

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

In the Matter of)	
)	
CABLE & WIRELESS, PLC)	
)	
Application for a License to Land and)	File No. SCL-96-005
Operate in the United States a Private)	
Submarine Fiber Optic Cable Extending)	
Between the United States and the)	
United Kingdom)	

CABLE LANDING LICENSE

Adopted: June 6, 1997

Released: June 20, 1997

By the Commission:

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I. INTRODUCTION

1. In this decision, we grant the application of Cable & Wireless, plc (C&W) under the Cable Landing License Act¹ for authority to land and operate a non-common carrier fiber optic submarine cable extending between the United States and the United Kingdom. The cable system will be owned exclusively by C&W, a foreign carrier, except for the U.S. cable landing station, which will be eighty percent U.S.-owned. In analyzing this application under the Cable Landing License Act, we apply an analysis consistent with our analysis adopted in the *Foreign Carrier Entry Order*.² Under this standard, we find that C&W lacks market power in the proposed cable system's foreign destination market, the United Kingdom, and therefore we need not examine whether the United Kingdom affords U.S. carriers effective competitive opportunities to land and operate submarine cable systems. Accordingly, we grant C&W's application, subject to the conditions described below.

II. APPLICATION

2. C&W is a company organized under the laws of the United Kingdom and whose officers are citizens of the United Kingdom. C&W provides telecommunications services around the world through various affiliates and subsidiaries. One subsidiary, Mercury, is a provider of domestic and international telecommunications service in the United Kingdom.³ Recently, the International Bureau authorized C&W's U.S. affiliate, C&W Inc. (CWI), under Section 214 of the Communications Act of 1934, as amended (1934 Act),⁴ to provide facilities-based service between the United States and the United Kingdom.⁵

3. The proposed cable will be owned exclusively by C&W, except for the U.S. landing station. C&W states that the U.S. landing station will be maintained by a corporate entity, yet to be formed, that will have no more than 20 percent foreign ownership and no foreign officers or directors. The U.S. landing station at all times will be under *de jure* and *de facto* control of U.S. corporations and citizens, according to C&W. The U.K. end of the cable, including the U.K. landing station point of interconnection with the U.K. public

¹ An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (Cable Landing License Act).

² See Market Entry and Regulation of Foreign-affiliated Entities, *Report and Order*, 11 FCC Rcd 3873 (1995), *recon. pending* (*Foreign Carrier Entry Order*).

³ C&W Application at 3 (filed June 26, 1996) (C&W Application).

⁴ 47 U.S.C. § 214.

⁵ Cable & Wireless, Inc., ITC-96-239 & ISP-93-007-ND, DA 96-2007 (Int'l Bur., rel. Nov. 29, 1996) (*CWI Order*).

switched network, will be directly owned and controlled by C&W. Although C&W states that the proposed cable will land in the northeastern United States and the southwestern portion of the United Kingdom, the precise landing points for the proposed cable system have yet to be selected.⁶

4. The capacity of the cable system will be sold or leased to users on a non-common carrier basis. C&W states that it will not hold itself out indifferently to serve the public and will make individualized decisions, in particular cases, about whether and on what terms to deal. C&W states that it is therefore not required to apply for authority under Title II of the 1934 Act because it is not offering the proposed services on a common carrier basis, and it urges the Commission to consider its application pursuant only to the Cable Landing License Act.⁷

5. Finally, C&W argues that the only issue the Commission should examine in this proceeding under the Cable Landing License Act is whether U.S. entities may obtain authorization on the U.K. end for landing wholly U.S.-owned submarine cables. C&W asserts that the reciprocity standard of the Cable Landing License Act is met because the United Kingdom has opened its international market to full facilities-based competition, including ownership of submarine cables. C&W argues that the effective competitive opportunities analysis adopted by the Commission in the *Foreign Carrier Entry Order* does not apply to non-common carrier cable applications.⁸

III. PETITION TO DENY

6. We placed C&W's application on public notice. Atlantic Express Communications, L.L.C. (Atlantic Express), a cable landing licensee of another non-common

⁶ C&W Application at 3-5. The proposed cable system will employ 1.55 micrometer wavelength technology operating on each of two fiber pairs at a minimum of 5 gigabits per second per fiber pair. The design capacity of the cable system will be a minimum of 2,016 Minimum Investment Units (MIUs) per fiber pair, for a total design capacity of 4,032 MIUs. The capacity on each fiber pair will be provided in thirty-two 155 megabits per second streams. *Id.* at 4.

⁷ *Id.* at 6-7.

⁸ *Id.* at 7-10.

carrier cable system on the U.S.-U.K. route,⁹ filed a petition to deny, to which C&W replied.¹⁰ Atlantic Express responded to C&W's reply.

7. In its petition to deny, Atlantic Express argues that C&W has provided insufficient information regarding voting and ownership interests in the proposed system, particularly with respect to ownership of the U.S. landing station. Atlantic Express also asserts that the U.K. Government maintains important influence over C&W by virtue of its "special share" arrangement. Finally, Atlantic Express argues that C&W, as one of the largest telecommunications companies in the world, has the ability and incentive to discriminate against U.S. carriers and that these concerns cannot be addressed in a Section 214 authorization. Atlantic Express argues that C&W's application should be denied or deferred until there is a more complete record on these issues.¹¹

IV. DISCUSSION

A. Sufficiency of C&W's Application

8. Atlantic Express asserts that C&W has provided insufficient information regarding voting and ownership interests in the proposed system, particularly with respect to ownership of the U.S. landing station. C&W responds that it has provided sufficient ownership information under the Commission's rules but, in any event, it is willing to accept a grant of the license with a condition that it provide more specific information as to ownership of the U.S. landing station.

9. Section 1.767(a)(6) of our rules requires that applications for cable landing licenses include a list of the proposed owners of the cable, their voting interests and ownership interests by segment in the cable.¹² We find that C&W has provided us with sufficient information on the ownership interests of Segment B (the U.K. cable landing station) and Segment C (the submarine cable, including the system interfaces at Segment A and Segment B). Both segments will be owned exclusively by C&W. As for Segment A (the U.S. cable landing station), we find that C&W's general description of the corporate

⁹ See Atlantic Express Cable Landing Licenses, 11 FCC Rcd 7033 (Int'l Bur., Telecom. Div., 1996) (*Atlantic Express*).

¹⁰ We grant C&W's motion to accept as a supplemental filing the service list that it inadvertently omitted from its reply. In its motion, C&W indicated that all of the parties on the service list nonetheless were properly served with C&W's reply. No one disputed C&W's declaration. C&W Motion to Accept Supplemental Filing (filed Aug. 14, 1996).

¹¹ Atlantic Express Petition to Deny at 9-10 (filed July 30, 1996).

¹² 47 C.F.R. § 1.767(a)(6).

entity that will maintain the cable landing station in the United States is sufficient at this time. To ensure that the Commission has detailed information about the ownership and voting interests for the entire cable system before C&W lands and operates the proposed cable, however, we condition final grant of this license upon C&W's filing of specific ownership and voting interest information for the U.S. landing station, as well as the voting interests in Sections B and C of the cable. We will give public notice of this information and this condition will be considered satisfied unless the Commission issues a public notice to the contrary no later than sixty days after receipt of this information.

10. We also find that C&W's description that its cable will land in the northeastern United States and in the southwestern portion of the United Kingdom is sufficient to determine whether the proposed cable would comply with the Cable Landing License Act and our rules.¹³ Pursuant to Section 1.767(a)(5) of our rules, however, C&W must provide a specific description of the landing stations, including a map, no later than ninety days prior to construction, and we condition this license upon final approval of the landing points. We will give public notice of this description, and this condition will be considered satisfied unless we issue a public notice to the contrary no later than sixty days after receipt of the specific description.

B. Private Submarine Cable Policy

11. C&W requests a license to land and operate a non-common carrier submarine cable system under the Cable Landing License Act and our private submarine cable policy.¹⁴ In 1985, we adopted our private submarine cable policy to promote competition in the provision of international transmission facilities.¹⁵ We have granted numerous licenses to land and operate private cable systems in the United States under this policy.¹⁶

¹³ See *Guam Telecom Ltd., L.C.*, 10 FCC Rcd 12104, 12105 (Int'l Bur., 1995); *Alaska Telecom Ltd., L.C.*, 10 FCC Rcd 6072, 6073 (Int'l Bur., 1995); *Transnational Telecom, Ltd.*, 5 FCC Rcd 598, 600 (Com. Car. Bur., 1990) (*Transnational Telecom*); *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686, 2688 (Com. Car. Bur., 1987) (conditional license) (*Pacific Telecom*).

¹⁴ Submarine cables are operated either on a non-common carrier (*i.e.*, private) or common carrier basis.

¹⁵ See *Tel-Optik Ltd.*, 100 F.C.C.2d 1033, 1041 (1985) (*Tel-Optik*).

¹⁶ See, *e.g.*, *TeleBermuda Int'l, L.L.C.*, File No. SCL-95-009, (Int'l Bur., Telecom Div., rel. Dec. 6, 1996); *AT&T Submarine Systems, Inc.*, File No. SCL-94-006, (Int'l Bur., rel. May 8, 1996); *Pacific Telecom*, 2 FCC Rcd at 2686; *Pacific Telecom*, 4 FCC Rcd 8061 (1989) (final license); *Transnational Telecom*, 5 FCC Rcd at 600; *Transgulf Communications, Ltd., Inc.*, 6 FCC Rcd 2335 (Com. Car. Bur., 1991); *Optel Communications, Inc.*, 8 FCC Rcd 2267 (1993) (*Optel*).

12. In determining the appropriate regulatory status of the proposed cable, our first inquiry is whether C&W would be acting as a "telecommunications carrier" under the Telecommunications Act of 1996 (1996 Act). The 1996 Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage."¹⁷ "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁸ Thus, we must determine in this case whether C&W will offer a telecommunications service for a fee to such class of users as to be "effectively available directly to the public."

13. The legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services. Specifically, the Joint Explanatory Statement states that the definition of telecommunications service "recognizes the distinction between common carrier offerings that are provided to the public . . . and private services."¹⁹ The 1934 Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire . . ."²⁰ The Commission's rules define a "communication common carrier" as "any person engaged in rendering communication for hire to the public"²¹ and the courts have held that the indiscriminate offering of a service to the public is an essential element of common carriage.²² Thus, we look to precedent for guidance in determining whether C&W will provide a telecommunications service for a fee to such class of users as to be "effectively available directly to the public."

¹⁷ 47 U.S.C. § 153(44).

¹⁸ 47 U.S.C. § 153(46); *see also* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 97-157, Section XIII.B.2.a (rel. May 8, 1997).

¹⁹ H.R. Conf. Rep. No. 104-458 at 116 (1996).

²⁰ 47 U.S.C. § 153(10).

²¹ 47 C.F.R. § 21.2.

²² *National Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*) (*citing* *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

14. In the *NARUC I* decision, the court applied a two-part test to determine when an operation should be classified as common carrier: "[W]e must inquire, first, whether there will be any legal compulsion . . . to serve [the public] indifferently, and if not, second, whether there are reasons, implicit in the nature of . . . [the] operations to expect an indifferent holding out to the eligible user public."²³ Thus, we must determine whether C&W will make capacity available to the public indifferently.²⁴ In this case, C&W has stated its intent to "make individualized decisions, whether and on what terms to serve," and not to undertake to carry for all people indifferently.²⁵ Therefore, there is no reason to expect that capacity in the proposed cable system would be held out to the public indifferently.

15. We next consider under the other part of the *NARUC I* test whether the public interest requires common carrier operation of the proposed facility. In examining this issue, we generally have focused on the availability of alternative common carrier facilities in assessing whether to require that a proposed cable be offered on a common carrier basis. For example, in granting a non-common carrier cable landing license in the *Optel* decision, we noted the availability of numerous terrestrial, microwave and satellite common carrier facilities that provided cross-border services between the United States and Canada.²⁶

16. As the International Bureau recently found in *MFS Globenet, Inc.*, there is wide availability of circuits between the United States and the United Kingdom.²⁷ The continental United States and the United Kingdom are served by Intelsat satellite common carrier circuits and a number of common carrier submarine cables, including the TAT-8, -9, -11 and -12/13 cable systems. Moreover, existing and planned non-common carrier systems, including the PTAT, Gemini, and Atlantic Express I and II cables systems and the PanAmSat,

²³ *Id.* at 642.

²⁴ *See id.*

²⁵ C&W Application at 6; *Southwestern Bell Telephone Co. v. F.C.C.*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *Nat'l Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 533 F.2d 601, 608-609 (D.C. Cir. 1976) (*NARUC II*) (stating that a carrier is not a common carrier when this is its practice).

²⁶ *Optel*, 8 FCC Rcd at 2269.

²⁷ *MFS Globenet, Inc.*, 11 FCC Rcd 12732, 12735 (Int'l Bur., Telecom. Div., 1996). On December 18, 1996, the Telecommunications Division of the International Bureau granted the request of MFS Globenet and C&W for C&W to own 50 percent of the corporate entity that will own the undersea portion of the Gemini cable system's facilities outside U.S. and U.K. territorial waters. Modification of MFS Globenet Cable Landing License, DA 96-2151, File No. SCL-96-004(M) (Int'l Bur., Telecom Div., rel. Dec. 18, 1996). *See also* TAT-12/TAT-13 Cable Landing License, 8 FCC Rcd 4808 (Com. Car. Bur. 1993); *Atlantic Express*, 11 FCC Rcd at 7034. C&W also owns part of the PTAT cable system extending between the United States and the United Kingdom and also serving Bermuda and Ireland. *Tel-Optik*, 100 F.C.C.2d at 1035.

Orion and Columbia/TDRS satellite systems, also serve, or will soon serve, this route. Although there is an increasing need for circuits on this route due to escalating Internet usage and other data traffic, we believe that there is sufficient existing and planned capacity available that C&W's proposed cable system will not become a bottleneck facility or the sole available means for a carrier or user to obtain new capacity on the U.S.-U.K. route. Thus, we find that there is no public-interest reason under *NARUC I* to require that C&W's proposed cable facilities be provided on a common carrier basis.

17. Based on the analysis above, we conclude that C&W will not offer capacity in the proposed cable system to the public on a common carrier basis, and that the public interest does not require that it do so. Accordingly, we find that C&W will not provide a telecommunications service for a fee to such class of users as to be "effectively available directly to the public" and thus will not be a "telecommunications carrier" under the 1996 Act.

C. Analysis Under the Cable Landing License Act

18. C&W argues that the only issue raised by this application under the Cable Landing License Act is whether U.S. entities may obtain authorization on the U.K. end for landing wholly U.S.-owned submarine cables. C&W asserts that the reciprocity standard of the Cable Landing License Act is met because the United Kingdom has opened its international market to full facilities-based competition, including ownership of submarine cables.

19. C&W asserts that its application is not subject to an effective competitive opportunities analysis because the Commission determined in the *Foreign Carrier Entry Order* that the effective competitive opportunities analysis does not apply to "domestic interexchange services, enhanced services, separate satellite systems and other non-common carrier facilities."²⁸ C&W argues that, if the Commission nonetheless decides that this application is subject to an effective competitive opportunities analysis under the *Foreign Carrier Entry Order*, C&W does not possess market power in the United Kingdom and therefore the Commission would not reach the issue of whether the United Kingdom offers effective competitive opportunities to U.S. carriers. Finally, C&W states that, if the Commission determines that an effective competitive opportunities analysis does apply, the United Kingdom does offer effective competitive opportunities to international facilities providers.²⁹

20. The Cable Landing License Act gives the President of the United States broad discretion to grant, withhold, condition or revoke cable landing licenses if the President

²⁸ C&W Application at 9 (citing *Foreign Carrier Entry Order*, 11 FCC Red at 3912).

²⁹ *Id.* at 7-10.

developed and maintained fully, we request the Commission keep the Department apprised of the practical development of such competition."³⁴

22. In our *TLD Order*, we explained that in our *Foreign Carrier Entry Order* we adopted an effective competitive opportunities analysis as part of our public interest analysis under Sections 214 and 310(b)(4) of the 1934 Act.³⁵ We acknowledged in the *TLD Order* that we did not address our market entry rules for applications under the Cable Landing License Act in the *Foreign Carrier Entry Order*. The *TLD Order*, however, provided us an opportunity to explain our historical approach to those types of applications, and how it relates to the effective competitive opportunities analysis adopted in the *Foreign Carrier Entry Order*.

23. In the *TLD Order*, we explained that one of our goals in adopting our approach in the *Foreign Carrier Entry Order* was to promote effective competition in the U.S. telecommunications market by encouraging foreign governments to open their telecommunications markets. Similarly, as outlined in *The French Telegraph Cable Company Memorandum Opinion and Order*,³⁶ one of Congress' purposes in enacting Section 2 of the Cable Landing License Act was to ensure that U.S. companies could have ownership and operation rights in the foreign country in the same manner as requested by the foreign company. Thus, we have applied on a case-by-case basis an analysis similar to an effective competitive opportunities analysis to applications under the Cable Landing License Act.

24. In reviewing TLD's application under the Cable Landing License Act, we examined whether TLD was affiliated with a foreign carrier with market power in a destination market of COLUMBUS II, the relevant cable. We found that TLD was affiliated with Telefonica de España, an incumbent carrier with market power in Spain, a destination market of the cable. We then examined the legal, or *de jure*, ability of U.S. carriers to have ownership interests in submarine cables landing in that market. Because U.S. carriers could not legally hold ownership interests in submarine cables landing in Spain, we found no need to examine other factors to determine whether U.S. carriers had the practical or *de facto* ability to have ownership interests in cable facilities in the destination market. We thus

³⁴ Letter from Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs, U.S. Department of State, to Donald H. Gips, Chief, International Bureau, Federal Communications Commission (Feb. 10, 1997).

³⁵ Telefonica Larga Distancia de Puerto Rico, Inc., FCC 97-127, SCL No. 93-001, at ¶ 26 & n.35 (rel. May 2, 1997) (*TLD Order*).

³⁶ The French Telegraph Cable Company, 71 F.C.C.2d 393, 403 (1979) (*FTCC Order*) (Commission found that allowing FTCC to expand its operations in the United States while the French Government prohibited U.S. carriers from operating in France would violate the Cable Landing License Act); see also *TLD Order* at ¶ 27.

concluded that Spain did not offer U.S. carriers effective competitive opportunities under the Cable Landing License Act.³⁷ Finally, we found no other countervailing interests that weighed in favor of granting that application under the Cable Landing License Act and we therefore denied the application.

25. In this case, unlike in the TLD proceeding, C&W is requesting authority to land and operate a non-common carrier cable. We find, however, that the same principles outlined in the *FTCC Order* apply regardless of whether a carrier seeks to own and operate a cable system on a common carrier or non-common carrier basis because all submarine cable applications are subject to the provisions of the Cable Landing License Act.³⁸ Therefore, consistent with our precedent, we apply an effective competitive opportunities framework in examining the application of a foreign carrier³⁹ or its affiliates⁴⁰ to land and operate a non-common carrier cable system under the Cable Landing License Act.⁴¹

26. In applying the effective competitive opportunities analysis under the Cable Landing License Act to C&W's application, we first determine whether C&W or its affiliate

³⁷ *TLD Order* at ¶¶ 31-32.

³⁸ See ¶ 20 *supra*.

³⁹ A "foreign carrier" is defined in Section 63.18(h)(1)(ii) of our rules as: ". . . [A]ny entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art.1." 47 C.F.R. § 63.18(h)(1)(ii). As in the *Foreign Carrier Entry Order*, we construe this definition of a foreign carrier as we did in *International Services*. Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. Regulation of International Common Carrier Services, Report and Order, 7 FCC Rcd 7331, 7334 n.47 (1992).

⁴⁰ The Commission has defined "affiliation" in Section 63.18(h)(1)(i)(B) of our rules for purposes of determining those foreign carrier affiliates that are subject to the effective competitive opportunities analysis. This definition includes an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. 47 C.F.R. § 63.18(h)(1)(i)(B). See also *Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-3914.

⁴¹ We note that on February 15, 1996, 69 countries signed a World Trade Organization ("WTO") agreement on basic telecommunications. The United Kingdom, like the United States, is one of the countries that has committed to open its market. On June 4, 1997, we issued a *Notice of Proposed Rulemaking* seeking comment on whether and how to amend our rules in response to the liberalized competitive environment that will exist when the WTO agreement takes effect on January 1, 1998. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, FCC 97-195 (rel. June 4, 1997). Because we have not yet adopted any new rules, however, we analyze the application before us under our current regulatory framework.

has market power in the United Kingdom, the destination market of the relevant cable.⁴² The *Foreign Carrier Entry Order* defines "market power" as "the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end."⁴³ "Bottleneck services or facilities" are "those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end."⁴⁴

27. If we determine that C&W does have market power in the United Kingdom, we will examine the legal, or *de jure*, ability of U.S. carriers to have ownership interests in submarine cables landing in the United Kingdom. If no explicit legal restrictions on ownership exist, we will examine other factors to determine whether U.S. carriers have the practical or *de facto* ability to have ownership interests in cable facilities on the foreign end.

28. Finally, we will determine whether there are other factors that weigh in favor of, or against, granting this application under the Cable Landing License Act. We will make this determination whether or not an applicant or its affiliate has market power in the destination market of the relevant cable.

29. In this case, C&W controls Mercury, a provider of domestic and international telecommunications services in the United Kingdom.⁴⁵ To determine whether we will apply our effective competitive opportunities analysis, we will examine the market power of Mercury in the United Kingdom, the foreign destination market of C&W's proposed cable system.

