Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Commission Consideration of	)	
Applications under the Cable	)	IB Docket No. 00-106
Landing License Act	)	

REPORT AND ORDER

Adopted: November 8, 2001 **Released:** December 14, 2001

By the Commission:

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I. INTRODUCTION

1. In this Report and Order, we adopt streamlining procedures for processing applications for submarine cable landing licenses. The measures we adopt are designed to facilitate the expansion of capacity and facilities-based competition in the submarine cable market. The measures also are designed to enable submarine cable applicants and licensees to respond to the demands of the market with minimal regulatory oversight and delay, saving time and resources for both industry and government, while preserving the Commission's ability to guard against anti-competitive behavior. As a result, the costs of deploying submarine cables should decrease to the ultimate benefit of U.S. consumers.

2. The approach we adopt tracks the streamlining procedures and competitive safeguards the Commission has adopted for section 214 authorizations of international telecommunications services.[1] Applications qualifying for streamlining – including an application for a substantial (i.e., non-pro forma) assignment or transfer of control of an interest in a cable landing license – will be acted upon in a 45-day period, a significant improvement over prior processing times. Further, we anticipate that most applications can be streamlined. The new procedures also provide for grant of such applications by public notice. We also adopt a rule, for both streamlined and non-streamlined applications, providing that entities that do not own or control a landing station in the United States or a five percent or greater interest in the proposed cable system generally will not be required to become licensees. Additionally, we agree with the suggestion of many commenters that the Commission should allow for post-transaction notification of pro forma assignments and transfers of control of interests in cable landing licenses, similar to the existing process for pro forma assignments and transfers of control of section 214 authorizations.[2] Together, these provisions should ease significantly the processes for obtaining cable landing licenses and for proceeding with pro forma transactions involving assignment or transfer of an interest in a cable landing license.

3. The streamlining and bright-line procedures we adopt in this Report and Order are less complex than the procedures proposed in the Notice of Proposed Rulemaking (NPRM) in this proceeding.[3] At the same time, the new rules will meet the objectives set out in the NPRM. In adopting the NPRM, the Commission sought to achieve three key objectives: (1) institute an expedited licensing process to speed the deployment of cable capacity to the market; (2) ensure careful Commission review of certain applications to guard against anti-competitive behavior; and

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1 *See Streamlining the International Section 214 Authorization Process and Tariff Requirements,* IB Docket No. 95-118, Report and Order, 11 FCC Rcd 12884 (1996) (*International 214 Streamlining Order*); *1998 Biennial Regulatory Review – Review of International Common Carrier Regulations,* IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 (1999) (*1998 International Biennial Review Order*); *In the Matter of 2000 Biennial Regulatory Review,* IB Docket No. 00-231, Notice of Proposed Rulemaking, 2000 WL 1752752 (Nov. 30, 2000) (*2000 International Biennial Review NPRM*).

2 *See* 47 C.F.R. § 63.24. *See also, infra,* section III.E.

3 *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 (2000) (*Submarine Cable NPRM*).

(3) adopt a pro-competitive model that could be used around the world.[4] We recognize the importance of reducing regulatory costs, providing regulatory certainty, and facilitating the planning of financial transactions. Today's adopted procedures should allow participants in the submarine cable market to make business decisions more readily. We note that the rules we adopt here, like all of our rules, are subject to biennial review.[5] In this regard, we are open to revising these rules should experience suggest further improvements that it would be in the public interest to adopt.

4. We reiterate here, as the Commission emphasized in the NPRM, that the streamlining process is optional. Although we encourage parties to use this process, we note that any party wishing to file an application for consideration under the traditional process is free to do so.

II. BACKGROUND

5. The Commission's authority to grant, withhold, or condition cable landing licenses derives from the Cable Landing License Act of 1921[6] and Executive Order No. 10530.[7] Section 34 of the Cable Landing License Act states that no person shall land or operate in the United States "any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States."[8] Section 35 of the Cable Landing License Act provides that:

> the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.[9]

Executive Order No. 10530 delegates to the Commission the President's authority under the

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4 *Submarine Cable NPRM*, 15 FCC Rcd at 20790, para. 3.

5 *See* section 11(a) of the Communications Act of 1934, 47 U.S.C. § 161(a), and section 202(h) of the Telecommunications Act of 1996, Telecommunications Act of 1996, Pub. Law No. 104-104, § 202, 110 Stat. 56 (1996).

6 Pub. Law No. 8, 67th Congress, 42 Stat. 8 (1921); 47 U.S.C. §§ 34-39.

7 Exec. Ord. No. 10530 § 5(a) (May 10, 1954), reprinted as amended in 3 U.S.C. § 301.

8 47 U.S.C. § 34. Section 34 states further that "[t]he conditions of sections 34 to 39 of this title shall not apply to cables, all of which, including both terminals, lie wholly within the continental United States." *Id.*

9 47 U.S.C. § 35.

Cable Landing License Act, with the proviso that "no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary."[10] Since 1954, the Commission has exercised the authority granted by the Cable Landing License Act and Executive Order No. 10530 to grant submarine cable landing licenses.[11]

6. In its July 1999 *Japan-U.S. Order*, the Commission reviewed and granted an application to land and operate a non-common carrier submarine cable between the United States and Japan.[12] The application had drawn allegations that the structure of the cable was anti-competitive due, in part, to concerns about the ability of non-landing parties both to collocate equipment at the Japanese cable landing stations and to interconnect and provide backhaul between these landing stations and the public telecommunications network.[13] The Commission found, given subsequent amendments to the cable's construction and maintenance agreement (C&MA) and the need for more capacity on the U.S.-Japan route, that the benefits of licensing and deploying the cable as scheduled outweighed the possible risk of anti-competitive effects.[14] At the same time, the Commission stated that it planned to commence a broader proceeding to examine how the Commission's policies regarding licensing submarine cables might best promote competition and benefit consumers.[15] In November 1999, the International Bureau held a Public

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[10] Exec. Ord. No. 10530 § 5(a).

[11] *See, e.g., Tel-Optik Limited, Application for a License to Land and Operate in the United States a Submarine Cable Extending Between the United States and the United Kingdom*, Memorandum Opinion and Order, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, 100 F.C.C. 2d 1033, 1043 at para. 21 (1985) (*Tel-Optik Order*).

[12] *AT&T Corp. et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, 14 FCC Rcd 13066 (1999) (*Japan-U.S. Order*).

[13] *Id.* at 13070-73, paras. 9-18. In reviewing the application, the Commission stated that Global Crossing had raised "serious issues about the control of necessary inputs by entities with incentives to raise the costs of other carriers and deter construction of additional capacity." *Id.* at 13076, para. 25; *see also Submarine Cable NPRM*, 15 FCC Rcd at 20796, para. 14. The result of this control of inputs, according to Global Crossing, was that other carriers perceive a need to use capacity on consortium cables as opposed to alternatively owned and structured cables. *Id.*

[14] *Japan-U.S. Order*, 14 FCC Rcd at 13079-80, paras. 36, 39. In particular, the Commission determined that the C&MA amendments allowing any party to collocate to provide competitive backhaul, and reducing the number of votes needed to expand the cable's capacity, would reduce certain potential competitive harms arising from the cable's structure. *See Submarine Cable NPRM*, 15 FCC Rcd at 20796-97, para. 15.

[15] *Japan-U.S.Order*, 14 FCC Rcd at 13079-80, paras. 36, 39. The Commission additionally noted its ability to impose common carrier or common-carrier-like obligations on the operations of submarine cable systems if the public interest so requires, and to classify facilities as common carrier facilities subject to Title II of the Communications Act if the public interest requires the facilities to be offered to the public indifferently, and stated that the broader proceeding might result in the application of new rules to existing cable systems. *Id.* at 13080-81, para. 40.

Forum to solicit views about how the Commission might reform its regulation of the submarine cable landing licensing process to further promote competition, and held numerous individual meetings with market participants for the same purpose.[16]

7. On June 22, 2000, the Commission released the NPRM in this proceeding, seeking comments on how it could streamline its procedures for approval of submarine cable landing license applications while also providing for careful review of certain applications to guard against anti-competitive behavior. The NPRM proposed three options, any one of which would qualify an applicant for streamlined review. The first streamlining option required an applicant to demonstrate that the route on which the proposed cable would operate was competitive. Under this option, a route would be considered "competitive" when at least three independently controlled cables, including the proposed cable, served the route.[17] The second streamlining option required the applicant to demonstrate sufficient independence of control of the proposed cable system from control of existing capacity on the route.[18] The third streamlining option required an applicant to demonstrate the existence of pro-competitive arrangements providing for collocation of equipment at landing stations and for competitive backhaul (that is, transit between cable landing stations and the public network) as well as for wet link capacity upgrades and use of capacity.[19]

8. Comments filed in the record reflect concerns that the three 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 process for granting cable landing licenses to bring new cables on line. In particular, commenters express concern that the three options might be difficult to administer and thus might result in substantial delays in placing cable landing license applications on public notice.[20]

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16 *See International Bureau To Hold Public Forum on Submarine Cable Landing Licenses*, Public Notice, 15 FCC Rcd 21792 (*Forum Public Notice*). At the Public Forum and individual meetings, staff solicited industry views on questions such as: (1) how the Commission might streamline or simplify the submarine cable landing licensing process; (2) whether conditions routinely imposed on submarine cable licenses remain necessary; (3) what sort of ownership should require an entity to be a licensee on a cable landing license; (4) whether the Commission should maintain the common carrier/non-common carrier distinction for submarine cable landing license categories; (5) whether certain submarine cable ownership structures raise competitive problems and how the Commission might address such problems; (6) how the Commission might address issues of competitive access to backhaul; (7) the circumstances, if any, under which price differentials, especially volume discounts, should be restricted; and (8) whether there are other competitive issues the Commission should address. *Forum Public Notice*, 15 FCC Rcd at 21792-93.

17 *Submarine Cable NPRM*, 15 FCC Rcd at 20800-03, paras. 25-32.

18 *Id.* at 20803-05, paras. 33-37.

19 *Id.* at 20805-08, paras. 38-50.

20 *See, e.g.*, TyCom Comments at 5 (stating that, given the complexity of the three options, presumably it would take substantially more time to make a determination of eligibility for streamlining than it takes for section 214 applications); FLAG Comments at 4 (stating that the criteria for streamlining should entail simple, straightforward showings using data that can be readily gathered by applicants); Level 3 Comments at 2 (stating (continued….)

9. Commenters suggest alternative proposals more closely modeled on the streamlining process for international section 214 authorizations.[21] TyCom, for example, suggests that the Commission adopt a "simplified streamlining approach that would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market where the cable lands."[22] According to TyCom, its alternative would respond to the key concern expressed in the NPRM: the potential use of market power in a destination market in conjunction with control over capacity, interconnection and backhaul to threaten competition in the provision of international services.[23] Viatel suggests that the Commission automatically streamline an application and grant the licensee non-common carrier status if no owner of the proposed cable is dominant in a region or on a route to be served by the cable. If an owner is dominant, Viatel proposes streamlining if the applicants agree to abide by a set of conditions including those set out in the NPRM's third option and additional safeguards from the *Japan-U.S. Order*.[24] AT&T suggests that the Commission find submarine cable landing

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that the three options would require applicants to submit highly complex and route-specific information that would require similarly complex and individual analyses by the Commission); Cable & Wireless Comments at 16-18 (stating that the proposals would increase regulatory uncertainty by requiring complex and burdensome competitive demonstrations); Global Crossing Comments at 12-13 (stating that the proposed tests do not lend themselves to streamlined processing).

[21] *See, e.g.*, Viatel Comments at 4 (stating that, like section 214 streamlining, streamlining for cable landing licenses should apply to applications to serve unaffiliated routes and routes where the Commission already has found affiliated foreign carriers to lack market power, as well as to applications that meet other equally straightforward conditions); WorldCom Comments at 9 (stating that the Commission should adopt a streamlining approach consistent with section 214 rules); Verizon Reply Comments at 1 (stating that the Commission should be guided by the section 214 streamlining process, which has worked well by providing clarity and regulatory certainty yet assuring that appropriate policies and protections are maintained).

[22] TyCom Comments at 3-4; TyCom Reply Comments at 5. *See also* Letter from Kent D. Bressie, Counsel for TyCom Networks (US) Inc., and Mary Ann Perrone, Assistant General Counsel, TyCom Networks (US) Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 21, 2001) (TyCom Letter) (stating that the Commission should: (1) adopt a streamlining process based on whether a controlling owner of a cable has market power in a destination market; (2) adopt, at most, a "no special concessions" rule to be applied in unusual circumstances where non-streamlined applications raise serious competitive concerns; (3) refrain from imposing extensive licensing conditions as a form of "back-door" common carrier regulation; and (4) adopt deadlines for issuing cable landing licenses modeled after the rule for processing international section 214 applications, *see* 47 C.F.R. § 63.12).

[23] TyCom Comments at 3-4.

[24] The conditions for streamlined treatment proposed by Viatel include: (1) the applicant must provide sufficient space at all landing stations in the United States, and at each foreign landing station on the route where applicants plan to land the proposed cable, to any other owner for the purpose of collocating equipment to provide backhaul; (2) all owners may use such space for the provision by them of backhaul to others; (3) no restrictions on the ability of any owner to subcontract the provision of backhaul or on resale or transfer of capacity, ownership shares or leasing rights on the cable; (4) space, connection facilities and necessary services must be provided promptly and without discrimination; (5) the capacity of the cable may be upgraded either by a 51 percent vote of the owners or by any group of owners voting to fully fund the cost of the upgrade; and (6) smaller firms will be allowed to combine their capacity requirements for the purpose of obtaining volume discounts. Viatel Comments at 10-11, Viatel Reply Comments at 4.

licenses to be presumptively competitive and eligible for streamlined processing, but not streamline those few applications that Commission staff believes give rise to extraordinary competitive issues requiring public comment.[25] As an alternative, AT&T suggests streamlined processing of all applications: (1) involving cables controlled by non-dominant carriers; (2) filed by carriers that have facilities-based international section 214 authorizations; or (3) proposing to serve World Trade Organization (WTO) Member countries.[26]

10. WorldCom suggests that the Commission issue a list of presumptively competitive routes, which would include routes with multiple cables and competitive landing and backhaul facilities on the foreign end.[27] In order to qualify for streamlining if foreign landing points were not on the list of presumptively competitive routes, applicants would be required to: (1) certify that neither the cable station(s) at the foreign end of the proposed cable, nor the backhaul, are 50 percent or more controlled by a carrier with market power in the relevant foreign market, relying on the Commission's existing list of foreign carriers with market power;[28] or (2) demonstrate that the proposed cable structure contains pro-competitive conditions, including collocation, backhaul, and capacity upgrade rights, consistent with the NPRM's third option.[29]

11. Global Crossing proposes that the Commission require an applicant to demonstrate that the cable's U.S.-end landing parties do not have a combined share of more than 35 percent of the active half circuits on the U.S. end, with an exemption for "thin routes." Global Crossing alleges that, by controlling key input markets, dominant carriers on a consortia cable can slow the development of competition in international telecommunications services.[30]

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[25] AT&T Reply Comments at 21. *See also* Cable & Wireless Comments at 9-17; Sprint Comments at 19.

[26] AT&T Reply Comments at 22.

[27] *See* WorldCom Comments at 10-11, WorldCom Reply Comments at 4. *See also* Caribbean Crossings Reply Comments at 1 (supporting issuance of a list of presumptively competitive routes, but for both WTO and non-WTO countries); Level 3 Reply Comments at 1-2, 4-6 (suggesting that WTO basic telecom commitments by the destination country should qualify the route as competitive); FLAG Telecom Comments at 4-6; Global Crossing Reply Comments at 9-10 (agreeing with WorldCom's suggestion for a list of presumptively competitive routes, and also suggesting addition of routes based on previous decisions regarding non-streamlined applications, declaratory rulings, and, as suggested by FLAG Telecom, actions periodically taken by the Commission on its own motion to identify competitive routes).

[28] WorldCom Comments at 11-12; Level 3 Reply Comments at 2 (agreeing with WorldCom proposal, with certain modifications).

[29] WorldCom Comments at 12-13 (agreeing with the NPRM proposals requiring that applicants certify to: sufficient collocation at cable landing stations; provision of direct access to their capacity ownership in the system; no restriction on who can provide backhaul; capacity upgrades with a 51% vote; and no unreasonable restrictions on resale, lease or transfer of capacity, or on any other transfer of an owner's rights in the cable, to third parties; as well as that applicants demonstrate that a proposed cable does not contain restrictions on use of wholly owned circuits by owners or third parties); Level 3 Reply Comments at 2.

[30] Global Crossing Comments at 9. Other commenters do not support wholesale adoption of Global Crossing's proposal. *See, e.g.*, AT&T Comments at 31; AT&T Reply Comments at 24-38; FLAG Telecom (continued….)

III. DISCUSSION

A. Eligibility for Streamlined Processing

12. Based on a thorough consideration of the concerns raised by commenters, we adopt a streamlining process modeled after our existing streamlining procedure for international section 214 authorizations and on various comments suggested in the record. Noting comments that the NPRM's three streamlining options were too complex to accomplish the Commission's goals of simplifying and streamlining the procedures for granting cable landing licenses, we do not adopt these specific options. Rather, we adopt an eligibility test under which the vast majority of applications will be streamlined: An application without any affiliation with a carrier that possesses market power in the cable's destination markets will qualify for streamlining, and an application having an affiliation with a carrier that possesses market power in a WTO Member destination market will qualify for streamlining with a certification from each applicant with such foreign carrier affiliation that it will accept standard competitive safeguards. For purposes of determining whether an applicant with a foreign carrier affiliation must agree to accept these competitive safeguards in order to qualify for streamlined processing, we adopt the same bright-line categories that we use in processing international section 214 applications filed by foreign carriers or their affiliates.[31] An applicant that is, or is affiliated with, a carrier that has market power in a cable's non-WTO Member destination market will not be eligible for streamlining.[32]

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Comments at 12-13; Sprint Comments at 13; Sprint Reply Comments at 3-4; WorldCom Reply Comments at 6-12; Viatel Reply Comments at 9-11. For example, AT&T contends that Global Crossing's proposal might lead to the construction of inefficiently sized cables, and Level 3, FLAG Telecom and WorldCom all assert that Global Crossing's proposed 35 percent rule would discourage investment and construction of new cables. AT&T Reply Comments at 24-25; Level 3 Comments at 8-9; FLAG Telecom Comments at 12-13; WorldCom Reply Comments at 9-10.

[31] *See* 47 C.F.R. § 63.12(c)(i)-(iii) (the streamlined processing procedures shall not apply where the applicant is affiliated with a foreign carrier in a destination market, unless the applicant clearly demonstrates in its application at least one of the following: (i) the Commission has previously determined that the affiliated foreign carrier lacks market power in that destination market; (ii) the applicant qualifies for a presumption of non-dominance under § 63.10(a)(3); and (iii) the affiliated foreign carrier owns no facilities, or only mobile wireless 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 bare capacity in international or domestic telecommunications facilities (excluding switches)). *See also infra* section III.B.

[32] This is consistent with the Commission's decision in the *Foreign Participation Order* to require applicants affiliated with foreign carriers that possess market power in a non-WTO destination market to meet the effective competitive opportunities test as a prerequisite to grant of an international section 214 authorization or cable landing license. *See 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, 23944-46, paras. 124-130 (1997), Order on Reconsideration, 15 FCC Rcd 18158 (2000) (*Foreign Participation Order*). As the *Foreign Participation Order* stated, WTO Members are committed to the progressive liberalization of trade and thus carriers from WTO Member countries present, as a group, less of a concern with anti-competitive conduct. By contrast, the markets of non-WTO Members, in almost all cases, are not liberalized, so they are far more likely to present anti-competitive concerns. *Foreign Participation Order*, 12 FCC Rcd at 23944, paras. 126-127.

13. To qualify for streamlining, a cable landing license application, including an application to assign or transfer control of an interest in a license, must contain a certification by each applicant stating whether it is, or has an affiliation with, a foreign carrier in any of the cable's destination markets, and, if so, identifying each such market.[33] We apply the 25 percent ownership affiliation standard that we currently apply to international section 214 and cable landing license applications.[34] If no applicant is a foreign carrier, and is not affiliated with a foreign carrier, in any of the cable's destination markets, the application will be eligible for streamlining. If any applicant is, or is affiliated with, such a foreign carrier, the application also must contain, for each named foreign carrier, either: (1) a demonstration, pursuant to section 63.12(c)(1)(i)-(iii), that the foreign carrier lacks market power;[35] or (2) a certification that the destination market where the foreign carrier possesses market power is a WTO Member country and the applicant with which the foreign carrier is affiliated agrees to abide by the standard competitive safeguards we adopt and codify in this Report and Order.[36] Although we conclude that these categories of applications generally should be eligible for streamlined processing, we cannot rule out the possibility that a particular application that is otherwise eligible for streamlining may appear to pose competitive risks requiring the imposition of safeguards in addition to the standard competitive safeguards that we adopt here.[37] We therefore delegate to the International Bureau the authority to identify those particular applications that may warrant additional public comment and Commission scrutiny under our procedures for non-streamlined applications.

14. This process mirrors the section 214 streamlining procedures. The *Foreign Participation Order* streamlined the processing of applications filed by any entity that qualifies for treatment as a "non-dominant" U.S. international carrier or that is affiliated with a foreign carrier in a WTO Member country and certifies it will comply with the Commission's dominant carrier

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33 Applicants for cable landing licenses currently submit this type of information. *See* 47 C.F.R. § 1.767(a)(8), incorporating by reference the information and certification requirements of 47 C.F.R. § 63.18(h)-(k).

34 *See* 47 C.F.R. § 63.09(e); *see also* 47 C.F.R. § 1.767(a)(8) (incorporating by reference the definition of "affiliated" contained in 47 C.F.R. § 63.09).

35 *See* 47 C.F.R. § 63.12(c)(1)(i)-(iii).

36 *See infra* section III.B. *See also* Appendix B, section 1.767(k). We also note that an applicant that initially agrees to accept and abide by the reporting requirements may subsequently file with the Commission a petition to remove the conditions from its license on the basis that it does not possess market power in any relevant input market. *Cf. Foreign Participation Order*, 12 FCC Rcd at 23961, para. 162. We would endeavor to act on any such petition expeditiously.

37 *Cf. Foreign Participation Order*, 12 FCC Rcd at 23913-14, para. 51 (noting that, in an exceptional case, entry into the U.S. market by an international section 214 applicant affiliated with a carrier that possesses market power in a WTO Member country may pose competitive risks requiring the imposition of safeguards in addition to the Commission's standard dominant carrier safeguards). We also note that an application to assign or transfer control of an interest in a cable may raise competitive or other issues that warrant additional public comment and Commission scrutiny under our non-streamlined procedures, particularly where multiple Commission licenses and authorizations are involved.

safeguards.[38] Section 63.12(c)(1) of the Commission rules sets forth this streamlining test.[39] Section 63.12(c)(1) expressly provides that streamlining does not apply where the applicant is, or is affiliated with, a foreign carrier in a destination market, unless the applicant clearly demonstrates in its application that its foreign affiliate lacks market power in that destination market or that the destination market is a WTO Member country and the applicant agrees to be classified as a dominant carrier to the affiliated destination country.

15. The eligibility test we adopt here is most similar to the alternatives proposed by TyCom and Viatel. Although TyCom's and Viatel's suggestions are not identical, the basic premise is the same: namely, the main consideration is whether a cable applicant is, or is affiliated with, a carrier with market power in any of the cable's destination markets. For cables where an applicant is, or is affiliated with, a foreign market-power carrier, we will impose competitive safeguards on that applicant. For cables with no such foreign market-power affiliations, we will streamline the processing of the application without imposing competitive safeguards, but rather only the routine conditions that apply to all cable landing licenses.[40]

16. This test, in focusing on affiliations with foreign carriers that possess market power, puts similarly situated applicants on equal footing. The test does not favor any particular type of cable structure over another and treats private and consortium cables alike. Affiliation with a market-power carrier on a route remains a constant, predictable factor, regardless of the way a company might choose, for business or other reasons, to structure its cable. We note there is wide support in the record for adoption of a policy that takes into account whether applicants have affiliations with carriers that possess market power in a destination market.[41]

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[38] In the *Foreign Participation Order*, the Commission concluded that it could rely on the WTO Members' commitments to open their markets to competition and to promote the introduction of pro-competitive regulatory principles, along with improved competitive safeguards, to adopt an open entry standard in the United States for applicants from WTO Member countries. *Foreign Participation Order*, 12 FCC Rcd at 23904, 23913, 23933-35, paras. 29, 50, 93-96. Under section 63.10(a) of the rules, a U.S.-authorized carrier is classified as dominant on a particular route if it is affiliated with a foreign carrier that possesses market power in a relevant input on the foreign end of that route, including local access facilities or cable landing station access or backhaul facilities. *Id.* at 23991, para. 221; *see also id.* at 23954, para. 147.

[39] *See* 47 C.F.R. § 63.12(c)(1)(i)-(vi). *See also Foreign Participation Order*, 12 FCC Rcd at 23900, 23961-62, 24032, paras. 21, 163 n.318, 322; *1998 International Biennial Review Order*, 14 FCC Rcd at 4921, para. 28. Under section 47 C.F.R. § 63.12, an applicant that is, or is affiliated with, a foreign carrier that possesses market power in a non-WTO Member country is not eligible for streamlining. Such an application requires public comment and additional scrutiny.

[40] Examples of routine conditions are the requirement that licensees notify the Commission in writing of the date on which the cable is placed in service, and the requirement that licensees notify the Commission in writing of the precise locations at which the cable will land. *See, e.g.*, *Japan-U.S. Order*, 14 FCC Rcd at 13083-84, para. 45(6),(11).

[41] *See, e.g.*, AT&T Comments at 22 (stating that the Commission automatically should streamline all applications in which cable stations are controlled by non-dominant carriers); Global Crossing Reply Comments at 15-16 (supporting a streamlining test that examines whether a dominant carrier controls key facilities, including landing stations and backhaul, on the foreign end of a proposed cable); TyCom Comments at 3-4 (continued….)

17. We respond to certain other comments as follows. We decline at this time to adopt WorldCom's proposal to establish a streamlining process relying on a list of presumptively competitive routes. The complexities identified in the record with respect to using the competitiveness of a route as a test for streamlining could be equally applicable in this context. We also decline to adopt Global Crossing's proposal that applicants demonstrate that the cable's U.S.-end landing parties do not have a combined share of more than 35 percent of U.S.-end active circuits.[42] Rather, we find that the procedures we adopt in this proceeding provide a more simplified means to meet the goal of a streamlined process that also guards against anti-competitive behavior. We note that AT&T filed a Motion to Strike the affidavit of Global Crossing Senior Vice President S. Wallace Dawson.[43] We find it unnecessary to rule on the Motion to Strike, because we do not rely on the information in the affidavit in reaching the conclusions in this Report and Order. Finally, we note that Cable & Wireless urges the Commission not to undertake a complicated examination of whether owners of capacity on the submarine cable are affiliated with a carrier that has market power on the foreign end of the route served.[44] We believe that our new streamlining procedures, by applying the existing section 214 model, address this concern.

18. Commenters also claim that the NPRM proposals might violate the U.S. commitments made in the General Agreement on Trade in Services (GATS).[45] The new

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(stating that a streamlining test should ask whether a controlling owner of a submarine cable has market power in a destination market); Viatel Comments at 10-11 (stating that the Commission automatically should streamline an application and grant non-common carrier status if no owner is dominant in the landing station region or on the route); WorldCom Comments at 2-5 (stating that streamlining rules should treat all non-dominant carriers alike and focus on applicant affiliations with dominant carriers).

[42] In fact, Global Crossing itself recently has submitted alternative suggestions. *See* Letter from Paul Kouroupas, Senior Counsel, Worldwide Regulatory and Industry Affairs, Global Crossing Ltd., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 12, 2001), at 1-3 (proposing that the Commission: (1) streamline review of those applications for which neither the cable landing station(s) nor the backhaul on the foreign end of the cable is 50% or more controlled by a carrier with market power in the relevant foreign market; and (2) permit streamlining for cables involving dominant foreign carriers if applicants supply documents such as the cable's C&MA demonstrating that they are contractually required to comply with certain conditions allowing for sufficient cable station collocation, unrestricted backhaul, capacity upgrades, and use of capacity).

[43] Affidavit of S. Wallace Dawson, Jr., In the Matter of AT&T Corp., et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, File No. SCL-LIC-19981117-00025 (filed Mar. 15, 1999). Global Crossing originally had filed Mr. Dawson's affidavit in the proceeding addressing the Japan-U.S. Cable System, and subsequently included the affidavit in Global Crossing's Reply Comments in the present proceeding. Global Crossing Reply Comments at Tab C. Global Crossing opposed striking the affidavit, and AT&T filed a reply.

[44] Cable & Wireless Reply Comments at 7-8.

[45] *See, e.g.,* AT&T Comments at iv, 16-18, Reply Comments at 10 (conditioning streamlined procedures on foreign market access conditions arguably would violate the GATS Most Favored Nation (MFN) obligation for cables landing in WTO Member countries); Sprint Comments at 14 (using the U.S. cable landing license process to demonstrate the availability of backhaul and collocation rights at landing stations in other countries might violate U.S. WTO commitments); TyCom Reply Comments at 8-13 (imposing reciprocity-based licensing (continued….)

streamlined procedures we adopt herein mirror the regulatory framework the Commission adopted in the *Foreign Participation Order*. In that proceeding, the Commission rejected arguments that its section 214 dominant carrier safeguards for foreign-affiliated U.S. carriers were inconsistent with U.S. obligations under GATS.[46] We conclude that the streamlining process we adopt herein, like the regulatory framework adopted in the *Foreign Participation Order*, will not deny market access or be contrary to Most Favored Nation (MFN) or National Treatment obligations.[47] This process, like the regulatory framework adopted in the *Foreign Participation Order*, adds competitive safeguards to the cable landing licenses of those entities, U.S. or foreign, that are affiliated with a carrier that has market power in a WTO Member destination market because we remain concerned with the ability of carriers with market power to leverage that power and engage in anti-competitive conduct in the U.S. market. The competitive safeguards we adopt here for such cable landing licenses, like the similar section 214 dominant carrier safeguards adopted in the *Foreign Participation Order*, serve to detect and deter anti-competitive conduct in the U.S. market.[48]

B. Protections Against Anti-Competitive Conduct

19. This Report and Order adopts criteria and procedures for streamlining submarine cable applications. We note that we will continue to analyze each application in the manner described in the *Foreign Participation Order* and consistent with other Commission precedents, while seeking approval of the Department of State and advice from the Executive Branch consistent with Executive Order No. 10530.[49] We set forth herein certain generally applicable conditions and competitive safeguards that should qualify most applications for streamlining. However, we cannot rule out the possibility that these measures would be ineffective at preventing anti-competitive conduct in a particular context and we would find it necessary to impose tailored conditions on the license or, in exceptional circumstances, to deny an application.

20. The new streamlining procedures will be available to applications for all submarine cables to WTO Member destination countries, including those cables with affiliations with carriers that possess market power in a destination market. We find that the generally applicable "no special concessions" rule that we adopt for submarine cables and the narrowly tailored set of

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requirements that examine market access conditions in WTO Member countries risks violating U.S. commitments of market access and national treatment and the MFN obligation under GATS, as well as the WTO Reference Paper). *But see* Global Crossing Reply Comments at 37-39, n. 85 (the Commission's proposal does not single out carriers or cables on the basis of their national identity, but looks at issues involving market power as it influences competition in the U.S. market, something that the Commission routinely does today).

46 *Foreign Participation Order*, 12 FCC Rcd at 24,036-53, paras. 335-375.

47 The new streamlining procedures also are not inconsistent with the WTO Reference Paper commitments on competitive safeguards and processing time. *See* TyCom Reply Comments at 11-13. The new competitive safeguards we adopt herein are designed to prevent competitive harm and include processing times.

48 *See infra* at section III.B. *See also* 47 C.F.R. § 63.10(c)(4)-(5).

49 *See* Exec. Order No. 10530 § 5(a), *supra* n. 7.

competitive safeguards described below ordinarily should protect against the risk of anti-competitive behavior associated with such market power.[50] As noted above, this approach is consistent with our Part 63 rules for the streamlined processing of applications for section 214 authorization to provide international telecommunications services. The Part 63 rules permit an applicant that is affiliated with a carrier with market power in a WTO Member destination country to obtain streamlined processing if the applicant agrees to be classified as a dominant carrier to that destination market.[51]

21. We also adopt a requirement that cable landing licensees, like international section 214 carriers, notify the Commission of any foreign carrier affiliations acquired after the issuance of a cable landing license where the affiliation is with a carrier in a market at the foreign end of the cable. If the Commission deems it necessary, it will impose on the newly affiliated licensee the competitive safeguards we adopt here. We adopt a new rule to implement this procedure similar to the rules we use in the context of international section 214 carriers.[52] The new rule, section 1.768, will apply to licensees of all submarine cables, whether authorized by the Commission prior to or after the effective date of the rules adopted in this proceeding. As explained below, we find that there is a heightened risk of anti-competitive conduct by a carrier that possesses market power at the foreign end of a U.S. cable when that carrier, or an affiliate, also possesses a substantial interest in a cable and uses the U.S. end of that cable. We conclude that this risk of anti-competitive conduct, as a general rule, warrants the imposition of the narrowly tailored requirements adopted here in the case of cables landing in WTO destination markets. We also conclude that a foreign carrier notification requirement similar to the requirement adopted for international section 214 carriers is necessary in the case of cables that may land in non-WTO destination markets, which present an increased risk of anti-competitive effects in the U.S. market.[53]

1. Role of Competitive Safeguards in International Services

22. The Commission's regulatory framework for the provision of U.S. international telecommunications services has addressed the ability of a company to exercise market power either by: (1) raising consumer prices by restricting its own output; or (2) raising consumer prices by increasing its rivals' costs or restricting its rivals' output through the control of an input that is necessary for the provision of service.[54] The Commission has found that dealings with foreign

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50 *See infra* paras. 30-39.

51 *See* 47 C.F.R. § 63.12(c)(1)(v).

52 *See* Appendix B, section 1.768 (Notification by and Prior Approval for Submarine Cable Landing Licensees that are or Propose to Become Affiliated with a Foreign Carrier). *See also* 47 C.F.R. § 63.11 (Notification By and Prior Approval for U.S. International Carriers that are or Propose to Become Affiliated with a Foreign Carrier).

53 *See Foreign Participation Order*, 12 FCC Rcd at 23944-45, paras. 124-27; *see also supra* n. 32.

54 *See, e.g., Foreign Participation Order*, 12 FCC Rcd at 23951-52, para. 144, n. 268 (economists recognize these different ways to exercise market power by distinquishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by (continued….)

carriers generally present concerns for the U.S. international services market that fall into the second category.[55]

23. In the *Foreign Participation Order*, the Commission found that the relevant input markets on the foreign end of a U.S. international route are the markets that involve services or facilities necessary for the provision of U.S. international services. These relevant markets generally include international transport facilities or services (including cable landing station access and backhaul facilities or services), inter-city facilities or services, and local access facilities or services on the foreign end.[56] Based on the record in this proceeding, we reaffirm, as discussed below, that each of these input markets involves facilities or services necessary for the landing, connection, or operation of submarine cables, and that discrimination by a carrier with market power in any of these foreign input markets could result in harm to competition and ultimately to consumers in the U.S. market.

24. In the submarine cable landing and international section 214 context, the Commission has long applied safeguards to address the concern that foreign market power can be abused with or without a U.S. affiliate.[57] The Commission also has found that an ownership affiliation between a U.S. carrier and a carrier in a foreign market creates a heightened ability and incentive to engage in anti-competitive behavior.[58] For that reason, the Commission has adopted dominant carrier safeguards that apply to U.S. telecommunications carriers that are, or are affiliated with, carriers that possess market power in particular destination markets.[59]

25. The competitive safeguards that we adopt here similarly are targeted to detect and deter discrimination by a carrier with market power in any of these submarine cable foreign input markets that could result in harm to competition in the U.S. market. We find that this narrowly tailored set of safeguards should be sufficient in all but the most exceptional of circumstances to detect and deter any anti-competitive behavior associated with market power in foreign markets where U.S.-licensed cable systems land and operate. Thus, consistent with the suggestions in the record, our streamlined processing will be available to cable landing license applications that include proposed licensees that are, or are affiliated with, foreign carriers that possess market power in WTO Member destination countries.

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restricting its own output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs, thereby causing its rivals to restrict their output).

55 *Id.* at 23951-52, para. 144.

56 *Id.* at 23953, para. 145.

57 *Id.* at 23954, para. 147, citing to *Regulation of International Common Carrier Services*, CC Docket No. 91-360, Report and Order, 7 FCC Rcd 7331, 7332, para. 6 (1992) (*International Services Order*). *See also* 47 C.F.R. § 63.10(a) ("no special concessions" rule); *Japan-U.S. Order*, 14 FCC Rcd at 13083, para. 45(4).

58 *Foreign Participation Order*, 12 FCC Rcd at 23954, para. 147.

59 *See* 47 C.F.R. § 63.10(c), (e).

26. The adopted safeguards are intended to prevent the leveraging of foreign market power into the U.S. international services market. In particular, we are concerned that an exclusive arrangement between a carrier[60] with market power on the foreign end and a U.S. submarine cable licensee could result in harm to competition and consumers in the U.S. market. Specifically, we are concerned that the foreign carrier with market power has control over essential inputs needed by U.S. licensees to obtain access to its market to land and operate a submarine cable between the United States and this destination market. As in the case of the provision of international services and facilities, essential inputs relevant to submarine cables can include cable landing stations, backhaul facilities that connect the landing station with international or "gateway" switching centers, transmission facilities from the gateway switch to the local telephone exchange, and access to the local telephone exchange.[61] Market power with respect to any of these essential inputs provides the ability and incentive to engage in conduct that poses a risk to competition in the United States.

27. In particular, a carrier with market power in a foreign destination market might seek to prevent licensees from obtaining access to those essential inputs. Or the market-power carrier might engage in whipsawing or other discriminatory conduct by allowing access to the inputs at less favorable terms and conditions than those available to other licensees, such as by charging higher prices or providing inferior technical connections or delaying delivery of the necessary input products.[62] In each of these possible cases, the intent of the foreign carrier with market power would be to offer better prices or better quality services to certain U.S. carriers or licensees and to charge higher prices or provide lower quality service to other U.S. carriers or licensees that compete with the favored entity. Such discriminatory conduct would raise costs for certain rivals and decrease their ability to offer competitive alternatives, and thereby likely would increase customer prices attributable to use of the submarine cable. Our "no special concessions" rule, defined explicitly to encompass exclusive arrangements in the provisioning, maintenance, and interconnection of services, facilities and functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, will address this potential harm to competition in the U.S. market.

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60 We use the term "carrier" here broadly to include, for example, entities whose sole telecommunications facilities are cable landing stations and that do not provide telecommunications services.

61 We also note that in the NPRM, the Commission suggested that three facilities components are key to submarine cables: (1) the wet link; (2) cable landing stations; and (3) exclusive backhaul facilities associated with the landing stations. The "wet link" of a cable system is that portion of the submarine cable facilities that is in the water and links one cable landing point to another cable landing point. *See Submarine Cable NPRM*, 15 FCC Rcd at 20799, n. 52. Entities that control these facilities are most likely to have the ability to affect competition on particular routes. In recognition of the key role of these three facilities components, we make explicit that the "no special concessions" rule applies, among other things, to submarine cable capacity, collocation at landing stations, and backhaul facilities. *See Submarine Cable NPRM*, 15 FCC Rcd at 20799, para. 21; *see also* Appendix B, section 1.767(g)(5).

62 *See Foreign Participation Order*, 12 FCC Rcd at 23891, para. 146.

28. Our concerns are heightened in the case of affiliation between such a foreign carrier and a licensee. In that instance, the foreign carrier with market power has the ability and incentive to use that market power to discriminate in favor of its affiliate and against unaffiliated U.S. carriers or licensees. It is precisely to detect and deter these types of potential discrimination that we adopt the reporting requirements set forth below as a condition of streamlined grant of a license. In contrast, where a submarine cable licensee is affiliated with a foreign carrier that does not have market power in a destination market, such heightened concerns about risk to competition in the United States ordinarily do not arise.

29. In two recent orders, *Telefónica SAM Order* and *AJC Order*, the International Bureau followed a similar analysis to attach competitive safeguards to the grants of two cable landing licenses for non-common carrier cables where the applicants were affiliated with carriers possessing market power in the cables' WTO Member destination markets.[63] The International Bureau applied competitive safeguards to address concerns that the terms for provisioning facilities, repairs, and interconnection might be detrimental to unaffiliated U.S. entities, including telecommunications service providers and information service providers, and to U.S. consumers,[64] specifically, that: (1) the market-power carriers and cable landing station owners in the affiliated destination markets might favor their affiliated cable landing license applicants, their affiliated section 214 service providers, or their affiliated information service providers; and (2) the applicants might favor their affiliates that possessed market power in the cables' destination markets.[65]

2. Adopted Competitive Safeguards

30. We adopt herein a set of competitive safeguards similar to the approach taken in section 214 authorizations and the *Telefónica SAM Order* and *AJC Order*: a "no special concessions" rule tailored to submarine cables and applicable to all licensees, and reporting requirements applicable to licensees that are affiliated with a foreign carrier with market power in one or more of the cable system's destination markets. These safeguards will permit applicants

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63 *See Telefónica SAM USA, Inc. and Telefónica SAM de Puerto Rico, Inc., Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Network,* Cable Landing License, 15 FCC Rcd 14915, 14923-24 at paras. 17-18 (IB/TD 2000) (*Telefónica SAM Order*) (finding risk of competitive harm due to applicants' affiliation with carriers and cable landing station owners having market power in WTO Member destination markets of Argentina, Chile, and Peru); *Australia-Japan Cable (Guam) Limited, Application for License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between Australia, Guam, and Japan*, SCL-LIC-20000629-00025, Cable Landing License, 15 FCC Rcd 24057, 204065 at paras. 19-20 (IB/TD 2000) (*AJC Order*) (applicant affiliated with a carrier that possesses market power in cable landing station access and local access facilities and services in WTO Member destination market of Australia).

64 These were similar to the concerns raised in the *Japan-U.S. Order*, 14 FCC Rcd at 13076, para. 25. *See supra* section II. The safeguards in the two Bureau orders also are similar to the safeguards identified in the *Japan-U.S. Order*, 14 FCC Rcd at 13076-78, paras. 28-34.

65 *Telefónica SAM Order*, 15 FCC Rcd at 14924, para. 18; *AJC Order*, 15 FCC Rcd at 24065, para. 20. *See also Foreign Participation Order*, 12 FCC Rcd at 23991, 23993-94, 24016-17, 24019-20, paras. 221, 226, 277-79, 284-86).

affiliated with market-power carriers in WTO Member destination markets to qualify for streamlined review where each applicant with such affiliation certifies that it will abide by the reporting requirements, in addition to the routine conditions, including the no special concessions rule, that apply to all cable landing licenses.[66]

31. No Special Concessions. Our existing licensing regime for submarine cables has included prohibitions against exclusive arrangements. Common carrier cables are subject to the "no special concessions" rule in section 63.14 of the Commission's rules.[67] We have traditionally required that all cable licensees not acquire any exclusive arrangements to land or operate cables.[68] Here, we decide to focus this prohibition more narrowly by confining it to special concessions with respect to foreign carriers with market power.[69] This is consistent with the more narrowly targeted "no special concessions" rule adopted in the *Foreign Participation Order* for purposes of section 214 authorizations.[70] We also make clear that the prohibited exclusive arrangements include those particularly relevant to the submarine cable market.

32. Thus, all licensees shall be prohibited from directly or indirectly accepting from a

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66 For a discussion of routine conditions, *see infra* section III.F. For codification of conditions, *see infra* Appendix B.

67 47 C.F.R. § 63.14. This rule is designed to prevent the leveraging of foreign market power into the U.S. international services market. *See, e.g., Foreign Participation Order*, 12 FCC Rcd at 23958, para. 157 (stating: "[i]f a foreign carrier with market power were to enter into an exclusive arrangement, competing carriers on the foreign end, if any exist, might not have sufficient capacity to accommodate rival U.S. carriers' needs. Such an arrangement, therefore, could limit rival U.S. carriers' ability to provide international services, raise these carriers' costs of termination, or degrade the quality of their service offerings, to the ultimate harm of U.S. consumers").

