

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

In the Matter of)	
)	
Saint Maarten International Communications Services, Inc.)	
)	
Application for Review of Application for a License to Land and Operate a Fiber Optic Submarine Cable System Between San Juan, Puerto Rico, and St. Maarten, Netherlands Antilles)	SCL-LIC-20031209-00033
)	
Application for Authorization to Construct, Acquire Capacity in, and Operate the SMPR-1 cable system Between San Juan, Puerto Rico, and St. Maarten, Netherlands Antilles on a common-carrier basis pursuant to Section 63.18(e)(3).)	ITC-214-20040128-00071
)	

ORDER ON REVIEW

Adopted: November 16, 2005

Released: November 22, 2005

By the Commission:

I. INTRODUCTION

1. In this decision, we deny Innovative Communications Corp.'s Application for Review of the action by the International Bureau, Policy Division, granting a license to St. Maarten International Communications Services, Inc. to land and operate, on a common carrier basis, a fiber optic submarine cable system, SMPR-1, between San Juan, Puerto Rico and St. Maarten, Netherlands Antilles.¹ Innovative requests that we modify the license to impose certain conditions. We find that the Application for Review does not present competitive concerns that justify modifying the license as Innovative requests. We therefore

¹ See Innovative Communications Corp. Application for Review, File No. SCL-LIC-20031209-00033 (filed June 10, 2004) ("*Application for Review*").

uphold the International Bureau (“Bureau”)² action granting SMITCOMS’s application to land and operate the SMPR-1 cable system.³

II. BACKGROUND

A. The Parties

2. St. Maarten International Communications Services, Inc. (“SMITCOMS”) is a corporation organized under the laws of Delaware and registered as a foreign corporation under the laws of Puerto Rico. SMITCOMS, located in the Netherlands Antilles, is a wholly-owned subsidiary of SMITCOMS, N.V., a corporation organized under the laws of St. Maarten, Netherlands Antilles.⁴ The Government of the Island Territory of St. Maarten, Netherlands Antilles, which is an autonomous part of the Kingdom of the Netherlands, wholly owns SMITCOMS, N.V., a licensed international carrier in the Island Territory of St. Maarten.⁵ The Netherlands Antilles is a member state of the World Trade Organization (“WTO”)⁶ SMITCOMS certifies that it is affiliated, within the meaning of section 63.09(e) of the rules,⁷ with several foreign carriers that operate in St. Maarten, including its direct parent, SMITCOMS, N.V., and Telem, which provides fixed wireline services to the residents of St. Maarten.⁸ In addition to holding a cable landing license and section 214 authorization to land, construct and operate the SMPR-1 cable system, SMITCOMS holds an international section 214 authorization to provide facilities-based and resale service between the United States and

² International Bureau, Policy Division acting pursuant to 47 C.F.R. § 0.261(a)(5).

³ See *Actions Taken Under the Cable Landing License Act*, Public Notice, DA 04-1307 (rel. May 11, 2004). In its Application for Review, filed June 10, 2004, Innovative does not discuss specifically the Bureau action granting the companion section 214 authorization to construct, acquire capacity in, and operate the SMPR-1 cable system on a common carrier basis, but it requests that we impose on the section 214 authorization the same conditions that it requests we impose on the cable landing license. See *Application for Review* at 14-15. Innovative’s request to modify the conditions of the companion section 214 authorization is not timely filed. Applications for review of the Bureau’s decision granting the section 214 authorization were due June 7, 2004 (within 30 days of the May 6, 2004, release of the public notice granting the section 214 authorization). See *International Authorizations Granted*, Public Notice, File No. ITC-214-20040128-00071, DA 04-1278 (rel. May 6, 2004). See also 47 C.F.R. §§ 1.115(d), 1.4(b). We therefore dismiss as untimely filed this portion of Innovative’s Application for Review.

⁴ See St. Maarten International Communications Services, Inc. Application for a License to Land and Operate a Fiber Optic Submarine Cable System Between San Juan, Puerto Rico and St. Maarten, Netherlands Antilles, File No. SCL-LIC-20031209-00033 (filed Dec. 9, 2003), Attachment 1 at 5 (“*Application*”).

⁵ See St. Maarten International Communications Services, Inc. Application for a License to Land and Operate a Fiber Optic Submarine Cable System Between San Juan, Puerto Rico and St. Maarten, Netherlands Antilles, File No. SCL-LIC-20031209-00033, Amendment (filed Jan. 7, 2004) at 2 n.2 (“*Amendment*”).

⁶ *Application*, Attachment 1 at 6.

⁷ 47 C.F.R. § 63.09. See also *Amendment* at 5.

