BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
GLOBAL CROSSING, LTD.	)	IB Docket No. 02-286
(Debtor-in-Possession), Transferor,	)	
	)	File Nos. ISP-PDR-20020822-00029,
and	)	et al.
	)	
GC ACQUISITION LIMITED,	)	
Transferee,	)	
	)	
Application for Consent to Transfer	)	
Control and Petition for	)	
Declaratory Ruling	)	

REPLY OF IDT CORPORATION

IDT CORPORATION

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July 3, 2003

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REPLY OF IDT CORPORATION

IDT Corporation ("IDT"), by its attorneys, hereby replies to (1) the June 26, 2003 Consolidated Response of Global Crossing Ltd. and GC Acquisition Limited to Comments on Third Amendment (the "Applicants' Response"), (2) the June 16, 2003 Comments of the Organization for International Investment (the "OII Comments"), (3) the June 16, 2003 Objections to Amended Applications and Petition for Declaratory Ruling of American Communications Networks, Inc. (the "ACN Objections"), (4) the June 26, 2003 Comments of XO Communications, Inc. (the "XO Comments"), and (5) COMMAXXESS' June 30, 2003 Response in Opposition to the Applicants Consolidated Response to All Pending Comments and Matters Before the Commission (the "COMMAXXESS Response"), with respect to the above-referenced applications (the "Applications") in which Global Crossing Ltd., Debtor-in-Possession ("GX") and GC Acquisition Limited ("New GX" and, together with GX, the

"Applicants") seek Commission consent to transfer control of licensed subsidiaries of GX to New GX and its parent companies, including Singapore Technologies Telemedia Pte Ltd ("ST Telemedia") and the Government of Singapore (the "New Transaction").

SUMMARY

The Applicants' Response, like their Third Amendment, invites the Commission to take on faith much of the relevant information the Commission will need to adequately assess whether the New Transaction serves the public interest. The Applicants have not supplied critical information about New GX and its proposed owners; indeed, with each submission they make, the Applicants raise more questions than they answer. Rather than provide the necessary information, the Applicants seek to divert the Commission's attention by asserting that notwithstanding the proposed transfer of control to "Singapore, Inc.," they are entitled to a blanket presumption that the transaction is in the public interest, that competition in foreign markets is not relevant, and that approval must be granted to conform to U.S. trade policy. The Commission must decline the Applicants' invitation to curtail its public interest analysis. Instead, it should either require the Applicants to supplement the record as suggested herein and in the earlier filed IDT Petition, or designate the pending Applications for hearing in order to test the veracity of Applicants' allegations of fact. In either event, the Commission should stop its internal processing clock until there is a record sufficient for it to be started again. Only by proceeding in this manner will the Commission be able to fully discharge its statutory duties.

I. THE APPLICANTS MISSTATE THE APPLICABLE STANDARD FOR REVIEW OF THE NEW TRANSACTION

The Applicants assert that they are entitled to a finding that the New Transaction "is presumptively in the public interest."[1] The Applicants misstate the Commission's standard for reviewing the New Transaction. The *Foreign Participation Order* established a rebuttable presumption "that applications for Section 214 authority from WTO Members do not pose concerns that would justify denial of an application on competition grounds."[2] This presumption was "adopt[ed] as a factor in [the] public interest analysis" which Congress has required the Commission to perform.[3] The presumption does not replace that analysis. The Commission made this clear when it adopted the presumption, stating that it is "statutorily obligated to evaluate all applications to ensure that they are consistent with the public interest."[4]

Moreover, as XO notes, even where the presumption applies, the Commission still must consider, "independent of [its] competition analysis,"[5] national security and other public interest concerns, including law enforcement, foreign policy, trade, and public safety, and must consider

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[1] Applicants' Response at 3.

[2] *Rules and Policies of Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"), at ¶50. The presumption also applies to applications to land and operate submarine cables from WTO Members and to applications for consent to obtain indirect ownership of common carrier and aeronautical radio licensees under Section 310(b)(4) of the Act by entities from WTO Members. *Id.*

[3] 47 U.S.C. §§ 214, 310(b)(4).

[4] *Foreign Participation Order* at ¶46. *See also* ACN Objections at 4-5.

[5] XO Comments at 3 (quoting *Foreign Participation Order* at ¶65).

"all relevant factors and evidence that might tend to rebut the presumption."[6] Moreover, a proposed transfer of a controlling interest requires the Commission to "examin[e] in detail the competitive impact of the" transaction.[7]

The Applicants have not, in any event, demonstrated that they are entitled to the presumption that the proposed foreign investment raises no competitive concerns. As demonstrated herein and in the IDT Petition,[8] "exceptional circumstances"[9] exist that fully justify not applying the presumption.

II. THE APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THE NEW TRANSACTION WILL BE IN THE PUBLIC INTEREST

Having inaccurately stated that they are entitled to a presumption that the New Transaction is in the public interest, the Applicants then assert that IDT and others "fail to rebut the presumption."[10] The Applicants' attempt to shift the burden of proof is unavailing. Control of Commission licenses and authorizations by a foreign government raises unique issues that warrant careful and thorough review. The Applicants, and not IDT or any other party, have the

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[6] *Lockheed Martin Global Telecommunications, et al., Assignor and Telenor Satellite Mobile Services, Inc., et al., Assignee, Order and Authorization*, 16 FCC Rcd 22897 (2001), at ¶27.

[7] *Foreign Participation Order* at n.85.

[8] IB Docket No. 02-286, IDT Corporation Petition to Dismiss or Deny and Opposition to Petition for Declaratory Ruling, June 16, 2003 (the "IDT Petition").

[9] *See Foreign Participation Order* at ¶51.

[10] Applicants Response at 7.

burden of demonstrating that the New Transaction is in the public interest. They have not done so on the record presently before the Commission.[11]

A. Critical Information Is Not in the Record

IDT disagrees with the Applicants' assertion that "ST Telemedia's legal, financial, technical, or managerial qualifications to hold a majority interest in New GX are a matter of record in this proceeding and have not been challenged by the commenters."[12] In fact, the Applicants have failed to provide fundamental information about New GX that is necessary for interested parties to fully assess and comment on the Applicants' qualifications, much less for the Commission itself to reach any conclusion about those qualifications. Some of this information is specifically required by the Commission's rules,[13] and all of it is necessary for the Commission's public interest analysis.

As the IDT Petition noted,[14] the Applicants have provided scant information about New GX's ownership and control.[15] The Applicants' Response does not address these deficiencies. It does, however, contain a new disclosure about an additional layer of ownership. Specifically,

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[11] IDT wishes to make clear that its interest in this matter is not motivated by any desire to impugn the Government of Singapore or any of its affiliates. IDT acknowledges that Singapore is a key trading partner of the United States and a strong ally in the Asia-Pacific region. Nonetheless, foreign government ownership and control of FCC licenses and critical infrastructure assets are a cause of significant concern to IDT, a publicly traded U.S. company that competes aggressively in a highly competitive industry sector and, unlike ST Telemedia and its affiliates, is not a dominant carrier and receives no advantages from government ownership.

[12] Applicants' Response at n.6.

[13] The Applicants' Form 603 ownership filings, for example, do not contain required attributable ownership information regarding officers and directors.

[14] IDT Petition at 15-16.

[15] As recently as May 13, 2003, the Applicants stated that they had only an "understanding" of the relationships between their direct and indirect parent companies. *See* IB Docket No. 02-286, Third Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling, May 13, 2003 ("Third Amendment"), at 9.

Temasek Holding (Private) Limited ("Temasek"), an indirect parent company of ST Telemedia, is "wholly owned by the Minister of Finance (Incorporated) of the Government of Singapore, which is also a Singapore person."[16] However, the Applicants still have not disclosed the identity of the officers and directors of New GX. Nor does the record reveal the identity of the officers and directors of any of the controlling interests of New GX, including Mauritius Company, STT Communications Limited, ST Telemedia, Singapore Technologies Pte Ltd. ("Singapore Technologies"), and Temasek. Consequently, it is impossible to determine who will exercise *de facto* control of New GX. Similarly, it is impossible to determine the extent of interlocking directorates among and between these entities and related affiliates (including Singapore Telecommunications Ltd. ("SingTel"), the dominant telecommunications operator in Singapore and, like ST Telemedia, owned by Temasek and the Government of Singapore) and other foreign carriers and government-linked entities. It cannot be disputed that this information is relevant, not only to the Commission's public interest analysis but also to competitors seeking regulatory transparency and nondiscriminatory treatment, both in Singapore and in the U.S.

The record also lacks other information relevant to New GX's "legal, financial, technical, [and] managerial qualifications." Missing are basic corporate governance documents, information about how New GX will be financed, and information about who will exercise *de facto* managerial and operational control. Instead the Applicants make blanket assertions

[16] Applicants Response at n.17. The Applicants did not identify the Minister. Earlier this week, nearly one year after filing the Applications, the Applicants also disclosed that they had just become aware that GX controls additional common carrier radio licenses. IB Docket No. 02-286, Fourth Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling, June 30, 2003 ("Fourth Amendment"). *See Public Notice*, DA 03-2179 (rel. July 2, 2003). IDT's Petition applies equally to both the Third and Fourth Amendments.

regarding the relationships between New GX's proposed new owners which, standing alone, are of limited credibility.[17]

For example, the Applicants claim that "the facts demonstrate that the Singapore Government does not confer financial or other advantages on ST Telemedia."[18] However, ST Telemedia's status as an indirect wholly owned subsidiary of Temasek and the Singapore Government clearly confers significant advantages. Temasek's own charter and business practices confirm this.

Temasek, one of several "Government Linked Companies," or GLCs, created by the Singapore Government and based in Singapore, is a massive investment holding company wholly owned – as the Applicants disclosed in their Response – by the Government's Minister for Finance. Founded in 1974, it holds and manages investments in companies involved in a range of business activities from port, shipping, and logistics, to banking and financial services, airlines, telecommunications and media, power and utilities, and rail. These companies are referred to as "TLCs" – Temasek-Linked Companies. Many of these companies are industry leaders in Singapore, including Singapore Technologies (another of New GX's proposed indirect parent companies), SingTel, Singapore Power, and DBS Bank. Temasek companies represent

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[17] The Commission and interested parties have the right to review on the record information sufficient to support the Applicants' claims that the Singapore Government "does not influence ST Telemedia's commercial policy and will not influence the commercial policy of New GX and its subsidiaries that hold FCC licenses," "does not have the right to consent to or veto the decisions of the company and does not hold a so-called 'golden share' in ST Telemedia," and "neither nominates nor appoints members to ST Telemedia's Board of Directors or the Boards of Directors of ST Telemedia's subsidiaries." *See* Applicants' Response at 11. These statements are repeated verbatim from a side letter to the recent U.S.-Singapore Free Trade Agreement (*see* Attachment 1 hereto). Even if these assertions are correct, they beg the question: if Temasek and the Government of Singapore – which the Applicants concede hold *de jure* control of ST Telemedia – do not exercise these rights, who does?

[18] Applicants' Response at 11.

approximately 21% of the total market capitalization of the Singapore stock exchange.[19] "Temasek's strategies are to leverage on the brands and market positions to globalise existing businesses…. Temasek will also consolidate and rationalise its shareholdings. Businesses that are no longer strategic and have no international potential will be divested."[20] Temasek has expressly stated that "to build regional or international businesses, [it] will assist the TLCs to shape their strategic developments, including consolidations, mergers, acquisitions, rationalisation or collaborations as appropriate."[21]

Consistent with its mission of "shaping the[] strategic developments" of its TLCs, Temasek is willing to use the assets of one of its companies to benefit another. For example, Temasek exercised its rights of mandatory exchange with regard to guaranteed bonds issued by one of its wholly-owned subsidiaries in exchange for shares of another of its subsidiaries, SingTel.[22] Use of the equity of one of Temasek's companies to pay off the debt of another company is a valuable financial advantage not available to ST Telemedia's competitors. More generally, cross-subsidization appears to be a fundamental purpose behind the structure of GLCs, such as Temasek, and the TLCs.[23]

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[19] *See* Temasek Holdings, "Corporate Backgrounder," attached as Attachment 2 hereto (available at http://www.temasekholdings.com/sg/temasek_news/corp_backgrounder/corporate_backgrounder_Jan03.pdf).

[20] *Id.*

[21] *Id.*

[22] *See* Press Release, "Temasek Holdings to Call for Exchange of US$1 Billion Fullerton Global Bonds Exchangeable for SingTel Shares," February 11, 2002 (available at http://www.temasekholdings.com/sg/temasek_news/new_release/11_02_2002.htm).

[23] The Temasek Charter articulates five goals for the TLC companies. These goals – values, focus, human capital, sustainable growth, and strategic development – demonstrate the pervasive influence of Temasek on its subsidiaries. The Charter makes clear that "[i]n the next phase of Singapore's economic development, Temasek

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The Applicants also assert that "[t]he Singapore Government does not influence ST Telemedia's commercial policy…."[24] However, Temasek "has defined for itself a proactive, value-adding shareholder role. As an involved, interested, and informed shareholder, Temasek *influences* the strategic direction of Temasek-Linked Companies (TLCs) by exercising its shareholder rights…."[25] Mr. S Dhanabalan, the Chairman of Temasek, in a speech late last year cogently explained the differences between the U.S. and Singapore public company models, including the concentration of ownership in Singapore public companies, typically among family members, and cited the advantages of the Singapore model.[26]

In his speech, Mr. Dhanabalan summarized Temasek's approach to corporate governance of its TLCs: "Over the years, [Temasek] has exercised due influence as a major shareholder over its companies in a number of different areas, namely: (1) the nomination of suitable persons for appointment as directors onto the TLC boards; (2) the establishment of employee compensation schemes (including stock options), and succession and development plans…; (3) the scrutiny of material transactions e.g. mergers and acquisitions that require shareholders' approval; and (4)

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aims to build and nurture internationally competitive businesses. These can leverage on Singapore's competitive strengths…." *See* New Release, "Temasek Announces New Charter," July 3, 2002, attached as Attachment 3 hereto. In contrast, the Applicants' assertion that "ST Telemedia finances its investment activities through traditional commercial means," Applicants' Response at 12, cannot be confirmed based on the present record.

[24] Applicants' Response at 11.

[25] *See* Attachment 2 ("Corporate Backgrounder") (emphasis added).

[26] "Why Corporate Governance – A Temasek Perspective," speech delivered October 31, 2002, Asian Business Dialogue on Corporate Governance 2002, at 3 (available at http://www.temasekholdings.com/sg/temasek_news/speeches/31_10?2002.htm). A copy of the speech is attached as Attachment 4 hereto.

the institutionalising of corporate governance and disclosure practices."[27] ST Telemedia, as a wholly-owned subsidiary of Singapore Technologies, which itself is a TLC, is directly impacted by the exercise of the influence described by Mr. Dhanabalan.

As Mr. Dhanabalan's comments make clear, Temasek and the Singapore Government also exert influence through the appointment of board members. "The character of Temasek derives from the character of the political leadership in Singapore."[28] Although the Applicants have not disclosed the Board Members of Temasek, ST Telemedia, and other relevant entities, IDT has learned that interlocking directorates exist and, moreover, that key Board Members are, in fact, high government officials. These relationships show links between government and industry that have no precedent in prior cases in which the Commission has been asked to approve foreign ownership in excess of the statutory limit – and raise questions about whether these persons and entities are "representatives" of the Singapore government for purposes of the Commission's foreign ownership analysis.[29]

- The owner of Temasek, the Singapore Minister of Finance – who was not named by the Applicants in their Response – is Brigadier General Lee Hsien Loong, who also is Singapore's Deputy Prime Minister. Mr. Lee is the husband of Madame Ho Ching, Executive Director of Temasek. He also is the son of Lee Kuan Yew, the founder of modern Singapore.[30]

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[27] *Id*. at 3-4.

[28] *Id*.

[29] Although the following information (compiled from the Temasek web site, Singapore Technologies' most recent annual report, and various Internet sources) is believed to be current, changes may have occurred. The Applicants, of course, have the ultimate responsibility for providing current, accurate information. In any event, the information demonstrates the Government of Singapore's extensive involvement with entities it controls, including ST Telemedia.

[30] DPM Lee also is the Deputy Chairman of GIC, one of Singapore's largest GLCs. DPM Lee's father is the Chairman of GIC, and his brother, cousins, brother-in-law, and sisters-in-law all are on the boards of Singapore Technologies or its subsidiaries and affiliates. DPM Lee's cousin is the Deputy Chairman of Temasek. *See* Tan

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- Madame Ho Ching is Executive Director and Member of the Board of Directors of Temasek, Deputy Chairman and a Member of the Board of Directors of Singapore Technologies (ST Telemedia's indirect parent), and Chairman of ST Telemedia subsidiary StarHub Pte Ltd. ("StarHub").

- Mr. Tan Guong Ching is Permanent Secretary of the Ministry of Home Affairs and is Chairman of the Board of Directors of ST Telemedia and of Singapore Technologies, and a director of StarHub.

- Mr. Teo Ming Kian is both Chairman of the Board of Singapore Technologies and Chairman of the Economic Development Board of Singapore, the lead agency that plans and executes strategies to sustain Singapore as a global hub for business and investment, and is the former Permanent Secretary for Defense.[31]

The Applicants' statement that "[t]he Government of Singapore neither nominates nor appoints members to ST Telemedia's Board of Directors or the Boards of Directors of ST Telemedia's subsidiaries,"[32] says nothing. In the absence of disclosures by the Applicants, one may reasonably conclude that ST Telemedia's Directors are nominated and appointed by Singapore Technologies, whose Directors in turn are nominated and appointed by Temasek. Senior government officials are on the boards of those ST Telemedia parent companies. Regardless of how the nomination and appointment process formally works, however, many Singapore Government officials are Directors of Temasek and the TLCs. If Temasek and the

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Boon Seng, "Why it May Be Difficult for the Government to Withdraw from Business," Singaporeans for Democracy, February 10, 2002 (available at http://www.sfdonline.org/Link%20Pages/Link%20Folders/02Pf/glc_100202.htm) (attached as Attachment 5 hereto).

[31] The overlap of influence also is pervasive within the Singapore Government. Singapore's current Permanent Secretary for Defense, Mr. Peter Ho, is the Deputy Chairman of the Board of the Infocomm Development Authority ("IDA"), Singapore's "independent" telecommunications regulatory authority. IDA's Chairman, Chuan Leong Lam, is Singapore's current Permanent Secretary for the Ministry of Environment.

[32] Applicants' Response at 11.

Government do not exert "influence" on the TLCs, it is difficult to explain the coincidence of these appointments. Closer examination of the involvement of Government officials with government-linked companies is required to determine the extent of these linkages.[33]

In sum, the Applicants' assertion that "[t]he Singapore Government *does not* influence ST Telemedia's commercial policy *and will not* influence the commercial policy of New GX and its subsidiaries that hold FCC licenses,"[34] cannot be verified on the present record. The Applicants do not dispute that they seek approval for the Singapore Government and its subsidiaries to control New GX, nor do they dispute that the Singapore Government already controls ST Telemedia and its affiliates. Consequently, their claim that there is not "a valid basis for concluding" that the Singapore Government "exerts" day-to-day control over ST Telemedia,[35] must be supported by more than bare, undocumented assertions. Under the circumstances, designating the Applications for hearing is appropriate in order to determine the accuracy of the Applicants' claims and to establish a complete record.[36]

B. Competition in Foreign Markets Is Relevant to the Public Interest Analysis

The Commission must reject the Applicants' argument that "competition in Asia is not relevant" and that it would be improper for the Commission to consider the impact of the New

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[33] *See* Attachment 5 ("Why it May Be Difficult for the Government to Withdraw from Business").

[34] Applicants' Response at 11 (emphasis added).

[35] *Id*. at 12. IDT concurs – but only because the record is not sufficient to conclude that such control does not exist.

[36] OII claims several public interest benefits will result from the New Transaction. *See* OII Comments at 6-7. More must be known about the proposed owners and how they may affect competition, however, before those potential benefits may be considered in the appropriate context.

Transaction on foreign telecommunications markets.[37] The Commission has acknowledged that foreign markets may be inextricably linked to competitive concerns in U.S. markets for purposes of its statutory public interest analysis. "[A]n applicant seeking to enter the U.S. market that is affiliated with a telecommunications carrier that possesses the ability to exercise market power in the foreign market for facilities and services necessary for the provision of U.S. international services may have the ability to discriminate in favor of its U.S. affiliate to the detriment of unaffiliated U.S. carriers."[38] Such is the case here.[39] Consequently, the Commission has an obligation to review competitive conditions in Southeast Asia, where, as IDT has shown, questions exist about anti-competitive activities of government-owned telecom service providers.[40] Once the Commission obtains from the Applicants information needed to conduct its analysis (in addition to other information discussed above), the Commission may determine whether its traditional safeguards and conditions will be effective to "detect and deter"[41] anti-competitive conduct.

The Applicants' assertions that no vertical market harms will result from the New Transaction are undocumented. According to the Applicants, ST Telemedia and SingTel have an "arm's length relationship" and are "fierce competitors," while SingTel and StarHub "compete

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[37] Applicants' Response at 8.

[38] *Foreign Participation Order* at ¶51.

[39] The Department of Justice has advised the Commission that foreign government ownership may be relevant if such ownership is likely to increase the existence or durability of market power in a foreign market and if the facts indicate that the transaction would enable and increase the likelihood that the party would leverage that market power to injure U.S. competitors and consumers. IB Docket No. 00-187, Letter from the Department of Justice, Sept. 14, 2001.

[40] *See* IDT Petition at 24.

[41] *Foreign Competition Order* at ¶51.

aggressively in the competitive Singapore market."[42] Substantially more information must be provided about the relationships between these companies in order to determine the accuracy of such statements.

Contrary to the Applicants' assertion, IDT has not claimed that ST Telemedia and SingTel "are essentially one and the same."[43] IDT has, however, pointed out that the present record is not sufficient to support a conclusive decision about their relationship. As has been noted, until very recently the Applicants appeared to have little knowledge about their new proposed owners;[44] consequently the Commission cannot simply accept at face value the Applicants' assertions about the Singapore market, particularly in light of the complex government-industry relationships and the common control by Temasek and the Government of the TLCs. For the same reason, the Applicants' list of "factors that would obviate any resulting risk to competition"[45] from government control can be given little credence. For example, given Temasek's influence over its TLCs, the fact that Temasek ultimately controls both SingTel and ST Telemedia (and ST Telemedia subsidiary StarHub) greatly weakens claims that those entities are competitors and that each company "establishes and pursues its business plans and objectives independently."[46]

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[42] Applicants' Response at 9-10.

[43] *Id.* at 11.

[44] *See, e.g.*, ACN Objections at 6.

[45] Applicants' Response at 12-13.

[46] *Id.* at 9.

With respect to horizontal markets, the Applicants claim that GX "no longer owns any cable systems or cable capacity in the Asia-Pacific region or that connect the U.S. and Asia."[47] The Applicants also claim that, of the five Pacific-region cable systems identified in the IDT Petition, four have not yet been built.[48] However, the New Transaction proposes to transfer control of the Commission authorizations for these four systems (Asia Direct Cable, Guam-Hawaii Cable, Hawaii Express Cable, and Orient Express Cable) to New GX.[49] The acquisition of control of these authorizations by New GX's proposed parent, ST Telemedia, will facilitate horizontal consolidation. The fact that these systems are not yet operational does not alter the fact that control of a critical mass of undersea cable system capacity in the Pacific region will be transferred. For the purposes of the Commission's analysis, the acquisition of authority to build these systems is no different than the acquisition of operational systems. Consequently, any claim that the New Transaction will not result in consolidation of existing submarine cable capacity in the Asia-Pacific region or on any U.S.-Asia route is disingenuous. The Commission cannot credit the Applicants' attempt to minimize the competitive importance of these systems while simultaneously seeking to acquire authority to build them.

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[47] *Id.*

[48] *Id.*

[49] The Licensee of these four systems is GC Pacific Landing Corporation, a subsidiary of GX. *See* File No. SCL-T/C-20020822-0074, FCC License Numbers SCL-ASG-19981204-00029 and SCL-T/C-19981204-00030. *See also* Global Crossing Ltd. and GC Acquisition Limited Seek FCC Consent to Transfer Control of Subsidiaries Holding Submarine Cable Landing Licenses, Wireless Licenses and Section 214 Authorizations, and Request Declaratory Ruling Allowing Indirect Foreign Ownership, *Public Notice*, IB Docket No. 02-286, DA 02-2299 (2002) at 4.

C. Close Scrutiny of the New Transaction Is Not Inconsistent with U.S. Trade Commitments

The Applicants and OFII seek to divert the Commission from its public interest analysis by claiming that U.S. trade policy will be undermined by the performance of that analysis. However, neither the WTO nor any international agreement or U.S. trade policy – including the U.S.-Singapore Free Trade Agreement ("USSFTA") – abrogates or diminishes in any way the Communications Act or the Commission's statutory obligation to review transactions involving foreign ownership and control.

Contrary to the claims of OII and the Applicants,[50] it is not the case that denial of the New Transaction would undermine U.S. commitments under the World Trade Organization ("WTO") Agreement on Basic Telecommunications Services ("WTO Telecom Agreement") under the General Agreement on Trade in Services ("GATS").[51] All WTO Members are required to extend to services and service suppliers of all other WTO Members "Most Favored Nation" ("MFN") treatment,[52] that is, they must treat all other WTO Members similarly. All WTO Members also must extend to other WTO Members "National Treatment," that is, they must treat companies from other WTO Members as they treat their own companies.[53] The GATS also

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[50] *See* OII Comments at 2; Applicants' Response at 6.

[51] The General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994).

[52] *See* GATS Article II. The MFN obligation and other GATS provisions apply to "measures" that affect trade in services. "Measures" are essentially actions taken by a national or subnational government. *See* GATS Article I para. 3(a).

[53] *See* GATS Article XVII. A WTO Member may expressly limit National Treatment by stating in its schedule of commitments the ways in which it intends to treat non-national companies differently from national companies. MFN treatment, in contrast, cannot be limited in this way.

requires measures related to domestic regulation to be reasonable, objective, impartial, and transparent.[54]

These commitments do not require the Commission to approve a transfer of control to a foreign government-owned entity that enjoys substantial advantages in its home markets. Such an approval would violate the Communications Act, disserve the public interest, and harm competition, while assisting only a foreign competitor.[55] Moreover, such an approval likely would result in disparate National Treatment among WTO Members, because no U.S. company enjoys the same advantages as a foreign government-owned entity. In this regard, the Commission's public interest analysis must take into account the USTR's recent offer to the WTO to commit the U.S. to "maintain an absence of national government ownership in public telecommunications service suppliers."[56] This offer should be of concern to all U.S. carriers, not because of its substance, with which IDT agrees, but because no multilateral offer or commitment exists from Singapore, resulting in an uneven playing field that is exemplified by the New Transaction. In light of common ownership and control of TLCs, the Commission also must take into account U.S. trade officials' concerns about the high rates SingTel charges its competitors.[57]

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[54] *See* GATS Articles III, VI.

[55] OII refers (OII Comments at 3) to a U.S. trade negotiator's statements promising "no limits" on foreign ownership. Those statements have no legal force or effect. The Commission, and not the USTR, is charged with interpreting the Communications Act's foreign ownership limits and conducting a public interest analysis.

[56] *See* http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf, at 47.

[57] *See, e.g.,* "SingTel Hits Back at Rivals Over Charges for Data Lines," Wall Street Journal Online, June 30, 2003.

Furthermore, the Singapore Government categorically has not "stated its intention to privatize ST Telemedia."[58] Rather, it explicitly, and carefully, stated in a side letter to the USSFTA that it is "*committed* to the privatization of SingTel and ST Telemedia ... *subject to the state of capital markets and the interests of other shareholders*."[59] Referring to its ongoing "privatization process" for SingTel – now in its tenth year and with the Government still firmly in control – the Government promised to "establish a plan to divest its majority share" in ST Telemedia.[60] For several reasons, the Commission should not rely on these statements. First, the side letter has no legal effect and is not enforceable in any venue, because the Singapore Government plainly made no commitment at all. Second, the divestiture is merely theoretical and cannot replace the present reality of Government dominance of the Singapore telecommunications market. Finally, given the realities of "Singapore, Inc." and the intertwined structure of the GLCs and TLCs, privatization simply is unlikely to occur anytime soon, if ever. As one close observer of Singapore's government-linked companies has noted, Temasek's Chairman has "made it clear that the government will not withdraw from businesses it deems to have a 'strategic' interest in."[61]

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[58] Applicants' Response at 13.

[59] Letter from the Singapore Minister for Trade and Industry to the Honorable Robert B. Zoellick, United States Trade Representative, May 6, 2003 (emphasis added). *See* Attachment 1 hereto. *See also* ACN Objections at n.12 (noting that "Applicants do not offer the divestiture by the Singapore government as a condition for approval of the transfer, leading one to question the timing and commitment for such a transfer.").

[60] *Id*.

[61] *See* Attachment 5 ("Why it May Be Difficult for the Government to Withdraw from Business").

D. The Applicants Must Not Be Allowed to Shield Relevant Information Behind the CFIUS Process

IDT concurs with the commenters who argue that parties to this proceeding should have greater access to information supplied by the Applicants that address national security matters.[62] The Applicants "have been working closely with the Commission, CFIUS, and CFIUS's constituent agencies"[63] on such matters, and interested parties should be informed about them, even if under a confidentiality order.[64] Greater transparency with respect to this aspect of the Commission's public interest analysis is not inconsistent with CFIUS rules.[65]

III. PRIOR CASES APPROVING FOREIGN OWNERSHIP ARE NOT DETERMINATIVE

The Applicants continue to argue that their proposed foreign ownership should be allowed under the permissive standard of Section 310(b)(4) of the Act, and is not prohibited by Section 310(a). The cases relied upon by the Applicants, however, should not bind the Commission here. Although the Applicants claim that the Commission has "repeatedly"

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[62] *See* XO Comments at 3-4.

[63] Applicants' Response at 14.

[64] It appears that by late April GX's Board was aware that CFIUS approval likely would not be obtained if Hutchison Telecommunications Limited ("Hutchison") remained as an investor. *See* Bench Decision on Motion for Authority to Amend Purchase Agreement, for Authority to Grant Releases, and for Extension of Exclusivity, Case No. 02-40188 (REG) (Bnkr. Ct. SDNY), July 1, 2003, at 14. This is significant information related to pending applications that interested parties should be kept apprised of, particularly because the possible future investment by Hutchison in New GX remains an issue, see Third Amendment at n.6 (requesting approval to accept additional foreign ownership up to 25%, including, presumably, from Hutchison), and because of questions about commercial relationships between Hutchison and Singapore GLCs, including Temasek. *See, e.g.,* COMMAXXESS Response at 5.

[65] *See* 31 C.F.R. § 800.702(a), which expressly allows public disclosure of materials filed with CFIUS when relevant to an administrative proceeding.

approved transactions such as the one under review,[66] that simply is not the case. In fact, the Commission never has approved the transfer of control of Commission licenses and authorizations to a foreign-government controlled entity to the extent that has been proposed in the subject Applications.[67]

In *Lockheed/Telenor*,[68] for example, although the Commission approved the assignment of licenses to an entity whose indirect parent was a public Norwegian company, Telenor ASA, owned 79% by the Kingdom of Norway, the Commission found that privatization of the Kingdom's ownership was well underway, and the Norwegian Parliament already had authorized a reduction in ownership to 34%.[69] The Commission also found that the government provided no subsidies or preferential access to capital, and, further, that significant European Union safeguards were in place that prohibited "aid by a 'member state or through state resources in any form whatsoever which distorts or threatens to distort competition' by favoring certain companies."[70] Perhaps most significant was the Commission's finding that Telenor ASA's corporate structure was "comprised entirely of private citizens, designed to insulate Telenor ASA's officers from potential government influence," and specifically "designed to preclude the Ministry of Trade and Industry, representing the government's shareholder rights, from

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[66] Applicants' Response at 5.

[67] Moreover, to the extent the *Foreign Participation Order* found that unlimited indirect ownership by a foreign government is consistent with WTO commitments, such a finding never has undergone judicial scrutiny, nor has it been approved by Congress.

[68] *Lockheed Martin Global Telecommunications, et al., Assignor and Telenor Satellite Mobile Services, Inc., et al., Assignee, Order and Authorization*, 16 FCC Rcd 22897 (2001) ("*Lockheed/Telenor*").

[69] *Id.* at n.80.

[70] *Id.* at ¶31.

interfering with the daily management, business activity, and strategic direction of Telenor ASA."[71]

In *VoiceStream/DT*,[72] the Commission found that post-merger, the German government would own a 45% equity interest; the Commission assumed that it also would hold *de facto* control. The Commission reviewed a substantial record on the issue of preferential access to capital and government subsidies before concluding that the relationships would not affect competition, and also relied on the European Union's prohibition on government aid.[73]

In *GE/SES*,[74] the Commission determined that total foreign government ownership (to be held by the State of Luxembourg and the German government) would not amount to controlling interests (29.27% equity and 43.43% voting).[75] An important factor in the Commission's public interest analysis again was that the foreign governments were bound by the European Union's prohibition on government aid.[76] In *Vodaphone/Globalstar*,[77] the Commission approved a transfer of control to a large, diverse group of domestic and foreign shareholders, the largest of which was a publicly traded Bermuda company with its principal place of business in, and its corporate governance dominated by nationals of, the U.S. Many of its foreign owners were

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[71] *Id.* at n.99.

[72] *VoiceStream Wireless Corp., et al., Transferors, and Deutsche Telekom AG, Transferee, Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001) ("*VoiceStream/DT*").

[73] *Id*. at ¶¶ 60-65.

[74] *General Electric Capital Corp., Transferors and SES Global, S.A., Transferees, Order and Authorization*, 2001 FCC LEXIS 5544 (IB/WTB 2001), *Supplemental Order*, 16 FCC Rcd 18878 (IB/WTB 2001) ("*GE/SES*").

[75] *Id*. at ¶¶ 26-29.

[76] *Id.* at ¶36.

[77] *Vodaphone Americas Asia, Inc., Transferor and Globalstar Corp., Transferee, Order and Authorization*, 17 FCC Rcd 12849 (IB 2002) ("*Vodaphone/Globalstar*").

limited partners with small equity and voting interests, and none were found to be affiliates of a foreign government.[78] *XO Communications*[79] also did not involve foreign government ownership; there, the Commission approved the acquisition of non-controlling interests by Telmex (a Mexican corporation), an Irish citizen, and limited partners.[80]

In all of these cases, the record which the Commission reviewed and relied upon contained substantially more detailed information about the proposed ownership structure of the transferee or assignee and its owners than is present in this docket. Moreover, the Commission's findings in these cases were based on facts – such as the structural separation of Telenor ASA management from the Kingdom of Norway's shareholder rights in *Lockheed/Telenor* – that simply are unlikely to be in the record.

As IDT has shown, past Commission decisions do not provide a solid basis on which to confirm the distinction between Sections 310(a) and 310(b).[81] IDT urges the Commission to revisit its conclusions in *VoiceStream/DT* and *Lockheed/Telenor*, and reiterates the need for Congressional guidance on this issue. In any event, based on the totality of the facts and circumstances, the Commission should determine that the public interest is not served by the proposed foreign government control.

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[78] *See id*. at ¶¶ 47-50.

[79] *XO Communications, Inc., Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 19212 (IB/WTB/WCB 2002).

[80] *See id*. at ¶¶ 23-27.

[81] *See* IDT Petition at 10-15; *VoiceStream/DT* at ¶44.

IV. CONCLUSION

Merely saying it does not make it so. Repeatedly, in their Third Amendment, their Fourth Amendment, and their Response, the Applicants invite the Commission to take on faith much of the relevant information the Commission will need to adequately assess whether the New Transaction serves the public interest. The Commission should decline the invitation. Instead, it should either require the Applicants to supplement the record as suggested herein and in the earlier filed IDT Petition, or designate the pending Applications for hearing in order to test the veracity of Applicants' allegations of fact. In either event, the Commission should stop its internal processing clock until there is a record sufficient for it to be started again. Only by proceeding in this manner will the Commission be able to fully discharge its statutory duties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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