68 *See Foreign Participation Order*, 12 FCC Rcd at 23934, para. 95; *see also, e.g., Japan-U.S. Order*, 14 FCC Rcd at 13083, para. 45(4) ("the Licensees or any persons or companies controlling them, controlled by them, or under direct or indirect common control with them shall not acquire or enjoy any right to land, connect, or operate submarine cables that is denied to any other United States company by reason of any concession, contract, understanding or working arrangement to which the Licensees or any persons controlling them, controlled by them, or under direct or indirect common control with them are parties").

69 For purposes of implementing the no special concessions rule, licensees shall rely on the Commission's published list of carriers presumed to possess market power in foreign markets. *See* 47 C.F.R. § 63.14 Note.

70 *See Foreign Participation Order*, 12 FCC Rcd at 23955-65, paras. 150-170. In the *Foreign Participation Order*, the Commission delineated specific types of exclusive arrangements that the "no special concessions" rule prohibits. *See Foreign Participation Order*, 12 FCC Rcd at 23962-63, paras. 164-167; *see also* 47 C.F.R. § 63.14(b). *See also* AT&T Reply Comments at 10 (stating that no special concessions rule is an appropriate mechanism to reduce the prospect of anti-competitive harm); Letter from James J. R. Talbot, Counsel for AT&T Corp., Concert Global Network U.S.A. and Concert Global Network Services, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Oct. 4, 2001), at 4 (urging the Commission to apply a no special concessions requirement on all U.S. submarine cable licensees on any cable on which a carrier with market power controls any cable station or backhaul arrangement in a destination market); *but see* TyCom Letter, supra n. 22, at 3-5 (supporting use of a no special concessions rule in unusual circumstances where non-streamlined applications raise serious competition issues).

foreign carrier with market power in one or more of the cable's destination markets a "special concession."[71] This safeguard is intended to prevent foreign carriers that possess sufficient market power on the foreign end of a cable route from affecting competition adversely in the U.S. market. A special concession is defined to include 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. A special concession 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. These market inputs are necessary to the landing, connection, and operation of submarine cables.

33. 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 substitute this more narrowly targeted safeguard for the prohibition against exclusive arrangements currently set forth in the license. The application should identify the cable landing license by its name and file number, list all licensees, reference the new no special concessions rule we adopt herein, and state that each licensee accepts and will abide by the provisions of the new rule. Each licensee or joint licensee must sign the application. The application should be captioned, "Cable Landing License Modification – Request to Modify No Exclusive Arrangements Condition," and should be addressed to the Secretary of the Commission, with a copy to the Chief, International Bureau. The Commission will place these applications on public notice and forward them to the Department of State for its consideration consistent with Executive Order No. 10530, following which the Commission will act on the applications either by public notice or by formal written order if it is necessary to address any significant issues in writing. 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.

34. Reporting Requirements. As noted above, a U.S. submarine cable licensee and a carrier with market power on the foreign end of a particular route may have the ability, absent effective safeguards, to engage in anti-competitive behavior that results in competitive harms in the U.S. market.[72] Consistent with our previous decisions[73] and comments in the record,[74] we find

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[71] *See* Appendix B, section 1.767(g)(5).

[72] *See supra* para. 24.

[73] *See Foreign Participation Order*, 12 FCC Rcd at 23969-70, para. 177; *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873, 3902-03, para. 79 (1995); *International Services Order*, 7 FCC Rcd at 7332, para. 10.

[74] *See, e.g.*, TyCom Comments at 3-4 (stating that streamlining should inquire whether or not a controlling owner of a submarine cable has market power in a destination market); WorldCom Comments at 4 (stating that the Commission should be concerned about competitive distortions where a U.S. carrier is affiliated (continued….)

that an affiliation between a U.S. licensee and its foreign counterpart significantly increases the ability and the incentive to engage in such behavior.[75] Because we find that affiliated entities have a heightened ability and incentive to engage in anti-competitive behavior, we apply additional safeguards to U.S. licensees on routes where they are affiliated with carriers that possess market power in a cable's destination markets. We adopt an approach that in large part relies on reporting requirements. These requirements allow the Commission to monitor and detect anti-competitive behavior without imposing unnecessarily burdensome regulation on a U.S. licensee due to its affiliation with a foreign carrier.

35. First, we adopt a requirement to provide provisioning and maintenance reports. Specifically, a licensee that is, or is affiliated with, a foreign carrier with market power in a destination market shall file quarterly reports summarizing the provisioning and maintenance of all network facilities and services related to the submarine cable procured from the licensee's foreign carrier affiliate, including any self-provisioning and maintenance by the licensee itself on the foreign end of the cable. These reports shall 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. This requirement includes, but is not limited to, those services procured on behalf of customers of any joint venture in which the licensees participate with such affiliates. This condition is intended to detect anti-competitive behavior and deter foreign affiliates possessing market power in destination markets from favoring affiliated licensees in provisioning and maintenance. As Global Crossing notes, reporting requirements will permit the Commission and interested parties, for example, to track whether landing station operators with market power are engaged in discriminating against unaffiliated carriers in their practices.[76] *See* Appendix B, section 1.767(l)(1).

36. Second, we adopt a requirement to provide circuit status reports. Specifically, a licensee that is, or is affiliated with, a foreign carrier with market power in a destination market shall file quarterly circuit status reports, on a facility-specific basis, in the format set out by the section 43.82 annual circuit status manual.[77] This condition is intended to detect anti-competitive behavior and deter licensees affiliated with carriers possessing market power in destination markets from favoring their foreign affiliates in circuit activation. *See* Appendix B, section

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with a dominant foreign carrier that can leverage its control over essential facilities to affect competition in the United States).

[75] Anti-competitive strategies are easier to enact with common ownership, and the incentive to undertake such strategies frequently is much greater when the profits from such behavior accrue to an affiliated or integrated entity. For example, a foreign carrier can benefit directly by engaging in anti-competitive behavior that increases the profits of its U.S. affiliate when the profits are passed through to the foreign carrier. Similarly, a significant investment in a U.S. carrier can provide a foreign carrier with sufficient influence to entice the U.S. affiliate to engage in anti-competitive conduct in the U.S. market. *See Foreign Participation Order*, 12 FCC Rcd at 23969-70, para. 177.

[76] Global Crossing Comments at 28-29.

[77] *See* 47 C.F.R. § 43.82.

1.767(l)(2).

37. We recognize that the public disclosure of the quarterly provisioning and maintenance and circuit status reports could result in the information being used for commercial advantage. As discussed above, these quarterly reporting requirements are designed to assist the Commission and competing participants in the cable market in determining whether a U.S. licensee is receiving favorable treatment from a foreign affiliate with market power. We therefore will allow licensees to whom the competitive safeguards apply to request a standard protective order for the quarterly reports that the licensee must file.[78]

38. We note that, should the need arise, the Commission may take various steps as appropriate to ensure compliance with license conditions, including the no special concessions rule and reporting requirements. The Commission could, for example, investigate evidence of non-compliance, impose appropriate additional conditions, take appropriate forfeiture actions pursuant to section 503(b) of the Communications Act,[79] or ultimately revoke a license for failure to comply with such conditions.

39. Finally, as a general rule we decline to impose different or special conditions for cables proposing to serve thin routes.[80] The *Foreign Participation Order*, in adopting an open entry standard along with competitive safeguards, concluded that the standard set of competitive safeguards for section 214 authorizations might be ineffective at preventing anti-competitive conduct under exceptional circumstances and that the Commission then would need to impose additional conditions to its grant of authority or possibly deny the application.[81] In this regard, the NPRM sought comment on whether, in a situation in which a cable landing license applicant is proposing to serve previously unserved routes, the Commission should impose conditions, such as a non-discrimination requirement, on the license, regardless of whether the Commission grants the license on a streamlined basis.[82] As delineated, our streamlined approach here assesses whether cable applicants are or are not affiliated with market-power carriers in a WTO Member destination market, rather than the competitiveness of a route. If an exceptional circumstance arises concerning thin routes, we believe this can be addressed by the authority we delegate to the International Bureau to find that an application is ineligible for streamlined processing and

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78 We will apply a standard protective order where the submitting party includes with its filing a showing by a preponderance of the evidence to support its case that the information should be accorded confidential treatment consistent with the provisions of the Freedom of Information Act (FOIA) or makes a sufficient showing that the information should be subject to a protective order. This is the standard found in section 0.459 of our rules, *see* 47 C.F.R. § 0.459, that is applicable to requests that materials or information submitted to us be withheld from public disclosure. *See Foreign Participation Order*, 12 FCC Rcd at 24017-18, para. 280.

79 *See* 47 U.S.C. § 503(b).

80 For purposes of this Report and Order, the term "thin routes" refers to routes where there currently is little or no cable capacity.

81 *See Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23934, paras. 51, 94.

82 *See Submarine Cable NPRM*, 15 FCC Rcd at 20819-20, para. 70.

requires consideration on a case-by-case basis.[83]

C. Procedures for Processing Streamlined Applications

40. We adopt the following procedures for applications that request streamlined treatment: (1) applicants will file electronic or paper applications with the Commission pursuant to section 1.767 of the rules; (2) the International Bureau will review the applications and (a) place on public notice as streamlined those complete applications deemed acceptable for filing and eligible for streamlined processing, or (b) issue a public notice indicating that an application is accepted for filing but ineligible for streamlined processing;[84] (3) as detailed below, consistent with the streamlining provided for section 214 international service applications, the filing of comments or a petition to deny will not necessarily result in the application being deemed ineligible for streamlined processing; (4**)** as detailed below, the Commission will review and act upon applications eligible for streamlined treatment within 45 days of the public notice announcing eligibility for streamlining, except where the Commission subsequently determines that the application warrants additional scrutiny and must be removed from streamlined processing; and (5) the Commission or International Bureau will issue cable landing licenses eligible for streamlining by public notice. We apply these procedures to both initial applications and non-pro forma assignments and transfers of control of interests in cable landing licenses.[85] We discuss below resolution of procedural issues raised in the NPRM.

41. Electronic Filing. Most parties commenting on this issue support the option of electronic filing of applications, provided there also is an alternative filing procedure that will work effectively and rapidly.[86] Thus, although we decline to mandate electronic filing of submarine cable applications, we encourage parties to avail themselves of this process.

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[83] Additionally, as noted, the Commission has authority to require a cable to be operated on a common carrier basis and to impose conditions specific to the particular cable if the public interest requires. *See Foreign Participation Order*, 12 FCC Rcd at 23934, para. 95 (relying, in adopting an open entry standard for cables landing in WTO Member countries, on the Commission's authority to require any new or existing cables to be operated on a common carrier basis and to add conditions in a situation that raises a high or unusual risk to competition); *see also* section III.G, *infra.* The *Foreign Participation Order* further noted that in exceptional cases of very high risk to competition, the Commission has the ability to deny an application. 12 FCC Rcd at 23934, para. 95.

[84] *See infra*, para. 43, for processing of applications ineligible for streamlining.

[85] *See also 1998 International Biennial Review Order*, 14 FCC Rcd at 4920, para. 24 (which includes some section 214 assignments and transfers of control within the class of streamlined applications). We adopt a separate post-transaction notification procedure for pro forma assignments and transfers of control of interests in cable landing licenses. *See infra* section III.E.

[86] *See, e.g.,* Cable & Wireless Reply Comments at 29; Level 3 Comments at 13; TyCom Comments at 20 and n.51 (suggesting that electronic filing may expedite the interagency review process). Caribbean Crossings, while favoring requiring electronic filing, notes that the Commission should ensure alternative filing procedures for instances in which electronic filing may be unavailable to some applicants or if the Commission system does not have the capacity, for example, to accommodate large attachments. Caribbean Crossing Comments at 3, 5.

42. Public Notices Announcing Applications Accepted for Filing and Eligible for Streamlining. We intend to continue the current practice of issuing public notices of applications accepted for filing in an expeditious manner. Upon receipt of an application, the International Bureau will review the application to determine whether it is acceptable for filing and eligible for streamlined processing.[87] However, it is especially difficult to predict unusual circumstances that may arise in particular situations where applications may be incomplete.[88] As the Commission noted in the NPRM, our intention is to continue the current practice, applicable not only to submarine cable landing license applications and section 214 applications but also to other applications before the Commission, of not accepting incomplete applications.[89] Therefore, we decline to adopt Cable & Wireless' suggestion to indicate a specific timeframe by which the Commission will issue public notices of applications accepted for filing.[90]

43. Public Notices Announcing Applications Accepted for Filing But Ineligible for Streamlining. We adopt our proposal to issue a public notice announcing that a particular application is ineligible for streamlining and to take action on such applications within 90 days of the public notice announcing their ineligibility for streamlining, unless the Commission provides notice that an additional 90-day review period is needed. This approach is both consistent with Commission rules and precedent in the section 214 context and necessary to maintain the Commission's ability to respond to extraordinary circumstances.[91] Cable & Wireless opposes this

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87 This is the same procedure used for streamlined processing of international section 214 applications. *See 1998 International Biennial Review Order*, 14 FCC Rcd at 4913, para. 10.

88 As the NPRM noted, we do not expect that the period between the filing of an application and the release of a public notice accepting the application for filing will be lengthy as a general rule because the International Bureau will put an application out on public notice as expeditiously as possible after determining that the application is complete. This review process will include determining whether an applicant with foreign affiliations is eligible for streamlined processing either because the affiliate lacks market power or because the affiliate with market power is in a WTO Member destination country and the applicant agrees to accept and abide by the reporting requirements.

89 *See Submarine Cable NPRM*, 15 FCC Rcd at 20813, para. 59 and n.108, *citing 1998 International Biennial Review Order*, 14 FCC Rcd at 4913, para. 10 (stating that the staff of the International Bureau will review a section 214 application to determine whether it is complete and eligible for streamlined processing, and, if an application is deemed incomplete and not acceptable for filing, the staff will notify the applicant and give the applicant an opportunity to provide the missing information). *See also, e.g., In the Matter of the Applications of TelQuest Ventures, L.L.C.*, Memorandum Opinion and Order, File Nos. 758-DSE-P/L-96, 759-DSE-P/L-96, FCC 01-216 (rel. Aug. 1, 2001), 2001 WL 863398 (affirming International Bureau's practice to refrain from granting premature earth station applications).

90 *See* Cable & Wireless Comments at n.30.

91 Section 63.12(c)(1) of the Commission's rules provides that a section 214 application is ineligible for streamlined treatment where the applicant is affiliated with a foreign carrier in a destination market and does not clearly demonstrate eligibility. *See supra* section III.A at para. 14; s*ee also* 47 C.F.R. § 63.12(c)(1). If an application is deemed complete but ineligible for section 214 streamlined processing, under section 63.12(d) the Commission issues a public notice indicating that the application is ineligible for streamlining, and, within 90 days of the public notice, takes action upon the application or provides public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. 47 C.F.R. § 63.12(d). Section 63.12(d) also provides that the Commission may extend each successive 90-day period, and (continued….)

proposal, arguing that this provision has been the cause of much delay and uncertainty in the section 214 streamlining process.[92] We disagree with Cable & Wireless. The Commission has used the 90-day extension period only in extraordinary circumstances, such as, for example, when a Bell Operating Company has applied for international section 214 authority that is related to a pending section 271 application, thus requiring extra time to resolve.[93] We would expect this provision, as applied to submarine cable landing license applications, also to have limited applicability.

44. Comments and Petitions to Deny. We adopt the procedure used for section 214 applications of not routinely removing applications from streamlining based on the filing of comments on competitive or other issues that a party might seek to raise.[94] We agree with commenters that the considerations applying to streamlined section 214 applications also apply in this context: namely, applications that qualify for streamlined processing generally do not raise public interest issues.[95] We agree that safeguards and regulations will be sufficient in most circumstances to prevent anti-competitive effects in the U.S. market.

45. 45-Day Review. We adopt a new procedure providing for the grant of an application announced as eligible for streamlined treatment within 45 days from the date the International Bureau issues the public notice accepting the application for filing, unless the Commission notifies the applicant in writing that the application has been removed from streamlined processing. Several commenters support a procedure whereby the Commission would grant streamlined applications within 45 days.[96] Consistent with the obligations of the

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that the application shall not be deemed granted until the Commission affirmatively acts upon the application. *Id.*

92 Cable & Wireless Comments at 15.

93 *See, e.g.*, *Non-Streamlined International Applications Accepted for Filing*, Report No. TEL-00358NS (rel. Feb. 28, 2001) (noting that the Commission had not yet issued an order on the applications for international section 214 authority filed by Verizon international subsidiaries for service originating in Massachusetts "because of extraordinary complexity").

94 *See Submarine Cable NPRM*, 15 FCC Rcd at 20812-13, para. 58; *1998 International Biennial Review Order*, 14 FCC Rcd at 4913-14, paras. 12, 23. The Commission's ex parte rules will continue to apply to informal communications concerning streamlined applications between outside parties and Commission staff. *See* 47 C.F.R. § 1.1206; *see also 1998 International Biennial Review Order*, 14 FCC Rcd at 4921, para. 26.

95 *See* WorldCom Comments at 15-17; AT&T Comments at 21; Global Crossing Comments at 29 (asserting that no comments are needed on streamlined applications); Cable & Wireless Comments at 16-17, 19 (asserting that there should be no routine comments on competitive issues for streamlined applications); Viatel Reply Comments at 11 (asserting that, if the Commission adopts Viatel's proposed streamlining standard, streamlined treatment would be extended only to those applications that present no colorable issues of adverse impact on competition, and, therefore, it would be appropriate for the Commission not to entertain oppositions to streamlined applications); *1998 International Biennial Review Order*, 14 FCC Rcd at 4913-14, para. 12 (addressing this issue in the section 214 context).

96 *See, e.g.*, Cable & Wireless Reply Comments at 10-11 (arguing that all applications should initially qualify for streamlined grant within 60 days, but supporting the Commission's adoption of shorter timeframes (continued….)

Executive Branch under the Submarine Cable Act and Executive Order No. 10530, Commission staff has been working with Executive Branch staff to coordinate procedures to implement this new streamlined review of applications.[97] A 45-day streamlining procedure should be a significant improvement, given that the average time for grant of initial licenses for various cable systems in recent years has been approximately 150 days.[98] To facilitate review by the Executive Branch, our new rules will require that, on the date of filing with the Commission, applicants that request streamlined processing must send a complete copy of the application, or any major amendments or other material filings regarding the application, to the U.S. Department of State, U.S. Department of Commerce, and U.S. Department of Defense.

46. We disagree with those commenters asserting that 45 days is too long and suggesting alternatives ranging from 14 days to 30 days.[99] As the Commission noted in the NPRM, a wholesale adoption of the current section 214 streamlining process for submarine cable landing license applications is impractical due to the unique role of the State Department with respect to submarine cable landing licenses.[100] A period of less than 45 days gives insufficient

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suggested by other commenters, provided Executive Branch approval also could be obtained during the shorter processing period); WorldCom Comments at 13-14 (strongly agreeing with proposal to grant streamlined applications within 60 days and supporting shorter window such as 30 or 45 days); Sprint Comments at 17-18; 360networks Comments at 9. Additionally, DOD supports whatever time period the Commission and Department of State agree upon. DOD Comments at 2.

97 *See infra* para. 80.

98 For example, for the initial licenses granted during 1998-2000, informal International Bureau data indicate that the time from filing to grant was, in most cases, on the order of 4 to 6 months. *See also* TyCom Letter, at 9-10, n. 33 (Commission should shorten the application processing time for obtaining a cable landing license in the United States, which TyCom calculates as having taken from 137 to 451 days for various cable systems). TyCom further observes that much of the processing time stems from the requirements for interagency coordination under prior procedures. *Id.* at 10, n. 34; *see also* TyCom Reply Comments at 18-20.

99 *See, e.g.*, Global Crossing Comments at 29-30 (suggesting 30 days as maximum); Level 3 Comments at 11-12 (suggesting 21 days and a 90-day maximum for processing non-streamlined applications); AT&T Comments at 3, Reply Comments at 21 (suggesting 14 days); FLAG Telecom Comments at 13-16 (suggesting 14 days).

100 *Submarine Cable NPRM*, 15 FCC Rcd at 20810-11, para. 54. The Commission's authority to grant or revoke submarine cable landing licenses is conditioned on obtaining approval of the Secretary of State. *See* Exec. Ord. No. 10530 § 5(a) (delegating the President's authority under the Cable Landing License Act to the Commission, provided that "no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary"); *Submarine Cable NPRM*, 15 FCC Rcd at 20809-10, para. 52 (noting the Commission's intent to coordinate closely with the Department of State in any streamlining measure the Commission may undertake). Because of the Cable Landing License Act's requirement for a written license and the executive order's requirement for prior approval of cable landing licenses by the Secretary of State, the streamlining process we adopt for cable landing licenses differs from the streamlining process for international section 214 applications, both by providing a longer processing time and by requiring the issuance of a written license prior to construction and operation rather than deeming an application granted at the end of the review period. *See, e.g.*, 47 C.F.R. § 63.18(a).

time for Executive Branch review and Commission action on the application. Moreover, as discussed below, we also are adopting our proposal to grant cable landing licenses by public notice, and are coordinating with the State Department and other Executive Branch agencies new interagency procedures that will provide a streamlined process for pro forma transactions. Together, we believe these changes will expedite regulatory processing and enhance the competitiveness of the submarine cable market.

47. There may be instances where the Commission, after initially placing an application on public notice as eligible for streamlining, determines that, in fact, the application warrants additional scrutiny and must be removed from streamlined processing. Commenters support such a process.[101] In those cases, the Commission will inform the applicant in writing that the application is no longer eligible for streamlined processing. We delegate to the International Bureau the authority to identify those particular applications that warrant additional scrutiny.[102] We anticipate that situations would be rare in which the International Bureau would find a cable landing license application ineligible for streamlined processing after initially determining it eligible for streamlining.[103]

48. Public Notices Issuing Cable Landing Licenses. We adopt the proposal in the NPRM to accelerate the submarine cable landing license approval process by issuing licenses for applications qualifying for streamlined grant by public notice, rather than by order.[104] This proposal received overwhelming support in the record as a measure that would reduce delays and burdens on Commission staff and resources, be consistent with section 214 streamlining, and meet the Cable Landing License Act requirement of issuing a "written license."[105] We expect that

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[101] WorldCom Comments at 17 (asserting that, at most, the Commission should reserve the right to remove an application from streamlined processing by notifying an applicant within 60 days of the filing, but only in rare circumstances); AT&T Reply Comments at 21 (asserting that the Commission should allow staff to remove from streamlining only the few applications staff believes raise "truly extraordinary competitive issues"); Cable and Wireless Comments at 16-17 (asserting that if there are compelling public interest concerns warranting non-streamlined processing, the Commission should remove an application from the streamlined grant process by notifying the applicant within 21 days of the initial public notice); Level 3 Comments at 12-13 (asserting that the Commission should automatically grant an application that qualifies for streamlining, even if an opposition is filed, unless Commission staff independently determines that the application raises extraordinary issues such as national security or significant anti-competitive concerns that cannot be resolved through standard conditions already in place); Viatel Reply Comments at 11 (asserting that, under Viatel's proposed streamlining guidelines, the Commission should undertake a factual inquiry only into those streamlined applications that Commission staff finds to present extraordinary competitive issues). *See also* 47 C.F.R. § 63.12(d).

[102] *See Submarine Cable NPRM*, 15 FCC Rcd at 20813-14, para. 60 and n.109, *citing 1*998 *International Biennial Review Order*, 14 FCC Rcd at 4920-21, para. 25.

[103] *See Submarine Cable NPRM*, 15 FCC Rcd at 20813-14, para. 60.

[104] *See Submarine Cable NPRM*, 15 FCC Rcd at 20811-12, para. 56.

[105] *See* 47 U.S.C. § 34. *See also* WorldCom Comments at 14-15; Cable & Wireless Comments at 11-12 and n.27 (referring, among other things, to the definition of a "writing" for purposes of determining the meaning of an Act of Congress); Level 3 Comments at 13; TyCom Reply Comments at 5-8 and n.19 (asserting that there is no legal impediment to issuing cable landing licenses by public notice rather than by order and referring to the (continued….)

granting submarine cable landing licenses by public notice will increase agency responsiveness and minimize the requisite amount of time to issue licenses, thereby lessening delay and increasing opportunities for allowing companies to deploy competitive services to customers and to make efficient use of rapidly changing technology.[106]

49. We agree with the majority of commenters that a public notice including pertinent information is tantamount to the "written license" required by the Cable Landing License Act. We agree with WorldCom that the public notice should contain essential facts about the licensed cable system comparable to the information that normally would be in a written order.[107] Thus, the public notice will provide information such as the location of landing points for the proposed cable, the initial capacity and design of the system, and the owners of the proposed cable system, their relative ownership percentages in the cable, and their foreign affiliations. The public notice also will state all applicable conditions and other important technical information about the cable. Delineation of this information is necessary for regulatory transparency as well as to provide the public relevant data.

50. We also may grant an application ineligible for streamlined processing by public notice and without a formal written order if it is unnecessary to address any significant issues in writing or to impose conditions that require written explanation.[108]

51. Interagency Coordination Procedures. We decline to adopt certain interagency coordination procedures suggested by various commenters. These include, for example, the use of conditional grants,[109] automatic approval,[110] a "check-off" system,[111] pre-approval

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definition of a "writing" for purposes of determining the meaning of an Act of Congress and to the definition of "license" in the Administrative Procedure Act); 360networks Reply Comments at 7 (asserting that the Commission should grant licenses by public notice, as long as routine conditions are included in the public notice). *But see* Global Crossing Comments at 30 (stating that a written order would not be necessary, but suggesting that the Commission grant applications by issuing a written license, rather than relying on issuance of a public notice, because the Cable Landing License Act specifically refers to a "written license"). Global Crossing argues, moreover, that a license typically must be filed as part of the application process with other agencies and would appear to be an easier vehicle than a public notice for providing ownership and other information. Global Crossing Comments at 30.

106 *See Submarine Cable NPRM*, 15 FCC Rcd at 20811-12, para. 56.

107 WorldCom Comments at 15 (noting that that this information is important to companies that are planning to build new cable systems or augment existing systems as well as to companies seeking to determine where opportunities exist to purchase capacity on other systems or identify collocation opportunities) and n.27 (noting that certain competitive concerns may need to be addressed where the applicant is affiliated with a foreign-end owner of capacity or cable stations).

108 *See 1998 International Biennial Review Order*, 14 FCC Rcd at 4913, para. 11 (allowing grant of non-streamlined section 214 applications by public notice).

109 *See* Global Crossing Comments at 29-30 (supporting conditional grant after 30 days); FLAG Telecom Comments at 15-16 (supporting conditional grant if State fails to act within 2 weeks); Level 3 Comments at 13; Cable & Wireless Comments at 10; AT&T Reply Comments at 21-22. *But see* TyCom Reply Comments at 7-8 (arguing that issuing conditional grants would increase the price of capacity and delay infrastructure buildout by introducing substantial uncertainty into the construction and financing of submarine cable systems, which in turn (continued….)

procedures,[112] and standard forms.[113] As discussed above, we are coordinating with the Executive Branch an approach to reviewing applications that will make a streamlined grant procedure viable and eliminate the need for the Commission to adopt other suggestions for interagency coordination. As noted, the 45-day streamlined review period is a significant improvement over current practice.

52. We also decline to adopt the suggestion of Global Crossing that the Commission commence a proceeding to examine the review procedures of state, local, and Federal agencies that are responsible for permitting submarine cable systems.[114] Global Crossing, although recognizing the importance and significance of land use and environmental issues, is concerned about increased costs and deployment delays it has experienced as a result of such regulatory activity.[115] Global Crossing states that a single cable system with two landings often includes review and some form of approval by as many as 25 different governmental resources and land use agencies, taking over two years to complete.[116] It may be more effective for Global Crossing to bring such issues directly to the attention of the agencies that are performing these various land use and environmental reviews. Similarly, we decline to adopt Level 3's suggestion that we

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would introduce a possible risk for investors and contractors that did not exist before); Cable & Wireless Reply Comments at 13-14 (while not opposing use of a conditional grant in certain situations, cautioning that issuance of conditional licenses could possibly lead to uncertainty and delay in the development and construction of new submarine cables and urging, therefore, that the Commission and the Executive Branch strive to approve virtually all applications within the streamlined processing period).

110 Level 3 suggests that the Commission coordinate a process for two-week approval by the Executive Branch that would include automatic approval if the Executive Branch takes no action within 14 days. Level 3 Comments at 12-13; Level 3 Reply Comments at 2.

111 Caribbean Crossings suggests a "check-off" system similar to Hart-Scott-Rodino review by the Federal Trade Commission and Department of Justice. Caribbean Crossings Comments at 2-3. *But see* Viatel Reply Comments at 12 (in the absence of a statutory deadline for Executive Branch action, the Commission cannot compel or act without such action by the Executive Branch).

112 Cable & Wireless recommends that the Commission obtain Department of State pre-approval to grant all applications that qualify for streamlined processing or a more limited group of applications, such as those to land cables in all countries that currently are served by a U.S. cable, are members of the WTO, and are not subject to trade sanctions. Cable & Wireless Comments at 14-15. *See also* AT&T Reply Comments at 21-22 (supporting idea of pre-approval process).

113 Cable & Wireless suggests that the Commission collaborate with the Secretary of State to create a standard form for Executive Branch approval that would identify the proposed cable, its landing points and applicant(s), and provide two alternate boxes, one to check off that the application is approved and the other to check off that the application is denied. Cable & Wireless Comments at 14.

114 Global Crossing Comments at 45.

115 *Id.* at 44-45.

116 *Id.* at 44.

preempt state review and licensing of submarine cables.[117] Level 3's and Global Crossing's suggestions go beyond the scope of this proceeding.

D. Required Applicants and Licensees

53. We adopt the NPRM proposal to limit the entities required to become applicants, and thus licensees, to those entities owning or controlling a cable landing station in the United States or with a five percent or greater interest in the cable system.[118] We believe that the new rule will ensure that entities having a significant ability to affect the operation of a cable system are applicants and thus become licensees upon grant so that they are subject to the conditions and responsibilities that are associated with a cable landing license. A corollary objective, as stated in the NPRM, is to ensure that smaller carriers or investors without such ability are not unduly burdened.

54. Specifically, we conclude that only the following entities must be 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.[119] This is a substantial change from our prior practice, which required all entities using the U.S. end of the cable to be applicants. We note that the new threshold is not mandatory, and therefore non-landing parties with less than a five percent interest will have the flexibility to be applicants if they elect to do so. We also believe, as the Commission stated in the NPRM, that adopting a specific method for determining required applicants will provide certainty to potential cable landing license entities.[120] Further, we will continue to require applicants for a cable landing license to identify all original owners, including those with less than five percent interests.[121] We also will retain as a routine condition of every license a requirement that the licensees must maintain de jure and de facto control of the U.S. portion of the cable system,

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117 Level 3 Reply Comments at 2.

118 *See Submarine Cable NPRM*, 15 FCC Rcd at 20823-24, para. 81.

119 We would consider use of the U.S. points of the cable system to include use of U.S.-end half-circuits for transport or for sale of capacity. However, it would not include, for example, use of half-circuits strictly at the foreign end or of full circuits strictly between various non-U.S.-end destination markets in a ring configuration cable system. The NPRM suggested that use of the U.S. points might not occur when cable capacity merely was "hard-patched" through the United States and the U.S. points of the cable system were not used to drop traffic in the United States or to re-originate traffic. *See Submarine Cable NPRM* at 20823-24, para. 81. However, we conclude here that the concept of "hard-patching" may be a difficult standard to apply in the context of U.S.-end transport and sale of cable capacity, and we therefore do not adopt this standard. At the same time, we will not require foreign-authorized carriers to become U.S. licensees of cables licensed by the Commission prior to the effective date of this order in circumstances where the foreign-authorized carrier has purchased, or has entered into an agreement to purchase, whole circuits in the cable system prior to the effective date of this order, and the circuits are hard patched through the United States to telecommunications facilities in a third country, with no breakout of traffic to the U.S. public switched network.

120 *See Submarine Cable NPRM*, 15 FCC Rcd at 20822-24, paras. 78-83.

121 *See* 47 C.F.R. § 1.767(a)(7)-(8).

including but not limited to 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 cable.[122] Therefore, if we receive an application for a cable landing license where the applicants do not have sufficient control over the cable system to ensure compliance with Commission rules, we will require the applicants to amend the application to add other U.S. owners as applicants.

55. AT&T and Global Crossing support the proposed five percent ownership threshold.[123] TyCom supports the Commission's proposal to clarify which entities should be cable landing license applicants and suggests that the Commission require as applicants those parties owning the portion of the cable in U.S. territorial waters.[124] TyCom contends that these parties are the entities necessary for enforcing the terms and conditions of the cable landing license because the Commission has jurisdiction over them and could take enforcement actions against them should the Commission find that the submarine cable for which they were licensed had failed to comply with the terms and conditions of the cable landing license.[125]

56. There is general agreement in the record that entities owning or controlling a U.S. cable landing station should be licensees, with alternative suggestions as to whether non-landing parties should be licensees and if so at what level of ownership or control. For example, FLAG Telecom asserts that the Commission should require licensing only for landing station owners and parties with de facto control, or 25 percent or greater ownership interest in the cable, but no less than a ten percent ownership interest.[126] FLAG Telecom relies on ownership thresholds that have not been designed specifically to reflect the ownership structures of submarine cables. We agree with AT&T's concern that the 25 percent threshold proposed by FLAG Telecom would exclude all or virtually all owners on most open investment submarine cable systems.[127] 360networks

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122 *See* Appendix B, section 1.767(g)(11).

123 *See, e.g.*, AT&T Reply Comments at 41 (asserting that, although a 5% ownership interest in a cable does not confer any obvious ability to affect the operation of the cable, a 5% threshold would provide a reasonable bright-line rule to exclude smaller owners); Global Crossing Comments at 41 (asserting that the Commission's proposal reflects Global Crossing's concern that landing station owners be included as licensees as well as its concern that licenses can play an important role in allowing the public to obtain key market information relevant to judging the nature of concentration of market power).

124 TyCom Comments at 17-18 (stating that, regardless of whether the Commission adopts an ownership threshold, the Commission should continue to require new owners of U.S.-territorial portions of the cable to become licensees in order to ensure that the Commission receives information regarding ownership and competition issues and retains the ability to enforce its authorizations).

125 *Id.*

126 FLAG Telecom Comments at 18-21 (asserting that a 5% ownership threshold is inconsistent with: (1) the section 63.18(h) requirement to identify those entities owning at least 10% of the applicant; (2) the regulatory definition of a foreign carrier affiliation as a 25% or greater ownership interest; and (3) section 3(1) of the Communications Act, defining affiliation as the ownership of an "equity interest (or the equivalent thereof) of more than 10 percent").

127 AT&T Reply Comments at 41.

argues that licensing should be required only for parties owning U.S. landing stations and the U.S. portion of the cable and other parties owning 25 percent or more of the cable who are unaffiliated with the U.S. owners/applicants.[128] Sprint and Level 3 suggest requiring licenses only for U.S. landing parties and not for other landing parties or other owners.[129] Cable & Wireless suggests requiring licenses only for landing parties but not for other owners.[130]

57. With respect to arguments that we should adopt a higher threshold than five percent for non-landing parties, we note that there currently is no low-end threshold. The new threshold is a change that permits entities with smaller interests the flexibility of not becoming applicants, which we conclude is a positive step.[131] An owner of a five to ten percent investment and voting interest in a consortium-type cable typically is one of the larger applicants.[132]

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[128] 360networks Reply Comments at 5-6.

[129] Sprint Comments at 20-21 (asserting that the Cable Landing License Act refers only to landing and operating a cable and that landing parties are the entities that land and operate the cable); Level 3 Comments at 17-18 (asserting that non-landing parties tend to be small carriers from U.S. and WTO Member countries with little market power and a non-controlling interest in the consortium, whereas landing parties may control bottleneck facilities such as cable landing stations and potentially possess the power and incentive to act anti-competitively by charging monopoly rents and discouraging construction of additional capacity).

[130] *See, e.g.*, Cable & Wireless Reply Comments at 24 (stating that including owners of cable capacity that are not also landing station owners goes beyond the scope of the Cable Landing License Act because the act refers to landing and operating cables).

[131] In proposing the 5% ownership threshold, the Commission noted that the greater a firm's investment in a cable system, the greater ability the firm has to influence the way in which a cable is operated. The Commission observed that entities with minimal investment in a cable system, on the other hand, do not have the same ability to affect the operation of the cable system, and there is not the same need, therefore, to subject these entities to the conditions and responsibilities that come with a cable landing license. *Submarine Cable NPRM*, 15 FCC Rcd at 20824, para. 82.

[132] *See, e.g.*, Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Construct, Acquire, and Operate Capacity in a Digital Submarine Cable System, the PAN AMERICAN Cable System, File No. ITC-97-221, Construction & Maintenance Agreement, Schedule B (Dec. 5, 1996) (Pan American Application) (of 9 applicants, applicant with 7.47% interest was one of the two largest shareholders); *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*) (of 19 applicants, two applicants each with 5.68% interest were two of four largest shareholders); *Japan-U.S. Order*, 14 FCC Rcd at 13087, Appendix B, Schedule B (of 19 applicants, applicant with 6.13% interest was one of five largest shareholders); *American Telephone and Telegraph Company et al. Joint Application for Authorization Under Section 214 of the Communications Act of 1934, As Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable Network Between and Among the United States Mainland, the State of Hawaii, the Island of Guam and Japan*, File No. ITC-92-179, Memorandum Opinion, Order and Authorization, 7 FCC Rcd 7758, 7764, Appendix 1, Schedule B (*TPC-5 Section 214 Order*) (of 7 applicants, applicant with 6.08% interest was one of three largest shareholders); *AT&T Corp. et al., Joint Application for a License to Land and Operate a Digital Submarine Cable System Between the United States, the Cayman Islands, Colombia, Costa Rica, Honduras, Mexico and Panama, the MAYA-1 Cable Network*, File No. SCL-LIC-19990325-00006, Cable Landing License, 14 FCC Rcd 19456, 19468, Schedule B (TD/IB 1999) *(MAYA-1 Cable Landing License*) (of 9 applicants, two applicants with (continued….)

Moreover, as a practical matter, using a 25 percent or ten percent threshold, as recommended by some commenters, would exclude most owners of consortium cables.[133] Therefore, licensees under a ten percent or higher threshold might not have sufficient control over the cables to ensure compliance with the terms and conditions of the cable landing license.[134] With regard to arguments that we should limit applicants to landing parties, as AT&T notes, cables with multiple owners often make management decisions through committees consisting of all owners, with voting rights based on ownership share.[135] Additionally, as the NPRM noted, consideration of a firm's influence on operations falls squarely within the ambit of the Cable Landing License Act, which requires a license to "land or operate" a submarine cable.[136] Therefore, we decline to limit applicants to landing parties.

58. We also conclude that, as a general rule, all initial applicants or licensees should be parties to any request to amend an application or to modify a license, respectively, to add a new applicant or licensee.[137] In particular, we require licensees to modify a cable landing license to add

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7.58% interest each were two of four largest shareholders). *See also Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 240 F.3d 1126, 1140 (D.C. Cir. 2001) (presuming, where an owner of a 5% or more interest would ordinarily be one of the two or three largest shareholders of a widely held corporation, that such owner typically has enough of an interest to justify the burden of informing himself about the company's activities and trying to influence management).

133 *See, e.g., Japan-U.S. Order*, 14 FCC Rcd at 13087, Appendix B, Schedule C (of 19 licensees, only two, Level 3 and Worldcom, had a greater than 10% ownership interest, with combined interests of less than 27%); *TAT-14 Cable Landing Order*, Appendix B, Schedule B (only one of 19 licensees had a greater than 10% interest, for 12.76%); *AT&T Corp. et al., Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Construct, Acquire, and Operate Capacity in a Digital Submarine Cable System, the COLUMBUS-III Cable System*, Memorandum Opinion, Order, and Authorization, 14 FCC Rcd 13436, 13444, Schedule B (TD/IB 1999) (only two of 10 applicants had a greater than 10% interest, with combined interest of 39%); Pan American Application, *supra* n. 132, at Schedule B (only one of 9 applicants had a greater than 10% interest, equaling 12.55%); *MAYA-1 Cable Landing License*, 14 FCC Rcd at 19468, Schedule B (only two of 9 applicants had a greater than 10% interest, with a combined interest of 32%).

134 As noted, the Commission routinely requires licensees to maintain de jure and de facto control of the U.S. portion of the cable system. *See, e.g., Japan-U.S. Order*, 14 FCC Rcd at 13083, para. 45(9) ("The Licensees 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 this license"); *see also* Appendix B at § 1.767(g)(11).

135 *See* AT&T Reply Comments at 41 (in open investment systems, landing party actions to light and power the cable system are controlled through the general or management committee consisting of all owners with voting based on ownership shares).

136 *Submarine Cable NPRM* at 20824, para. 82, *citing* the Cable Landing License Act, 47 U.S.C. § 34 (emphasis added).

137 Under this rule, joint applicants or licensees may appoint one party to act as proxy. *See* Appendix B, section 1.767(m). Historically, joint applicants or licensees on consortia cables, for example, have appointed one applicant or licensee to file amendments or modifications with the Commission. This rule does not apply to applications to assign or transfer control of an interest in a cable landing license. Such applications do not require the agreement of all licensees.

an owner with a greater than five percent interest to the license when the owner, although not an initial joint applicant or licensee when the license was granted because its ownership was exclusively at foreign points on the cable system, subsequently seeks to provide service over the cable on an end-to-end basis. In this case, we conclude the owner and existing licensees should apply to add the owner to the license for the U.S. portion of this end-to-end service consistent with the rules we adopt here that entities that own or control a five percent or greater interest in the cable system and use U.S. points must be licensees.[138] Level 3 urges the Commission to eliminate any requirement for prior approval to add new non-landing parties and therefore does not support a requirement to modify a license to add such an initial foreign-end owner that subsequently decides to provide service over the cable on an end-to-end basis.[139] As noted above, however, we decline to adopt the suggestion of some commenters, including Level 3, to limit the license to cable landing parties.

59. We clarify that once an entity becomes a licensee, it is subject to the Commission's rules for modifications, assignments and transfers of control of interests in cable landing licenses, even where these interests are less than five percent.[140] We adopt the NPRM proposal that a licensee for an existing submarine cable that does not own or control a U.S. landing station and has less than a five percent interest in the cable may file an application with the Commission to modify the license to relinquish its interest in the license.[141] We will require that the licensee seeking to relinquish its interest in the license serve a copy of its application on each other joint licensee of the cable system. This service requirement is intended to ensure that each other licensee has specific notice and opportunity to consider whether grant of the application would affect the ability of those licensees to comply with the routine condition imposed on every license requiring each licensee to maintain control of the U.S. portion of the cable system sufficient to comply with the Commission's rules and any specific conditions of the license.[142] We will place such requests on public notice and will grant applications by public notice unless the International Bureau determines there is a reason to seek additional comment and review.

60. We reiterate that applicants for common carrier landing licenses are required to

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138 We reiterate, however, that we will not require foreign-authorized carriers to become U.S. licensees of cables licensed by the Commission prior to the effective date of this order in circumstances where the foreign-authorized carrier has purchased, or has entered into an agreement to purchase, whole circuits in the cable system prior to the effective date of this order, and the circuits are hard patched through the United States to telecommunications facilities in a third country, with no breakout of traffic to the U.S. public switched network. *See supra* n. 118.

139 Level 3 Comments at 18.

140 For example, an initial licensee might convey a partial interest in the cable to another entity, with the result that the initial licensee holds an interest of less than 5%, or an initial licensee with an interest below 5% nonetheless might request to be included as a licensee, or might have been included as a licensee on a license granted prior to the effective date of this Report and Order.

141 *See Submarine Cable NPRM*, 15 FCC Rcd at 20824, para. 83.

142 *See supra* para. 54; *see also* Appendix B, section 1.767(g)(11).

file, in addition to an application for the cable landing license itself, an application for section 214 authority for the construction of new lines under section 63.18(e)(4) of the rules.[143] This 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]

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143 *See* 47 C.F.R. § 63.18(e)(4).

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.

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 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

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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.

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]

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]

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

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 (continued….)

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 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

(Continued from previous page)
case-by-case basis); Level 3 Reply Comments at 2 (asserting that the Commission should develop standardized conditions).

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).

carrier if it does not meet the two-part test set forth by the court in *NARUC I*.[161] 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]

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[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*, 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 Crossing

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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).

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 other

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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.

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
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 required to 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.

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).