⁸ SMITCOMS explains that, from 1975 through 1996, Telem was operated by a governmental agency of the central government of the Netherlands Antilles. *Amendment* at 5, n.10. In 1996, the central government created a limited liability company to assume operational control over Telem. *Id.* Under provisions contained in the 1996 Telecom Law adopted by the Central Government of the Netherlands Antilles, the government of St. Maarten elected to assume control of Telem in order to meet the needs of its residents and the public interest. *Id.* SMITCOMS states that Telem will become one of various fixed wireline providers in St. Maarten under the 1996 Telecom Law, pending approval of new entry by the central government. *Id.*

all permissible foreign points, including St. Maarten.⁹ SMITCOMS is classified as a dominant international carrier pursuant to section 63.10 of the rules in its provision of international service between the United States and St. Maarten.¹⁰

4. Innovative Communications Corp. (“Innovative”) is a multi-services telecommunications and media company headquartered in St. Croix, U.S. Virgin Islands. It provides local and interexchange telephony, cellular, and Internet services, operates a cable franchise and owns and publishes a daily newspaper in the U.S. Virgin Islands. The company also has operations in the British Virgin Islands, France, Guadeloupe, Martinique, St. Martin and St. Maarten, Netherlands Antilles. Through subsidiaries and/or affiliated companies, Innovative provides cellular services (Eastern Caribbean Cellular, “ECC”), and cable television services (St. Maarten Cable TV) to St. Maarten. The record indicates that Innovative also has a license to provide long distance services in St. Maarten and has announced plans to offer additional services, including competitive local exchange services, in St. Maarten.

B. The Application and Proceedings

5. On December 9, 2003, SMITCOMS filed an application under section 1.767(a) of the Commission’s rules¹² for a license to land and operate, on a common carrier basis, a fiber optic submarine cable system, SMPR-1, between San Juan, Puerto Rico, and St. Maarten, Netherlands Antilles. Pursuant to section 1.767(b), the Cable Landing License Act of 1921,¹³ and Executive Order No. 10530,¹⁴ the Bureau informed the Department of State of the Application and received no objection to grant.¹⁵ The SMPR-1 system lands at Isla Verde, San Juan, Puerto Rico and Divi Little Bay, St. Maarten, Netherlands Antilles. At Isla Verde, SMITCOMS lands its cable using an existing landing station operated by Telecomunicaciones Ultramarinas de Puerto Rico, which currently serves as an interconnection point for numerous cable systems in the Caribbean Region. Other than the landing station at Isla Verde, SMITCOMS, N.V. owns 100 percent of the SMPR-1 cable system.¹⁶ The Bureau placed the application on public notice on March 5, 2004.¹⁷ On March 18, 2004, Innovative filed a Petition to Adopt Conditions that addressed both the application for a cable landing license and the companion section 214 application.¹⁸

⁹ See *International Authorizations Granted*, Public Notice, DA 03-2605, File No. ITC-214-20030702-00319 (rel. Aug. 7, 2003). See also *Application*, Attachment 1 at 1.

¹⁰ See Public Notice, *supra* note 9.

¹¹ Opposition to Application for Review (filed June 25, 2004) (“*Opposition*”).

¹² 47 C.F.R. § 1.767.

¹³ An Act Relating to the Landing and Operation of Submarine Cables in the United States, Pub. Law No. 8, 67th Congress, 42 Stat. 8 (1921); 47 U.S.C. §§ 34-39.

¹⁴ Exec. Ord. No. 10530 § 5(a) (May 10, 1954), reprinted as amended in 3 U.S.C. § 301.

¹⁵ See Letter from James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission to Executive Branch Agencies (February 27, 2004).

¹⁶ See *Application*, Attachment 1 at 4-5; *Amendment* at 3.

¹⁷ *Streamlined Submarine Cable Landing License Applications Accepted for Filing*, Public Notice, DA 04-618 (rel. Mar. 5, 2004).

¹⁸ Innovative Petition to Adopt Conditions, File Nos. SCL-LIC-20031209-00033 and ITC-214-20040128-00071 (filed Mar. 18, 2004).

Innovative argued that grant of the cable landing license and companion section 214 authorization raised a risk to competition on the U.S.-Netherlands Antilles route that warranted the imposition of specific conditions to protect U.S. carriers and consumers.¹⁹ On March 30, 2004, SMITCOMS filed a Reply and Opposition to the Petition to Adopt Conditions,²⁰ and on April 9, 2004, Innovative filed a Reply.²¹ By public notice dated May 6, 2004, the Bureau granted SMITCOMS's section 214 application and authorized it to construct and operate the SMPR-1 cable system on a common-carrier basis pursuant to section 63.18(e)(3) of the rules.²² By public notice dated May 11, 2004, the International Bureau granted SMITCOMS's cable landing license application and authorized it to land and operate SMPR-1 between San Juan, Puerto Rico, and St. Maarten, Netherlands Antilles.²³ The Bureau did not address the merits of Innovative's Petition to Adopt Conditions in the grant of the section 214 authorization or the cable landing license, each of which the Bureau processed on a streamlined basis.²⁴

7. On June 10, 2004, Innovative filed the instant Application for Review requesting that the Commission review the action of the Bureau granting SMITCOMS's license without imposing the conditions Innovative requested. Innovative argues that general competitive safeguards (i.e., the no special concessions rule and reporting requirements) will not address the "unusual risk to competition" posed by SMITCOMS's and its parents' anticompetitive behavior and that additional conditions should have been imposed in order to prevent

¹⁹ *Id.*

²⁰ SMITCOMS Reply and Opposition to Petition to Adopt Conditions, File Nos. SCL-LIC-20031209-00033 and ITC-214-20040128-00071 (filed Mar. 30, 2004).

²¹ Innovative Reply, File Nos. SCL-LIC-20031209-00033 and ITC-214-20040128-00071 (filed Apr. 9, 2004).

²² *International Authorizations Granted*, Public Notice, File No. ITC-214-20040128-00071, DA 04-1278 (rel. May 6, 2004).

²³ *Actions Taken Under the Cable Landing License Act*, Public Notice, DA 04-1307 (rel. May 11, 2004).

²⁴ Section 63.12 of the Commission's rules establishes a streamlined process for granting international section 214 authorizations that generally are not expected to raise public interest concerns. *See* 47 C.F.R. § 63.12; *1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, IB Docket No. 98-118, Report and Order, FCC 99-51, 14 FCC Rcd 4909 (1999) ("*1998 International Biennial Review Order*"). An application that is eligible for streamlined processing under the specific criteria of section 63.12 is placed on public notice and granted 14 days after the date of public notice unless the Commission informs the applicant in writing, within the 14-day public notice period, that the application is being removed from streamlined processing. 47 C.F.R. § 63.12(a), (c)(4); *see also 1998 International Biennial Review Order*, 14 FCC Rcd at 4920-21, ¶ 25 (delegating to the International Bureau the authority to identify those particular applications that appear eligible for streamlining but that nonetheless warrant public comment and additional Commission scrutiny under current stated Commission policies). The Commission does not seek public comment on streamlined applications or entertain petitions to deny. *Id.*, 14 FCC Rcd at 4919-20, ¶ 23. With regard to informal communications concerning streamlined applications between outside parties and Commission staff, the Commission's ex parte rules continue to apply. Any such informal communication does not result in an application being ineligible for streamlined processing. An application can be removed from streamlined processing only in the sound discretion of Commission staff. *Id.*, 14 FCC Rcd at 4921, ¶ 26. The Commission adopted substantially the same streamlined procedure for processing submarine cable landing licenses in *Review of Commission Consideration of Applications Under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, 16 FCC Rcd 22167, 22187-91, ¶¶ 40-47 (2001) ("*Submarine Cable Report and Order*").

SMITCOMS from harming competition and U.S. consumers.²⁵ Innovative contends that the Bureau's failure to impose additional conditions conflicts with established Commission precedent and policy.

8. On June 25, 2004, SMITCOMS filed an Opposition to Innovative's Application for Review.²⁶ SMITCOMS argues that the Commission previously reviewed Innovative's allegations and either declined to take action or elected to disregard the accusations as being without merit.²⁷ SMITCOMS also contends that Innovative's Application for Review was untimely filed and requests the imposition of additional conditions that are merely duplicative of the Commission's existing competitive safeguards.²⁸

9. On July 8, 2005, Innovative filed a Reply to SMITCOMS's Opposition to Application for Review and argued that, because the Application challenged the Bureau's decision to grant the cable landing license without imposing additional conditions, the proper trigger for contesting the Bureau's decision was the May 11 Public Notice granting the cable landing license.²⁹ Consequently, Innovative argues that the Application for Review was timely filed on July 10, 2004.

III. DISCUSSION

A. Standard of Review

10. Section 1.115 of the Commission's rules establishes that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."³⁰ The rule further provides that "the factor(s) which warrant Commission consideration of the questions presented [include]: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy."³¹ In the event the Commission chooses to deny an Application for Review, the Commission is permitted to deny such an Application with or without specifying its reasoning.³² Based on our review of the record, we deny Innovative's Application for Review of the Bureau action granting SMITCOMS a cable landing license for the SMPR-1 cable system. Specifically, we find that the Bureau's decision to grant SMITCOMS's submarine cable landing license application without imposing the additional conditions requested by

²⁵ *Application for Review* at 1.

²⁶ *See Opposition*, *supra* note 11.

²⁷ *Id.* at 3. Specifically, SMITCOMS states that the Enforcement Bureau declined to take action on an informal complaint filed by Innovative in October 2003. It also notes that the International Bureau declined to respond to similar allegations that Innovative raised in the Petition to Adopt Conditions that it filed with the Bureau in response to SMITCOMS's applications for the SMPR-1 cable landing license and companion section 214 authorization.

²⁸ *Id.* at 3-5.

²⁹ *Reply to Opposition* at 2.

³⁰ 47 C.F.R. § 1.115 (2003). *See also* 47 U.S.C. § 155(c)(4)-(7).

³¹ *Id.*, § 1.115 (b)(2)-(b)(2)(i). The other factors that warrant Commission consideration of the questions presented are: (ii) the actions involved a question of law or policy that has not previously been resolved by the Commission; (iii) the actions involved the application of precedent or policy that should be overturned or revised; (iv) there has been an erroneous finding as to an important or material question of fact; or (v) there has been prejudicial procedural error. 47 C.F.R. § 1.115 (b)(2)-(b)(2)(i)-(v).

³² 47 C.F.R. § 1.115(g).

Innovative did not conflict with statute, regulation, case precedent or established Commission policy. We find that Innovative's Application for Review of the Bureau's grant of the cable landing license was timely filed, and we therefore address below the merits of this portion of its Application for Review.³³

B. Analysis

12. The Commission's authority to grant, withhold, or condition cable landing licenses derives from the Cable Landing License Act of 1921³⁴ and Executive Order No. 10530.³⁵ Section 35 of the Cable Landing License Act provides that licenses may be granted upon "such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of the cables so licensed."³⁶ Executive Order No. 10530 delegates to the Commission the President's authority under the Cable Landing License Act.³⁷ 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.³⁸

13. In the *Foreign Participation Order*,³⁹ the Commission adopted a rebuttable presumption that a submarine cable landing license application filed by an entity that is, or is affiliated with, a carrier in a WTO Member country where the cable lands does not pose concerns that would justify denial of the application on competition grounds.⁴⁰ The

³³ The proper trigger for Innovative's Application for Review seeking to add conditions to the cable landing license was May 11, 2004, the release date of the public notice granting the license. Innovative therefore timely filed its Application for Review of the license grant on June 10, 2004, the 30th day after release of the Public Notice granting the cable landing license. See *Actions Taken Under the Cable Landing License Act*, Public Notice, DA 04-1307 (rel. May 11, 2004). See also 47 C.F.R. §§ 1.115(d), 1.4(b). As discussed *supra* note 3, we dismiss as untimely filed the portion of Innovative's Application for Review that requests us to impose the same conditions on the companion section 214 authorization for the SMPR-1 cable system.

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

³⁵ Exec. Ord. No. 10530 § 5(a) (May 10, 1954), reprinted as amended in 3 U.S.C. § 301.

³⁶ 47 U.S.C. § 35.

³⁷ The delegation of Presidential authority is granted 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. Exec. Ord. No. 10530 § 5(a).

³⁸ 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 and Opinion Order, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, 100 F.C.C. 2d 1033, 1043, ¶ 21 (1985).

³⁹ 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 23916-17; Order on Reconsideration, 15 FCC Rcd 18158 (2000) ("*Foreign Participation Order*").

⁴⁰ See *Foreign Participation Order*, 12 FCC Rcd 23916-17, ¶¶ 57-58. See also, e.g., *Telefonica SAM USA Inc. and Telefonica 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, DA 00-1826, 15 FCC Rcd 14915, 14917-18, ¶ 6 (Telecom Div./IB 2000) ("*Telefonica SAM*").

Commission observed that, if a particular application presents unusual risks to competition, the Commission can address most potential problems by imposing conditions on the license.⁴¹

14. Subsequently, in the *Submarine Cable Report and Order*,⁴² the Commission adopted rules and procedures to achieve three key objectives: (1) institute an expedited licensing process to speed deployment of cable capacity to the market; (2) ensure careful Commission review of certain applications to guard against anti-competitive behavior; and (3) adopt a pro-competitive model that could be used around the world.⁴³ The Commission determined that it could streamline the processing of the vast majority of applications, including applications filed by entities that are, or are affiliated with, a carrier that possesses market power in one or more of the cable's destination markets so long as the destination market was a member of the WTO and the applicant certified that it would comply with certain competitive safeguards.⁴⁴ The Commission concluded that, while applicants with foreign carrier affiliations generally should be eligible for streamlined processing, it could not 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 adopted in the *Submarine Cable Report and Order*.⁴⁵ The standard competitive safeguards adopted in the *Submarine Cable Report and Order* are intended to prevent the leveraging of foreign market power into the U.S. international services market. These safeguards are targeted to detect and deter discrimination among U.S. carriers by a foreign carrier with market power in the provision of inputs on the foreign end of a submarine cable that are necessary to land, connect, and operate that cable between the United States and the foreign point.⁴⁶ In adopting its regulatory framework, the Commission noted that a foreign carrier can abuse its market power with or without a U.S. affiliate.⁴⁷ Thus, the Commission adopted a "No Special Concessions" rule, codified in section 1.767(g)(5), that applies to all cable landing licensees, including SMITCOMS. The "No Special Concessions" rule prohibits a U.S. cable landing licensee from agreeing to accept, from any foreign carrier with market power on the foreign end of a U.S.-licensed cable,⁴⁸ an exclusive arrangement involving services, facilities, or functions on the foreign end 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,

⁴¹ See *Foreign Participation Order*, 12 FCC Rcd at 23934, ¶ 94. See, e.g., *Telefonica SAM*, 15 FCC Rcd at 14917-18, ¶ 6.

⁴² *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, 16 FCC Rcd 22167 (2001) ("*Submarine Cable Report and Order*").

⁴³ *Id.*, 16 FCC Rcd at 22168-69, ¶ 3.

⁴⁴ *Id.*, 16 FCC Rcd at 22174-78, 22187-93, ¶¶ 12-18, 40-52. The streamlined processing procedures and requirements are codified in section 1.767(i)-(l) of the rules, 47 C.F.R. § 1.767(i)-(l).

⁴⁵ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22175, ¶ 13.

⁴⁶ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22179-82, ¶¶ 22-29. 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. *Id.* at 22181, ¶ 26.

⁴⁷ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22180, ¶ 24.

⁴⁸ For the purposes of section 1.767(g)(5), the term "foreign carrier" is defined to include any entity that owns or controls a foreign cable landing station. See 47 C.F.R. § 1.767(g)(5) and Note to § 1.767.

or lessors.⁴⁹ Moreover, because an affiliation between a U.S. carrier and a foreign carrier with market power creates a heightened ability and incentive to engage in anti-competitive activity, the Commission also adopted competitive safeguards applicable to dealings between such affiliated entities. These safeguards, which consist of quarterly reporting requirements that are codified in section 1.767(l), are designed to make a U.S. carrier's interaction with its affiliated foreign carrier transparent and thereby guard against discriminatory conduct.⁵⁰ The Bureau specifically conditioned grant of SMITCOMS's cable landing license on its compliance with the reporting requirements due to its affiliation with SMITCOMS, N.V.⁵¹

16. Innovative argues that the competitive safeguards imposed on SMITCOMS's license for the SMPR-1 cable system will not address the "unusual risk to competition" posed by SMITCOMS's ownership and operation of the system.⁵² Innovative's Application for Review raises two arguments in favor of imposing additional conditions. First, Innovative contends that SMITCOMS will have the incentive and ability to leverage its exclusive ownership of two of the key components of submarine cables – the "wet link" and the cable landing station in St. Maarten⁵³ – to the detriment of U.S. competitors and consumers. It asserts that SMITCOMS's exclusive ownership and operation of the wet link and cable landing station constitute "special concerns" outlined in the *Submarine Cable Report and Order* that raise an unusual risk to competition.⁵⁴ Innovative also asserts that the SMPR-1 cable will satisfy demand for capacity on the U.S.-St. Maarten route that existing cables cannot meet.⁵⁵ Innovative argues that SMITCOMS's control of the SMPR-1 wet link and cable landing station in St. Maarten will allow it to: (a) impose costs on other carriers by charging supracompetitive rates for backhaul, transit, collocation, and cross-connection and through its ability to control the timing of circuit activation; (b) offer access to these inputs only at unfavorable terms and conditions, that SMITCOMS's engineering and technical decisions and delaying delivery of the necessary input products to benefit SMITCOMS's will of competitors on the U.S.-St. Maarten route. Innovative contends that SMITCOMS, N.V. and the Government of St. Maarten routinely act to stifle competition by new entrants, including Cellular One and ECC, to the benefit of themselves and SMITCOMS. It also states that the Government of St. Maarten has espoused a policy of limiting the competition to which SMITCOMS, N.V. is subject. Innovative asserts that the ownership affiliation between

⁴⁹ See 47 C.F.R. § 1.767(g)(5).

⁵⁰ See 47 C.F.R. § 1.767(l). See also *Submarine Cable Report and Order*, 16 FCC Rcd at 22184-85, ¶¶ 34-36.

⁵¹ SMITCOMS agrees in its Application to abide by the reporting requirements specified in section 1.767(l)(1)-(2) of the rules. *Id.* at 9. See also *Amendment* at 6 (correcting its certification of compliance to reference paragraph (l) rather than paragraph (k) of section 1.767).

⁵² *Application for Review* at 6.

⁵³ 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 Report and Order*, 16 FCC Rcd at 22181, ¶ 26 n.61.

⁵⁴ *Application for Review* at 12.

⁵⁵ *Application for Review* at 5.

⁵⁶ *Application for Review* at 5-6, 12.

SMITCOMS and SMITCOMS, N.V., a foreign carrier with market power, creates “a heightened ability and incentive to engage in anticompetitive behavior.”⁵⁷ To ensure that SMITCOMS does not use its license to distort competition and harm U.S. consumers, Innovative requests that the Commission impose additional conditions on SMITCOMS’s cable landing license.⁵⁸

18. We are not persuaded by either of Innovative’s arguments and find that Innovative has failed to show that the competitive safeguards the Bureau imposed on SMITCOMS’s license will be insufficient to detect or deter unreasonable discrimination by SMITCOMS or its parent, SMITCOMS, N.V. We observe, at the outset, that SMITCOMS, N.V. owns and controls 100 percent of the SMPR-1 cable system wet link and the cable landing station at Divi Little Bay, St. Maarten.⁵⁹ Innovative correctly notes that, in the *Submarine Cable Report and Order*, the Commission determined that entities that control the wet link and cable landing station of a submarine cable system (as well as exclusive backhaul facilities associated with the landing station), are most likely to have the ability to affect competition on particular routes. We disagree, however, that the Commission considered the exclusive end-to-end ownership and control of a U.S.-licensed cable system, including the wet link and foreign cable landing station, by a foreign carrier with market power in a WTO Member country to present “special concerns”⁶⁰ that warrant imposing the conditions that Innovative requests in this proceeding. In applying the open entry standard to submarine cable landing license applicants from WTO Member countries in the *Foreign Participation Order*, the Commission fully anticipated that foreign carriers with market power in these countries would seek to construct and operate submarine cables end-to-end between the United States and their home markets.⁶¹ The Commission’s purpose in subsequently codifying competitive safeguards for cable landing licensees in the *Submarine Cable Report and Order* was to adopt a pro-competitive, expedited licensing process while ensuring careful review of applications and the imposition of a predictable set of competitive safeguards narrowly tailored to detect and deter discrimination by a licensee and an affiliated foreign carrier with market power in a relevant input market in one or more of a cable’s destination markets.⁶² It was precisely because the Commission recognized that a cable system’s wet link and cable landing station (as well as exclusive backhaul facilities) are key components of a submarine cable system that it specifically included these components in the list of facilities and services covered by the No

⁵⁷ *Id.* at 13.

⁵⁸ Specifically, Innovative requests that: (1) SMITCOMS must provide sufficient space at its St. Maarten cable landing station to other unaffiliated carriers for collocation equipment to provide backhaul; (2) SMITCOMS must provide collocation space, connection facilities, and necessary services promptly; (3) SMITCOMS may not restrict who can provide backhaul; (4) SMITCOMS must offer competitors access to its cable landing station on the same rates, terms and conditions as those offered to any other competitors or affiliates; and (5) SMITCOMS must allow smaller firms to combine their capacity requirements for the purpose of obtaining volume discounts.

⁵⁹ As discussed *supra* paragraph 5, the SMPR-1 cable lands in the United States at the Isla Verde landing station, operated by Telecomunicaciones Ultramarinas de Puerto Rico, which serves as an interconnection point for numerous cable systems serving the Caribbean Ocean region.

⁶⁰ See *Application for Review* at 12-13.

⁶¹ See *Foreign Participation Order*, 12 FCC Rcd at 23896-97, 23932-35, ¶¶ 10, 87-96.

⁶² See *Submarine Cable Report and Order*, 16 FCC Rcd at 22168-69, ¶ 3. See also *supra* paras. 14-15.

Special Concessions Rule that applies to all cable landing licensees, including SMITCOMS.⁶³ Thus, contrary to Innovative's argument that SMITCOMS, N.V.'s ownership and control of the SMPR-1 wet link and cable landing station in St. Maarten presents a "special concern," we find that the No Special Concessions Rule is designed specifically to address the competitive concern raised by SMTICOMS, N.V.'s exclusive ownership and control of these facilities.

20. We also reject as without foundation Innovative's argument that the "narrow version" of the No Special Concessions Rule in section 1.767(g) "will likely be of little deterrence value."⁶⁴ Innovative misconstrues the manner in which the Commission "narrowed" the scope of the No Special Concessions Rule as compared to the prohibition on exclusive arrangements that the Commission previously had imposed on cable landing licensees prior to adopting section 1.767(g)(5).⁶⁵ The Commission focused section 1.767(g)(5) more narrowly than the pre-existing uncodified prohibition on exclusive arrangements by confining it to special concessions with foreign carriers that possess market power, rather than to all foreign carriers.⁶⁶ The Commission also provided more clarity in section 1.767(g)(5) than in the pre-existing prohibition by specifying that the prohibited exclusive arrangements include those particularly relevant to the submarine cable market.⁶⁷ Innovative also disputes the efficacy of section 1.767(g)(5), because SMITCOMS, which holds an international section 214 authorization to provide facilities-based and resale services to all permissible foreign points, already is subject to the similar prohibition on agreeing to accept special concessions contained in section 63.14 of the rules. According to Innovative, section 63.14 "has not prevented any anticompetitive conduct or led [SMITCOMS's] ultimate owner, the Government of St. Maarten, to alter its express policy of limiting the number of international carriers."⁶⁸ The anticompetitive conduct alleged by Innovative, however, consists of purported efforts by SMITCOMS, N.V. and the Government of St. Maarten in administrative and judicial proceedings in the Netherlands Antilles to limit the number of carriers in St. Maarten. We do not find that SMITCOMS, N.V.'s or its parent

⁶³ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22181, ¶ 26 n.61 ("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 also 47 C.F.R. § 1.767 (g)(5).

⁶⁴ *Application for Review* at 14.

⁶⁵ The pre-existing uncodified prohibition on exclusive arrangements provided that: "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." *Submarine Cable Report and Order*, 16 FCC Rcd at 22183, ¶ 31 n.68.

⁶⁶ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22183, ¶ 31. In the *Foreign Participation Order*, the Commission similarly had narrowed the scope of the No Special Concession Rule in section 63.14 that applies to all U.S.-authorized international common carriers. See *id.* (citing *Foreign Participation Order*, 12 FCC Rcd at 23955-65, ¶¶ 150-170). In narrowing the No Special Concessions rule in section 63.14 to exclude U.S. carrier arrangements with foreign carriers that lack market power, the Commission observed that exclusive arrangements can serve the public interest in appropriate circumstances. *Foreign Participation Order*, 12 FCC Rcd at 23957-58, ¶ 156.

⁶⁷ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22183, ¶ 31.

⁶⁸ *Application for Review* at 14.

entity's exercise of administrative or judicial rights in the Netherlands Antilles constitutes anti-competitive conduct that the No Special Concessions rules in sections 63.14 and 1.767(g)(5), or that Innovative's own proposed conditions, are intended to address. The prohibition on agreeing to accept special concessions from foreign carriers with market power is designed to prevent the leveraging of market power into the U.S. market through discrimination among U.S. carriers by a foreign carrier with market power in relevant input markets.⁶⁹ The purpose of this safeguard is precisely to ensure that a foreign carrier with market power does not favor its U.S. affiliate over unaffiliated U.S. carriers in providing the facilities and services that Innovative's proposed conditions seek to address: i.e., access to and use of capacity on the cable; access to the cable landing station, including collocation space, connection facilities and necessary services; and the opportunity to provide or obtain backhaul capacity.⁷⁰ Should SMITCOMS, N.V. deny, restrict or otherwise degrade the access of U.S. carriers, except SMITCOMS, to the St. Maarten market by virtue of its ability to control the amount of capacity into St. Maarten, as Innovative alleges could occur, such action would raise questions that would require scrutiny under our No Special Concessions rule.⁷¹

22. Our quarterly reporting requirements, moreover, are intended to provide the necessary transparency to ensure that SMITCOMS, N.V. does not favor its U.S. affiliate, SMITCOMS, by delaying the provisioning or maintenance, or degrading the quality, of necessary services and facilities to SMITCOMS's U.S. competitors. Under the terms of its license, SMITCOMS is required to file quarterly circuit status information for the U.S.-St. Maarten route on a facility-specific basis.⁷² According to our rules, SMITCOMS is required to file its circuit status data on the U.S.-St. Maarten route no later than 90 days after the close of each calendar quarter, and unaffiliated U.S. carriers can readily compare this information to

⁶⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23952, ¶ 145.

⁷⁰ The exclusive arrangements prohibited by the No Special Concessions rule include arrangements 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. 47 C.F.R. § 1.767(g)(5)(ii). If a foreign carrier with market power were to enter into an exclusive arrangement with a U.S. carrier, competing carriers on the foreign end, if any exist, might not have sufficient capacity to accommodate rival U.S. carrier needs. See *Foreign Participation Order*, 12 FCC Rcd 23954, ¶ 157. 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. *Id.*

⁷¹ We also note that the SMPR-1 cable system is authorized as a common carrier cable system. As such, SMITCOMS's operation of the system in the United States, and its provisioning of capacity in U.S. half-circuits, is subject to, *inter alia*, section 201 of the Act, which requires that service be provided upon reasonable request and that rates and practices be just and reasonable. In addition, section 202 of the Act prohibits undue discrimination among customers. The Commission has ample authority to investigate allegations that a violation of the statute or our rules has occurred. See 47 U.S.C. § 218. In the event that the Commission were to find a violation of the statute or rules, we have several different remedies available, such as forfeitures, the imposition of additional conditions, or revocation for failure to comply with the statute, rules or conditions of SMITCOMS's license. See *Submarine Cable Report and Order*, 16 FCC Rcd at 22186, ¶ 38.

⁷² See 47 C.F.R. § 1.767 (l)(2). SMITCOMS is required to file these circuit status reports pursuant to section 63.10(c)(4) of the rules because it is classified as a "dominant" U.S. international common carrier under the terms of its international section 214 authorization for the provision of facilities-based and resale services on the U.S.-St. Maarten route. See *supra* paragraph 3.

their own circuit status data.⁷³ With this information, the Commission can determine if SMITCOMS is unreasonably denying unaffiliated U.S. carriers access to capacity on the SMPR-1 cable system.

23. SMITCOMS's license also requires it to file quarterly reports summarizing the provisioning and maintenance of all network facilities and services that SMITCOMS procures from SMITCOMS, N.V.⁷⁴ The quarterly reports will allow unaffiliated carriers to monitor and detect whether SMITCOMS is receiving favorable treatment from SMITCOMS, N.V., and to notify the Commission if they believe SMITCOMS is engaging in discriminatory conduct.⁷⁵ Innovative provides no evidence or policy basis to contradict the Commission's conclusion that "[s]uch a reporting requirement will serve as a strong deterrent from engaging in unduly discriminatory behavior."²⁴ Notwithstanding Innovative's allegations about SMITCOMS, N.V.'s past behavior, we find no basis in the record to conclude that SMITCOMS will not abide by the standard competitive safeguards imposed on its cable landing license. Innovative has not provided any evidence that SMITCOMS or SMITCOMS, N.V. has engaged in adjudicated violations of the Commission's rules or U.S. antitrust or other competition laws, or in demonstrated fraudulent or other behavior, such that this past behavior might indicate that SMITCOMS would fail to comply with the Commission's competitive safeguards and other rules.⁷⁷ 25. We note that SMITCOMS has not demonstrated in this proceeding that its parent, SMITCOMS, N.V., will lack market power in relevant input markets in St. Maarten that are necessary to land, connect and operate the SMPR-1 cable system. We therefore find that SMITCOMS, N.V. is subject to the requirements of the No Special Concessions rules codified in sections 1.767(g)(5) and 63.14. We direct the International Bureau to issue an amended *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets* to add St. Maarten to the list of destination markets and SMITCOMS, N.V. as a carrier presumed to possess market power in St. Maarten.⁷⁸

26. In summary, we find that Innovative's Application for Review does not present concerns that justify imposing the specific conditions it proposes in addition to those that

⁷³ See 47 C.F.R. §§ 1.767 (l)(2), 63.10 (c)(4).

⁷⁴ See 47 C.F.R. §§ 1.767 (l)(1), 63.10(c)(3).

⁷⁵ See *Submarine Cable Report and Order*, 16 FCC Rcd at 22185, ¶ 35. See also *Foreign Participation Order*, 12 FCC Rcd at 24016, ¶ 277.

⁷⁶ *Foreign Participation Order*, 12 FCC Rcd at 24016, ¶ 277. We also note that, because SMITCOMS is classified as a "dominant" U.S. international carrier on the U.S.-St. Maarten route, it also files quarterly reports of its traffic and revenue on that route. 47 C.F.R. § 63.10(c)(2).

⁷⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23915, ¶ 53. In evaluating character qualifications of applicants, the Commission considers misconduct that violates the Communications Act or a Commission rule or policy and certain adjudicated non-FCC-related behavior that allows the Commission to predict whether an applicant has or lacks the character traits of truthfulness and reliability. See, e.g., *MCI Telecommunications Corp., Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, FCC 88-24, 3 FCC Rcd 509, 515 n.14 (1988) (character qualification standards adopted in broadcast context can provide guidance in common carrier context).

⁷⁸ This list is publicly available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-1584A1.pdf. The list currently includes only the Netherlands Antilles and specifies that only Antelecom N.V. is presumed to possess market power in the Netherlands Antilles. The International Bureau most recently amended the list by Declaratory Ruling issued on May 28, 2004, DA 04-1584, 19 FCC Rcd 20385 (Int'l Bur. 2004).

already apply to SMITCOMS's cable landing license for the SMPR-1 submarine cable system. We emphasize that the Commission reserves the right to review SMITCOMS's license, and, if warranted, impose additional conditions, as necessary, to protect competition and consumers on the U.S.-Maarten route.⁷⁹ Moreover, if the Commission were to find that SMITCOMS, or any other U.S. carrier, had received discriminatory access to SMITCOMS, N.V.'s cable landing facilities or other exclusive arrangements in violation of the Commission's No Special Concessions rules in sections 1.767(g)(5) and 63.14, we would not hesitate to take appropriate corrective action.⁸⁰

IV. ORDERING CLAUSES

27. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Innovative Communications Corporation requesting modification of the cable landing license granted to St. Maarten International Communications Services, Inc. for the SMPR-1 cable system IS DENIED and its request for modification of the companion section authorization for the cable system IS DISMISSED

⁷⁹ See *supra* note 71. See also 47 C.F.R. § 63.21(g) ("The Commission reserves the right to review a carrier's [international section 214] authorization, and, if warranted, impose additional requirements on U.S. international carriers in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.").

⁸⁰ See *supra* note 77. An intentional violation of the No Special Concessions rule might result not only in direct sanctions, but further might raise questions about a carrier's character qualifications with respect to future applications for Commission authority.

28. IT IS FURTHER ORDERED that the International Bureau shall amend the Commission's *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets* to add St. Maarten to the list of destination markets and SMITCOMS, N.V. as a carrier presumed to possess market power in St. Maarten.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary