Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
Tyco Telecommunications (US) Inc., *Assignor,*	
VSNL Telecommunications (US) Inc., *Assignee,*	File Nos. SCL-ASG-20050304-0003 SCL-MOD-20050304-0004 SCL-T/C-20050304-0005
and	
Tyco International Ltd. *Transferor,*	
VSNL Telecommunications (US) Inc., *Transferee,*	
and	
Tyco Networks (Guam) LLC., *Licensee*,	
Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems.	

To the Commission:

REPLY BRIEF IN SUPPORT OF PETITION TO DENY OF CREST COMMUNICATIONS CORPORATION

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REPLY BRIEF IN SUPPORT OF PETITION TO DENY

Crest Communications Corporation ("Crest"), by its attorneys, hereby submits this Reply in support of its Petition to Deny ("Petition") the above-captioned Applications ("Applications") of Tyco Telecommunications (US) Inc., Tyco International Ltd., Tyco Networks (Guam) LLC, (collectively "Tyco") and VSNL Telecommunications (US) Inc. (a wholly owned subsidiary of Videsh Sanchar Nigam Limited) (collectively, "VSNL") for authority to transfer and assign cable landing licenses pursuant to the Cable Landing License Act, 47 U.S.C. §§ 34-39, and Section 1.767 of the Commission's rules, 47 C.F.R. § 1.767.[1] For the reasons set forth in its Petition and herein, Crest urges the Commission to remove these Applications from streamlined processing and ultimately deny them as not in the public interest, convenience and necessity.

I. INTRODUCTION AND SUMMARY

The Applications present significant competition and economic security concerns that the Commission simply cannot ignore or give short shrift to. Indeed, three U.S. Senators—Senators Stevens, Kyl, and Sessions—have expressed their serious concerns about the economic and national security implications associated with the proposed transaction. As the Senators stated:

> [The] TGN is a strategic asset of incalculable value to United States security and commercial interests. It is an immense, international network offering massive amounts of high-quality, fiber optic bandwidth…[T]his transaction gives the Indian government control over a significant portion of the world's submarine cable network (including more than 80 percent of the total trans-Pacific undersea capacity) and over key, strategic submarine cable landing stations in the United States and India. The Indian government owned all of VSNL until 2002, and now the government still owns 26 percent of the company and plays an active role

[1] *In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System,* Petition to Deny of Crest Communications Corporation, Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 (Filed March 31, 2005) ("*Petition*" or "*Petition to Deny*").

> in company management. This relationship has led VSNL to act in a fashion demonstrably hostile to U.S. military and commercial interests. The U.S. Trade Representative recently noted VSNL's anti-competitive conduct with respect to its landing stations in India. More importantly, in the early 1990s, VSNL refused to allow another undersea cable network to establish a landing point on the island of Diego Garcia, which houses a U.S. military base.[2]

Nor has VSNL or Tyco made any demonstration of a compelling need for expedition.[3] At bottom, there is no reason why the Commission should rush to judgment in this case. The Commission, therefore, should remove the Applications from streamlined processing so that all of the competition and public interest issues can be appropriately reviewed and analyzed.

Just as important, the Applicants have not met their burden of demonstrating that specific competitive benefits from the proposed transaction will outweigh the serious and compelling economic harm to U.S. carriers and consumers that would result from the sale of the Tyco Global Network ("TGN") to VSNL. Rather than address head-on the merits of the serious issues raised

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[2] Letter dated April 7, 2005 from Senator Jon Kyl, Senator Ted Stevens, and Senator Jeff Sessions to The Honorable John W. Snow, Secretary, United States Department of the Treasury, at 1 (attached as Exhibit A) ("*Senators' Letter*"). The National Security Agreement entered into between the various federal agencies and VSNL primarily relates to domestic communications security and not the many other national security issues raised by this transaction. *In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System*, Joint Petition to Adopt Conditions to Authorizations and Licenses, Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 (Filed April 11, 2005) *("Joint Petition*"). *See also, post,* Part II.D.

[3] *In the Matter of Review of Commission Consideration of Applications under the Cable Landing License Act,* Report and Order, IB Docket No. 00-106, 16 FCC Rcd. 22167, ¶ 47 (2001) ("There may be instances where the Commission, after initially placing an application on public notice as eligible for streamlining, determines that, in fact, the application warrants additional scrutiny and must be removed form streamlined processing….We delegate to the International Bureau the authority to identify those particular applications that warrant additional scrutiny.") ("*Cable Landing Order*"); *International Authorizations Granted*, Public Notice, 18 FCC Rcd. 25127 (2003) (deeming VSNL's Section 214 application ineligible for streamlined processing due to issues of "extraordinary complexity").

by Crest and the U.S. Senators, the Applicants have chosen simply to attack the messengers. The Commission should not be distracted by this tactic. Instead, the Commission should focus on the message: if VSNL is allowed to buy TGN, the most technologically advanced and highest-capacity global undersea cable system will fall out of U.S. ownership and control, resulting in serious economic harm to U.S. carriers and consumers. And, as demonstrated in Crest's Petition, VSNL is not an ordinary company that plays by marketplace rules. It began as a government-owned monopoly, and still has significant government involvement and influence. At the same time, it dominates the U.S.-India market for private line circuits.

If the Commission ultimately determines that outright denial of the Applications is not warranted, then the Commission should condition its grant on specific divestiture and/or common carrier obligations for the new owner of the TGN. In particular, the Commission should require VSNL to divest two fiber pairs from the Tyco Pacific cable. Such divestiture would not create any impediment to the proposed transaction and would help protect the international telecommunications market from VSNL's anticompetitive conduct. In any event, the Commission should require the Tyco Pacific cable to be operated on a common carrier basis in order to prevent any price gouging or discriminatory conduct by VSNL.

II. VSNL HAS FAILED TO CARRY ITS BURDEN OF DEMONSTRATING THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST

A. VSNL Has Barely Responded To Crest's Demonstration Of Serious Anti-Competitive Effects Of The Transaction

The Applicants have manifestly failed to meet their burden of demonstrating that the proposed transaction is in the public interest.[4] It is well understood that where, as here, the potential harms to competition raised by a proposed transaction are substantial, the burden of

[4] 47 U.S.C. § 309(e) (2000) (burdens of proceeding and proof rest with the applicant); *see, e.g., LaFlore Broadcasting Co., Inc.,* 66 FCC 2d 734, 736-37 (1975).

proof on the Applicants to demonstrate transaction-specific benefits correspondingly becomes more demanding.[5] In order to show that the benefits of the transaction will outweigh the harms, the Applicants "must provide sufficient support for any benefit claims so that the Commission can verify the likelihood and magnitude of each claimed benefit."[6] In addition, any public interest benefits must be transaction-specific; *i.e.*, they "must be likely to be accomplished as a result of the [transaction] but unlikely to be realized by other means that entail fewer anticompetitive effects."[7]

The Applicants clearly have not met this burden. The potential harms of this transaction have been well-documented by Crest and its economic expert, and yet the Applicants have made virtually no effort to provide support for any claimed benefits of the proposed transaction.[8] Nor have the Applicants provided any evidence (such as the rigorous economic analysis provided by Crest) to demonstrate that the identified harms will not occur.

1. The Concerns Raised By Crest In Its Petition Are Serious, And Supported By Rigorous Economic Analysis

The Joint Opposition fundamentally fails to address the serious anticompetitive effects that will result from the proposed transaction. As a preliminary matter, VSNL fails to recognize

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[5] *See Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14825 ¶ ¶ 255-6 (1999).

[6] *Application of EchoStar Communications Corp., Gen. Motors Corp., and Hughes Elecs. Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, 20630 ¶ 190 (2002).

[7] *Id.* at ¶ 189 (citations omitted).

[8] *In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System,* Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 at 11 (Filed March 4, 2005) ("*Application*").

that the principal relevant geographic market is the U.S.- India market, instead focusing on the U.S.-Japan and U.S.-U.K. markets. To the extent that VSNL does discuss the U.S.-India market, it barely attempts to respond to the competition concerns raised by Crest.

The Applicants' principal contention is that the Indian market is fully competitive, and that VSNL will not be able to abuse its power on the U.S. to India route because "neither Tyco nor VSNL (nor their affiliates) owns, controls or operates a cable system in the Japan-Singapore route."[9] The Applicants also argue that there is tremendous excess capacity on the trans-Pacific route and that this "massive development of new capacity has resulted in a capacity glut that essentially eliminates the risk of dominant behavior on this route."[10] The Applicants' premise may be correct, but their conclusion is plainly wrong. As Crest explained in its Petition, the capacity glut across the Pacific Ocean exists almost entirely on the Tyco Pacific cable.[11] Most of the competing cables are fully utilized, with insufficient excess capacity to meet expected demand.[12] And the Applicants' statement that new trans-Pacific cables will be built any time soon is pure fantasy.[13] The Tyco Pacific cable's design capacity is upwards of 7.68 Tbps, representing more than 85% of the available capacity across the Pacific. With this asset, VSNL

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[9] *In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System,* Joint Opposition to Petition to Deny, Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 at 17 (Filed April 11, 2005) ("*Joint Opposition*").

[10] *Id.* at 16.

[11] *Petition to Deny* at 7, 45 & Exhibit 2.

[12] The only possible exception is the PC-1 cable, which is in bankruptcy and has many other technical, operational, legal, and other problems that will keep it from ever being used or relied upon by international carriers. *Petition to Deny* at 7 n. 17, 45 n.113, Exhibit 2.

[13] *Joint Opposition* at 16.

will be able to protect and extend it dominant position on the U.S.- India market for many years to come.

In his supplemental declaration attached to this brief, Dr. Pelcovits explains why the assertion that VSNL does not have market power on the Japan-Singapore route (on which most U.S.-India traffic must pass) is false. If VSNL's ability to assert its dominance on the U.S. to India route were significantly hampered by a lack of market power on the Japan-Singapore route, then the enormous disparity on DS-3 and STM-1 rates between the India-U.S. and Singapore-U.S. routes could not be sustained.[14] Moreover, contrary to VSNL's assertion, if this transaction were approved, VSNL would have an end-to-end pipe between India and the United States. VSNL's combined network would include the Tata Indicom cable between India and Singapore, dark fiber (that could easily be equipped) on the c2c network between Singapore and Japan, and the Tyco Pacific cable. Indeed, VSNL would have unquestioned dominance on the critical U.S. to India route across the Pacific.

According to the Applicants, the U.S.-India market is more competitive than portrayed by Crest. But as Dr. Pelcovits explains, these assertions are belied by the facts.[15] For example, as reflected in the recent data produced by the Telecom Regulatory Authority of India ("TRAI"), a comparison of VSNL's private line half circuit rates between the U.S. and India to the rates in other U.S. international markets shows that prices for all sized circuits are significantly higher in the U.S.-India market than any other major U.S. route to Asia.[16] "Performance in this

[14] *Supplemental Pelcovits Declaration* at 5 ("*Pelcovits*") (Attached as Exhibit B).

[15] *Id.* at 4.

[16] *Id*.

market…provides the most direct evidence that VSNL has exercised enormous monopoly power over the international private circuit market between the U.S. and India."[17]

In addition, and again contrary to the Applicants' assertion, TRAI's tentative decision to impose some degree of price controls on international private-line half-circuit prices in India is not indicative of effective competition in that market.[18] In fact, it is powerful proof of VSNL's monopoly power in these markets. Dr. Pelcovits explains that absent regulation, VSNL would rationally maintain prices at their current levels. The existence of impending price controls provides VSNL with a powerful incentive to evade such controls and "collect its monopoly rents from other sources, including the trans-Pacific transport and end-to-end circuit sales."[19] This is precisely the harm to competition that this transaction raises; it will allow VSNL to continue and extend its anticompetitive behavior through the bundling of services, while still restricting inputs to competitors.

Next, the Applicants deny that approving the proposed transaction would enable VSNL to evade regulation in the U.S.-India market. Yet again, VSNL fails to address the concern raised by Crest. Dr. Pelcovits explains:

> Regulated firms have a powerful incentive to evade profit or price regulation, precisely because regulation is a very imperfect process. Firms can evade the controls established by even the most astute regulatory agency, because regulators cannot observe, detect, or prevent all of the indirect methods that the regulated firm may use to extract monopoly rents. To say that *regulation can prevent regulatory evasion* ignores the fundamental imperfection of the regulatory process.[20]

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[17] *Id.*

[18] VSNL has, in fact, appealed the decision and obtained a stay against its enforcement. *Petition to Deny* at 19 n. 51.

[19] *Pelcovits* at 5.

[20] *Id.* at 6.

As for TRAI's regulation of VSNL's private-line half-circuit lease prices, it does not, as VSNL states, "undermine" Crest's argument. At most, TRAI proposes to regulate half-circuit prices on leased lines; it has not suggested that it would regulate the sale of IRU's on an end-to-end whole circuit basis, which increasingly has become the preferred pricing mechanism for selling large amounts of international bandwidth. With ownership of the Tyco Pacific cable, VSNL for the first time would be able to sell whole circuits – on cables that it either owns or controls – between India and the United States.

Furthermore, as Dr. Pelcovits explains, TRAI's actions are the source of potential regulatory evasion. VSNL has monopoly power in the international bandwidth market in India and TRAI is, albeit belatedly and ineffectively, making some movement toward restricting VSNL's ability to abuse its monopoly position. This gives VSNL a powerful incentive to evade regulation and collect its monopoly rents in related input markets.

Crest's Petition also provides strong evidence that competitive entry into the U.S.-India market would be much less likely if the Applications are approved. The Applicants' response to this evidence is remarkably weak. VSNL argues that because "Tyco Telecom has already made a strategic business decision to exit the wholesale undersea cable bandwidth market by selling TGN," and because VSNL was the only bidder for TGN, the "Commission cannot conclude that Tyco Telecom's entry into India's international bandwidth market is necessary to ensure that new cables will land in India."[21] VSNL argues that Crest's Petition is dependent on the Commission finding that rejecting the Applications would cause Tyco to reverse its decision to exit this market, and commit significant resources to enter the India bandwidth market.

[21] *Joint Opposition* at 19.

The Applicants are wrong. As Dr. Pelcovits explains, there is no real either/or proposition here: either VSNL buys TGN, or Tyco continues to operate the cable against its will. Instead, there are innumerable other options. "It is unreasonable to expect that there are no other potential buyers of these assets….[D]emand is increasing for undersea cable capacity crossing the Pacific Ocean, and the TGN trans-Pacific cable controls a very large share of the existing and future capacity in this route."[22] Crest's concern is that the public interest will be harmed if this cable system is sold to an owner that has an incentive to foreclose entry in the U.S.-India international bandwidth market. Only VSNL has such an incentive – and the ability – to continue to dominate the international bandwidth market in India if it were allowed to acquire the sole remaining cable with any significant amount of available capacity across the Pacific.

The lack of available alternative submarine cable capacity across the Pacific Ocean, VSNL's dominant position and control over cable landing stations in India, and the Tata Group's other substantial submarine cable assets will allow VSNL to sustain its dominant position in the U.S.-India market and possibly attain a dominant position on other routes crossing the Pacific. As a result, the proposed transaction will likely drive any potential entrants from the market. Potential entrants would require a significant volume of traffic to warrant investment in a new cable landing station in India. If VSNL controls virtually the entire excess capacity in the Pacific, no new entrants are likely to be forthcoming. The transaction thus presents significant entry foreclosure concerns and therefore should be blocked in its current form. [23]

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[22] *Pelcovits* at 7.

[23] Contrary to VSNL's assertion, *see Joint Opposition* at 17 n. 58, this concern of entry foreclosure is unquestionably a horizontal anticompetitive effect. *See In re The Merger of MCI Communications Corporation and British Telecommunications Plc,* Memorandum Opinion and Order, 12 FCC 15351, 15406 (1997) ("*BT-MCI Order*").

2. The Relevant Geographic Market Is The U.S.-India Market, Not U.S.-Japan or U.S.-U.K.

Rather than attempt to satisfy its burden of demonstrating that the proposed transaction is in the public interest or otherwise engage in any discussion of the serious competition concerns raised by Crest's Petition, VSNL attempts to misdirect the Commission by arguing that the public interest analysis should focus on the U.S.-Japan or U.S.-U.K. markets and not the U.S. - India market. VSNL goes so far as to state that the Commission has already agreed that the relevant geographic markets are the U.S.-Japan and U.S.-U.K. markets.[24]

Indeed, there should be no question as to the relevant geographic market since the International Bureau has already held, insofar as VSNL's ability to abuse its market power is concerned, that the relevant market is in fact U.S.-India. In its order granting VSNL's Section 214 authorization in 2004, the Bureau's analysis focused entirely on the U.S.-India route.[25] While VSNL's purchase of a U.S.-Japan cable certainly adds to the competitive problems on the U.S.-India route, it in no way eliminates the need to analyze the proper geographic market. According to the Commission, "[a] relevant geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area."[26] The Commission has found that a single relevant geographic market is "an area in which all

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[24] *Joint Opposition* at 15-16 ("[The cable landing license] rules provide that the Commission will examine the competitive effects of a transaction in the destination markets for the licensed facilities, in this case Japan and the United Kingdom." (citing 47 C.F.R. §§ 1.767(a)(11)(i), (k))).

[25] *See VSNL America Inc., Order, Authorization and Certificate,* 19 FCC 16555 (Int'l Bur. 2004) ("*VSNL 214 Order*").

[26] *BT-MCI Order* at 15375 ¶ 51.

customers in that area will likely face the same competitive alternatives for a [relevant] product."[27] In this case, the relevant geographic market unquestionably is U.S. to India.

The Applicants' misplaced focus on the U.S.-Japan market actually reveals why these Applications are particularly unsuited for streamlined processing. VSNL is literally correct that the Commission's streamlining procedures focus on the cable's "destination market."[28] VSNL is also correct that the destination market of the Tyco Pacific cable is Japan. However, as explained above, the real competition concerns raised by these Applications is on the U.S. to India route. The solution, of course, is to remove the Applications from streamlined processing, so that the very real competition concerns raised by these Applications can be adequately addressed by the parties and the Commission.

Cases like this one are precisely why the Commission granted the Bureau the discretion to remove any application from streamlined processing.[29] The Bureau should exercise that discretion here and avoid rushing to judgment so that the streamlining procedures are not misused to allow a transaction with serious anticompetitive and other public interest concerns to proceed with only minimal scrutiny.[30]

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[27] *See The Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* Memorandum Opinion and Order, 12 FCC 19985 ¶ 54 (1997).

[28] 47 C.F.R. § 1.767(k).

[29] *Cable Landing Order* at ¶ 47.

[30] It is worth noting that, in its Applications, the parties stated that the relevant destination markets were Japan and the U.K. *See Application* at 21. VSNL does not possess market power in Japan or the U.K. As a result, VSNL did not certify that it agreed to accept and abide by the reporting requirements set forth in 47 C.F.R. § 1.767(*l*), which VSNL would have been required to do if the destination market were India. This is yet another example of how the proposed transaction has so far managed to avoid serious scrutiny.

B. Contrary to VSNL's Assertions, Its Anticompetitive Practices In the U.S/India Market Have Not Ceased And Continue to Harm U.S. Carriers and Consumers

In its Petition, Crest provided substantial evidence of VSNL's long history of anticompetitive behavior. Nothing in the Joint Opposition seriously calls into question the evidence provided by Crest. However, the Applicants suggest that Crest's concerns regarding VSNL's anticompetitive practices are outdated. It is patently clear to anyone involved in the industry, however, that VSNL's bad conduct continues virtually unabated.

For example, the Applicants state that VSNL's restriction of FLAG Telecom's access to available capacity on the FLAG Telecom Europe-Asia ("FEA") cable was the subject of a settlement agreement in May 2004 that fully resolved the issues.[31] While FLAG Telecom may have believed at the time that these issues were on their way to being resolved, it is Crest's understanding that the issues are not currently resolved, and VSNL continues to block FLAG Telecom's unfettered access to available capacity on the FEA cable in India.

Furthermore, the Applicants suggest that the Commission should ignore the recent reports issued by the Office of the U.S. Trade Representative ("USTR") noting VSNL's ongoing anticompetitive conduct in the U.S.-India market. It is critically important for the Commission to consider such evidence; indeed, it is the Commission's obligation to do so under the public interest standard. The USTR has itself urged the Commission to give applications of this sort special scrutiny.[32]

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[31] *See Joint Opposition* at 22.

[32] In its comments to the Notice of Proposed Rulemaking in the *Foreign Participation Order* proceeding, the USTR stated, in the related context of Section 214 applications, that "[t]he Commission should inquire whether a proposed service is likely to help or hinder competition and consumer welfare. The Executive Branch agencies believe that, in making this determination, the Commission should evaluate competitive effects, if any, in U.S. telecommunications services markets, in relevant international services markets and on affiliated

In its most recent Section 1377 report, issued just a couple of weeks ago, the USTR noted that VSNL continues to abuse its control over cable landing stations in India, stating "problems persist based on the continued control by India's dominant international operator, VSNL, over access to all but one submarine cable landing station in India."[33] Numerous other parties also have expressed concerns in recent months that VSNL is exercising its monopoly control in India to the disadvantage of competitors. For example, ComTel/ASCENT reported that "VSNL still refuses to permit interconnection and access to the unused capacity" on the FEA cable which lands at Mumbai.[34] CompTel/ASCENT stated that VSNL's refusal created an artificial shortage of undersea cable capacity into and out of India and resulted in exorbitant and supranormal prices on available capacity.[35] Similarly, the United States Council for International Business has recently stated:

> VSNL has severely limited access to spare submarine cable capacity by refusing to allow access at reasonable rates. These actions have created an artificial shortage of submarine cable capacity, preventing competitive operators from meeting the full bandwidth demands of their customers and driving bandwidth prices for the capacity that is available to much higher levels than the prices for similar capacity on routes where the market is more competitive.[36]

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international routes." Office of the United State Trade Representative, Comments, Foreign Participation Order docket at 3 (Jul. 9, 1997).

[33] United States Office of the Trade Representative, *Results of the 2005 Section 1377 Review of Telecommunications Trade* Agreements at 6 (March 31, 2005) available at *available at* http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/asset_upload_file959_7529.pdf (last visited March 31, 2005) ("*2005 USTR Report*").

[34] *Petition to Deny* at 22-23.

[35] *Id.*

[36] United States Council for International Business, Comments on Compliance with U.S. Telecommunications Trade Agreements (Dec. 22, 2004), *available at* http://www.ustr.gov/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Revie

Lastly, the Telecommunications Industry Association ("TIA") reported to the USTR that "VSNL has not complied completely with its agreement from earlier [in 2004] to provide additional capacity, and the company continues to charge exorbitant prices to the detriment of U.S. customers and U.S. companies in India that need capacity."[37] TIA urged the U.S. government to closely monitor VSNL's behavior, noting the "serious adverse effects" VSNL's conduct has "for U.S. telecommunications and information technology (IT) companies that desire access to the Indian market," including denial of market access, inflated prices for bandwidth, and increased charges for calls to and from India.[38]

All of this is dramatic evidence of VSNL's continued anticompetitive conduct in India, and VSNL's incentives to continue to act in this manner will only grow if the proposed transaction is approved by the Commission. In responding to Crest's Petition, the Applicants have chosen to decline to address the serious concerns raised by VSNL's previous and ongoing anticompetitive conduct. The Commission, however, must not ignore this evidence.

C. The Commission's Public Interest Analysis Is Broader Than The Antitrust Inquiry Conducted By The Department of Justice

The Applicants repeatedly assert that the fact that the DOJ terminated its antitrust inquiry into this transaction means that the transaction is in the public interest. As the Commission is

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w_of_Compliance_with_Telecom_Trade_Agreements/Section_Index.html (last visited March 30, 2005).

[37] Telecommunications Industry Association, Comments on Compliance with U.S. Telecommunications Trade Agreements (Dec. 17, 2004), *available at* http://www.ustr.gov/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/Section_Index.html (last visited March 30, 2005).

[38] *Id.*

well aware, this clearly is not a correct statement of the law. The Commission's public interest analysis is significantly broader than the DOJ's limited antitrust inquiry.

In considering whether to grant an application involving a Commission license, the Commission must make a public interest determination,[39] which includes an analysis of the potential anticompetitive effects of the proposed transaction.[40] This analysis is informed, but not limited, by antitrust laws.[41] In fact, the Commission has, on multiple occasions, imposed

[39] *See*, *e.g.*, 47 U.S.C. § 309(a); 47 U.S.C. § 310(d).

[40] *See*, *e.g.*, *In re Solar Broad. Co., Assignor, and Cumulus Licensing Corp., Assignee, for Consent to Assignment of Licenses of WSTH-FM, Alexander City, AL, and WDAK(AM), Columbus, GA, and Cumulus Licensing Corp., Assignor, and Clear Channel Broad. Licenses, Inc., Assignee, for Consent to Assignment of Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phoenix City, AL, WPNX(AM), Phoenix City, AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL,* Memorandum Opinion and Order, 17 FCC Rcd 5467, 5473 ¶ 20 (2002) ("The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.").

[41] *See*, *e.g.*, *id*. (citing *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.")); *In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 17 (2004) ("The Commission and the Department of Justice ("DOJ") each have independent authority to examine communications transactions involving mergers and acquisitions, but the standards governing the Commission's review differ from those of DOJ. The review conducted by DOJ is pursuant to Section 7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition in any line of commerce. The Commission, on the other hand, is charged with determining whether the transaction serves the broader public interest.") (citations omitted) (*GM News Corp. Order*); *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (discussing a case in which the FCC recognized that all potential entrants into the market presented potential antitrust complications but found entry to be in the public interest, the court stated, "[s]ince the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible, we have insisted that the agencies consider antitrust policy as an important part of their public interest calculus. But the agencies are not strictly bound by the dictates of [the antitrust] laws; rather, they are entrusted with the responsibility to determine

conditions on an authorization to address competition concerns where neither the Federal Trade Commission nor DOJ has found such conditions necessary.[42] These conditions are imposed to provide the best possible public interest benefits to the communications field.[43] In this case, there are significant competitive concerns that the Commission should note. These concerns may or may not rise to the level of antitrust violations in DOJ's view. But whatever the answer to that question, the anticompetitive effects of the proposed transaction are serious threats to the communications industry and U.S. carriers and customers needing private line capacity on the India-U.S. route.

D. The New Network Security Agreement Does Not Address All of the Serious National and Economic Security Concerns Raised by the Proposed Transaction

The Network Security Agreement ("2005 NSA") recently supplied to the Commission is not sufficient to protect all of the U.S. national and economic security interests associated with VSNL's proposed acquisition of the TGN. The 2005 NSA states that it supersedes the 2004 agreement entered into at the time of VSNL's Section 214 authorization, but the two agreements are remarkably similar, even though the Commission application for which the NSA was reached in 2004 is far different from the Applications at issue in this proceeding.[44] The proposed

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when and to what extent the public interest would be served by competition in the industry." (internal citations omitted)).

[42] *See*, *e.g.*, *GM News Corp. Order* (imposing conditions on the proposed transaction that were targeted to address anticompetitive concerns despite that neither FTC nor DOJ required such conditions); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001) (imposing conditions above and beyond those imposed by FTC and DOJ to address competition concerns).

[43] *See*, *e.g.*, *GM News Corp. Order* at 484 ¶ 17.

[44] Similarly, when Singapore Technologies Telemedia ("STT") acquired Global Crossing, it reached a comparable NSA with DOJ, FBI, and DHS. *In re Global Crossing Ltd.*

transaction will give VSNL substantial, and often exclusive, power over the routing of significant amounts of U.S. international voice and data traffic. For example, future U.S. communications traffic moving west to Asia will have little choice but to use a VSNL-controlled network due to the dearth of trans-Pacific fiber optic cable alternatives. If this transaction were to proceed, therefore, U.S. government authorities and the U.S. military would be forced to rely on cables owned by foreign entities when sending sensitive and classified communications to military bases in Guam and Asia. Yet the 2005 NSA primarily addresses the security and integrity of domestic communications and of domestic communications infrastructure[45] and, like its predecessor, fails to ensure the security of communications once they leave the domestic United States.[46]

For example, the 2005 NSA will not provide security from illegal interceptions and wiretaps as U.S. communications travel over fiber optic cables outside the United States. Similarly, the 2005 NSA will not guarantee the reliability, integrity, or quality of the communications service outside the domestic United States—there is no guarantee that wire or electronic communications traveling internationally will be transmitted intact and without

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(Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization, 18 FCC 20301, App. D, New GX/Executive Branch Agreement (2003).

[45] Like its predecessor and like the Global Crossing-STT NSA, the 2005 NSA defines "Domestic Communications" as wire or electronic communications "(whether stored or not) from one U.S. location to another U.S. location" and the U.S. portion of a wire or electronic communication "(whether stored or not) that originates or terminates in the United States." *Joint Petition* at section 1.10.

[46] *See Petition to Deny* at 43.

interruption or distortion. And while the 2005 NSA likely will facilitate the ability of U.S. law enforcement and intelligence authorities to conduct wiretaps within the United States, no such cooperation is provided for outside the domestic United States. Thus, although some changes incorporated in the 2005 NSA give the U.S. government some additional influence over VSNL's handling of domestic communications, the NSA does not even begin to address the unique national and economic security concerns raised by a transaction of the magnitude of VSNL's acquisition of the TGN.

III. IF THE COMMISSION DETERMINES THAT IT WILL NOT DENY THE APPLICATIONS OUTRIGHT, IT SHOULD IMPOSE REAL CONDITIONS ON ITS APPROVAL TO PREVENT THE DEMONSTRATED ANTI-COMPETITIVE HARMS

If the Commission determines not to deny the Applications outright, it should at minimum impose real conditions on any approval that are targeted at alleviating the anticompetitive harms occasioned by the transaction. In particular, there are two conditions that the Commission should consider imposing on VSNL. First, the Commission should condition its approval of the Applications on VSNL-Tyco's agreement to divest at least two fiber pairs on the Tyco Pacific cable network. Second, the Commission should require that the Tyco Pacific cable be operated on a common carrier basis.

A. The Commission Should Condition Approval Of The Applications On The Divestiture Of Two Fiber Pairs On Tyco Pacific Cable

While Crest believes that the Applicants have failed to demonstrate that this transaction is in the public interest, Crest submits that the Commission should, at a minimum, condition any approval of the Applications on the divestiture of at least two fiber pairs on the Tyco Pacific cable. The Commission has previously made clear that its public interest analysis enables it to "impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public

interest is served by the transaction."[47] In the past, these conditions have included the divestiture of certain facilities to eliminate competitive concerns.[48]

1. Divestiture Of At Least Two Fiber Pairs Would Reduce VSNL's Ability To Act Anti-Competitively

Short of outright denial of the Applications, the remedy most likely to address the anticompetitive concerns of this transaction is the divestiture of at least two fibers pairs on the Tyco Pacific cable. As detailed in Crest's Petition and in Dr. Pelcovits' two declarations, VSNL's ability to protect its dominant position on the U.S.-India route is largely dependant upon the Tyco Pacific cable, which will be the only trans-Pacific cable likely to have available capacity for the foreseeable future. Divestiture of at least two fiber pairs on this cable would provide a competitive alternative to VSNL across the Pacific, thereby limiting VSNL's ability to leverage its control of the bottleneck cable landing stations in India. It also would partially eliminate the disincentive for competitive entry into the Indian cable landing station market that otherwise would exist because of VSNL's control of virtually all new capacity across the Pacific.

2. Appropriate Divestiture Would Help Alleviate Many of the National Security Concerns Associated With This Transaction

Divestiture of at least two fiber pairs of the Tyco Pacific cable also would help resolve some of the national security concerns raised by the proposed transaction. As noted in its Petition, Crest is a provider of critical telecommunications infrastructure in Alaska and between

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[47] *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, Memorandum Opinion and Order, FCC 04-255, WT Dkt. No. 04-70, at ¶ 43 (rel. Oct. 26, 2004).

[48] *Id. See, e.g., GTE Corp., Transferor, and Bell Atlantic Corp., Transferee,* Memorandum Opinion and Order, 15 FCC 14032, 14047 ¶ 24 (2002); *AT&T Corp., British Telecommunications, PLC, VLT Co., Violet License Co. LLC, and TNV [Bahamas] Limited Applications*, Memorandum Opinion and Order, 14 FCC 19140, 19150 ¶ 15 (1999); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC 18025, 18032 ¶ 10 (1998) (conditioning approval on the divestiture of MCI's Internet assets).

Alaska and the continental United States.[49] Crest owns submarine fiber optic cable branching units on the Tyco Pacific network that are intended to connect the Eareckson Air Station on Shemya Island and other military installations on Kodiak Island to various bases within Alaska and to the U.S. mainland.[50] Crest has been in discussions with the U.S. Department of Defense ("DOD") to use these branching units to enhance the early warning and interception capabilities of the U.S. military's national missile defense program. Should the Tyco Pacific cable come under the control of a foreign entity or a foreign government, however, DOD's desire to use these branching units for enhanced fiber connectivity likely would be diminished due to the threat of data corruption or data interception. Alternative fiber optic cable solutions would cost the DOD over ten times more than interconnecting via these branching units.

The divestiture of two fiber pairs on the Tyco Pacific cable network would alleviate some of these national security concerns. Not only would this ensure that adequate bandwidth is available to the U.S. government and others from an approved and neutral U.S. operator in the northern Pacific Ocean region – where competitive alternatives will be effectively limited to the TGN – but it would enable key network equipment associated with the fiber pair connected to the Alaskan branching units to be segregated under a U.S. owner's control. In this way, divested fiber pairs under the control of a U.S.-approved operator will provide adequate and secure capacity for current and future U.S. government requirements.[51]

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[49] *See Petition to Deny* at 1 n.1.

[50] *See Petition to Deny* at Figure 3, Trans-Pacific Cable System Branching Units (also attached as Exhibit C). Crest's Northern Lights network would consist of fiber pairs branching off of the two branching units on the Northern Segment of the Tyco Pacific network toward Alaska.

[51] Control of network operations for these fiber pairs, including cable station operation and maintenance, would need to rest in the U.S. operator's control to ensure network security.

B. The Commission Should Deem the Tyco Pacific Cable To Be A Common Carrier Cable, Or Should Impose Common Carrier-Like Obligations On This Cable Network

If the Commission determines not to deny the Applications, it should, at the very least, require the Tyco Pacific cable to be operated on a common carrier basis.[52] In its Joint Opposition, the Applicants acknowledge that the Commission has the authority to require the Tyco Pacific cable to be operated on a common carrier basis.[53] The Commission has authorized non-common carrier cables only where: (1) there is no legal compulsion to serve the public indifferently; and (2) there are no reasons implicit in the nature of the operations to expect that the applicant would make capacity available to the public indifferently and indiscriminately.[54]

In applying the first prong of the *NARUC I* test to submarine cable authorizations, the Commission has stated that there will be no compulsion to serve the public indifferently where there is no public interest reason to require facilities to be offered on a common carrier basis.

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[52] The Tyco Pacific cable was originally licensed on a non-common carrier basis. *See In re Tycom Networks (US) Inc. and Tycom Networks (Guam) L.L.C., Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland, Hawaii, Guam, and Japan, The Tycom Pacific Cable System*, Cable Landing License, DA 00-2762 (rel Dec. 8, 2000) ("*Tycom Networks Order*"). Circumstances have now changed since the adoption of this order such that the transfer of the cable landing licenses should be conditioned on regulation of the facilities as a common carrier. The Commission has the authority to subsequently classify facilities as common carrier facilities if the public interest requires. *See, e.g., In re 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 Extending Between Florida, Puerto Rico, Brazil, Argentina, Chile, Peru, and Guatemala,* Cable Landing License, 15 FCC 14915, 14921 ¶ 13 (2000) *("Telefonica SAM USA")*.

[53] *See Joint Opposition* at 15.

[54] *See In re Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom,* Cable Landing License, 12 FCC 8516, 8520-23 ¶¶ 11-17 (1997) ("*Cable & Wireless Order*"); *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

This public interest analysis has generally focused on whether an applicant will be able to exercise market power because of the lack of alternative facilities.[55] As Crest has explained, there is a lack of alternative facilities in this case, especially with respect to expected future demand of trans-Pacific bandwidth. In the foreseeable future, there will be no significant competitors to the Tyco Pacific cable. When the cable was initially licensed, the Commission found (based on Tyco's unopposed assertions) that there was "sufficient existing or planned facilities on the routes to prevent them from exercising market power in offering services to the public."[56] As discussed in Crest's Petition to Deny, many of these alternative facilities have either been decommissioned or never materialized.[57] In 2000, the Commission accepted Tyco's assertion that the following cables were "sufficient existing or planned facilities on the routes to prevent [Tyco] from exercising market power in offering services to the public": TPC-3, TPC-4, TPC-5, North Pacific, Japan-US, China-US, Pacific Crossing 1, and FLAG Pacific-1.[58] But TPC-3 and TPC-4 have been decommissioned, and the FLAG Pacific-1 cable never

[55] *See Cable & Wireless Order* at 8522 ¶¶ 14-15. However, the Commission has also stated that it is not limited to that reasoning. *See*, *e.g.*, *In re Australia-Japan Cable (Guam) Ltd., Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between Australia, Guam, and Japan,* Cable Landing License, 15 FCC 24057, 24062 ¶ 13 (2000) ("*Australia-Japan Cable Order*"); *In re AT&T Corp., et. al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, Cable Landing License, 14 FCC Rcd 13066, 13080 ¶ 39 (1999).

[56] *In re Tycom Networks (US) Inc. and Tycom Networks (Guam) L.L.C., Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland, Hawaii, Guam, and Japan, The Tycom Pacific Cable System*, Cable Landing License, File No. SCL-LIC-20000717-00026, DA-00-2762, at ¶ 8 (Int'l Bureau 2000) ("*Tycom Networks Order*").

[57] *See Petition to Deny* at 45 n. 113 and Exhibit 2

[58] *Tycom Networks Order* at ¶ 8.

materialized.[59] Further, as explained in the Crest Petition, even among those cables that have come into and remain in service there is insufficient alternative capacity to meet expected demand.[60]

It is also unclear whether VSNL could meet the second prong of the *NARUC I* test; *i.e.*, there are reasons implicit in the nature of VSNL's operations to expect that it would not make capacity available to the public indifferently and indiscriminately. As explained above, VSNL has both the incentive and ability to discriminate in favor of its own traffic on the Tyco Pacific cable to the detriment of U.S. carriers and customers.

Alternatively, the Commission should consider imposing common carrier-like obligations on the Tyco Pacific cable.[61] The Commission presciently anticipated the issue in this case in the *Tel-Optik Order*, where it stated:

> We would be concerned if, in practice, a foreign owner or co-owner of a cable were to provide capacity to an affiliated switched or enhanced service provider, for example, on terms far more favorable than those offered to U.S. companies providing similar services. We would view such discrimination undertaken for the purpose of, or resulting in, manipulation of competition in a particular service to be inconsistent with the terms of the Cable Landing License Act. We will reserve the right to condition license if practices develop that are antithetical to the reciprocal

[59] PriMetrica, Inc., *International Bandwidth 2004, Volume 1: Submarine Networks* at 116 (2004) (listing major trans-Pacific submarine cable systems).

[60] *See Petition to Deny*, Exhibit 2 (showing that the Pacific Crossing-1 cable system has been in bankruptcy for a number of years, and there are serious questions as to its reliability and commercial viability; that the U.S.-China and TPC-5 cable networks are fully subscribed; that the North Pacific Cable is not a viable option because it only provides 1 Gpbs of capacity; and that while the U.S.-Japan network could be upgraded, it is reasonable to expect that its signatories will maintain their current ownership interests and not make additional capacity available to third parties.

[61] The Commission clearly has the authority to do so. *See, e.g., Telefonica SAM USA* at 14921 ¶ 13; *Australia-Japan Cable Order* at 24062-24063 ¶ 15.

> rights of the U.S. carriers, switched or enhanced service providers, or other U.S. citizens.[62]

VSNL will have every incentive and the ability to engage in precisely this sort of anticompetitive behavior. And as experience has shown in India, VSNL has done so to the detriment of U.S. carriers and consumers.

The Commission also analyzed these issues in *Telefonica SAM USA*.[63] In that case, the petitioner sought authority to land and operate a submarine cable in the U.S.-South America region on a non-common carrier basis. The Commission granted the request, subject to conditions. While there were alternative cables available, the Commission found that "there is risk of competitive harm to U.S. consumers and to competitive providers, including telecommunications service providers and information service providers, on the U.S.-Argentina, U.S.-Chile, and U.S.-Peru routes due to [the applicant's] affiliation with dominant foreign carriers and foreign cable landing stations in those foreign destinations."[64]

The Commission granted the license, subject to common carrier-type conditions. The conditions included:

- "a requirement that Applicants make capacity on the SAM-1 cable available, on a nondiscriminatory basis, to all customers, including all information service providers, licensed carriers, and others; and a requirement that Applicants' standard cable capacity lease agreement allow for unrestricted resale or transfer of cable capacity,"[65] and
- "a requirement that Applicants allow unaffiliated parties to provide backhaul capacity and permit, on a nondiscriminatory basis, collocation

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[62] *Tel-Optik Ltd. and Submarine Lightwave Cable Co.*, 100 FCC 2d 1033, 1052 n.26 (1985).

[63] *See Telefonica SAM USA*.

[64] *Id.* at 14923-14924.

[65] *Id*. at 14926.

> space in the cable landing stations as well as access to cable capacity and backhaul; and a requirement that Applicants provide the Commission with their standard cable capacity lease agreement."[66]

The Commission should impose similar conditions here. But such conditions need to be extended to the India market, where VSNL dominates and controls four of the five cable landing stations.

IV. VSNL'S ALLEGATIONS OF "GREENMAIL" ARE FRIVOLOUS, AND INDICATE A DESIRE TO DISTRACT THE COMMISSION FROM THE SERIOUS COMPETITION ISSUES RAISED BY THE APPLICATIONS

The assertion by the Applicants that Crest's opposition to the proposed transaction is part of a "greenmail" retaliation campaign against Tyco is a frivolous charge that attempts to distract the Commission from the merits of the important arguments Crest has raised – namely, that sale of the TGN to VSNL has serious, negative consequences for U.S. economic and national security and global communications competition.

A. Crest Has Raised Serious and Legitimate Concerns about the Transaction

The Applicants assert that "Crest has no direct interest in the sale of Tyco Atlantic and Tyco Pacific, save for the leverage or retaliation value that Crest's opposition to the TGN sale might provide in ongoing commercial negotiations with Tyco Telecom."[67] That statement is

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[66] *Id*. at 14927. *See also Australia-Japan Cable Order at 24065-24066* ("Telstra is the landing party for almost all submarine cables in Australia…. Telstra, therefore, has market power in at least two of the three relevant markets – cable landing station access and local access facilities or services – on the Australian end of the U.S.-Australia route. We are concerned that AJC's foreign affiliate, Telstra, might favor AJC or affiliated telecommunications or information service providers…. In this instance, …we find that market forces and a limited number of additional conditions will constrain the ability of AJC Guam and its foreign affiliates in Australia to engage in anticompetitive practices.… Finally, the availability of regional submarine cable links (SEA-ME-WE-3, APCN and JASURAUS), that together connect Australia, via Indonesia, to the Philippines, and the availability of Guam-Philippines, connecting the Philippines to Guam, will help to create competition on the U.S.-Australia route.") (citations omitted).

[67] *Joint Opposition* at 4.

patently false. As Crest plainly states in its Petition, Crest's economic interest in this transaction are clear: VSNL's proposed acquisition of the TGN threatens the viability of Crest's business plan to develop Alaskan branching units off of the Tyco Pacific network in order to upgrade the U.S. national missile defense program communications infrastructure.

Equally important, as demonstrated by Crest's Petition and by the letter from three prominent U.S. Senators to Treasury Secretary Snow,[68] there are important U.S. national security concerns raised by this transaction. Crest has opposed the transaction, and the Senators requested that the Committee on Foreign Investment in the United States ("CFIUS") investigate the transaction due to their strongly held belief that the TGN, as the last remaining global cable network under U.S ownership and control, should remain under U.S. control in order to ensure U.S. economic and national security and to benefit global communications competition. As Crest demonstrated in its Petition, these concerns are supported by clear evidence – including the public findings of U.S. and Indian regulators.[69]

B. Crest Has Never Engaged in "Extortionate Behavior" or Retaliation Against Tyco

Contrary to the assertions made in the Joint Opposition and in the attached declarations, Crest representatives never threatened to oppose the VSNL-Tyco transaction if Tyco failed to agree to an uneconomic price for constructing the Northern Lights branching units.[70] No

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[68] *See Senators' Letter* (attached as Exhibit A).

[69] *See, e.g.*, United States Office of the Trade Representative, *Results of the 2005 Section 1377 Review of Telecommunications Trade Agreements* (Mar. 31, 2005), available at http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/asset_upload_file959_7529.pdf (last visited Apr. 18, 2005); TRAI, *Consultation Paper on Fixation of Ceiling Tariff for International Private Leased Circuit (Half Circuit)*, Consultation Paper No. 10/2004 (Apr. 30, 2004).

[70] While VSNL and Tyco recognize that the Commission's anti-greenmail rule, 47 C.F.R. § 1.935(c), does not apply to the Applications at issue in this proceeding, the parties assert

payment was ever offered or made in exchange for not filing or withdrawing Crest's Petition. Moreover, as demonstrated by the attached declaration of Crest President and Chief Executive Officer Donald Schroeder, Crest and Tyco were engaged in negotiations concerning the Alaskan branching units on the Tyco Pacific cable well before the VSNL-Tyco transaction was announced.[71] And from the time the proposed transaction became public, Crest had concerns about its potential impact on U.S. national security and on Crest's embedded investment in the branching units. Thus, while the Crest-Tyco negotiations concerning the branching units continued, Crest principals made clear to Tyco that Crest still had concerns about the sale of the TGN to VSNL and would consider opposing that transaction.

In their declarations to the Commission, Tyco executives assert that Crest's pricing demands were "extortionate."[72] In fact, the ongoing pricing negotiations between Tyco and

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that the rule "establishes a sensible bar to extortionate behavior" and that Crest's actions are of the sort that the anti-greenmail rule was designed to prohibit. The Applicants' logic is flawed in several respects. As Applicants readily point out, Section 1.935(c) does not apply in the context of cable landing license applications. *See Joint Opposition* at n. 33. Section 1.935 of the Rules is applicable only in the wireless context. 47 C.F.R. § 1.935. *See also* 63 Fed. Reg. 68904 (adopting rule 1.935 as part of a consolidation of the Commission's licensing rules for wireless radio services). In fact, no Commission decision has ever discussed either "greenmail" or Section 1.935 in the context of cable landing licenses. Instead, the Commission's "greenmail rules" are designed to prevent a perversion of the Commission's system for licensing of scarce spectrum resources. In the wireless context, the rules attempt to curtail the extraneous filing of applications and petitions to deny that have the sole purpose of making it difficult for a genuinely interested party to win authorization, while extracting monetary payments for withdrawal. *See*, *e.g.*, *In re Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC 719, ¶ 31 (1992). These concerns would not apply to cable landing licensing because, among other reasons, cable stations are not hampered by the need for access to scarce spectrum resources. Even if the rule did apply to the Applications at issue here, as indicated above, the facts relating to Crest's negotiations with Tyco for the Alaskan branching units would not amount to a violation of the rule.

[71] Declaration of Donald Schroeder (attached as Exhibit C).

[72] *Joint Opposition*, Declaration of David Coughlan, ¶ 10.

Crest were based on legitimate market conditions, which include the current glut of available cable inventory. As demonstrated in the attached declaration, Crest arrived at its offer based upon Crest's ability to pay and its lack of any pre-sale commitments from prospective users of this system segment. Moreover, Crest's offer was significantly lower than Tyco's proffered price because Crest believed that its proffered price would be marginally cash flow positive to Tyco in light of its current excessive inventory levels.

Nevertheless, once the VSNL-Tyco transaction was announced, Crest's concerns about the national security implications of the transaction formed an important backdrop to the Crest-Tyco Alaskan branching unit negotiations. As demonstrated in Mr. Schroeder's declaration, Crest desired to continue with its exploratory conversations with Tyco concerning the possible construction of the Northern Lights branching unit to Seward in hopes that a favorable agreement could be reached that would quell at least some of Crest's financial concerns about the impact of the VSNL-Tyco transaction, even if the national security concerns were still present.

In sum, as Mr. Schroeder states in his declaration, Crest's opposition to the Tyco-VSNL transaction was not leveraged as a threat because Tyco did not accept Crest's proffered price for construction of the branching units. Rather, Crest decided to oppose the VSNL-Tyco transaction on the grounds that it would have significant negative financial consequences for Crest given Crest's embedded investment and lost or devalued business opportunities, as well as enormous negative consequences for U.S. national security.

C. Applicants' *Ad Hominem* Attack on Brian Roussell is Without Merit

The Applicants also attempt to smear the reputation of a Crest Executive Vice President, asserting that he somehow acted improperly during his tenure at Tyco and later at Crest with respect to the negotiations concerning the Alaskan branching units. First, when Mr. Roussell was Vice President for Marketing and Sales at Tyco, he lacked any ability to unilaterally

negotiate or close any deals concerning the Alaskan branching units. In 2002, discussions about the branching unit opportunity for Tyco were fully vetted and reviewed through Tyco's existing review and approval processes for all transactions. Thus, while it is true—as the declarations of Tyco executives appended to the Joint Opposition suggest—that Mr. Roussell played a key role for Tyco in its negotiations with Crest regarding the Northern Lights project, Mr. Roussell had no undue influence or ability to approve that transaction. To suggest otherwise is simply incorrect. The Commission should not be swayed by this misleading and false *ad hominem* attack.

Second, the Joint Opposition and accompanying declarations suggest that Mr. Roussell knew that he would be taking a position with Crest when he was at Tyco, negotiating the Northern Lights transaction. Again, these asserted facts are not true. As the Applicants' declarations and Joint Opposition note, Mr. Roussell was an at-will employee with Tyco, and he was one of at least six vice presidents who were laid off from Tyco as part of a corporate restructuring. In fact, Mr. Roussell was offered the opportunity to stay in his current position at Tyco if he wanted, but that position would have required continued extensive travel, and it would not have provided him with opportunities for career advancement. So, when Mr. Roussell was offered a severance package as part of a corporate restructuring, he opted to take it. It was nothing more than a coincidence – not the product of advance scheming or under-the-table dealings – that Crest offered Mr. Roussell an opportunity in Portland. And although Mr. Roussell began to work for Crest while he was still accepting severance payments from Tyco, it is categorically false to suggest that Mr. Roussell was working for Crest, negotiating on Crest's behalf, or otherwise working to help Crest, while he was an employee with Tyco.

V. CONCLUSION

For all of the foregoing reasons, Crest urges the Commission to take the above-captioned Applications off of streamlined processing and ultimately deny them as not in the public interest, or otherwise condition their approval as indicated herein.

Respectfully submitted,

____/s/ Philip L. Malet_____

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Counsel to Crest Communications Corp.

April 18, 2005

Exhibit A

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Letter from Sens. Kyl, Stevens, and Sessions to

Treasury Secretary John Snow

United States Senate

WASHINGTON, DC 20510

April 7, 2005

The Honorable John W. Snow
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue
Washington, D.C. 20220

Dear Secretary Snow:

We understand that Tyco International intends to sell its Tyco Global Network (TGN), the most technologically advanced global undersea fiber optic cable system, to India's dominant international telecommunications provider, Videsh Shanchar Nigam Limited (VSNL). We would like to request that a full Committee on Foreign Investment in the United States (CFIUS) investigation be conducted immediately concerning this proposed acquisition. The Exon-Florio section of the 1950 Defense Production Act provides for such a 45-day investigation to supplant the standard, and typically superficial, 30-day review in cases like this one – i.e., where there are clearly significant national security issues at stake.

TGN is a strategic asset of incalculable value to United States security and commercial interests. It is an immense, international network offering massive amounts of high-quality, fiber optic bandwidth. More than 70 percent of the world's international telecommunications traffic is carried over submarine cables like the TGN. But the percentage of U.S. ownership and control over this grid is in rapid decline at a time when the U.S. military is increasing its reliance on fiber optic cables. One key U.S. Department of Defense effort – the Global Information Grid-Bandwidth Expansion program – relies on using bandwidth capacity to connect key intelligence, command, and operational locations.

Second, this transaction gives the Indian government control over a significant portion of the world's submarine cable network (including more than 80 percent of the total trans-Pacific undersea capacity) and over key, strategic submarine cable landing stations in the United States and India. The Indian government owned all of VSNL until 2002, and now the government still owns 26 percent of the company and plays an active role in company management. This relationship has led VSNL to act in a fashion demonstrably hostile to U.S. military and commercial interests. The U.S. Trade Representative recently noted VSNL's anti-competitive conduct with respect to its landing stations in India. More importantly, in the early 1990s, VSNL refused to allow another undersea cable network to establish a landing point on the island of Diego Garcia, which houses a U.S. military base.

Given the obvious strategic importance of the TGN and the level of control the Indian government would have over the global undersea cable grid if the transaction is allowed to proceed, we believe the transaction warrants a full and thorough review by CFIUS. We ask that such a review commence immediately and that, upon its completion, our offices be fully briefed on the conclusions.

Thank you for your prompt attention to this important matter. If you need further information, please feel free to contact us directly.

Sincerely,

JON KYL
United States Senator

TED STEVENS
United State Senator

JEFF SESSIONS
United States Senator

Exhibit B

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Supplemental Declaration of Michael D. Pelcovits, Ph.D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
Tyco Telecommunications (US) Inc., *Assignor,*	
VSNL Telecommunications (US) Inc., *Assignee,*	File Nos. SCL-ASG-20050304-0003 SCL-MOD-20050304-0004 SCL-T/C-20050304-0005
and	
Tyco International Ltd. *Transferor,*	
VSNL Telecommunications (US) Inc., *Transferee,*	
and	
Tyco Networks (Guam) LLC., *Licensee,*	
Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems.	

SUPPLEMENTAL DECLARATION OF MICHAEL D. PELCOVITS, Ph.D.

I have been asked to review the Joint Opposition to Petition to Deny filed by the Applicants in this proceeding and respond to some of the issues raised regarding the competitive effects of the proposed acquisition. As outlined below, the Applicants have failed entirely to rebut or respond to the significant competition issues described in my

earlier declaration.[1] The Applicants fail to acknowledge VSNL's monopoly power over international circuits linking India to the rest of the world. Furthermore, they do not provide any analysis that would enable the Commission to be assured that VSNL's monopoly power will dissipate in the near or longer term.[2] Finally, the Applicants ignore the likely effect of the proposed acquisition on the ability of VSNL to preserve and strengthen its monopoly power in the vital U.S.-India telecommunications market.

I. Markets Must be Defined Properly

The Applicants propose that the Commission analyze the proposed acquisition only from the perspective of the "destination country of the cable system," implying that the Tyco Pacific cable should be analyzed from the standpoint of the U.S.-Japan market and the Tyco Atlantic cable from the standpoint of the U.S.-U.K. market.[3] By defining the "relevant" markets this way, the Applicants completely side-step the significant competition issues in the U.S.-India market, which is the market most likely to be adversely affected by the proposed acquisition, and which should be of the greatest interest to the Commission.

The Applicants argue that the market between the U.S. and Japan or the U.S. and U.K. will not see a reduction in competition as a result of the proposed acquisition. That

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[1] *See In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System*, Joint Opposition to Petition to Deny, Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 (Filed April 11, 2005) (Hereafter "*Joint Opposition*").

[2] The time period used by the antitrust agencies in the United States for evaluating the ability of new entrants to counteract the anticompetitive effects of a merger is two years. U.S. Department of Justice, *Horizontal Merger Guidelines*, Section 3.2, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm (last visited April 18, 2005).

[3] *Joint Opposition* at 25.

may well be true, because VSNL may have no direct ability to limit entry on these routes – by virtue of controlling landing stations or landline access in the U.S. or Japan, for example. Nevertheless, VSNL's acquisition of the most technologically advanced and largest undersea cable between the U.S. and Japan route will have a direct impact on other markets where the Tyco Global Network ("TGN") serves as a key input into the provisioning of service in these markets.

As I explained in my initial declaration, the market for high-capacity bandwidth between the U.S. and India relies on several complementary inputs, including trans-Pacific capacity and submarine cable landing station (SCLS) access in India. If this acquisition were approved, VSNL will reinforce its monopoly power in the U.S.-India market by combining its dominant position over access to landing stations in India together with ownership of a substantial share of the trans-Pacific capacity linking the U.S. with Asia. By arguing that the Pacific (and Atlantic) markets should be viewed in isolation, VSNL has completely ignored this important vertical relationship between the input and output markets. The Commission should focus its attention on the fact that this increase in VSNL's market power is greater than the "sum of the parts."

II. VSNL Controls Bottleneck Resources in India

In the Joint Opposition, the Applicants attempt to deflect attention away from the serious competitive problems in the private line markets between India and the rest of the world, including the United States, by arguing that "the India market is dynamic and characterized by significant new entry from entities other than VSNL."[4] Further, they claim that "since neither Tyco nor VSNL (nor their affiliates) owns, controls or operates

[4] *Joint Opposition* at 19.

a cable system on the Japan-Singapore route," the market conditions in the U.S.-India route are far more competitive than portrayed by the petitioner.[5]

However, the Applicants assertions are belied by the facts. As set forth in the table below, a simple comparison of VSNL's private line half-circuit rates between the U.S. and India to the rates in other U.S. international markets shows rates for all sized circuits significantly higher in the U.S.-India market than any other major U.S. route to Asia.[6] For example, STM-1 circuits, which are among the most important bandwidths used by international carriers, are priced five to ten times higher on the U.S.-India route than on other U.S.-Asia routes. Performance in this market, as shown by these prices, provides the most direct evidence that VSNL has exercised enormous monopoly power over the international private line circuit market between the U.S. and India.

Monthly Price of International Private Line Circuit (in $000s)

Route	E-1	DS-3	STM-1
Japan-USA	23	99	191
South Korea-USA	23	102	229
Hong Kong-USA	24	124	269
Singapore-USA	33	174	346
India-USA	**39**	**656**	**1,931**

[5] *Id.* at 17.

[6] This table was included in my initial declaration and was produced by the Telecom Regulatory Authority of India. *See In re Tyco Telecommunications (US) Inc., Assignor, and VSNL Telecommunications (US) Inc., Assignee, Application for Assignment of a Cable Landing License for the Tyco Atlantic Submarine Cable System and of a Jointly-Held Cable Landing License for the Tyco Pacific Submarine Cable System*, Petition to Deny of Crest Communications Corp., Dkt. Nos. Streamlined SCL-T/C-20050304-00003, 00004, 00005 (Filed March 31, 2005); Telecom Regulatory Authority of India, The Telecommunication Tariff (Thirty Fourth Amendment) Order, 2005, Explanatory Memorandum at 35 (March 11, 2005).

The Applicants claim that VSNL does not have significant capacity, let alone market power, on the Japan-Singapore route, on which most India-U.S. traffic must pass. They imply that this prevents VSNL from charging excessive prices on circuits between India and the United States. This assertion also is belied by this data on pricing.[7] If VSNL's claim were true, then the enormous disparity on DS-3 and STM-1 rates between the India-U.S. and Singapore-U.S. routes could not be sustained.

Finally, the fact that the Telecom Regulatory Authority of India ("TRAI") found it necessary to impose controls on international private line half-circuit prices in India is itself powerful proof of VSNL's monopoly power in these markets. Absent regulation, VSNL likely would maintain prices at the pre-regulation levels and extract as much monopoly rent as possible. Since such regulation limits its profits, however, VSNL has a powerful incentive to evade these price controls and collect its monopoly rents from other sources, including trans-Pacific transport and end-to-end circuit sales.

III. VSNL's Ability to Evade Regulation is a Serious Concern

Applicants deny that approving the TGN transaction would enable VSNL to evade regulation in the U.S. and India.[8] With respect to U.S. regulation, the Applicants claim that the Commission has significant authority over non-common carrier cable landing licensees and would be able to prevent VSNL from favoring its own affiliate, VAI, and disadvantaging its rivals. With respect to regulation in India, the Applicants argue that TRAI has demonstrated its willingness to control VSNL's market power by its recent acts of reducing rates for high-capacity bandwidth services. According to the

[7] *Id.* at 18.

[8] *Id.* at 23.

Applicants, "Crest undermines its own argument as it appears to argue that TRAI's ability to regulate VSNL effectively will push VSNL to recover lost Indian monopoly rents through above-market pricing of trans-Pacific capacity."[9]

The *Joint Opposition* is an attempt by the Applicants to obfuscate the true nature of regulatory evasion strategies. Regulated firms have a powerful incentive to evade profit or price regulation, precisely because regulation is a very imperfect process. Firms can evade the controls established by even the most astute regulatory agency because regulators cannot observe, detect, or prevent all of the indirect methods that the regulated firms may use to extract monopoly rents. To say that regulation can prevent regulatory evasion ignores the fundamental imperfection of the regulatory process. More fundamentally, the Applicants ignore the inherent superiority of structural remedies over regulation. It makes much more sense to deny an acquisition that allows a regulated firm to leverage and consolidate its market power, over the alternative, which is to increase the burden on regulators to oversee all lines of business of the regulated firm.

The Applicants suggest a remedy to potential problems on trans-Pacific routes, which is to require a non-common carrier licensee to operate on a common carrier basis.[10] Although common carrier regulation may inhibit the worst abuses of monopoly power in a market, it does not eliminate problems associated with "non-price" discrimination against competitors – achieved by means such as slow provisioning or repair of circuits provided to competitors. The Commission is well aware of the difficulty of policing non-price discrimination from its own attempts (and attempts by

[9] *Id.* at 24.

[10] *Id.* at 23.

state regulators) to regulate the quality of dedicated circuits provided by the U.S. incumbent local exchange carriers ("ILECs") to their competitors under Section 251 of the Telecommunications Act of 1996. The important lesson to be learned from this recent example is that it is far better to avoid competition problems altogether by denying a proposed acquisition that creates the problem in the first place.

The Applicants' arguments about Indian regulation ignore the regulatory evasion issue entirely. TRAI's regulation of VSNL's private line half-circuit lease prices does not "undermine" Crest's argument; it is the source of the potential for regulatory evasion. If TRAI did not attempt to regulate VSNL, then VSNL would have nothing to evade. The point is that VSNL has monopoly power, and TRAI is attempting to set binding constraints on VSNL's prices. This is what gives VSNL the incentive to evade regulation and collect monopoly rent in other unregulated markets. Moreover, the proposed acquisition will facilitate such regulatory evasion by providing VSNL, for the first time, with the means to sell end-to-end circuits between India and the United States on undersea cables that it owns and controls.

IV. Competitive Entry is Much Less Likely if the Acquisition is Approved

The Applicants provide a very weak response to concerns about the foreclosure effect of the proposed acquisition on further entry into India's international bandwidth market. The *Joint Opposition* argues that since "Tyco Telecom has already made a strategic business decision to exit the wholesale undersea cable bandwidth market by selling TGN," and since VSNL was the only bidder for TGN, the "Commission cannot conclude that Tyco Telecom's entry into India's international bandwidth market is

necessary to ensure that new cables will land in India."[11] Thus, according to the Applicants, the Commission has only two choices: either VSNL buys TGN, or Tyco must continue to operate the cable system against its will.

This is a false dichotomy. For example, Tyco can seek other buyers for its undersea cable assets. It is unreasonable to expect that there are no other potential buyers of these assets, albeit at a lower price that does not include the capitalized value of monopoly rents. As I explained in my initial declaration, demand is increasing for undersea capacity crossing the Pacific Ocean, and the TGN trans-Pacific cable controls a very large share of existing and future capacity in this route. It is inconceivable, therefore, that the trans-Pacific cable is valueless. And the public interest will benefit if this cable system is sold to an owner that does not have an incentive to foreclose entry in the U.S.-India international bandwidth market because that owner would be much more likely to build or support the construction by others of new cables landing in India.

/s/ Michael D. Pelcovits

Michael D. Pelcovits
Principal
Microeconomic Consulting &
Research Associates, Inc.

April 18, 2005

[11] *Id.* at 19.

Exhibit C

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Declaration of Donald J. Schroeder

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
Tyco Telecommunications (US) Inc., *Assignor,*	
VSNL Telecommunications (US) Inc., *Assignee,*	File Nos. SCL-ASG-20050304-0003 SCL-MOD-20050304-0004 SCL-T/C-20050304-0005
and	
Tyco International Ltd. *Transferor,*	
VSNL Telecommunications (US) Inc., *Transferee,*	
and	
Tyco Networks (Guam) LLC., *Licensee,*	
Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems.	

DECLARATION OF DONALD J. SCHROEDER

I, Donald J. Schroeder, declare as follows:

1. I am President and Chief Executive Officer ("CEO") of Crest Communications Corporation ("Crest"). I also was President and Chief Executive Officer ("CEO") of Crest's predecessor in interest, Neptune Communications, LLC ("Neptune").

2. In January 2002, Neptune's management and senior executives at Tyco were aware that the U.S. Department of Defense ("DOD") had performed a desk study – a detailed review of ocean floor characteristics – in order to form the basis for a preliminary cable route plan for an undersea cable from south central Alaska to Shemya Island, AK at the end of the Aleutian Island chain.

3. Our understanding at the time was that the estimated construction cost for this proposed DOD cable route would be $500 to $600 million. The communications objectives for this DOD undersea cable route would be to provide secure fiber optic communications capability between and among Fairbanks, AK (Fort Greely); Shemya Island, AK; Kodiak Island, AK; and the Continental United States ("CONUS"). The projected operational date of the planned upgrade to the radar system at Shemya Island, AK and completion of Phase I construction of national missile defense ("NMD") test sites and land based interceptor sites was sometime in 2005.

4. On January 31, 2002, Neptune and Tyco representatives met with representatives of the U.S. Missile Defense Agency ("MDA") and their advisors. During that meeting, the Neptune and Tyco representatives: (i) described Tyco Global Network – Pacific ("TGN-Pacific") and its scheduled ready for commercial service date of December 2002; (ii) highlighted the unique window of opportunity that existed until mid-March 2002 to insert two branching units into the northern segment of TGN-Pacific for future NMD communications requirements; (iii) discussed the estimated cost and communications security of this network alternative as compared to the other dedicated construction alternative; and (iv) explored any interest MDA had in this communications network solution and investigated any interest and capability of providing funding for both branching units in order to preserve this alternative at an estimated construction cost savings of up to $500 million.

5. In the wake of the January 31, 2002 meeting, during a series of follow-up discussions in February 2002 – discussions which included Tyco senior executives and staff – the MDA expressed serious concerns about the ability of any non-U.S. party to eavesdrop, intercept, corrupt, or otherwise interfere with the TGN-Pacific proposed communications path from the Japan end of TGN-Pacific. MDA concerns were satisfied based upon technical discussions with Tyco technical staff. MDA was satisfied from a network security perspective with TGN-Pacific being owned by Tyco (or, implicitly, a U.S. party acceptable to MDA). During this period, MDA also stated there was no funding available to pay for the insertion of the two contemplated branching units before mid-March, 2002.

6. On March 20, 2002, Neptune executed an Instruction to Proceed for the Northern Lights Cable Network ("Northern Lights ITP") with Tyco. Among other things, the Northern Lights ITP provided for the purchase by Neptune of two branching units, inserted strategically into the northern segment of the TGN-Pacific. See Exhibits D and E, attached.

7. The prospective Crest business opportunities associated with the Northern Lights Cable Network were clear.

   - Branching unit # 1 (to Seward and Kodiak, AK) always had three potential applications:

     a. National Missile Defense;

b. Other DOD communications requirements which may require physical and geographic diversity (*i.e.*, undersea cable system diversity, cable landing station diversity and/or inland terrestrial system diversity), subject to any security concerns associated with the underlying owner of TGN-Pacific; and

c. Alaska commercial users.

- Branching unit # 2 (to Shemya Island, AK) always had one potential application:

  a. National Missile Defense – no sooner than 2005. See Exhibit F, attached.

8. In effect, Crest created a "free call option" for the U.S. government and MDA for a secure communications network solution that would save the U.S. government up to $500 million as compared to the other undersea fiber optic alternative being considered.

9. On October 7, 2002, the Commission granted to Crest's wholly owned subsidiary, Northern Lights Holdings, Inc., the following submarine cable landing licenses: SCL-LIC-20020807-00066 and SCL-AMD-20020808-00067 "(i) to land and operate a submarine cable between Shemya, Aleutian Islands, Alaska and a branching unit on the TyCom Pacific Cable System, SCL-LIC-20000717-00026 (Segment 1); (ii) to land and operate a submarine fiber optic cable between Seward, Alaska and another branching unit on the TyCom Pacific Cable System (Segment 2); and (iii) to land and operate a submarine fiber optic cable between Kodiak Island, Alaska and a branching unit on the Seward Segment (Segment 3)." See Public Notice DA No. 02-2554, 15 FCC Rcd. 24078 (2002).

10. On November 1, 2004, it was announced that Tyco International. Ltd. agreed to sell the Tyco Global Network ("TGN") to Videsh Sanchar Nigam Limited ("VSNL") for $130 million. It became immediately evident to Crest that this transaction was not consistent with Crest's interests and that Crest was going to have to oppose the Tyco-VSNL transaction for several reasons:

- Crest embedded investment in branching unit # 2 (Shemya Island, AK) and the associated NMD business opportunity would be rendered worthless by virtue of VSNL acquiring TGN due to VSNL's links with and 26% ownership interest in VSNL by the Indian government. This was clear based upon the 2002 meetings Crest and Tyco had with the MDA and their advisors.

- Crest embedded investment in branching unit # 1 (Seward and Kodiak Island, AK), and associated business opportunities would be devalued if VSNL's acquisition of TGN were allowed to proceed because:

  - Any NMD-related business opportunity involving Seward, AK or Seward and Kodiak Island, AK would be rendered worthless by virtue of VSNL acquiring TGN.

- Any DOD related business opportunities with other non-NMD related parts of DOD would be rendered worthless to the extent other DOD users were concerned about VSNL becoming the owner of TGN.

- The residual value of branching unit # 1, if any, would completely depend on: (i) other non-NMD DOD users who may not be concerned by VSNL ownership of TGN, if any; and (ii) Alaska commercial users.

11. In light of these factors, Crest entered into exploratory discussions with Tyco to construct the Northern Lights branching unit # 1 to Seward at Crest's preferred price: the lesser of $5 million or variable cost. Crest believed $5 million to be marginally cash flow positive to Tyco (about $1 - $2 million) due to what Crest understood to be Tyco's inventory levels. Any Crest investment in this segment of the Northern Lights Cable system could only be built on a purely speculative basis since Crest had no pre-sale commitments from any prospective user of this system segment and the announced sale of the TGN to VSNL, if consummated, would essentially wipe out any interest in the system by the DOD. Crest understood that as with countless other exploratory inquiries that never amount to deals, Tyco might turn down the $5 million proposal.

12. In late November, 2004, Tyco notified Crest that it did not accept the proffered $5 million price for construction of the Northern Lights Cable system segment from branching unit # 1 to Seward, AK.

13. Crest proceeded to oppose the proposed Tyco-VSNL transaction given the significant negative financial consequences for Crest resulting from the lost/devalued embedded investment and associated business opportunities, as well as enormous negative consequences for NMD and national security.

I declare under penalty of perjury that, to the best of my knowledge, understanding, and belief, the foregoing is true and correct.

Donald J. Schroeder

April 18, 2005

Exhibit D

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Map of Northern Lights Network

Northern Lights

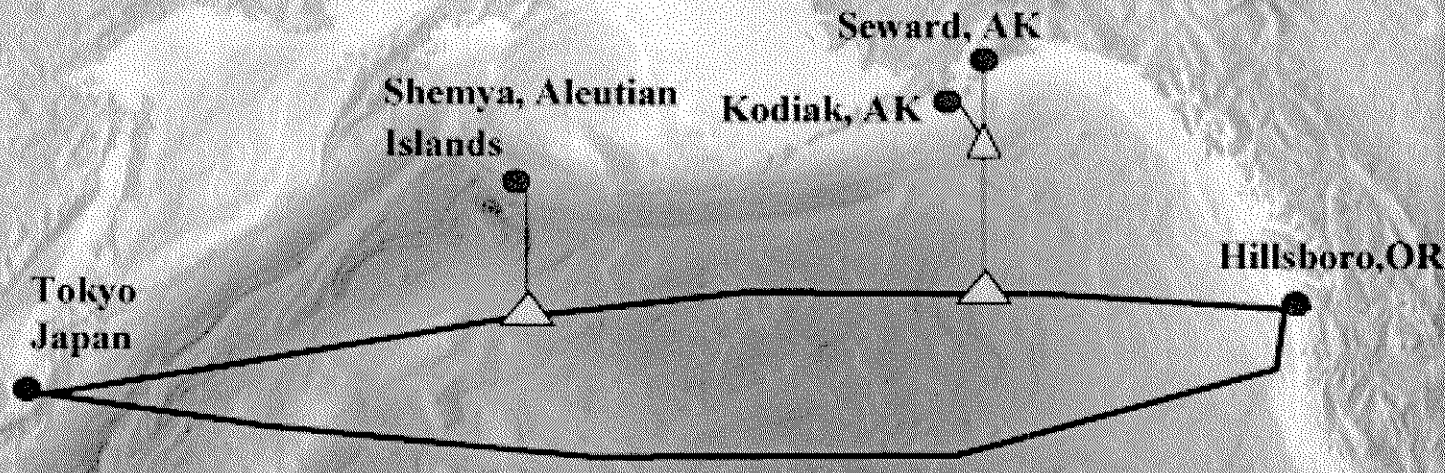


Exhibit E

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Schematic Map of Northern Lights Network

Northern Lights – Fiber Map

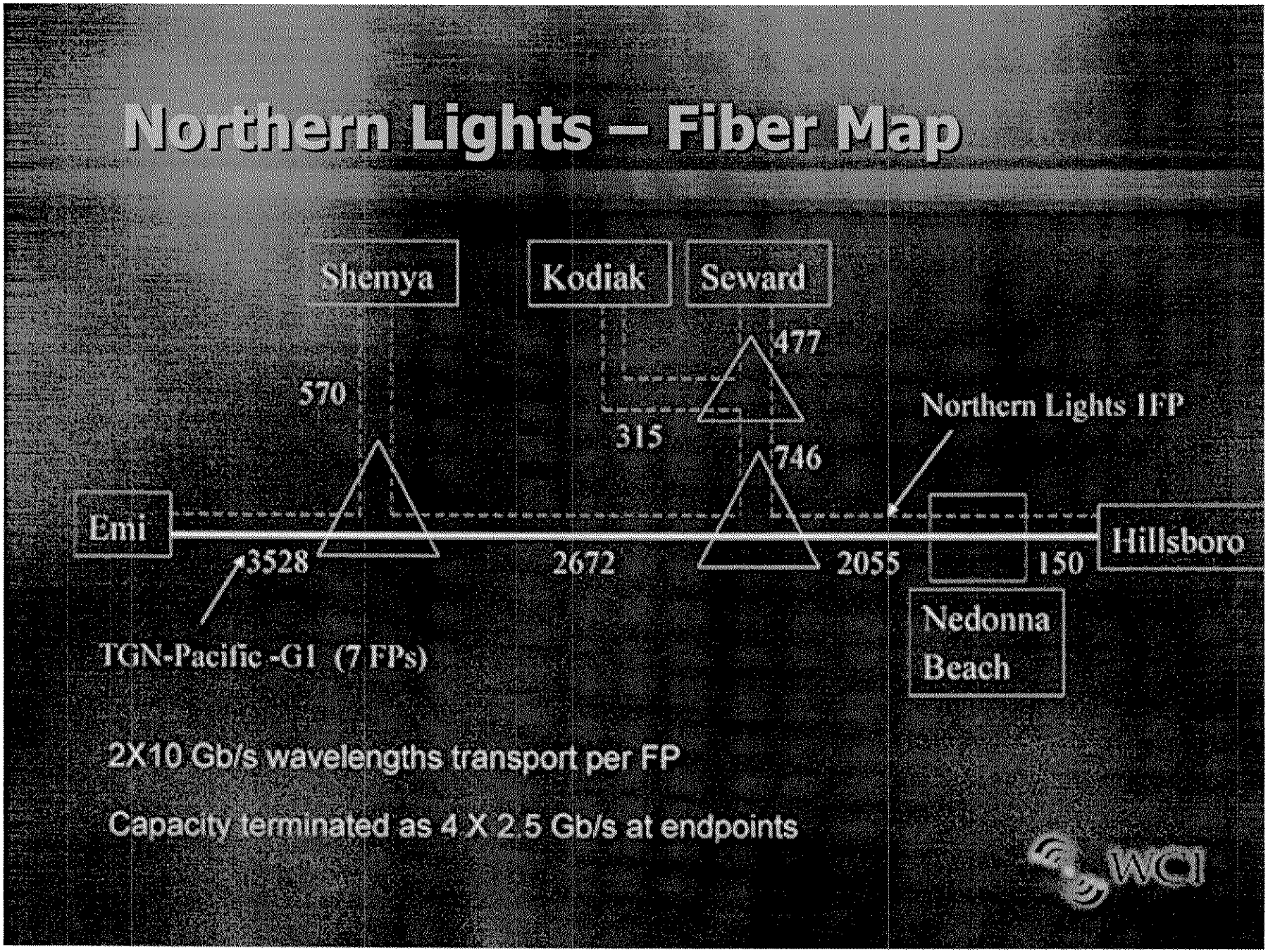


Exhibit F

To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

National Missile Defense Diagram

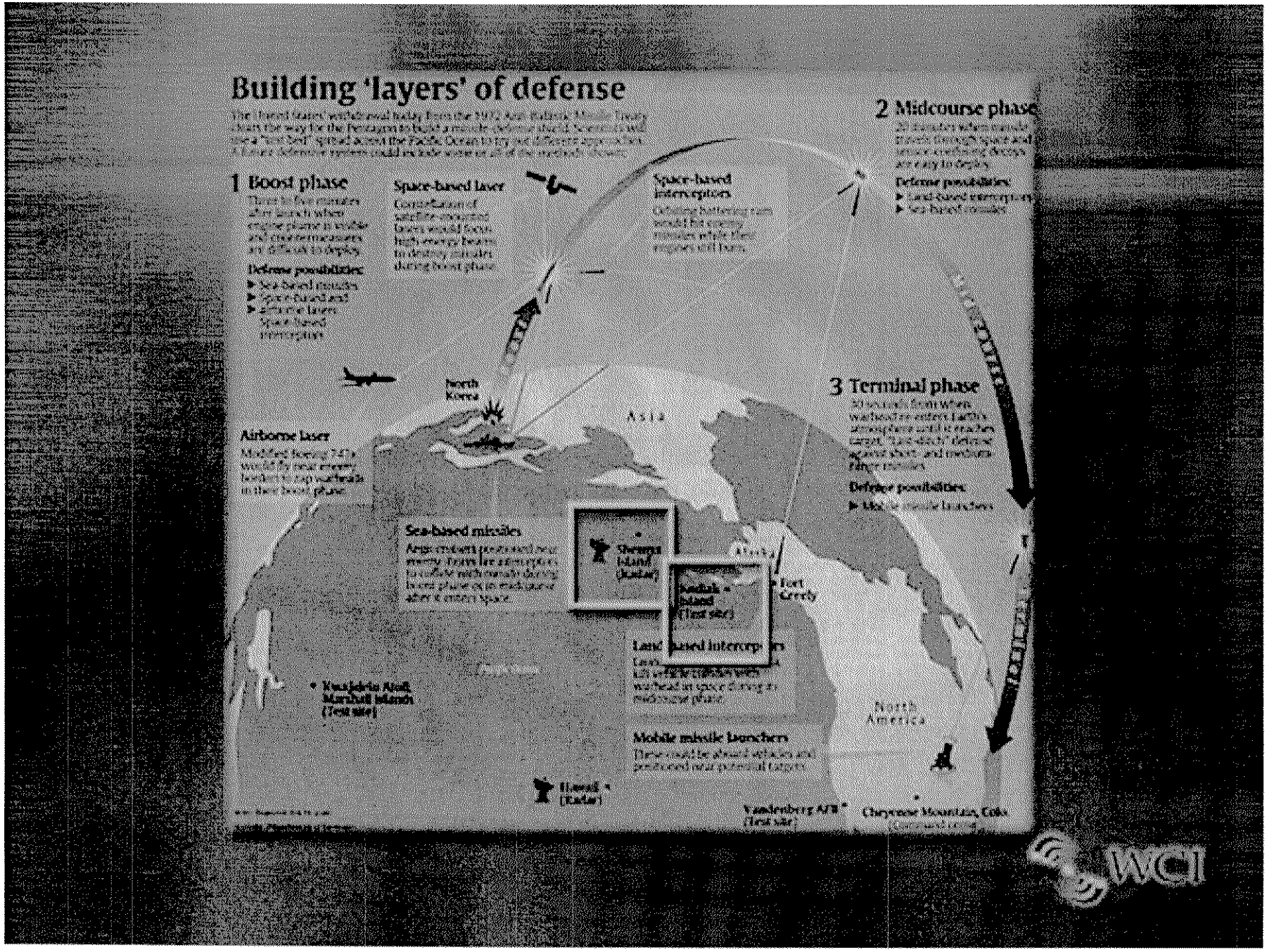

Building 'layers' of defense
1 Boost phase
Space-based laser
Defense possibilities
2 Midcourse phase
Space-based interceptors
Defense possibilities
3 Terminal phase
Defense possibilities
North Korea
Asia
Airborne laser
Sea-based missiles
Sheraga Island (Radar)
Kwajalein Atoll, Marshall Islands (Test site)
Land-based interceptors
Mobile missile launchers
North America
Eareckson Air Station, Alaska
Vandenberg AFB (Test site)
Cheyenne Mountain, Colo.

Exhibit G

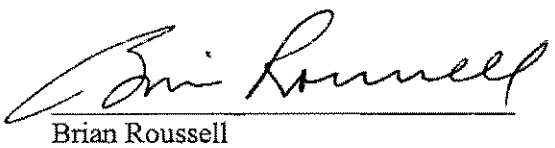
To Reply Brief in Support of Petition to Deny of Crest Communications Corporation

Declaration of Brian Roussell

Declaration of Brian Roussell

I, Brian Roussell, Executive Vice President of Crest Communications Corp., hereby declare under the penalty of perjury that I have read Crest Communications Corporation's Reply Brief in Support of its Petition to Deny the applications of Tyco Telecommunications (US) Inc., Tyco International Ltd., Tyco Networks (Guam) LLC, and VSNL Telecommunications (US) Inc. (a wholly owned subsidiary of Videsh Sanchar Nigam Limited) for authority to transfer and assign cable landing licenses pursuant to the Cable Landing License Act, 47 U.S.C. §§ 34-39, and Section 1.767 of the Commission's rules, 47 C.F.R. § 1.767.

The representations, information, and facts set forth herein are true and correct to the best of my knowledge and belief.



Brian Roussell
Executive Vice President
Crest Communications Corp.

April 18, 2005

CERTIFICATE OF SERVICE

I, Emily Hancock, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that I served a true copy of the "Reply Brief in Support of Petition to Deny of Crest Communications Corporation" in SCL-ASG-20050304-0003, SCL-MOD-20050304-0004, and SCL-T/C-20050304-0005 (VSNL-Tyco Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems) (a) on April 18, 2005 by email (where indicated by *); (b) on April 18, 2005 by U.S. mail and on April 19, 2005 by hand delivery (where indicated by ‡); and (c) on April 18, 2005 by mail and email (where indicated by **) upon each of the following:

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