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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND DELIVERY**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

*Re: Review of Commission Consideration of Applications under the Cable Landing License Act, IB Docket No. 00-106, Notice of Ex Parte Presentation*

Dear Ms. Salas:

As a new entrant in the submarine cable operator market, TyCom Networks (US) Inc. ("TyCom") continues to support the Commission's efforts to streamline the licensing of submarine cables landing in the United States. In this *ex parte* submission, TyCom provides more specific views on streamlining procedures and licensing conditions that might be adopted by the Commission in this rulemaking.<sup>1</sup>

**I. The Commission Should Adopt a Bright-Line Streamlining Process Based on Whether or Not a Controlling Owner of a Submarine Cable Has Market Power in a Destination Market for that Cable**

TyCom continues to support a bright-line streamlining process modeled on the Commission's efficient and effective procedures for processing applications for international Section 214 authorizations. As the data compiled by commenters in this proceeding and the Commission itself attest, submarine cable capacity continues to increase exponentially while average capacity prices decline, to the benefit of U.S. end

<sup>1</sup> See *In the Matter of Review of Commission Consideration of Applications under the Cable Landing License Act, Notice of Proposed Rulemaking*, 15 FCC Rcd. 20,789 (2000) ("NPRM").

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users and consumers.<sup>2</sup> In this competitive environment, submarine cable operators have an incentive to maximize capacity sales by maximizing connectivity for a submarine cable, including unrestricted access to cable stations and unaffiliated backhaul providers. The Commission's streamlining of its cable landing license rules should therefore reflect these realities, and preserve the private submarine cable policy that has fostered these developments.<sup>3</sup>

TyCom continues to advocate its original streamlining proposal, in which the Commission would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market for that cable.<sup>4</sup> Under such a procedure, the Commission would automatically grant streamlined cable landing license applications via public notice within a set number of days of issuance of the initial public notice. The commenters in this proceeding—both new and established carriers—were almost uniformly supportive of a such a streamlining process, and AT&T has reaffirmed its support for a substantive streamlining rule similar to that proposed by TyCom.<sup>5</sup> Only Global Crossing continues to advocate for additional, complex, and unwieldy regulation that would ignore the market's competitive realities (namely, greatly expanded capacity, declining capacity prices, and competition even among capacity purchasers on a single submarine cable<sup>6</sup>) and intrude into business decisions that are properly those of carriers, not to mention beyond the Commission's

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<sup>2</sup> See, e.g., Letter from Douglas W. Schoenberger, Gov't Affairs Director, AT&T, to Magalie Roman Salas, FCC Secretary, IB Docket No. 00-106, at 4 (filed Aug. 15, 2001) ("AT&T August 15th Letter") (graphing statistics from the Commission's June 29, 2001, International Circuit Status Report); "The U.S. International Services Market: The Transition from Cartel to Competition," Presentation of the International Bureau to the Federal Communications Commission, July 12, 2001, available at <http://www.fcc.gov/ib/td/julypresentation5.ppt>; Comments of Cable & Wireless USA, Inc., IB Docket No. 00-106, app. A (filed Sept. 20, 2000) ("C&W Comments") (showing increasing capacity and decreasing prices on trans-Pacific routes).

<sup>3</sup> See NPRM ¶ 69; *Tel-Optik Ltd.*, 100 FCC.2d 1033 (1985) (licensing PTAT, the first non-common carrier submarine cable).

<sup>4</sup> See Comments of TyCom Networks (US) Inc., IB Docket No. 00-106, at 3-4 (filed Aug. 21, 2000) ("TyCom Comments"); Reply Comments of TyCom Networks (US) Inc., IB Docket No. 00-106, at 5 (filed Sept. 20, 2000) ("TyCom Reply Comments").

<sup>5</sup> See AT&T August 15th Letter, at 3 (proposing to streamline applications for non-dominant applicants, applicants affiliated with non-dominant carriers, and—under most conditions—applicants affiliated with dominant foreign carriers, except in "unusual competitive circumstances").

<sup>6</sup> See Comments of Level 3 Communications, LLC, IB Docket No. 00-106, at 5-6 (filed Aug. 21, 2001); TyCom Reply Comments, at 4.

expertise.<sup>7</sup> If the industry is in such a state of distress as Global Crossing claims,<sup>8</sup> the Commission should do just the opposite: encourage investment, commercial flexibility, and technological innovation—the very cornerstones of the private submarine cable policy<sup>9</sup>—by refraining from re-regulating private submarine cables.

TyCom's proposed rule would address the Commission's concerns about abuse of market power while providing regulatory relief for the vast majority of applicants. This rule would preserve the flexibility of submarine cable operators to sell capacity in a variety of ways, to attract investment, and to manage risk. It would also require few changes in the Commission's application requirements, as the Commission already requires submission of detailed ownership and affiliation information and maintains a list of carriers having market power in foreign markets.<sup>10</sup>

## **II. A “No Special Concessions” Rule Would Address the Commission’s Competitive Concerns and Provide Appropriate Regulatory Flexibility**

Rather than adopt extensive new licensing conditions, the Commission should—at most—adopt a “no special concessions” rule to be applied in unusual circumstances where non-streamlined applicants raise serious competition issues. This condition would address the Commission's key competition concerns while giving the Commission the flexibility to adapt to particular factual situations in a way that rigid reporting and contract filing requirements would not do. It would also allow the International Bureau to deepen its existing compliance initiative with the Enforcement Bureau.<sup>11</sup>

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<sup>7</sup> See Letter from Paul Kouroupas, Global Crossing Ltd., to Magalie Roman Salas, FCC Secretary, IB Docket No. 00-106, at 2-3 (filed Sept. 12, 2001) (advocating Commission regulation of numerous contractual terms relating to ownership and operation of private submarine cable systems).

<sup>8</sup> See *id.*, at 1. If anything, Global Crossing's most recent filing (attaching an error-filled article from the August 2001 issue of *Lightwave*) demonstrates Global Crossing's fear of additional competition from competitors, who have decided to share risk and capital costs to compete with Global Crossing. The Commission should welcome such competition.

<sup>9</sup> See *Tel-Optik*, 100 FCC.2d at 1041-42.

<sup>10</sup> See TyCom Comments, at 4-5.

<sup>11</sup> See *Public Notice, International Bureau and Enforcement Bureau Announce Program to Increase Compliance with Licensing Requirements for Carriers that Provide International Telecommunications Services and Operators of International Telecommunications Facilities Pursuant to Section 214 of the Communications Act and Sections 34-39 of the Submarine Cable Landing License Act*, 16 FCC Rcd. 3857 (Int'l and Enf. Bureaus 2001).

At present, the Commission's submarine cable rules lack a "no special concessions" rule like that contained in Section 63.14 of the Commission's rules.<sup>12</sup> That rule prohibits international carriers authorized under the Commission's Part 63 rules

from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and from agreeing to accept special concessions in the future.<sup>13</sup>

The Commission's rules define a "special concession" as:

an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications service where the arrangement is not offered to similarly situated U.S. licensed carriers and involves:

- (1) Operating agreements for the provision of basic services;
- (2) Distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or
- (3) Any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.<sup>14</sup>

Nevertheless, the International Bureau imposed a condition in the licenses for the SAM-1 and Australia-Japan cable systems forbidding the licensees from accepting (directly or indirectly) any "special concession" (as defined in Section 63.14(b) of the Commission's rules) from an affiliated dominant carrier or foreign cable station owned by an affiliated dominant carrier.<sup>15</sup>

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<sup>12</sup> Applicants for a cable landing license are not required to make a certification pursuant to Section 63.18(n) of the Commission's rules—the cross-reference for applications for international Section 214 authorizations. *See* 47 C.F.R. § 1.767.

<sup>13</sup> *See* 47 C.F.R. § 63.14(a).

<sup>14</sup> 47 C.F.R. § 63.14(b).

<sup>15</sup> *See Telefonica SAM USA, Inc., Cable Landing License*, 15 FCC Rcd. 14,915, 14,931 (Int'l Bur. 2000) ("SAM-1 License") (condition 15); *Australia-Japan Cable (Guam) Limited, Cable Landing License*, 15 FCC Rcd. 24,057, 24,071 (Int'l Bur. 2000) ("AJC License") (condition 12).

TyCom supports the *limited* use of a “no special concessions” rule as an efficient and sufficient means for addressing many of the Commission’s competition concerns. Application of such a condition would also render other conditions—such as reporting of provisioning and maintenance by affiliated entities and unrestricted access to backhaul and cable stations (discussed in part III below)—redundant and unnecessary.

### **III. The Commission Should Refrain from Imposing Extensive Conditions as a Form of “Back-Door” Common Carrier Regulation**

Apart from limited application of a “no special concessions” rule, however, the Commission should refrain from engaging in “back-door” common carrier regulation of private submarine cables through the imposition of extensive licensing conditions. TyCom remains skeptical of the permissibility, effectiveness, and public interest benefits of detailed or lengthy licensing conditions—particularly reporting and contract filing requirements—for private submarine cables. Instead, the Commission should reaffirm its private submarine cable policy and open market entry standard, and claim some of the credit for exponential capacity increases and declining capacity prices, which have greatly benefited consumers. Based on these market realities, the Commission should further deregulate the market for submarine cable facilities and services.

In two recent cable landing licenses, the International Bureau has imposed extensive licensing conditions. For the SAM-1 cable system, it imposed seven additional conditions on the licensees:

- (1) Filing of quarterly provisioning and maintenance reports summarizing procurements from dominant affiliates of network facilities and services;
- (2) Filing of quarterly circuit status reports under the Commission’s Part 43 rules for common carriers;
- (3) Filing of reports (within 30 days of the transaction) of capacity sales, including the customer’s identity, the capacity amount sold, and the capacity price;
- (4) Unrestricted resale of capacity by capacity purchasers;
- (5) Guaranteed access to capacity for all holders of international Section 214 authorizations;
- (6) Guaranteed access to backhaul from unaffiliated providers; and
- (7) A prohibition on offering or accepting “special concessions,” as defined in Part 63 of the Commission’s rules for common carriers, to affiliated dominant carriers or their foreign cable stations.<sup>16</sup>

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<sup>16</sup> *SAM-1 License*, 15 FCC Rcd. at 14,931 (conditions 13-16).

For the Australia-Japan cable system, the International Bureau imposed three additional conditions on the licensee:

- (1) A prohibition on offering or accepting “special concessions,” as defined in Part 63 of the Commission’s rules for common carriers, to affiliated dominant carriers or their foreign cable stations;
- (2) Filing of quarterly provisioning and maintenance reports summarizing procurements from dominant affiliates of network facilities and services; and
- (3) For capacity users, guaranteed direct interface access to the cable network interface and the ability to collocate equipment on commercially reasonable and nondiscriminatory terms at the cable stations.<sup>17</sup>

In TyCom’s view, and for a variety of reasons, many of these conditions are unnecessary or ineffective.

*First*, the Commission should avoid imposing conditions that require private submarine cable operators to act in whole or in part as common carriers. In articulating its private submarine cable policy as it approved the first private submarine cable, the Commission found “no need to require these applicants to operate as common carriers.”<sup>18</sup> But by adopting conditions similar to those in the *SAm-1 License* and the *AJC License*, the Commission would require private submarine cable operators to do just that. Those conditions would require private submarine cable operators to undertake many of the international common carrier obligations of Title II of the Communications Act of 1934, as amended, and in Parts 43 and 63 of the Commission’s rules.<sup>19</sup> These conditions are

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<sup>17</sup> *AJC License*, 15 FCC Rcd. at 24,071 (conditions 12-14).

<sup>18</sup> *See Tel-Optik*, 100 FCC.2d at 1041.

<sup>19</sup> *See* 47 U.S.C. § 201(a) (requiring common carriers to furnish communication services upon request), § 202 (prohibiting discrimination among customers in the provision of communications services), § 251(c)(2) (requiring incumbent local exchange carriers to provide just, reasonable, and non-discriminatory interconnection); 47 C.F.R. §§ 43.61(c), 63.10(c)(3) (requiring quarterly traffic and revenue reporting requirements for dominant international carriers), § 63.10(c)(4) (requiring quarterly provisioning and maintenance reporting requirements for dominant international carriers), § 63.10(c)(5) (requiring quarterly circuit status reporting for dominant facilities-based international carriers), § 63.21(h) (requiring reporting of customer identity, purchase volume, and purchase price for dominant international carriers); *In the Matter of Regulation of International Accounting Rates, First Report and Order*, 7 FCC Rcd. 559 (1992) (requiring U.S. international common carriers “to permit unlimited resale of all their international switched telecommunications services”). This resale requirement is particularly harmful to private submarine cable operators that sell capacity on an ownership basis in order to raise capital, not just sales revenues. *See, e.g., Guam-Philippines Cable L.P. et al., Opposition to Application*

entirely inconsistent with the very idea of a private submarine cable policy and with the International Bureau's finding under *NARUC I* that the public interest does not require operation of the facility on a common carrier basis.<sup>20</sup> As TyCom has noted previously, such conditions threaten to reduce the very flexibility that has served U.S. carriers, investors, and consumers so well since 1985.<sup>21</sup>

*Second*, the Commission should avoid imposing conditions where market-based incentives already exist to achieve the same result. To maximize capacity sales, submarine cable operators have an incentive to maximize the connectivity of their submarine cables, particularly in allowing unrestricted access to their cable stations and to unaffiliated backhaul providers. Submarine cable operators that do so make their facilities comparatively more attractive to potential customers by enhancing their customer's ability to connect the population centers they serve. TyCom, for one, has always allowed unrestricted access to its cable stations (on a space-available basis) and to backhaul providers. TyCom also benefits from the use of cable stations owned by other submarine cable operators.

*Third*, the Commission should refrain from imposing licensing conditions based on rationales that will quickly become outdated. If incorporated into a cable landing license, such conditions will remain in the license for its entire 25-year term, without regard for the original reasoning for including them. With SAM-1, for example, the International Bureau imposed many of the conditions to address what it saw as a shortage of connectivity on certain U.S.-South America routes.<sup>22</sup> Since the license was granted, however, Global Crossing has largely completed construction of South American Crossing, another ring-configuration system serving many of the same destination markets as SAM-1.<sup>23</sup> Nevertheless, the conditions remain in SAM-1's license and are not

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for Review, File No. SCL-AMD-19980902-00018, at 19 (filed Jan. 28, 1999) (explaining how capacity purchase terms were used to encourage investment in, and provide capital for, the private Guam-Philippines cable system).

<sup>20</sup> See, *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.) ("*NARUC I*"), cert. denied 425 U.S. 992 (1976); *SAM-1 License*, 16 FCC Rcd. at 14,927 (finding that the applicants "will not offer capacity in SAM-1 to the public on a common carrier basis and that the public interest does not require that they do so"); *AJC License*, 16 FCC Rcd. at 24,068 (finding that the applicant "will not offer capacity on AJC to the public on a common carrier basis, and that the public interest does not require that it do so").

<sup>21</sup> See TyCom Comments, at 7-8.

<sup>22</sup> See *SAM-1 License*, 16 FCC Rcd. at 14,923-24.

<sup>23</sup> See Global Crossing Ltd. Press Release, "Global Crossing Completes Core Worldwide Network" (June 21, 2001) (noting that "[t]he final connection was between Lima, Peru and South American Crossing, which is already operational in

subject to a “sunsetting provision” based on the passage of time or changed competitive circumstances, thus ensuring their obsolescence.

*Fourth*, the Commission should weigh carefully the public interest benefits of any conditions, particularly those involving reporting and contract filing requirements. Not only do such conditions impose substantial administrative burdens on licensees, they threaten to overwhelm Commission staff with volumes of paperwork—volumes that would obscure useful information in any event. As TyCom has noted previously with respect to the Commission’s environmental processing rules under the National Environmental Policy Act, that law’s purpose “is not to generate paperwork—even excellent paperwork—but to foster excellent action.”<sup>24</sup> Similarly, the Commission should seek to avoid generating paperwork under the Cable Landing License Act unless it finds that the public interest so requires.<sup>25</sup> Moreover, the Commission should avoid imposing reporting and contract filing requirements that would deliver competitively sensitive information to a licensee’s competitors, and instead focus on protecting the interests of end users and consumers.

*Fifth*, the Commission should avoid imposing conditions that would call into question U.S. compliance with its WTO commitments. As TyCom has noted previously, the Commission has abandoned its reciprocity-based approach to submarine cable licensing for applicants from WTO Members on grounds of inconsistency with the WTO Agreement on Basic Telecommunications.<sup>26</sup> The *Reference Paper* requires WTO Members who adopt it, such as the United States, to maintain appropriate measures to prevent suppliers who, alone or together, are a major supplier from engaging in or

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major markets throughout the region, including Mexico, Argentina, Brazil, Chile, Venezuela and Panama”), available at <[http://www.globalcrossing.com/pressreleases/pr\\_062101a.htm](http://www.globalcrossing.com/pressreleases/pr_062101a.htm)>.

<sup>24</sup> 40 C.F.R. § 1500.1(c). *See also* Comments of TyCom Networks (US) Inc., RM-9913, at 8 (filed Aug. 14, 2000) (quoting same).

<sup>25</sup> While the Commission, in evaluating cable landing license applications, has typically applied a “public interest” test similar to that in Section 201 of the Communications Act of 1934, as amended, the Cable Landing License Act itself—the sole statutory basis for issuing cable landing licenses to non-common-carrier submarine cables—contains no such test or standard. *See* 47 U.S.C. § 201(a) (providing for regulation of common carriers under a “public interest” standard); 47 U.S.C. §§ 34-39.

<sup>26</sup> *See* TyCom Reply Comments, at 8-9; *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Report & Order on Reconsideration*, 12 FCC Rcd. 23,891, 23,933-35 (1997) (“*Foreign Participation Order*”), *aff’d Order on Reconsideration*, 15 FCC Rcd. 18,158 (2000).

continuing anti-competitive practices.<sup>27</sup> But such measures must have a competition justification. Given the competitive state of the market for submarine cable services and facilities and the existence of market-based incentives, TyCom does not believe that such a justification has been made.

#### **IV. The Commission Should Adopt Deadlines for the Issuance of Cable Landing Licenses**

TyCom again urges the Commission to adopt deadlines for the issuance of cable landing licenses in order to reduce the construction delays and investment disincentives entailed by a lengthy application process and to comply with U.S. WTO obligations. The Commission should incorporate such deadlines into its cable landing license application processing rules by modeling them on the Commission's successful and efficient streamlined international Section 214 rules.<sup>28</sup> Such deadlines are particularly important for non-streamlined applications.

For a streamlined cable landing license application, the Commission would quickly place streamlined applications on public notice and grant them automatically within a short period of time.<sup>29</sup> As numerous commenters in this proceeding have stated, there is no statutory impediment to such a license grant via public notice.<sup>30</sup>

For a non-streamlined application, the Commission would be required to act within 90 days after issuing a public notice accepting such an application for filing.<sup>31</sup> Only applications raising issues of "extraordinary complexity" would allow the Commission to extend the application processing period for an additional 90-day period.<sup>32</sup>

Such a process would serve to shorten the application processing time for obtaining a cable landing license in the United States, which is comparatively lengthy by international standards. As Figure 1 demonstrates, it took more time for TyCom—a new carrier—to obtain the requisite cable landing license or equivalent in the United States

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<sup>27</sup> *Reference Paper* § 1.1, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 436 (WTO 1997), reprinted in 36 I.L.M. 354, 367 (1997).

<sup>28</sup> See 47 C.F.R. § 63.12.

<sup>29</sup> See 47 C.F.R. § 63.12(a), (b) (granting streamlined international Section 214 authorizations within 15 days).

<sup>30</sup> See C&W Comments at 11-12.

<sup>31</sup> See 47 C.F.R. § 63.12(d).

<sup>32</sup> *Id.*

than just about any other country where the TyCom™ Global Network is authorized to land.

**FIGURE 1:**

**APPLICATION PROCESSING TIMES  
FOR CABLE LANDING LICENSES OR EQUIVALENTS  
FOR THE TYCOM GLOBAL NETWORK**

<b>COUNTRY</b>	<b>APPLICATION PROCESSING TIME (FROM FILING DATE TO ISSUANCE DATE)</b>
France	116 days
Germany	85 days
Greece	219 days
Italy	32 days
Japan	30 days
Netherlands	20 days
Portugal	90 days
Spain	122 days
United Kingdom	144 days
United States <sup>33</sup>	140 days (TyCom Atlantic) 144 days (TyCom Pacific)

As TyCom and other commenters have noted previously, much of the processing delay stems from the cumbersome process of obtaining consent from the Executive Branch departments.<sup>34</sup> In many cases (although not those where applications were contested at the Commission), the Commission has acted almost immediately after obtaining a consent letter from the State Department following Executive Branch review. The need for Executive Branch review, however, has not precluded the Commission from adopting

<sup>33</sup> Application processing times for other systems have varied, as follows: Apollo (137 days); Australia-Japan (172 days); 360pacific (154 days); FLAG Pacific (156 days); Caribbean Crossings (153 days); SAM-1 (187 days); TAT-14 (211 days); Japan-U.S. (234 days); Guam-Philippines (229 days); and Columbus-III (451 days).

<sup>34</sup> See TyCom Reply Comments, at 18-20.

and shortening deadlines for grants of international Section 214 authorizations.<sup>35</sup> TyCom urges the Commission to do likewise with cable landing licenses.

Such a process would also comport with U.S. WTO obligations. Interestingly, while the Commission's rules provide application processing deadlines for international Section 214 applications and common carrier radio license applications (under Section 310(b) of the Communications Act of 1934) for applicants from WTO Members, they provide no such deadlines for cable landing license applications.<sup>36</sup> While the Commission makes a regulatory distinction between common carrier and non-common carrier telecommunications services, the U.S. WTO commitments do not. Those obligations apply equally to all scheduled basic telecommunications services—including non-common carrier submarine cable transmission services—and are subject to the *Reference Paper* provision on application processing time.<sup>37</sup> That provision requires the United States to make available "all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license."<sup>38</sup> To ensure compliance with these obligations and avoid construction delays and investment disincentives, TyCom urges the Commission again to adopt a streamlined application process with licensing deadlines.

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<sup>35</sup> See *1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Report and Order*, 14 FCC Rcd. 4909, 4914-17 (1999) (finding that 14-day streamlined processing and grants of authority via public notice afforded adequate Executive Branch Review).

<sup>36</sup> See 47 C.F.R. § 63.12; *Foreign Participation Order*, 12 FCC Rcd. at 24,043.

<sup>37</sup> See *Reference Paper*; WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), S/GBT/W/1/Add.2/Rev.1 (Feb. 12, 1997); TyCom Reply Comments, at 12-13.

<sup>38</sup> *Reference Paper* § 4.

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For the reasons stated above and in TyCom's other submissions in this proceeding, TyCom urges the Commission to streamline, simplify, and expedite the licensing of submarine cables landing in the United States. Please contact us with any questions regarding this submission.

Respectfully submitted,



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