30. In its recent grant of CWI's request to provide facilities-based services between the United States and the United Kingdom under Section 214, the International Bureau found that once the United Kingdom's Department of Trade and Industry (DTI) issued additional facilities-based licenses for international switched and private line services, Mercury would lack market power in the United Kingdom in the provision of these services. In analyzing Mercury's market power in the provision of international facilities-based services, the Bureau applied traditional antitrust principles to examine: (1) Mercury's market share; (2) the supply

⁴² See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3887 ("The effective competitive opportunities test adopted here applies only to carriers with market power. . . . If dominant carriers are to match these entry opportunities, and the competitive strategies that they make possible, they have an incentive to support policy reforms in foreign countries that would satisfy the effective competitive opportunities analysis.)."

⁴³ *Id.* at 3917.

⁴⁴ *Id.*

⁴⁵ C&W Application at 3.

elasticity of the market; (3) the demand elasticity for Mercury's services; and (4) Mercury's cost structure, size, and resources.⁴⁶

31. The Bureau first examined the local and national (domestic long distance) markets for terminating international facilities-based services at their U.K. destination. It concluded that Mercury does not control bottleneck services and facilities for terminating international switched and private line services and therefore lacks market power in the United Kingdom's domestic market.⁴⁷

32. The Bureau next examined the facilities-based markets for international services. The Bureau observed that the DTI had announced its intention to eliminate the restrictions limiting the provision of international facilities-based services to British Telecommunications, plc (BT) and Mercury and had invited companies to apply for licenses to provide international facilities-based telecommunications services on all routes from the United Kingdom.⁴⁸ The Bureau noted that DTI had not yet authorized any carrier other than Mercury or BT to provide international facilities-based services. The Bureau found that, "[w]ith the issuance of new facilities-based international licenses by DTI, . . . Mercury's current market shares of 24.6 percent and 36 percent for international switched and private line services [would not] confer market power in either product market."⁴⁹

33. The Bureau also found there is significant capacity on existing and future cable and satellite circuits between the United States and the United Kingdom.⁵⁰ With respect to barriers to entry into these product markets, the Bureau expressed its anticipation that the implementation of the United Kingdom's new regulatory policies would promote competitive entry into the international facilities-based services markets.⁵¹ The Bureau found that there was sufficient evidence of an elastic demand for Mercury's services, and that Mercury's size

⁴⁶ See *CWI Order* at ¶ 9. The Bureau analyzed Mercury's market power in the provision of international switched services and private line services separately because the two services constitute separate product markets.

⁴⁷ *Id.* at ¶¶ 10-12. The Bureau found that Mercury's share of the U.K. domestic market for local and national (long distance) services is low, and Mercury's size and resources do not provide persuasive evidence that Mercury has market power in the United Kingdom's domestic telecommunications market.

⁴⁸ *Id.* at ¶ 16.

⁴⁹ *Id.* at ¶ 14 (footnote omitted).

⁵⁰ *Id.* at ¶ 15.

⁵¹ *Id.* at ¶ 17 (" . . . there is nothing in the record before us to suggest that the United Kingdom will impose restrictions on foreign ownership or participation in the provision of international facilities-based switched and private line services.").

and resources do not provide persuasive evidence that Mercury holds market power in the provision of international facilities-based services.⁵² The Bureau therefore concluded that, once DTI issues additional facilities licenses, Mercury will lack market power in the United Kingdom in the provision of facilities-based services.⁵³ Based on its findings, the Bureau did not apply the effective competitive opportunities analysis as part of its review of CWI's application.⁵⁴

34. We now examine whether Mercury has market power arising from its current ownership of U.K. submarine cables and cable stations. We note that, between them, Mercury and BT historically have owned and controlled nearly all U.K. undersea cables and cable stations. However, on December 19, 1996, DTI issued licenses to forty-five new entrants, including a number of U.S. carriers, to provide U.K. facilities-based service. Upon request, applicants were granted licenses conferring "code powers," which vest the licensees with special rights to facilitate the construction of networks and cable stations. No further authorization is needed to land cables in the United Kingdom.⁵⁵ We expect that new entrants will take advantage of this liberalization to construct and operate new cable facilities in competition with BT and Mercury. Given this opening of the U.K. international facilities market, and Mercury's current shares in the international facilities-based services product markets,⁵⁶ we also find that Mercury does not have market power arising from its ownership of U.K. undersea cables and cable stations. We affirm the International Bureau's findings that Mercury does not control bottleneck facilities in the United Kingdom and thus does not have market power in the United Kingdom, the destination market of this proposed cable. Accordingly, we do not reach the issue of whether the United Kingdom affords U.S. carriers effective competitive opportunities to land and operate cable systems in the United Kingdom.

35. We next examine whether there are any other reasons to deny C&W's application. As mentioned above, we received a communication from the Secretary of State indicating that the Secretary approves the grant of the license.⁵⁷ We have received no other

⁵² *Id.* at ¶ 18-19.

⁵³ *Id.* at ¶ 20.

⁵⁴ *Id.*

⁵⁵ In light of the grant of these licenses, the International Bureau issued a letter to CWI on December 23, 1996 indicating that CWI's Section 214 authorization to provide facilities-based international switched and private line services on the U.S.-U.K. route as a non-dominant carrier was effective immediately. See Letter from Donald H. Gips, Chief, International Bureau, Federal Communications Commission to Rachel J. Rothstein, Senior Regulatory Counsel, Cable & Wireless, Inc. (Dec. 23, 1996).

⁵⁶ See ¶ 32 *supra*.

⁵⁷ See ¶ 21 *supra*.

communication from the Executive Branch expressing concern under the Cable Landing License Act with this application. In addition, no other party has raised any concerns which would warrant denying C&W's application. Accordingly, we conclude we should grant this application.

D. Other Issues

1. Potential for Discrimination by C&W

36. Atlantic Express argues that because of its diverse interests around the world, C&W would have the ability and incentive to discriminate against U.S. interests. Atlantic Express states that C&W owns and operates the largest fleet of deep-sea submarine cable laying ships in the world and thus could manipulate restoration rights to favor its own customers in this cable over others or deprive U.S. firms of a fair opportunity to participate in the cable provisioning process. In addition, Atlantic Express argues that C&W, with affiliates in over fifty foreign countries, could delay or deny U.S. carriers access to the proposed cable unless they agree to a *quid pro quo* designed to favor one of C&W's affiliates in another market.

37. Atlantic Express also states that some of its discrimination concerns are now outside of the scope of the Section 214 authorization process because our *International Section 214 Streamlining Order* permits non-dominant carriers with global Section 214 authority to add circuits without additional Commission authorization on any facilities not on the exclusion list.⁵⁸ Thus, according to Atlantic Express, once a carrier receives global Section 214 authority, no vehicle of redress for discrimination would exist. In response, C&W states that Atlantic Express' claims about the potential for anticompetitive conduct by C&W arising from its cable ownership are based on "speculation and surmise."⁵⁹

38. We decline to deny C&W's application or require common carrier treatment of the proposed cable facility based on Atlantic Express' discrimination concerns. Absent a much stronger evidentiary showing than Atlantic Express has provided, we do not believe that the mere fact that C&W has diverse operations in other markets should have a direct bearing on our decision regarding this facility on the U.S.-U.K. route. Such an approach could chill facilities investment as global competition increases and carriers enter new markets. Moreover, anticompetitive conduct by C&W or any other entity that violates U.S. antitrust laws remains fully actionable.

⁵⁸ See Streamlining the International Section 214 Authorization Process and Tariff Requirements, *Report and Order*, 11 FCC Rcd 12884 (1996).

⁵⁹ C&W Opposition at 5.

39. We emphasize that our decision to grant this cable landing license to C&W on a non-common basis is predicated in part upon the current and planned facility alternatives on the U.S.-U.K. route.⁶⁰ Because of these alternatives, carriers and users will have viable choices other than C&W's proposed system when seeking capacity on the U.S.-U.K. route. Likewise, as the owner of a non-common carrier cable system, C&W will tailor its capacity offerings to individual customers. We note, however, that we always have the ability to change the regulatory status of this cable and any other non-common carrier cables on the same route to common carrier if the public interest so requires. Should conditions change for *any* reason, and the C&W cable becomes a potential bottleneck facility, we can exercise this option. Our ability to change the regulatory status of a non-common carrier cable also remains available for redressing anticompetitive discrimination.⁶¹ The fact that non-dominant U.S. carriers no longer need to obtain additional Section 214 authority to add circuits on particular U.S.-licensed facilities in no way limits our authority to reclassify a particular cable as a common carrier facility or even revoke the license.

2. Special Share Arrangement

40. Atlantic Express asserts that the U.K. Government maintains important influence over C&W by virtue of its "special rights preference share" in C&W. C&W argues that the rights possessed by the U.K. Government under this arrangement with C&W are limited in nature.

41. In accordance with its special share, the U.K. Government or its representative must consent in writing to any proposals for amending, removing, or altering certain provisions of C&W's articles of incorporation. These include provisions regarding special share rights, limitations on shareholders, and directors (requiring, for example, that either the chairman or the chief executive officer of C&W be a British citizen). The special shareholder is also entitled certain rights with regard to major corporate events and to receive notice of, attend, and speak at general meetings. As we found above, C&W's U.K. affiliate, Mercury, is non-dominant in the U.K. market. There is no record evidence to indicate that the special share arrangement alters this status. Accordingly, we find that C&W's special share

⁶⁰ See ¶ 16 *supra*. We note that the existence of other facilities on this route is relevant both for determining how to regulate the operation of this cable (*i.e.*, on a common or non-common carrier basis) and for examining C&W's market power.

⁶¹ We note that the Commission has the authority to require such a change in regulatory status to common carrier. *See, e.g., Optel*, 8 FCC Rcd at 2269; *Norlight, Order on Reconsideration*, 2 FCC Rcd 5167, 5168 (1987); *NARUC I*, 535 F.2d at 644. Also, Section 2 of the Cable Landing License Act states that a cable landing license may be granted "upon such terms as shall be necessary to ensure just and reasonable rates and service in the operation and use of cables so licensed." Cable Landing License Act at § 35.

arrangement with the U.K. Government does not change the outcome of our analysis of this application.

V. CONCLUSION

42. We grant C&W's application for authority to land and operate a non-common carrier fiber optic submarine cable extending between the United States and the United Kingdom, subject to the conditions listed below.⁶² Grant of this application will increase facilities competition on the U.S.-U.K. route.

VI. ORDERING CLAUSES

43. Consistent with the foregoing, we hereby GRANT AND ISSUE to Cable & Wireless, plc, under the provisions of the Cable Landing License Act and Executive Order 10530, a license to land and operate a non-common carrier fiber optic submarine cable system (with two fiber pairs operating at 5 Gbps per pair) extending between the United States and the United Kingdom, with landing points in the northeastern United States and the southwestern portion of the United Kingdom. This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon its shore shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the 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 or improvement of harbors for navigational purposes;

(2) 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 cable from injury or destruction by enemies of the United States of America;

⁶² Based on the information provided by C&W and pursuant to the Commission's procedures implementing the National Environmental Policy Act of 1969, 47 C.F.R. §§ 1.1301-1.1319 (1996), we conclude that the grant of the requested authorizations would have no significant effect on the quality of the human environment and is therefore categorically excluded from environmental processing. Consequently, C&W is not required to submit an environmental assessment with this application.

- (3) The Licensee or any persons or companies 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 be authorized by the Commission pursuant to Section 214 of the Communications Act, as amended;
- (4) The Licensee or any persons or companies controlling it, controlled by it, or under direct or indirect common control with it shall not acquire or enjoy any right for the purpose of handling or interchanging traffic to or from the United States, its territories, or its possessions to land, connect, or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, that is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons controlling it, controlled by it, or under direct or indirect common control with it are parties;
- (5) 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 Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;
- (6) The licensee shall obtain prior Commission approval for any change of five percent or more in the ownership or control of the cable;
- (7) The Licensee shall notify the Commission in writing of (i) the precise locations at which the cable will land; and (ii) the specific ownership interests of Segment A, the U.S. landing station, including a description of the proposed owners and their voting interests. Such notification shall occur no later than ninety days prior to commencing construction of the cable landing stations. The corporate entity maintaining the U.S. landing station shall have no more than 20 percent foreign ownership without prior approval. The Licensee also shall notify the Commission of the proposed voting interests of Segments B and C of the cable. The Commission will give public notice of the filing of this information, and grant of this license will be considered final unless the Commission issues a notice to the contrary no later than sixty days after receipt of all the required information;
- (7) The Commission reserves the right to require the Licensee to file an environmental assessment or environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would significantly affect the environment

within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules;

(8) This license is revocable by the Commission after due notice and opportunity for hearing pursuant to section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. § 35, or for failure to comply with the terms of the authorizations;

(9) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or extended upon proper application, and, upon expiration of this license, all rights granted under it shall be terminated; and

(10) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of the cable landing license.

44. This Order is issued effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 C.F.R. §§ 1.106, may be filed within 30 days of the date of public notice of this order (*see* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary