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April 22, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Global Crossing Ltd., et al., IB Docket No. 02-286

Dear Madam Secretary:

IDT Corporation (“IDT”) through its undersigned counsel asks the Federal Communications Commission (“FCC” or “Commission”) to refrain from taking action on the Second Amendment to the Global Crossing Ltd. (Debtor-in-Possession) (“GCL”) and GC Acquisition Limited (“New GX”) (collectively “Applicants”) Application (IB Docket 02-286) unless and until *after* the Applicants reach a final agreement with the Committee on Foreign Investments in the United States (“CFIUS”) and there is an opportunity for public comment thereon.

On August 22, 2002, the Applicants filed applications for FCC consent to transfer control of GCL’s subsidiaries holding Section 214 authority, submarine cable landing

licenses and wireless licenses to New GX.¹ The proposed transaction would result in Hutchison Telecommunications Limited (“Hutchison Telecom”) and Singapore Technologies Telemedia Pte Ltd (“ST Telemedia”) each holding an indirect interest in GCL subsidiaries.² As a result of these potential interests, the Department of Defense (“DOD”), Department of Justice (“DOJ”), Federal Bureau of Investigations (“FBI”), and CFIUS (collectively the “Executive Agencies”) are investigating the law enforcement, national security, and public safety issues implicated by this application. To ensure that the Executive Agencies have adequate time to review these issues, the DOJ and FBI requested that the Commission defer dispositive action on this application until these issues are resolved.³ The Commission has not restarted its 180-day review of this application because the Executive Agencies’ review is not complete.⁴

The Applicants subsequently filed a second amendment to their application in an apparent attempt to expedite the Commission’s review of its application.⁵ In the *Second Amendment*, the Applicants merely state that they are having “ongoing discussions” with

¹ Application for Consent to Transfer Control and Petition for Declaratory Ruling of Global Crossing Ltd. (debtor-in-possession) and GC Acquisition Limited, IB Docket No. 02-286 (filed August 22, 2002).

² *Id.* at 25.

³ Motion for Continued Deferral of the United States Department of Justice and the Federal Bureau of Investigations, IB Docket No. 02-286 (filed October 21, 2002).

⁴ Letter from James Ball to Andrew Lipman, Jean Kiddoo, and Paul Gagnier, IB Docket No. 02-286 (March 27, 2003).

⁵ Second Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling of GCL and New GX, IB Docket No. 02-286 (filed April 7, 2003). (“*Second Amendment*”).

CFIUS and superficially discuss the changes they “expect” to make to the application.⁶ The Applicants claim that the final terms required by the Executive Agencies will not differ materially from the *Second Amendment*.⁷

As discussed below in greater detail, the Commission should not act on the *Second Amendment*, unless or until the Executive Agencies complete their review and the proposed changes are finalized.⁸ Furthermore, the FCC must issue a Public Notice at that time to allow the public an opportunity to comment because the changes constitute a major amendment to the application.

The *Second Amendment* states that the Applicants *expect* that CFIUS’s approval “would be conditioned upon the modifications to Hutchison Telecom’s investment as described herein” and acknowledges that the Applicants are uncertain of the changes that CFIUS will require.⁹ The Applicants are putting the Commission in a position of reviewing a “moving target” because the precise structure of the amendment is unknown. It is impossible for the Commission to make an informed decision if it is not provided with all the facts.

Instead of reviewing the application at this time, the Commission should require the Applicants to submit all relevant documents, including the Proxy Agreement, once an

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

⁸ In the event that the Commission determines that it is not necessary to wait for CFIUS to conclude its review, IDT believes that the Commission must provide an opportunity for public comment prior to taking dispositive action.

⁹ *Second Amendment* at 2.

agreement is reached with CFIUS. The Proxy Agreement is particularly important because it is intended to address the concerns of the Executive Agencies regarding foreign ownership. In addition, the voting and corporate governance rights of Hutchison Telecom, a foreign investor in New GX, will be voted according to the standards established in the Proxy Agreement.¹⁰ As discussed below in greater detail, this information is necessary in order for the Commission to determine independently whether or not the application is in the public interest.

In addition to requesting that the Commission review an incomplete application, the Applicants state that their application must be approved by April 30, 2003, because GCL, Hutchison Telecom, and ST Telemedia each have a right to terminate the Purchase Agreement after that date if all of the regulatory approvals (including the FCC's) have not been secured.¹¹ The Commission must, however, base its decision on the public interest and should not expedite its review process to meet an arbitrary deadline imposed by the parties.

Section 63.52(b) of the Commission's rules provides that the Commission will not grant a major amendment to a Section 214 application unless the Commission issues a Public Notice that it has accepted the filing.¹² To determine if an amendment is "major,"

¹⁰ *Id.*

¹¹ *Id.*

¹² 47 C.F.R. § 63.52(b).

the Commission must investigate whether or not the proposed amendment is, or appears to be, “of decisional significance to a particular application.”¹³

The Commission considers any national security, law enforcement, foreign policy, and trade policy concerns raised by the Executive Branch in determining whether or not the application is in the public interest.¹⁴ By the Applicants’ own admission, the proposed changes are designed to address national security and law enforcement issues raised by Executive Agencies.¹⁵ It appears that the Executive Agencies believe that, without these changes, including the Proxy Agreement, the transaction could threaten national security. As a result, the proposed changes are material to the Commission’s ability to determine whether or not the application is in the public interest. Although the Commission has stated that it will accord a certain level of deference to the expertise of the Executive Agencies with respect to national security issues, the Commission must still undertake its own independent analysis of whether a particular application is in the public interest.¹⁶

The Commission can meet this obligation only if it analyzes all the particular facts of an application. If the Commission does not “exercise its own judgment,” it

¹³ *Implementation of New Rules Governing International Section 214 Applications and Section 310(b)(4) Determinations*, DA 96-157, *Public Notice*, 11 FCC Rcd 3168, 3168 (1996).

¹⁴ *In the Matter of 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, 95-22 *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23919 ¶ 61 (1997) (“*Foreign Participation Order*”), *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

¹⁵ *Second Amendment* at 1.

¹⁶ *Foreign Participation Order* at 23919-20 ¶ 62-63.

impermissibly abdicates its role as a rational decision maker and the Courts will overturn the Commission's decision.¹⁷ Because the proposed change will necessarily impact the Commission's evaluation of whether or not the transaction is in the public interest, it is therefore of decisional significance. The *Second Amendment* is thus a major amendment, and the Commission must issue a Public Notice to provide the public with an opportunity to comment once CFIUS has completed its review and the final terms of the amendment are known.¹⁸

Respectfully submitted,
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¹⁷ *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001), *citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993).

¹⁸ 47 C.F.R. § 63.52.

CERTIFICATE OF SERVICE

I, Paul Malmud, do hereby certify that on this 22nd day of April 2003, I caused a copy of the foregoing to be transmitted via E-mail or U.S. Mail, First Class, postage pre-paid, to each of the following:

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