requirement applies regardless of whether an applicant already holds section 214 authority of any type at the time it files the cable application.[144]

E. Pro Forma Transfers and Assignments

61. Several commenters suggest that the Commission replace the requirement for prior approval of pro forma assignments and transfers of interests in cable landing licenses with post-transaction notifications, as the Commission currently allows for section 214 authorizations.[145] No commenter opposes such suggestions. We concur with commenters. By their nature, pro forma transactions do not result in a change in the ultimate control of the interest in the cable landing license or in changes to the cable system itself as previously evaluated at the time of the initial license application.[146] Therefore, we adopt herein a new process designed to remove prior review of pro forma transactions.[147]

62. To implement this process we are amending the condition we currently apply to all cable landing licenses, which states that, "Neither this license nor the rights granted herein shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the

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144 *See Submarine Cable NPRM*, 15 FCC Rcd at 20824, para. 82.

145 *See, e.g.*, Global Crossing Comments at 35-36 (asserting that the Cable Landing License Act does not address assignments and transfers); TyCom Reply Comments at 13-14 (asserting that allowing for post-transaction notification would appropriately conform the submarine cable rules to the section 214 rules and noting also that the Cable Landing License Act does not address transfers and assignments); 360networks Comments at 10-11, 360networks Reply Comments at 7 (asserting that the Commission, as opposed to requiring prior approval, should adopt rules permitting licensees to provide subsequent notification regarding pro forma transfers and assignments, and arguing that Commission forbearance from requirements of the Cable Landing License Act would not be implicated because, in approving the initial license, the Department of State already would have passed on the location of the cable and the qualification of its owners); AT&T Reply Comments at 42 (urging the Commission to adopt 360networks' proposal for giving blanket approval for pro forma transfers and assignments).

146 *See, e.g.*, 47 C.F.R. § 63.24 (illustrating non-substantial, or pro forma, transactions).

147 The Commission previously declined to adopt such a procedure. In the *1998 International Biennial Review Order*, the Commission adopted section 63.24 of the rules, setting out procedures for review of pro forma assignments and transfers of control of section 214 authorizations to provide international telecommunications service. 47 C.F.R. § 63.24. In that proceeding, the Commission denied a request by WorldCom to allow for post-transaction notification of pro forma transfers and assignments of submarine cable landing licenses, citing the requirements of the Cable Landing License Act and Executive Order 10530's requirement for prior Department of State approval of cable licenses. *See 1998 International Biennial Review Order*, 14 FCC Rcd 4909, 4944 at para. 86 (1999). Additionally, in the *2000 International Biennial Review NPRM*, the Commission has proposed to amend section 63.24 only with respect to assignments and transfers of control of international section 214 authorizations and not with respect to assignments and transfers of control of interests in cable landing licenses, which the *2000 International Biennial Review NPRM* states would continue to be governed by section 1.767 of the Commission's rules. *2000 International Biennial Review NPRM*, 15 FCC Rcd at 24272, n. 36. As noted, upon review of the record in this proceeding and our coordination with the Department of State and other Executive Branch agencies, we herein have reached a different conclusion.

Commission shall give prior consent in writing."[148] The rules we adopt today carve out a limited exception to this condition for pro forma transactions for all cable landing licenses that the Commission grants after the effective date of this Report and Order. Under this exception, a pro forma assignee or a person or company that is the subject of a pro forma transfer of control of an interest in a cable landing license is not required to seek prior approval, but if electing post-transaction notification must: (1) notify the Commission no later than 30 days after the pro forma transaction is consummated; (2) certify that the assignment or transfer of control is pro forma and, together with all previous pro forma transactions, does not result in a change of the licensee's ultimate control; and (3) provide an update to any ownership information required by our rules. The Commission will place the notification on public notice, and the pro forma transaction will be subject to reconsideration if the Commission should determine that the transaction in fact was not pro forma in nature.

63. For cable landing licenses granted prior to the effective date of this Report and Order, a licensee may file an application with the Commission seeking a modification of its license to incorporate this limited exception to the prior approval requirement currently set forth in the applicable license condition. The application should identify the cable landing license by its name and file number, list all licensees, reference the new pro forma rule we adopt herein, and state that each licensee accepts and will abide by the provisions of the new pro forma rule. Each licensee or joint licensee must sign the application. The application should be captioned, "Cable Landing License Modification - Request to Add Pro Forma Condition," and should be addressed to the Secretary of the Commission, with a copy to the Chief, International Bureau. The Commission will forward these applications to the Department of State for approval consistent with Executive Order No. 10530, following which the Commission will grant the modifications. Licensees interested in effecting this modification to their cable landing licenses at the earliest possible date should file these applications with the Commission within 30 days of the effective date of this Report and Order.[149]

64. We note that the Commission is currently considering changes to the rules for pro forma assignments and transfers of control of international section 214 authorizations.[150] Because we believe it would ease the burdens on section 214 carriers and cable landing licensees, and on the Commission, if we better harmonize our rules for assignments and transfers of control applicable to international services, we may make further changes to section 1.767 based on any amendment we make to section 63.24 in the *2000 International Biennial Review* proceeding.[151]

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[148] *See, e.g., Japan-U.S. Order,* 14 FCC Rcd at 13083, para. 45(5).

[149] In order to facilitate prompt action on these applications, we encourage licensees to file them separately from any application to modify their license to substitute the new "no special concessions" rule for the condition in their license that prohibits the acquisition of exclusive arrangements. *See supra* para. 33.

[150] The Commission has proposed amending section 63.24 to provide greater flexibility and to match more closely the procedures for review of international section 214 assignments and transfers of control with the procedures used for other service authorizations, particularly the procedures used in the Commercial Mobile Radio Service. *See 2000 International Biennial Review NPRM,* 15 FCC Rcd at 24267-73, paras. 7-20.

[151] *See id.* at 24268, para. 10.

65. Under the rule changes we adopt herein, applicants are responsible for determining whether a proposed transaction is pro forma or substantial and for complying with the relevant rules and procedures that govern Commission approval of such transactions. The Commission retains the authority to determine that a particular transaction characterized by the applicants as pro forma is, in fact, a substantial change of control and therefore should be subject to the appropriate review. In such case, the Commission will rescind the grant of the purported pro forma assignment or transfer of control.

F. Codification of Procedures

66. We codify the new streamlining procedures in section 1.767 of the Commission's rules.[152] *See* Appendix B of this Report and Order. In particular, we amend section 1.767 to reflect this new procedure and to add the routine conditions we currently attach to all cable landing licenses as well as the requirements we adopt in this Report and Order for the streamlining of applications for cables having affiliations with carriers possessing market power in WTO Member destination markets. We note that the routine conditions set out in Appendix B will attach both to submarine cable landing licenses granted under the streamlining procedures adopted in this Report and Order and to submarine cable landing licenses granted under a case-by-case analysis. Additionally, we amend section 1.767 to add the new post-transaction notification rule for pro forma assignments and transfers of control of interests in cable landing licenses, and the new ownership threshold for entities applying to become licensees, both discussed above. We seek ways to provide clarity and certainty to market participants, and we find that codification of these conditions, as well as of the new streamlining procedures, will serve this objective.

67. There is ample support in the record for codification. For example, in comments submitted prior to the NPRM, Level 3 suggested that the Commission develop clear and publicly available standard conditions and urged the Commission to place them in a rule, as the Commission has done with section 214 conditions.[153] Commenters agree that the Commission should develop clear and publicly available standard conditions, with most commenters suggesting codification of such conditions.[154]

68. We also agree with commenters that assert that requiring an applicant to submit a letter affirmatively accepting the terms and conditions of the cable landing license is not

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[152] *See* 47 C.F.R. § 1.767.

[153] *See Submarine Cable NPRM*, 15 FCC Rcd at 20821, para. 74 and n.156. *See also, e.g.*, 47 C.F.R. §§ 63.10(c), 63.14.

[154] *See, e.g.*, Cable & Wireless Comments at 23-24; AT&T Comments at 67; Global Crossing Comments at 39-40 (agreeing with Level 3 that routine conditions should be codified in a rule); Sprint Comments at 19 (agreeing with Level 3 that routine conditions should be codified in a rule); TyCom Comments at 13-14 (supporting Commission codification of limited standard conditions and application of other conditions on a case-by-case basis); Level 3 Reply Comments at 2 (asserting that the Commission should develop standardized conditions).

necessary and that elimination of this requirement will reduce confusion and transaction costs.[155] We eliminate this routine condition and do not include it in the conditions we codify in Appendix B. Eliminating this condition is consistent with the section 214 process, which does not require affirmative acceptance. In its place, we adopt the approach suggested by TyCom that is currently used in the section 214 context, whereby applicants certify in their initial applications (regardless of whether the application seeks streamlined treatment) that they will abide by the routine licensing conditions set out in our rules.[156]

G. Private Carrier/Common Carrier Distinction

69. We conclude that the Commission should continue its private (i.e., non-common carrier) submarine cable policy, while also maintaining the distinction between cables operated on a common carrier and on a non-common carrier basis.[157] Commenters state that private cable status stimulates competition,[158] gives flexibility to negotiate capacity packages in an industry that is subject to rapidly changing technology,[159] and preserves the ability to tailor unique arrangements.[160]

70. Maintaining both private and common carrier regulatory options for operating a submarine cable system provides licensees and the Commission, respectively, flexibility in seeking and determining how a cable system will be operated. Although most recently-licensed cable systems operate on a non-common carrier basis, some applicants have proposed to operate their cable systems on a common carrier basis. Additionally, as the Commission stated in the NPRM, there may be limits to the Commission's ability to refrain from regulating a licensee as a common carrier if it does not meet the two-part test set forth by the court in *NARUC I*.[161]

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155 *See* AT&T Comments at 67; Global Crossing Comments at 39-40; Sprint Comments at 19; TyCom Comments at 14; WorldCom Comments at 17.

156 TyCom Comments at 14. *See also* 47 C.F.R. § 63.18(e)(1)(iii), (e)(2)(iii).

157 For a background discussion of the Commission's process for deciding whether a proposed cable system qualifies for non-common carrier status under *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (*NARUC I*), *cert. denied*, 425 U.S. 992 (1976), *see Submarine Cable NPRM*, 15 FCC Rcd at 20815-18, paras. 62-67. The D.C. Circuit has affirmed the continuing use of the *NARUC I* test in light of the addition of the terms "telecommunications carrier" and "telecommunications service" in the Communications Act as part of the Telecommunications Act of 1996. *See Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

158 Cable & Wireless Comments at 26.

159 FLAG Telecom Comments at 16-18.

160 *See, e.g.*, AT&T Comments at 65-66 (asserting that the Commission should continue to permit submarine cables to be operated either on a common carrier or non-common carrier basis because the ability to tailor unique arrangements is essential in a competitive environment).

161 That two-part test asks whether an entity holds itself out to serve the public indifferently or if there is a public policy reason to require the entity to hold out indifferently. *See Submarine Cable NPRM*, 15 FCC Rcd at 20818-19, para. 69 and n.146, *citing NARUC I*, 525 F.2d at 642. As noted in the *Foreign Participation Order*, (continued....)

Therefore, we decline to adopt the suggestion of some commenters that we eliminate the distinction between cables operated on a common carrier and private carrier basis[162] or that we permit applicants to elect private carrier status without having to prove eligibility for such status.[163] An applicant for a cable landing license must indicate in its application under which of these two regulatory categories it wishes to operate the cable.[164]

(Continued from previous page)
cable landing station access and backhaul facilities are among the relevant input markets on the foreign end of a U.S. international route that are necessary for the provision of U.S. international services. *Foreign Participation Order*, 12 FCC Rcd at 23953, para. 145. Thus, there may be a public policy reason, under some circumstances, to require a cable landing licensee affiliated with a foreign carrier with market power over cable landing station access and backhaul facilities in a destination market to operate as a common carrier.

[162] *See* Level 3 Comments at 4, 13-14 (stating that the distinction leads to unnecessary confusion with some cables needing to obtain section 214 authority and others not needing such authority, particularly because the Cable Landing License Act does not make such a distinction, and suggesting that the common carrier/private carrier distinction should be replaced with meaningful categories of licensing conditions that can be applied based on market conditions on the foreign end of the cable and in the United States, and on the ownership structure of the cable system); Viatel Comments at 12 (arguing that the Commission should eliminate common carrier regulation of applicants that qualify for streamlined treatment because the streamlining requirements proposed by Viatel would prevent anti-competitive conduct and in that case common carrier regulation would be redundant).

[163] *See* Global Crossing Comments at 37-39 (suggesting that the Commission adopt a rebuttable presumption that would grant such elections as a matter of course in applications eligible for streamlined processing); *see also* 360networks Reply Comments at 7. *But see* TyCom Comments at 13 (noting that the concerns raised in the NPRM would make it difficult at this time for the Commission to conclude in all cases that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," *citing* 47 U.S.C. § 160(a)(1)). TyCom, in supporting the Commission's tentative conclusion, asserts that: (1) the Communications Act and *NARUC I* compel the Commission to impose common carrier regulation on certain submarine cables; and (2) no compelling case has been made that would satisfy the statutory test to forbear from regulating certain entities as common carriers. *Id.* at 8-13.

[164] 47 C.F.R. § 1.767(a)(6). We note that the Commission retains the ability to impose obligations on the operations of a non-common carrier cable system if the public interest so requires or to reclassify facilities such that they would be subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently. *See Submarine Cable NPRM*, 15 FCC Rcd at 20817-18, para. 67 and n. 136, *citing, e.g., Japan-U.S. Order*, 14 FCC Rcd at 13080-81. *See also* Cable Landing License Act, 47 U.S.C. § 35 (providing that a license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed").

H. Licensing and Regulatory Fees

71. We acknowledge parties' concerns that licensing and regulatory fees should reflect changes in regulatory requirements.[165] We conclude, however, that this submarine cable streamlining proceeding is not the proper vehicle to address modifications to existing fee structures. As the NPRM noted, the Commission ordinarily proposes changes in regulatory fees through an annual rulemaking process specifically designated for this purpose.[166] We suggest that parties seeking changes in regulatory fees pursue their proposals through the annual rulemaking vehicle.

I. Miscellaneous Requests

72. Here we address various miscellaneous suggestions for additional streamlining measures.

73. Amendment of Affiliation and Disclosure Thresholds. We decline to adopt Global Crossing's suggestions that we amend our rules to reduce the ownership information required in an application for a cable landing license.[167] Section 63.18(h) of the Commission's rules requires applicants to provide the name, address, citizenship and principal businesses of any person or entity that owns at least ten percent of the equity of an applicant and the percentage of equity owned by each of those entities, and also requires applicants to identify any interlocking directorates it has with a foreign carrier.[168] Section 63.18(i) requires an applicant to certify whether it is, or is affiliated with, a foreign carrier.[169] Sections 63.18(h)-(i) apply to cable landing licenses because these provisions are cross-referenced in section 1.767(a)(8).[170] Global

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165 For example, Global Crossing urges the Commission to propose, at an appropriate future date, a suitable modification of the regulatory fees pursuant to section 9(b)(3) of the Communications Act. Global Crossing Comments at 43. Cable & Wireless proposes that the fees paid by licensees should no longer be tied to the capacity of their cables. Cable & Wireless Comments at 25 (asserting further that cables today can be built with immense amounts of capacity, and that, "for licensees of these high capacity cables, this means payment of exorbitant regulatory fees on an annual basis"). In the alternative, Cable & Wireless asserts that, if the Commission decides to retain the current fee structure that calculates fees based on cable capacity, the Commission should "replace the antiquated 64 kbps regulatory fee unit with the more technologically appropriate STM-1 unit." Cable & Wireless Comments at 25-26. 360networks suggests that the Commission initiate a new proceeding to harmonize fees with the new streamlined review process. 360networks Reply Comments at 8.

166 *Submarine Cable NPRM*, 15 FCC Rcd at 20828, para. 92, *citing, e.g.*, *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Report and Order, FCC 99-146 (rel. June 18, 1999). For a general description of licensing fees for submarine cables, *see* 15 FCC Rcd at 20826-27, paras. 87-90. For a general description of the processes for modifying licensing and regulatory fees, *see id.* at 20827-29, paras. 91-94.

167 *See* Global Crossing Comments at 32-33; *see also* Cable and Wireless Reply Comments at 28-29 (supporting Global Crossing's suggestion).

168 47 C.F.R. § 63.18(h).

169 47 C.F.R. § 63.18(i).

170 47 C.F.R. § 1.767(a)(8).

Crossing seeks to raise the ownership interest identified in section 63.18(h) from ten to 20 percent, eliminate the requirement in section 63.18(h) for disclosure of interlocking directorates or alternatively limit the requirement to common carrier cables, and narrow the certification required by section 63.18(i) to encompass only carriers with market power in the destination markets where the cable lands.[171] We find that the public benefits most from the efficiency of having consistent foreign affiliation and disclosure requirements for international section 214 authorizations and cable landing licenses. These issues would be more appropriately considered in the course of our 2002 biennial review of all of our rules, when a record may be compiled on whether to change these rules as they apply to both types of authorizations.[172]

74. Specific Description of Cable Landing Station. We clarify our rule regarding the type of information an applicant must provide in its specific description of cable landing stations.[173] Global Crossing asks us to enumerate the precise requirements of an adequate description.[174] We make a minor change to section 1.767(a)(5) to clarify that this rule requires geographic coordinates, and not just street addresses, in all instances. As clarified, section 1.767(a)(5) states that the description shall include a map showing the specific geographic coordinates, and may include street addresses, of each landing station.

75. With regard to this requirement, we expect applicants to provide information sufficient to pinpoint the location(s) where the cable lands, the beach joint, and of the cable landing station that controls the cable's interface with inland points of presence. Historically, the beach joint and cable landing station were located in close proximity to each other. In many cases this continues to be true. Recently, however, some applicants have advised that the cable landing station facility is located at some distance – in some cases up to 50 miles – from the beach joint.[175] In those instances, the International Bureau has asked applicants to provide both sets of coordinates, and we herein affirm and codify the International Bureau's approach. Additionally, we clarify that applications stating that the cable landing station will be located within "X miles of" a particular set of geographic coordinates do not satisfy the requirement for a specific description. Precise coordinates are required to allow for national security review and

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171 *See* Global Crossing Comments at 33-35.

172 We note that the Commission, as recently as 1999, declined to raise the ten percent ownership interest set out in section 63.18(h). *See 1998 International Biennial Review Order*, 14 FCC Rcd at 4940-01, paras. 75-76. *See also id.* at para 28 (concluding that the Commission could not allow applicants themselves to determine which affiliated foreign carriers lack market power for purposes of determining eligibility for streamlining).

173 *See* 47 C.F.R. § 1.767(a)(5). We also amend this rule to consolidate the requirement for cable landing station ownership information into § 1.767(a)(7).

174 Global Crossing Comments at 36-37.

175 *See, e.g.*, TyCom Networks (US) Inc. and TyCom Networks (Guam) L.L.C., Application to Modify the oregon and Japan Landing Points for the TyCom Pacific Cable System, File No. SCL-MOD-2001-0326-00010; *International Authorizations Granted*, Public Notice Report No. TEL-00402 at 16, DA No. 01-1318 (May 31, 2001), 2001 WL 579565.

other purposes.[176] Our experience is that most applicants comply, in the first instance, with this requirement, and that, in those few cases where the application is incomplete or raises questions, the International Bureau contacts the applicants and requests supplemental information that usually is filed by letter and then incorporated into the public file.

IV. CONCLUSION

76. We adopt an eligibility test for streamlined processing of cable landing license applications and will act on applications qualifying for streamlined processing – including an application for a substantial (i.e., non-pro forma) assignment or transfer of control of an interest in a submarine cable landing license – within 45 days of the public notice announcing that the applications are complete and accepted for filing. The streamlining procedures are designed to promote the expansion of capacity and competition in the submarine cable market and to reduce unnecessary regulatory oversight. At the same time, the "no special concessions" rule and the reporting requirements we adopt will preserve the Commission's ability to guard against any anti-competitive behavior arising from carriers possessing market power in a cable's destination markets. This Report and Order also concludes that entities that do not own or control a landing station in the United States or a five percent or greater interest in a proposed cable generally will not be required to become applicants, and thus licensees, for a cable landing license. This is a substantial change from our current practice, which does not set a minimum threshold and thus encompasses a much larger set of applicants and licensees. Additionally, the Report and Order substitutes a new post-transaction notification procedure for the current prior approval of pro forma assignments and transfers of control of interests in cable landing licenses. Finally, the Report and Order codifies the streamlining procedures and the conditions attached to cable landing licenses. Together, these changes should expedite regulatory processing, enhance the ability of service providers to compete in the submarine cable marketplace, and facilitate deployment of services to consumers.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

77. As required by the Regulatory Flexibility Act (RFA),[177] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM.[178] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The text of the Commission's Final Regulatory Flexibility Analysis (FRFA) is set forth in Appendix C.

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176 *See, e.g.*, 47 C.F.R. § 1.1307(c)-(d) of our rules (environmental procedures).

177 The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

178 *See Submarine Cable NPRM*, 15 FCC Rcd at 20834, Appendix A.

B. Paperwork Reduction Act of 1995 Analysis

78. The Report and Order contains a modified information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Report and Order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public comments on the modified information collections are due 30 days from the date of publication of this Report and Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments on the modified information collections must be submitted by the Office of Management and Budget (OMB) on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, commenters should submit a copy of any comments on the information collections contained herein to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov; and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW, Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

VI. ORDERING CLAUSES

79. Accordingly, IT IS ORDERED THAT, pursuant to sections 1, 4(i) and (j), 201-255, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-255, 303(r), and the Cable Landing License Act, 47 U.S.C. §§ 34-39 and Executive Order No. 10530, section 5(a), reprinted as amended in 3 U.S.C. § 301, the Report and Order IS HEREBY ADOPTED and the Commission's rules, 47 C.F.R. part 1, ARE AMENDED as set forth in Appendix B.

80. IT IS FURTHER ORDERED that the policies, rules and requirements established in this decision SHALL TAKE EFFECT 60 days after publication in the Federal Register, or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507, unless by then the Commission has not received appropriate correspondence from the Executive Branch and places a notice in the Federal Register suspending the effective date.

81. IT IS FURTHER ORDERED that authority is delegated to the Chief, International Bureau as specified herein, to effect the changes as set forth above.

82. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

Parties Filing Comments or Reply Comments and Short-Form Names

AT&T Corp. and its affiliates Concert Global Networks USA L.L.C. and Concert Global Network Services Ltd. (AT&T)
Cable and Wireless USA, Inc. (Cable & Wireless)
Caribbean Crossings, Ltd. (Caribbean Crossing)
FLAG Telecom Holdings Limited (FLAG Telecom)
Global Crossing Ltd. (Global Crossing)
Level 3 Communications, LLC (Level 3)
Sprint Communications Company L.P. (Sprint)
TyCom Networks (US) Inc. (TyCom)
U.S. Department of Defense (DOD)
Verizon Global Solutions, Inc. (Verizon)
Viatel, Inc. (Viatel)
WorldCom, Inc. (WorldCom)
360networks Inc. (360networks)

APPENDIX B

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as follows:

Part 1 – PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.767 is amended by revising paragraphs (a)(5), (a)(7), (a)(8) of this part; adding new paragraph (a)(9); redesignating paragraph (a)(9) as (a)(10); adding new paragraph (a)(11); and adding new paragraphs (g)-(m) and new notes to read as follows:

§ 1.767 Cable landing licenses.

* * * * *

(a) * * *

(5) A specific description of the cable landing stations on the shore of the United States and in foreign countries where the cable will land. The description shall include a map showing specific geographic coordinates, and may also include street addresses, of each landing station. The map must also specify the coordinates of any beach joint where those coordinates differ from the coordinates of the cable station. The applicant initially may file a general geographic description of the landing points; however, grant of the application will be conditioned on the Commission's final approval of a more specific description of the landing points, including all information required by

this paragraph, to be filed by the applicant no later than 90 days prior to construction. The Commission will give public notice of the filing of this description, and grant of the license will be considered final if the Commission does not notify the applicant otherwise in writing no later than 60 days after receipt of the specific description of the landing points, unless the Commission designates a different time period;

* * * * *

(7) A list of the proposed owners of the cable system, including each U.S. cable landing station, their respective voting and ownership interests in each U.S. cable landing station, their respective voting interests in the wet link portion of the cable system, and their respective ownership interests by segment in the cable;

(8) For each applicant of the cable system, a certification as to whether the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a foreign cable landing station in any of the cable's destination markets. Include the citizenship of each applicant and information and certifications required in §63.18(h) through (k), and in §63.18(o), of this chapter;

(9) A certification that the applicant accepts and will abide by the routine conditions specified in paragraph (g) of this section; and

(10) * * *

(11) (i) If applying for authority to assign or transfer control of an interest in a cable system, the applicant shall complete paragraphs (a)(1) through (a)(3) of this section for both the transferor/assignor and the transferee/assignee. Only the transferee/assignee needs to

complete paragraphs (a)(8) through (a)(9) of this section. At the beginning of the application, the applicant should also include a narrative of the means by which the transfer or assignment will take place. The application shall also specify, on a segment specific basis, the percentage of voting and ownership interests being transferred or assigned in the cable system, including in a U.S. cable landing station. The Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.

(ii) In the event the transaction requiring an assignment or transfer of control application also requires the filing of a foreign carrier affiliation notification pursuant to § 1.768 of this part, the applicant shall reference in the application the foreign carrier affiliation notification and the date of its filing. *See* § 1.768. *See also* § 1.767(g)(7) (providing for post-transaction notification of pro forma assignments and transfers of control).

(iii) An assignee or transferee shall notify the Commission no later than 30 days after either consummation of the assignment or transfer or a decision not to consummate the assignment or transfer. The notification may be by letter and shall identify the file numbers under which the initial license and the authorization of the assignment or transfer were granted.

* * * * *

(g) *Routine Conditions*. Except as otherwise ordered by the Commission, the following rules apply to each licensee of a cable landing license granted on or after **[enter the effective date of the rules]**:

(1) Grant of the cable landing license is subject to: (i) all rules and regulations of the Federal Communications Commission; (ii) any treaties or conventions relating to communications to which the United States is or may hereafter become a party; and (iii) any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person by grant of the license;

(2) The location of the cable system within the territorial waters of the United States of America, its territories and possessions, and upon its shores shall be in conformity with plans approved by the Secretary of the Army. The cable shall be moved or shifted by the licensee at its expense upon request of the Secretary of the Army, whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance and improvement of harbors for navigational purposes;

(3) The licensee shall at all times comply with any requirements of United States government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cables from injury or destruction by enemies of the United States of America;

(4) The licensee, or any person or company controlling it, controlled by it, or under direct or indirect common control with it, does not enjoy and shall not acquire any right to handle traffic to or from the United States, its territories or its possessions unless such service is authorized by the Commission pursuant to section 214 of the Communications Act, as amended;

(5) (i) The licensee shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier, including any entity that owns or controls a foreign cable landing station, 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.

(ii) For purposes of this section, a special concession is defined as an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, where the arrangement is not offered to similarly situated U.S. submarine cable owners, indefeasible-right-of-user holders, or lessors, and includes arrangements for the terms for acquisition, resale, lease, transfer and use of capacity on the cable; access to collocation space; the opportunity to provide or obtain backhaul capacity; access to technical network information; and interconnection to the public switched telecommunications network.

Note to § 1.767(g)(5): Licensees may rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which foreign carriers are the subject of the requirements of this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

(6) Except as provided in paragraph (7) of this section, the cable landing license and rights granted in the license shall not be transferred, assigned, or disposed of, or disposed of indirectly by transfer of control of the licensee, unless the Federal Communications Commission gives prior consent in writing;

(7) A pro forma assignee or a person or company that is the subject of a pro forma transfer of control of a cable landing license is not required to seek prior approval for the pro forma transaction. A pro forma assignee or person or company that is the subject of a pro forma transfer of control must notify the Secretary, Federal Communications Commission, Washington, D.C. 20554, with a copy to the Chief, International Bureau, Federal Communications Commission, no later than thirty (30) days after the assignment or transfer of control is consummated. The notification may be in the form of a letter (in duplicate to the Secretary), and it must contain a certification that the assignment or transfer of control was pro forma, as defined in § 63.24(a) of this chapter, and, together with all

previous pro forma transactions, does not result in a change of the licensee's ultimate control. A single letter may be filed for an assignment or transfer of control of more than one license issued in the name of a licensee if each license is identified by the file number under which it was granted;

(8) Unless the licensee has notified the Commission in the application of the precise locations at which the cable will land, as required by paragraph (a)(5) of this section, the licensee shall notify the Commission no later than ninety (90) days prior to commencing construction at that landing location. The Commission will give public notice of the filing of each description, and grant of the cable landing license will be considered final with respect to that landing location unless the Commission issues a notice to the contrary no later than sixty (60) days after receipt of the specific description. *See* § 1.767(a)(5) of this section;

(9) The Commission reserves the right to require the licensee to file an environmental assessment should it determine that the landing of the cable at the specific locations and construction of necessary cable landing stations may significantly affect the environment within the meaning of § 1.1307 of this part implementing the National Environmental Policy Act of 1969. *See* § 1.1307(a) and (b) of this part. The cable landing license is subject to modification by the Commission under its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules. *See also* § 1.1306 note 1 and § 1.1307(c) and (d) of this part;

(10) The Commission reserves the right, pursuant to section 2 of the Cable Landing License Act, 47 U.S.C. 35, Executive Order No. 10530 as amended, and section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, to impose common carrier regulation or other regulation consistent with the Cable Landing License Act on the operations of the cable system if it finds that the public interest so requires;

(11) The licensee, or in the case of multiple licensees, the licensees collectively, shall maintain de jure and de facto control of the U.S. portion of the cable system, including the cable landing stations in the United States, sufficient to comply with the requirements of the Commission's rules and any specific conditions of the license;

(12) The licensee shall comply with the requirements of § 1.768 of this part;

(13) The cable landing license is revocable by the Commission after due notice and opportunity for hearing pursuant to section 2 of the Cable Landing License Act, 47 U.S.C. 35, or for failure to comply with the terms of the license or with the Commission's rules; and

(14) The licensee shall notify the Secretary, Federal Commissions Commission, Washington, D.C. 20554, in writing, within thirty (30) days of the date the cable is placed into service, of the date the cable was placed into service. The cable landing license shall expire twenty-five (25) years from the in-service date, unless renewed or extended upon proper application. Upon expiration, all rights granted under the license shall be terminated.

(h) *Applicants/Licensees*. Except as otherwise required by the Commission, the following entities, at a minimum, shall be applicants for, and licensees on, a cable landing license:

(1) Any entity that owns or controls a cable landing station in the United States; and

(2) All other entities owning or controlling a five percent (5%) or greater interest in the cable system and using the U.S. points of the cable system.

(i) *Processing of Cable Landing License Applications*. The Commission will take action upon an application eligible for streamlined processing, as specified in paragraph (k) of this section, within forty-five (45) days after release of the public notice announcing the application as acceptable for filing and eligible for streamlined processing. If the Commission deems an application seeking streamlined processing acceptable for filing but ineligible for streamlined processing, or if an applicant does not seek streamlined processing, the Commission will issue public notice indicating that the application is ineligible for streamlined processing. Within ninety (90) days of the public notice, the Commission will take action upon the application or

provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. Each successive 90-day period may be so extended.

(j) *Applications for Streamlining.* Each applicant seeking to use the streamlined grant procedure specified in paragraph (i) of this section shall caption its application and any cover letter with "Application for Cable Landing License -- Streamlined Processing Requested." Applications for streamlined processing shall include the information and certifications required by paragraph (k) of this section. On the date of filing with the Commission, the applicant shall also send a complete copy of the application, or any major amendments or other material filings regarding the application, to: U.S. Coordinator, EB/CIP, U.S. Department of State, 2201 C Street, N.W., Washington, D.C. 20520-5818; Office of Chief Counsel/NTIA, U.S. Department of Commerce, 14th St. and Constitution Ave., N.W., Washington, D.C. 20230; and Defense Information Systems Agency, Code RGC, 701 S. Courthouse Road, Arlington, Va. 22204, and shall certify such service on a service list attached to the application or other filing.

(k) *Eligibility for Streamlining.* Each applicant must demonstrate eligibility for streamlining by (1) certifying that it is not a foreign carrier and it is not affiliated with a foreign carrier in any of the cable's destination markets; (2) demonstrating pursuant to § 63.12(c)(l)(i)-(iii) of this chapter that any such foreign carrier or affiliated foreign carrier lacks market power; or (3) certifying that the destination market where the applicant is, or has an affiliation with, a foreign carrier is a World Trade Organization (WTO) Member and the applicant agrees to accept and abide by the requirements set out in paragraph (l) of this section. An application that includes an applicant

that is, or is affiliated with, a carrier with market power in a cable's non-WTO Member destination country is not eligible for streamlining.

(l) *Requirements Applicable to Licensees Affiliated with a Carrier with Market Power in a Cable's WTO Destination Market.* Any licensee that is, or is affiliated with, a carrier with market power in any of the cable's WTO Member destination countries, and that requests streamlined processing of an application under paragraphs (j)-(k) of this section, must comply with the following requirements:

(1) File quarterly reports summarizing the provisioning and maintenance of all network facilities and services procured from the licensee's affiliate in that destination market, within ninety (90) days from the end of each calendar quarter. These reports shall contain the following: (i) the types of facilities and services provided (for example, a lease of wet link capacity in the cable, collocation of licensee's equipment in the cable station with the ability to provide backhaul, or cable station and backhaul services provided to the licensee); (ii) for provisioned facilities and services, the volume or quantity provisioned, and the time interval between order and delivery; and (iii) the number of outages and intervals between fault report and facility or service restoration; and

(2) File quarterly circuit status reports, within ninety (90) days from the end of each calendar quarter and in the format set out by the § 43.82 annual circuit status

manual with the exception that activated or idle circuits must be reported on a facility-by-facility basis and derived circuits need not be specified. *See* § 63.10(c)(5) of this chapter.

(m) (1) Except as specified in paragraph (m)(2) of this section, amendments to pending applications, and applications to modify a license, including amendments or applications to add a new applicant or licensee, shall be signed by each initial applicant or licensee, respectively. Joint applicants or licensees may appoint one party to act as proxy for purposes of complying with this requirement.

(2) Any licensee that seeks to relinquish its interest in a cable landing license shall file an application to modify the license. Such application must include a demonstration that the applicant is not required to be a licensee under paragraph (h) of this section and that the remaining licensee(s) will retain collectively de jure and de facto control of the U.S. portion of the cable system sufficient to comply with the requirements of the Commission's rules and any specific conditions of the license, and must be served on each other licensee of the cable system.

Note to § 1.767: The terms "affiliated" and "foreign carrier," as used in this section, are defined as in § 63.09 of this chapter except that the term "foreign carrier" also shall include any entity that owns or controls a cable landing station in a foreign market.

3. Add § 1.768 to read as follows:

§ 1.768 Notification by and prior approval for submarine cable landing licensees that are or propose to become affiliated with a foreign carrier.

Any entity that is licensed by the Commission ("licensee") to land or operate a submarine cable landing in a particular foreign destination market that becomes, or seeks to become, affiliated with a foreign carrier that is authorized to operate in that market, including an entity that owns or controls a cable landing station in that market, shall notify the Commission of that affiliation.

(a) *Affiliations requiring prior notification*: Except as provided in paragraph (b) of this section, the licensee must notify the Commission, pursuant to this section, forty-five days before consummation of either of the following types of transactions:

(1) Acquisition by the licensee, or by any entity that controls the licensee, or by any entity that directly or indirectly owns more than twenty-five percent of the capital stock of the licensee, of a controlling interest in a foreign carrier that is authorized to operate in a market where the cable lands; or

(2) Acquisition of a direct or indirect interest greater than twenty-five percent, or of a controlling interest, in the capital stock of the licensee by a foreign carrier that is authorized to operate in a market where the cable lands, or by an entity that controls such a foreign carrier.

(b) *Exceptions:*

(1) Notwithstanding paragraph (a) of this section, the notification required by this section need not be filed before consummation, and may instead by filed pursuant to

paragraph (c) of this section, if either of the following is true with respect to the named foreign carrier, regardless of whether the destination market where the cable lands is a World Trade Organization (WTO) or non-WTO Member:

(i) The Commission has previously determined in an adjudication that the foreign carrier lacks market power in that destination market (for example, in an international section 214 application or a declaratory ruling proceeding); or

(ii) The foreign carrier owns no facilities in that destination market. For this purpose, a carrier is said to own facilities if it holds an ownership, indefeasible-right-of-user, or leasehold interest in a cable landing station or in bare capacity in international or domestic telecommunications facilities (excluding switches).

(2) In the event paragraph (b)(1) of this section cannot be satisfied, notwithstanding paragraph (a) of this section, the notification required by this section need not be filed before consummation, and may instead be filed pursuant to paragraph (c) of this section, if the licensee certifies that the destination market where the cable lands is a WTO Member and provides certification to satisfy either of the following:

(i) The licensee demonstrates that its foreign carrier affiliate lacks market power in the cable's destination market pursuant to § 63.10(a)(3) of this chapter (*see* § 63.10(a)(3)); or

(ii) The licensee agrees to comply with the requirements contained in § 1.767(l) of

this part effective upon the acquisition of the affiliation. *See* § 1.767(l).

(c) *Notification after consummation:* Any licensee that becomes affiliated with a foreign carrier and has not previously notified the Commission pursuant to the requirements of this section shall notify the Commission within thirty days after consummation of the acquisition.

Example 1 to paragraph (c). Acquisition by a licensee (or by any entity that directly or indirectly controls, is controlled by, or is under direct or indirect common control with the licensee) of a direct or indirect interest in a foreign carrier that is greater than twenty-five percent but not controlling is subject to paragraph (c) of this section but not to paragraph (a) of this section.

Example 2 to paragraph (c). Notification of an acquisition by a licensee of a hundred percent interest in a foreign carrier may be made after consummation, pursuant to paragraph (c) of this section, if the foreign carrier operates only as a resale carrier.

Example 3 to paragraph (c). Notification of an acquisition by a foreign carrier from a WTO Member of a greater than twenty-five percent interest in the capital stock of the licensee may be made after consummation, pursuant to paragraph (c) of this section, if the licensee demonstrates in the post-notification that the foreign carrier lacks market power in the cable's destination market or the licensee agrees to comply with the requirements contained in § 1.767(l) of this part effective upon the acquisition of the affiliation.

(d) *Cross-reference:* In the event a transaction requiring a foreign carrier notification pursuant to

this section also requires a transfer of control or assignment application pursuant to the requirements of the license granted under § 1.767 or § 1.767(g) of this part, the foreign carrier notification shall reference in the notification the transfer of control or assignment application and the date of its filing. *See* § 1.767(g).

(e) *Contents of notification*: The notification shall certify the following information:

(1) The name of the newly affiliated foreign carrier and the country or countries at the foreign end of the cable in which it is authorized to provide telecommunications services to the public or where it owns or controls a cable landing station;

(2) Which, if any, of those countries is a Member of the World Trade Organization;

(3) The name of the cable system that is the subject of the notification, and the FCC file number(s) under which the license was granted;

(4) The name, address, citizenship, and principal business of any person or entity that directly or indirectly owns at least ten (10) percent of the equity of the licensee, and the percentage of equity owned by each of those entities (to the nearest one percent);

(5) Interlocking directorates. The name of any interlocking directorates, as defined in § 63.09(g) of this chapter, with each foreign carrier named in the notification. *See* § 63.09(g).

(6) With respect to each foreign carrier named in the notification, a statement as to whether the notification is subject to paragraph (a) or (c) of this section. In the case of a notification subject to paragraph (a) of this section, the licensee shall include the projected date of closing. In the case of a notification subject to paragraph (c) of this section, the licensee shall include the actual date of closing.

(7) If a licensee relies on an exception in paragraph (b) of this section, then a certification as to which exception the foreign carrier satisfies and a citation to any adjudication upon which the licensee is relying. Licensees relying upon the exceptions in paragraph (b)(2) of this section must make the required certified demonstration in paragraph (b)(2)(i) of this section or the certified commitment to comply with the requirements in paragraph (b)(2)(ii) of this section in the notification required by paragraph (c) of this section.

(f) If the licensee seeks to be excepted from the requirements contained in § 1.767(l) of this part, the licensee should demonstrate that each foreign carrier affiliate named in the notification lacks market power pursuant to § 63.10(a)(3) of this chapter. *See* § 63.10(a)(3).

(g) *Procedure.* After the Commission issues a public notice of the submissions made under this

section, interested parties may file comments within fourteen days of the public notice.

(1) If the Commission deems it necessary at any time before or after the deadline for submission of public comments, the Commission may impose requirements on the licensee based on the provisions of § 1.767(l) of this part. *See* § 1.767(l).

(2) In the case of a prior notification filed pursuant to paragraph (a) of this section in which the foreign carrier is authorized to operate in, or own a cable landing station in, a non-WTO Member, the licensee must demonstrate that is continues to serve the public interest for it to retain its interest in the cable landing license for that segment of the cable that lands in the non-WTO destination market by demonstrating either that the foreign carrier lacks market power in that destination market pursuant to § 63.10(a)(3) of this chapter or the market offers effective opportunities for U.S. companies to land and operate a submarine cable in that country. If the licensee is unable to make either required showing or is notified that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules under 47 U.S.C. 34-39 and Executive Order No. 10530, dated May 10, 1954, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

Note to § 1.768(g)(2): The assessment of whether a destination market offers effective opportunities for U.S. companies to land and operate a submarine cable will be made under the

standard established in *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23946 at para. 130 (1997), 62 FR 64741.

(h) All licensees are responsible for the continuing accuracy of information provided pursuant to this section for a period of forty-five days after filing. During this period if the information furnished is no longer accurate, the licensee shall as promptly as possible, and in any event within ten days, unless good cause is shown, file with the Secretary in duplicate a corrected notification referencing the FCC file numbers under which the original notification was provided.

(i) A licensee that files a prior notification pursuant to paragraph (a) of this section may request confidential treatment of its filing, pursuant to § 0.459 of this chapter, for the first twenty days after filing. Such a request must be made prominently in a cover letter accompanying the filing.

Note to § 1.768: The terms "affiliated" and "foreign carrier," as used in this section, are defined as in § 63.09 of this chapter except that the term "foreign carrier" also shall include an entity that owns or controls a cable landing station in a foreign market.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),[179] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Review of Commission Consideration of Applications under the Cable Landing License Act, Notice of Proposed Rulemaking (NPRM).[180] The Commission sought written public comment on the proposals of the NPRM, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[181]

A. Need for, and Objectives of, the Report and Order

2. In recent years, there has been growth in the number and capacity of submarine cables triggered in large part by increased Internet and data traffic. Because of this increased demand for capacity, the rapid pace of technological development, and the emergence of non-traditional ownership and financing structures in the submarine cable marketplace, the International Bureau reviewed its policies for licensing submarine cables. As a result of the review, the Commission initiated this proceeding.

3. The Report and Order adopts streamlining procedures for processing applications for submarine cable landing licenses. The streamlining procedures are designed to promote the expansion of capacity and facilities-based competition in the submarine cable market, which should increase innovation and lower prices for U.S. consumers of international communications services. The measures also are designed to enable international carriers to respond to the demands of the market with minimal regulatory oversight and delay, saving time and resources for both the industry and the government, while preserving the Commission's ability to guard against anti-competitive behavior.

4. The measures adopted in the Report and Order are part of the Commission's continuing streamlining efforts. We recognize the importance of reducing regulatory costs, providing regulatory certainty, and facilitating the planning of financial transactions. The procedures contained in the Report and Order should allow participants in the submarine cable market to make business decisions more readily.

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179 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

180 *See Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Notice of Proposed Rulemaking, 15 FCC Rcd 20789, 20834 (2000).

181 *See* 5 U.S.C. § 604.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

5. There were no comments in response to the IRFA. In general, commenters were very supportive of the agency's proposal to streamline the submarine cable landing license process. However, some commenters were concerned that the options proposed in the NPRM could be burdensome and time-consuming for both applicants and Commission staff, and, instead of expediting the licensing process, could slow the licensing process. Thus, commenters proposed alternatives that more closely resembled the streamlining process currently used by the agency for processing international section 214 authorizations. The Report and Order adopts an approach to streamlining that reflects the concerns raised by commenters.

6. Commenters in this proceeding presented a number of approaches and/or criteria for determining whether an application would be eligible for streamlined processing. The Report and Order adopts an eligibility test for cables to World Trade Organization (WTO) Member countries that focuses on whether the applicants are, or are affiliated with, carriers with market power in the cable's destination market. Cables without such affiliations will be eligible for streamlining. Cables with such affiliations will be eligible if the applicants/licensees with such affiliations comply with requirements that are similar to existing dominant carrier requirements applicable to section 214 carriers that have affiliations with market power carriers in foreign markets. (*See* 47 C.F.R. § 63.10). In addition, all licensees will be subject to the prohibition against entering into special arrangements with foreign market-power carriers. The Commission believes that the rules and regulations adopted herein both will respond to the commenters' proposals and preserve the Commission's ability to guard against anti-competitive behavior that could result in harm to consumers in the U.S. market.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

7. The RFA directs agencies to provide a description of, and, where feasible, estimate of, the number of small entities that may be affected by the proposals, if adopted.[182] The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[183] In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[184] A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria

[182] 5 U.S.C. § 603(b)(3).

[183] 5 U.S.C. § 601(6).

[184] 5 U.S.C. § 601(3).

established by the SBA.[185]

8. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. Some of these telephone communications companies may have ownership interests in submarine cables or use such cables to provide international service. The Census Bureau reports that there were 2,321 such companies that had been operating for at least one year at the end of 1992.[186] According to the SBA's definition, a wireline telephone company is a small business if it employs no more than 1,500 persons.[187] All but 26 of the 2,321 wireline companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 wireline companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that 2,295 or fewer of these wireline companies are small entities that might be affected by these proposals.

9. The streamlining measures contained in the Report and Order are available to entities applying for a license to land or operate submarine cables under the Cable Landing License Act (or entities applying to assign or transfer control of interests in existing submarine cable landing licenses). The measures, however, may indirectly affect other entities as well, including users of submarine cable service such as Internet service providers (ISPs) that lease capacity or purchase indefeasible rights of use (IRUs) on cable systems. The policies and rules adopted in the Report and Order will reduce the burden on all applicants regardless of size, by permitting applicants to seek to have their applications granted in a more expeditious manner. We do not have precise numbers for the small entities that will be affected by the policies and rules. Agency data indicates there have been approximately 50 cable landing applications filed with the Commission since 1992, but the total number of licensees at any particular time is difficult to determine, because many licenses are jointly held by several licensees and assignments and transfers of control of interests occur on a regular basis. Based on this information, we would estimate that, over the next five years, the streamlining procedures may benefit as many as 50 applicants meeting the SBA definition of a small entity.

10. In addition to expediting the processing of applications, the Report and Order will require fewer entities to become applicants/licensees. This change will further reduce the number of small entities subject to the rules and regulations. Only the following entities will be

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185 5 U.S.C. § 632.

186 U.S. Department of Commerce, *Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995).

187 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) Codes 51331, 51333, and 51334.

required to be applicants for a cable landing license: an entity that (1) owns or controls a U.S. landing station; or (2) owns or controls a five percent or greater interest in the cable system and will use the U.S. points of the cable system. In order to afford existing cable landing licensees this same opportunity, small entities that meet the criteria may request to be removed from the cable landing license.

11. We note that it is difficult to determine with precision the number of small entities that will be affected by this Report and Order. For example, some small entities with less than five percent ownership may elect to become licensees. We will be able to compile more specific data only after small entities file applications seeking removal from existing cable landing licenses. However, the following example of cable ownership interests will provide a good illustration of the potential number of small entities that could be exempt from the requirements of the Report and Order. According to agency data at the time of application, the percentage of ownership interests for an existing submarine cable system, the TAT-14 cable, were as follows: four U.S. carriers owned five percent or greater (these four carriers owned a total of 32.57 percent.); fifteen U.S. carriers owned less than five percent (these fifteen carriers owned a total of 16.93 percent); and thirty-two foreign carriers owned the remaining 50.50 percent.[188]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

12. Any reporting or recordkeeping requirements imposed on small entities will be insignificant. Generally, applicants seeking a cable landing license will submit the same information that is currently required by the rules. Applicants may continue to file for a license under the existing procedures, and some applicants will not meet the eligibility criteria for streamlined processing. Applicants may file electronic or paper applications.

13. We believe that many small entities below the five percent ownership criteria may decide not to be cable landing license applicants, and therefore, such entities will not be subject to the reporting, recordkeeping, or compliance requirements applicable to licensees. Small entities that are currently licensees, and meet these criteria, may file an application requesting that they be removed from the license. The application would demonstrate that the entity: (1) does not own or control a U.S. cable landing station; and (2) holds less than five percent interest in the cable system. The application would be filed with the Commission and copies would be served on each other licensee of the cable system. This burden should be minimal because the information would be readily available from the information that the entity provided at the time of becoming an initial applicant or from other business records showing an increase or decrease of ownership interest. As an existing licensee of a cable landing license, the entity would have ready access to the names and addresses of other licensees. Thus, the service burden also would be minimal.

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[188] The data source is from *AT&T Corp. et al., Joint Application for a License to Land and Operate in the United States a Submarine Cable System Extending Between the United States, Denmark, Germany, the Netherlands, France and the United Kingdom,* File No. SCL-LIC-19990303-00004, Cable Landing License, DA 99-2042, Appendix B, Schedule B (TD/IB 1999) (*TAT-14 Cable Landing Order*), Schedule B, 1998.

14. The Report and Order also adopts a set of reporting requirements that will impose additional reporting burdens on certain entities. We believe, however, that very few small entities will be burdened with this requirement. Reporting requirements will be imposed only on those applicants that have an affiliation with a carrier with market power in any of the cable's destination markets. These applicants will be required to provide provisioning and maintenance reports that include: (a) identification of each facility or service provisioned and/or maintained; (b) for provisioned facilities and services, the volume or quantity provisioned and the order-to-delivery intervals; and (c) for each facility and service, the number of outages and intervals to restoration. Also, applicants will be required to provide quarterly circuit status reports, on a facility-specific basis, in the format set out by the Commission's annual circuit status manual. If applicants have a concern over the public disclosure of their reports, they may seek confidential treatment of the information and request a standard protective order.

15. The Report and Order also adopts a rule that requires licensees to notify the Commission of new affiliations that they acquire with foreign carriers in a cable's destination market. If the Commission deems it necessary, it will impose on the newly affiliated licensee the reporting requirements discussed above. This rule is similar to the notification rule that applies in the context of international section 214 carriers, *see* 47 C.F.R. §. 63.11. We believe this reporting requirement will have minimal applicability to small entities because it will apply only to licensees, and it is likely, under our rules, that few small entities (that is, those independently owned and operated companies with no more than 1500 employees) will be required to become licensees.

16. The Report and Order also adopts a new process designed to remove prior Commission review of pro forma assignments or transfers of control of interests in submarine cable landing licenses. Again, this process will have minimal applicability to small entities to the extent they are not cable licensees. Pro forma transactions usually do not result in a change in the ultimate control of the interest in the cable landing license or in changes to the cable system itself as previously evaluated at the time of the initial license application. Under the Report and Order, a pro forma assignee or a person or company that is the subject of a pro forma transfer of control of an interest in a cable landing license will no longer be required to seek prior approval, but if electing post-transaction notification, must: (1) notify the Commission no later than 30 days after the pro forma transaction is consummated; (2) certify that the assignment or transfer of control is pro forma, and together with all previous pro forma transactions, does not result in a change of the licensee's ultimate control; and (3) provide an update to any ownership information required by our rules. Under this new rule, the burden of seeking prior approval would be eliminated for most entities, thus allowing them to proceed with their pro forma transaction without delay. Entities would file the same information after the transaction instead of prior to the transaction. The Report and Order provides that existing licenses could be modified, at a licensee's request, to be subject to this post-transaction process. The licensee would be required to file an application with the Commission seeking a modification of its license to incorporate this limited exception to the prior approval requirement currently set forth in the applicable license condition. This new process will impose a slight burden on applicants that have been granted a cable landing license and wish to take advantage of this new process. Presumably licensees will only subject themselves to this burden if they believe the benefit of expedited post-transaction processing of pro forma assignments or transfers of control will offset any burden. Similarly, the

Report and Order states that licensees of previously authorized cables may file applications to modify their licenses to substitute the new, more narrowly tailored "no special concessions" rule for the "no exclusive arrangements" condition contained in existing licenses.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage or the rule, or any part thereof, for small entities.[189]

18. In the NPRM, we requested comment on whether small entities would be adversely affected by the proposals and whether the proposals would enable small entities to respond to the demands of the market with minimum regulatory oversight, delays, and expenses. Commenters did not specifically address the impact on small entities. Rather, commenters expressed concerns that the NPRM proposals could be burdensome and time-consuming on all entities. Commenters proposed alternative measures more aligned with the existing section 214 streamlining procedures. As a result, the Report and Order adopts measures that are closely modeled on the streamlining process for international section 214 authorizations which has been successful and not burdensome.

19. The procedures adopted in the Report and Order are designed to provide more certainty and flexibility for applicants, encourage investment and infrastructure development by multiple providers, expand available submarine cable capacity, and decrease application processing time. This decision extends the benefits of streamlined processing to as many applicants as possible, including small entities. It reduces the regulatory and procedural burdens while preserving the Commission's ability to guard against anti-competitive behavior. This streamlined processing may benefit small entities especially because the procedures should facilitate entry by such entities into the submarine cable market and expand international services available to such entities. In addition, we have developed a definition of "licensee" that should permit a large number of small entities to be exempt from the requirements contained in the Report and Order.

20. Finally, the reporting requirements and other measures adopted in the Report and Order will minimize any economic impact on small entities. The reporting requirements, which apply only to certain licensees, will allow the Commission to monitor and detect anti-competitive behavior without imposing unnecessarily burdensome regulations on a U.S. licensee due to its affiliation with a foreign carrier.

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[189] 5 U.S.C. § 603(c).

21. To simplify compliance with the rules and requirements, the Report and Order codifies the submarine cable landing license conditions. This step will provide clear and publicly available standard conditions for all entities. Also, applicants will no longer be required to submit a letter affirmatively accepting the terms and conditions of the cable landing license.

Report to Congress: The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C.§ 801(a)(1)(A). In addition, the Commission will send a coy of the Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).