleased with KDD-SCS's performance as a "subcontractor" on PC-1 that it had awarded KDD-SCS the primary Phase 1 construction contract for the new East Asia Crossing cable – an 11,600 kilometer cable linking Japan, Taiwan, Korea, Hong Kong and China – and declared that the choice of KDD-SC "will *ensure* that this project . . . is completed on or before schedule."[11]

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[9] *Asia Global Crossing and Global Bandwidth Solutions Announce Completion of Pacific Ocean Subsea and Japanese Terrestrial Cable Systems,* Global Crossing Press Release dated December 21, 1999 (emphasis added).

[10] *Asia Global Crossing Awards East Asia Crossing Construction Contract to KDD-SCS Inc.*, Global Crossing Press Release dated December 23, 1999 ("Global Crossing December 23 Press Release") (emphasis added).

[11] Global Crossing December 23 Press Release (emphasis added).

Thus, Global Crossing itself has directly refuted each of the key assertions in the Dawson Affidavit. Development of the PC-1 cable, far from having been unfairly subordinated, came in a year ahead of the rival JUS cable (and three months ahead of its own construction schedule); the northern landing rights that supposedly had been blocked have been acquired; and rather than having lost its time to market advantage over the JUS cable, Global Crossing's "threatened" competitive position in the Asian market is now indisputably stronger.

The Commission should likewise reject Dr. Joskow's novel claim that the Commission should not be concerned that Global Crossing's approach would impede the deployment of open investment cables, because open investment cables are not "necessary" to achieve pro-competitive efficiencies. As Professors Ordover and Willig explain, discouraging open investment cables would, in fact, directly harm the public by denying carriers pro-competitive efficiencies. Ordover-Willig Ex Parte Dec. ¶¶ 75-81. The open investment model enables both large and small carriers to share in economies of scale and thereby to gain efficiencies that reduce the cost of providing service. *Id.* ¶ ¶ 76, 79. In open investment cables, all carrier-owners, including smaller carriers, share directly in the economies of scale to which their traffic contribute. *Id.* Open investment cables also permit a carrier to convey its interest and give a carrier a say with regard to whether and when that cable is expanded. *Id.* ¶ 79.

This stands in stark contrast to closed investment cables, which typically do not allow other carriers to share in the benefits of ownership and limit the ability of carrier-lessees to transfer or sell their leasehold interests. Furthermore, the closed investment cable owner determines if and when capacity will be expanded, which may (or may not) coincide with the business plans of the existing carrier-lessees. *Id.* ¶ 80.

Finally, Professors Ordover and Willig demonstrate that there is no economic foundation for the specific regulatory proposal advanced by Global Crossing – *i.e.*, that the Commission should treat as presumptively suspect submarine cable landing license applications whenever the "landing parties on the U.S. end of the cable . . . have a combined share of more than 35 percent of active half circuits . . . on the U.S. side of the route served by the cable." *Notice of Proposed Rulemaking*, IB Docket No. 00-106, ¶ 37 (June 22, 2000) ("*Notice*"). Instead, Global Crossing's own comments confirm that its true aim is to use the regulatory process to handicap its open investment cable rivals. Ordover-Willig Ex Parte Dec. ¶¶ 82-87.

II. GLOBAL CROSSING'S REPLY FILING CONTAINS NUMEROUS ADDITIONAL MISREPRESENTATIONS.

Global Crossing's reply filing also makes a number of factual misrepresentations in defense of entry regulation targeted at Global Crossing's competitors. The most significant of these assertions – *i.e.*, those that underlie the economic arguments discussed above – are fully analyzed and rebutted in the accompanying declarations of Professors Ordover and Willig and Mr. McInerney. AT&T and Concert below address other significant misrepresentations advanced by Global Crossing at the reply stage of this proceeding.

A. Global Crossing's Claims That Backhaul Is A Bottleneck Input Are Baseless.

As described above, and in the accompanying Declaration of Professors Ordover and Willig, Global Crossing's economic theories are critically dependent upon the assumption that backhaul is monopolized at both the U.S. and foreign end of international cables. The overwhelming evidence, however, is to the contrary.

As the Commission has repeatedly found, U.S. cable landing stations are not bottleneck facilities.[12] Rather, U.S. backhaul services are highly competitive, with multiple backhaul providers serving all open investment cables landing in the United States, and substantially decreasing backhaul prices. McInerney Ex Parte Dec. ¶ 12. Concert estimates that U.S. prices for backhaul are generally at least 50 percent lower than two years ago. *Id.* U.S. backhaul prices for high volumes (more than 200 STM-1 circuits) have fallen by greater amounts, and are now in the range of $2000 per month per STM-1. *Id.*

Nor can there be any claim that landing parties have an unfair advantage in competing for the backhaul business of other carriers on open investment cables landing in the U.S. There is no requirement for any owner to purchase backhaul from one of the landing parties. Instead, every carrier generally has three options: (1) purchase backhaul from one of the landing parties; (2) purchase backhaul from a non-landing party provider of backhaul; or (3) self-provision its own backhaul.

Any co-owner of an open investment cable landing at a Concert cable station may collocate at that station on a cost basis and use its own personnel and equipment to provide

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[12] *See AT&T Int'l Non-Dominance Order*, 11 FCC Rcd. 17963, ¶ 26 (1996) (finding that "owners of a submarine cable can choose to land the cable at any one of several cable landing stations," that cable landing stations are not "bottlenecks," and that arrangements regarding cable station access are "contractual" matters); *AT&T Int'l Non-Dominance Recon. Order*, 13 FCC Rcd. 21501, ¶ 26 (1998) (affirming that cable station access concerned "contractual arrangements"); *BT-MCI Merger Order*, 12 FCC Rcd. 15351, ¶ 163 n.224 (1997) (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"); *MCI-WorldCom Merger Order*, 13 FCC Rcd. 18025, ¶ 115 (1998) (finding barriers to entry were sufficiently low that even if MCI-WorldCom were to attempt to raise prices for backhaul, that would simply shift customers to alternative backhaul providers); *AT&T-BT JV Order*, 14 FCC Rcd. 19149, ¶ 100 (1999) (rejecting the claim advanced by Sprint that AT&T had "bottleneck control over cable landing stations in the U.S." and could

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backhaul services to itself and others, provided sufficient space and other resources are available at the cable station. *Id.* ¶ 14. Multiple backhaul providers are collocated today at all Concert U.S. cable stations (other than Concert's Magens Bay, U.S. Virgin Islands station, where two backhaul providers have chosen the cheaper alternative of collocating at a nearby AT&T POP with cross-connect arrangements to the cable station, and Concert's St. Croix, U.S. Virgin Islands station, where no carrier (including Concert or AT&T) provides backhaul services). All other U.S. carriers operating cable stations serving open investment cables have similar policies for collocation and backhaul. *Id.*

The new high-capacity open investment cables are served by large numbers of backhaul providers. *Id.* ¶ 13. There will be eleven backhaul providers serving TAT-14 at Concert's Tuckerton, NJ cable station – AT&T, C&W, Carrier 1, France Telecom, Globenet, GTE, KPN/Qwest, WorldCom, MFN, Sprint and Telia. Nine of these providers will also provide backhaul for TAT-14 at Sprint's Manasquan, NJ cable station. The JUS cable will have at least six U.S. backhaul providers, with AT&T, WorldCom, Williams and Sprint serving Concert's Manchester, CA cable station, and AT&T, WorldCom, Level III and Qwest serving WorldCom's Los Osnos, CA cable station. Six providers serve the Maya-1, Americas-II and Columbus III cables at Concert's Ojus, FL cable station – AT&T, C&W, Genuity, WorldCom, Sprint and Entel Chile. All other open investment cables landing in the United States are also served by multiple backhaul providers, including the China-U.S. cable, Columbus II and Americas I, each

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(. . . continued)
use its "position as a cable station owner to benefit itself at the expense" of the carriers landing traffic at stations it owned).

of which is served by four backhaul providers, and TPC-5, TAT-12/13, TAT-11, TAT-10 and TAT-9, which are each served by three backhaul providers. *Id.* ¶ 13.[13]

Backhaul competition is also quickly emerging in many foreign countries. For example, in the JUS proceeding, AT&T provided evidence of emerging backhaul competition at the Japanese end of the JUS cable,[14] and there has been significant progress since then. At least six backhaul suppliers in Japan will serve the JUS cable (C&W-IDC, Global Access, Japan Telecom, KDD, NTT Com and TT Net), and Concert has recently issued a Request for Proposals to various suppliers to handle its backhaul needs in Japan for this cable. McInerney Ex Parte Dec. ¶ 16. Backhaul prices in Japan have declined significantly over the past year, and the market rate for a STM-1 circuit from the Japan-U.S. cable stations in Japan to Tokyo is now under $100,000 per year. *Id.*

Further, backhaul services are increasingly competitive in the European countries that are the landing points for transatlantic cables, all of which are fully open to facilities-based competition and have multiple backhaul providers and declining backhaul prices. *Id.* There are also multiple backhaul suppliers and declining backhaul prices in most liberalized countries in Asia and Latin America. *Id.*

B. Global Crossing's Attacks On Open Investment Cables Are Specious.

Global Crossing repeatedly claims that open investment cables can – and do – charge supracompetitive prices. Global Crossing Reply at 29, 30. There is no support for these false

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[13] In the JUS proceeding, SBCI (a new entrant with zero market share) stated that the opportunity to compete in the backhaul business and to provide backhaul for traffic other than its own was a factor in its decision to participate in Japan-U.S. over PC-1.

[14] Affidavit of Thomas K. McInerney, ¶ 7 (filed in File No. SCL-LIC-19981117-00025, Mar. 8, 1999).

assertions. Open investment cables are non-profit, cost-sharing ventures, and they consistently provide lower prices than closed investment cables, which are profit-making enterprises. McInerney Ex Parte Dec. ¶ 11. For example, the open investment cable TAT-14 is offering capacity at far lower prices (approximately $400,000 per STM-1) than the closed investment cable AC-1 (until recently approximately $2.5 to $7.5 million per STM-1 and now approximately $650,000 to $1.2 million per STM-1). *Id.* Indeed, the Commission recognized the important role of open investment cables in ensuring competitive pricing on the North Atlantic route in authorizing TAT-12/13 in 1993. *American Telephone & Telegraph Co.*, 8 FCC Rcd. 4810, 4814 (1993) ("We find that the introduction of TAT-12/13 will . . . encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers").

Relatedly, Dr. Joskow asserts that barriers to entry into the market are high based on the "fact" that, despite "exploding" demand, new operational cables have come on line slowly. Joskow Dec. ¶ 17. The relevant data tell a different story. The Commission's most recent circuit status report shows that undersea capacity is expanding at an ever-increasing annual rate. Specifically, total U.S. trans-ocean fiber-optic capacity increased by 164 percent from 1995-96 and by 265 percent from 1996-98 and (based on Commission estimates) by 276 percent from 1998-99 and by 525 percent from 1999-2000. *1998 Section 43.82 Circuit Status Data*, International Bureau Report, Dec. 1999, at Table 7. Dr. Joskow claims "lags" in competition from new Transatlantic cables since Gemini and Atlantic Crossing first became operational in 1997-98, but ignores the recently operational "Yellow" cable – a joint venture of Global Crossing, Level 3, and Viatel – that has more capacity than any transoceanic cable ever built. *See Level 3 Activates New Undersea Cable Connecting North American and European*

Broadband Networks, Level 3 Press Release dated November 30, 2000 (http://biz.yahoo.com/prnews/001130/co_level_3.html).

Dr. Joskow likewise sweeps under the rug the huge subsequent upgrades in recent cables. Gemini, for example, has increased its capacity by 300 percent and Atlantic Crossing has upgraded its capacity by 400 percent. *See 1998 Section 43.82 Circuit Status Data*, International Bureau Report, Dec. 1999, at Table 7. He overlooks the subsequent 150 percent increase in capacity on TAT-12/13 resulting from a similar upgrade. *See id.*

Finally, he completely disregards the massive size of proposed cables, particularly TAT-14, which will by itself increase total Transatlantic submarine capacity by almost 400 percent. *See id.* He likewise ignores four recently approved new systems that will expand pre-existing U.S.-Japan capacity by 2000 percent over the next two years. McInerney Ex Parte Dec. ¶ 17.[15] Dr. Joskow also fails to consider the large number of new private operator-owned cable stations that will serve new cables.[16]

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[15] Global Crossing asserts that "private cables are planned, deployed, and operated in accordance with overall retail traffic requirements as determined by the market, rather than in accordance with the requirements of the major international carriers, as in the case with consortium cables." Global Crossing Reply at 30. *All* submarine cable arrangements, whether open investment or closed investment, are market-driven. Concert's decisions regarding new submarine cable capacity are based on the need to compete in a highly competitive market by providing customers with high quality services at the lowest possible cost. McInerney Ex Parte Dec. ¶ 10.

[16] *See 360pacific (USA), Inc.*, File No. SCL-LIC-20000620-00024, ¶¶ 3, 12 (Nov. 20, 2000) (landing stations in Bandon, OR, Seattle, WA, Oahu, HI- North and Oahu, HI – South); *FLAG Pacific Limited*, File No. SCL-LIC-20000606-00023, ¶¶ 3, 12 (Nov. 9, 2000) (landing stations in the Aleutian Islands, AL, San Francisco, CA or Portland, OR, and the Hawaiian Islands); *Tycom Networks (US), Inc.*, File No. SCL-LIC-20000717-00026, ¶ 2 (Dec. 7, 2000) (landing stations in California, Oregon, Hawaii and Guam); *Caribbean Crossings Ltd.*, SCL-AMD-20000405-00011, ¶¶ 3, 11 (Jun. 20, 2000) (landing station in Boca Raton, FL); *Worldwide Telecom (USA) Inc.*, File No. SCL-LIC-19990804-00012, ¶ 3 (Jan. 14, 2000) (landing station near Boston, MA); *Atlantica USA LLC*, File No. SCL-LIC-19990602-00010, ¶ 15 (Dec. 10, 1999) (landing station in Boca Raton, FL); *Flag Atlantic Limited*, File No. SCL-LIC-19990301-

(continued . . .)

In his JUS declaration, Dr. Joskow also claimed that open investment cables are "unfair" to smaller carriers. According to Dr. Joskow, "despite the voting rights provided by ownership, the carriers integrated into both the input and output markets often have close to, and sometimes have actual majority control." Joskow Jus Dec. ¶ 95. Again, the facts are quite different. All owners of open investment cables vote in accordance with the size of their ownership interest, and smaller U.S. carriers such as Level III, with an 11.6 percent ownership interest in the JUS cable, and PGE, with a 7.4 percent interest, accordingly have larger votes than any Japanese carrier, including the international incumbent KDD and local exchange incumbent NTT, both of which have ownership interests on the JUS cable of under 4 percent. McInerney Dec., Ex. 2. In contrast, carriers purchasing capacity on Global Crossing and other closed investment cables have *no* voice in *any* governance decision concerning those cables. *Id.* ¶¶ 41, 43.

As a fallback, Dr. Joskow claimed that for the smallest carriers, there is little difference between open investment and closed investment cables. He writes: "[F]or small carriers that are not the developers of cables, ownership of capacity in cable consortia provides few benefits over a structure in which carriers take long term leases for capacity. Their ability to deliver traffic and the likelihood that they could affect management decisions of the cable are virtually the same under a consortia structure or under a private cable structure." Joskow JUS Dec. ¶ 13.

In fact, open investment cables provide many advantages that are not available from closed investment systems, particularly cheaper initial and upgraded capacity, and the general absence of resale restrictions. McInerney Dec. ¶¶ 39-45. Indeed, U.S. carriers made clear in the JUS proceeding (File No. SCL-LIC-19981117-00025) that they chose to participate in the JUS

(. . . continued)
00005, ¶¶ 11-12 (Oct. 1, 1999) (landing stations on the north and south shore of Long Island,
(continued . . .)

system because they believed that JUS cable capacity was cheaper for them than using PC-1, and because they concluded that participation in the JUS system also offered other significant advantages in light of its open governance structure and lack of restrictions on backhaul and the use of capacity.[17]

(. . . continued)
NY).

[17] *See* Supplemental Comments of Viatel, Inc., at 4 (filed Mar. 8, 1999) ("[T]he amount of capacity that Viatel wanted to purchase (i.e. an STM-1) was 150% more expensive than JUS as an initial matter. To further compound this already large price differential, STM-1 purchasers on JUS will receive an additional two (2) STM-1s at no additional charge when JUS is upgraded. Effectively, therefore, after the JUS upgrade is completed, JUS capacity will have cost Viatel approximately one-quarter of what the same capacity would have cost Viatel on PC-1. In addition, PC-1 imposes certain restrictions on capacity purchasers that JUS does not – including backhaul restrictions – that make it less attractive than JUS."); Supplemental Reply Comments of PSINet, at 6 (filed Mar. 15, 1999) ("PSINet's decision to participate in the JUS Network consortium was based on sound economic and business principles. JUS Network is simply cheaper and offers more than Global Crossing."); Comments of Qwest Communications Corp., at 4-5 (filed Mar. 8, 1999) ("Qwest's investment in the JUS consortium is part of its strategy to become a low-cost high quality provider of facilities based voice and data services throughout the world. In the transatlantic stage for that effort, Qwest chose to obtain capacity on [a] Global Crossing[] . . . cable. . . . Qwest considered all available alternatives, including purchase of capacity from Global Crossing, but found that participation in JUS was economically more attractive. Among other factors, Qwest concluded that the governance structure of the JUS consortium would give Qwest an opportunity to participate in decisions affecting the network – a benefit that Global Crossing did not offer for carriers obtaining capacity on PC-1. . . . Qwest's experience is that JUS offered the most economically attractive alternative to PC-1. It is that consideration, and none other, that resulted in Qwest's decision to participate in the JUS consortium."); Reply Comments of SBCI-Pacific Networks, Inc., at 6 (filed Mar. 16, 1999) ("Before SBCI decided to invest in the JUS-CN, it conducted a business analysis comparing the terms and cost of participating in JUS-CN and in PC-1. Like many other carriers, SBCI concluded that participation in JUS-CN was economically superior to participation in PC-1. SBCI decided to participate in JUS-CN in its sound business judgment, because it offers SBCI the more attractive economic alternative for international transport on the Japan-U.S. route, not for any other reasons about which GC theorizes."); Letter from Pacific Gateway Exchange, File No. SCL-LIC-19981117-00025 (filed Mar. 12, 1999), at 1 ("Like other smaller members of the Japan-US consortium, PGE joined the consortium after making a market-driven determination that the Japan-US prices, terms and conditions offer PGE the optimal means to obtain international capacity. PGE carefully considered and specifically rejected Global Crossing's offer to purchase capacity on its system because, in our view, Global Crossing's prices, terms and conditions for international capacity and backhaul were not competitive.").

C. Global Crossing's Suggestion That Hubbing Is Not Widespread And Effective Is Baseless.

Global Crossing now realizes that the existence of competitive, regional routes is fatal to its theories. As Professors Ordover and Willig explain, if the markets are regional, the fact that there are several submarine cables serving each of the three major regions means that no particular cable (or inputs necessary for service on that cable) can be a bottleneck because transit arrangements can be used to route traffic between the areas "served" by the individual cables. Ordover-Willig Ex Parte Dec. ¶¶ 43-47. And, as Mr. McInerney showed, the widespread use of refiling arrangements clearly demonstrates the existence of regional markets. *See* McInerney Dec. ¶¶ 21-29. Indeed, as the Commission found in the *Foreign Participation Order*, 12 FCC Rcd. 23891, ¶ 94 (1997), there can be no harm to U.S. competition as the result of the existence of carriers with bottleneck control at the foreign end of U.S. cables when 52 countries have committed to grant market access for international services and consequently "alternative routing options will almost always be available."

In its reply comments, Global Crossing responds that "[t]he prevalence of refiling arrangements . . . is most likely the result of the disparities that exist among international settlement rates, and does not in itself provide reliable evidence that effective hubbing arrangements exist in a region." Global Crossing Reply at 10 n.9. This makes no sense. Refile is the same as hubbing, and the prevalence of refile therefore *does* show the existence of hubbing. It is simply irrelevant whether the extensive refile that already occurs today is the result of differences among settlement rates or other reasons. The facts are that these hubbing arrangements are available to U.S. carriers for the delivery of switched traffic to virtually all countries with the full endorsement of the Commission, as AT&T and Concert have shown, and as Global Crossing does not – and cannot – deny.

D. Global Crossing's Proposed Entry Regulation Is Unprecedented And, Indeed, Flatly Inconsistent With The Commission's Policies And Decisions.

In its reply comments, Global Crossing asserts that the "Commission has long recognized in other contexts that imposing structural conditions on entry may be the most effective means of ensuring just and reasonable rates for telecommunications services." Global Crossing Reply at 18. Commission precedent, however, does not support structural conditions on entry based on foreign-end market access in WTO Member countries.

First and foremost, Global Crossing has been unable to explain why existing conduct regulations are insufficient to combat any of the competitive concerns that it has alleged. As AT&T and Concert explained in their Comments (at 34-37), to the extent former incumbent foreign carriers still retain market power at the foreign end of U.S. international routes, the Commission prevents the use of this market power to harm U.S. competition through its dominant carrier rules, No Special Concessions requirement, International Settlements Policy and benchmark conditions for Section 214 authorizations.

Moreover, the Commission addressed competitive issues raised by foreign dominant carrier submarine cable bottlenecks in the *Foreign Participation Order* and adopted open entry policies in light of U.S. WTO commitments, increased global competition resulting from the WTO agreement, and the "improved regulatory framework" adopted in that order. *Foreign Participation Order* ¶ 2. The Commission emphasized that additional conditions would be necessary only in "rare cases." *Id.* ¶ 13. It also made clear that market access policies based on foreign market conditions could be perceived as violating Article II of the GATS, would undermine U.S. leadership "in prompt effective implementation of our [WTO] commitments," would lead other countries to limit implementation of their commitments, and would harm the public interest. *Id.* ¶ 40.

Global Crossing argues that the *Notice*'s "streamlining" proposals "are not aimed at opening up foreign markets to competition" and would not "condition licenses on market access conditions – that is, whether a WTO Member has granted U.S. carriers access to its market." Global Crossing Reply at 38 & n.85. That is false. For example, the proposed "Pro-Competitive Arrangements" streamlining option requires the provision of collocation space "at each foreign landing station," the ability of "all owners or designees of owners" to "use such space for the provision by them of backhaul services to others," and the absence of "restrictions on the ability of any owner to subcontract the provision of backhaul." *Notice* ¶ 42. That plainly conditions streamlined approval on the ability of U.S. carriers to provide facilities-based services (backhaul) in foreign markets – which U.S. carriers are unable to do today in WTO Member countries that continue to prohibit facilities-based competition, and which would ensure that submarine cables serving those countries would never qualify for streamlining on this basis.

Such requirements are foreclosed by the *Foreign Participation Order*. "Adopting a policy that limits access to the U.S. market by telecommunications carriers purely based on the existence or quality of a country's commitment would be viewed by many WTO members as a violation of the GATS." *Foreign Participation Order* ¶ 40. As the Commission held (¶ 35), "treating carriers differently from countries that have made limited or no commitments could be viewed as inconsistent with our international obligations."

E. The AT&T-Concert Proposal To Streamline Submarine Cable Entry Regulation Is Fully Consistent With The Commission's Section 214 Streamlining Requirements.

Global Crossing argues that the Commission cannot adopt AT&T's and Concert's deregulatory proposals because they conflict with the Commission's *International Section 214 Order*, 14 FCC Rcd. 4909 (1999), and the rules the Commission promulgated in that decision.

Again, that is false. The AT&T-Concert deregulatory proposals are fully consistent with the international Section 214 streamlining requirements of Section 63.12(c).

The only relevant category of applications not subject to streamlining under Section 63.12(c) is subsection (1), covering Section 214 applicants affiliated with foreign carriers in a destination market – but which does *not* apply where the affiliation is with a non-dominant foreign carrier (Section 63.12 (c)(i)-(ii)), or where the destination market is a WTO Member country and the applicant agrees to be classified as a dominant carrier to that country (Section 63.12 (c)(v)). These exceptions cover all applicants affiliated with foreign carriers in a destination market, other than those with market power in non-WTO destination countries.

Subsections (2) and (3) of Section 63.12(c) address Section 214 applications to provide resale and ISR services, which are not relevant here, and subsection (4) applies where the Commission informs the applicant within 14 days that the application is not subject to streamlined treatment. As AT&T and Concert stated in their opening comments (at 3), the Commission should provide a similar safety net for submarine cable applications and allow Staff to pull out of the streamlining queue those few applications that it believes raise extraordinary competitive issues requiring public comment. AT&T and Concert have also made clear that the Commission's existing conduct regulations, including the dominant carrier rules, should continue to apply to all cable owners with market power in destination markets. *See, e.g.*, AT&T-Concert Reply at 23.

CONCLUSION

For the reasons stated above and in the previous submissions by AT&T and Concert in this proceeding, the Commission should adopt the proposals detailed in AT&T and Concert's August 21, 2000 Comments.

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