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NOTE: An Erratum is attached to the end of this document.

Federal Communications Commission (F.C.C.)
Cable Landing License

IN THE MATTER OF AT&T SUBMARINE SYSTEMS, INC.

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Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands

DA 96-719
Adopted: May 8, 1996
Released: May 8, 1996

****1 *14885** By the Chief, International Bureau:

I. Introduction

1. In this Order, we grant the application of AT&T Submarine Systems, Inc. (AT&T-SSI) under the Cable Landing License Act [1] for authority to land and operate a digital submarine cable system extending between St. Thomas and St. Croix in the U.S. Virgin Islands (St. Thomas-St. Croix system) on a non-common carrier basis. We reject the contentions of Telefonica Larga Distancia de Puerto Rico, Inc. (TLD) and Virgin Islands Telephone Corporation (Vitelco) that AT&T-SSI must operate the cable system on a common carrier basis.

2. We find that AT&T-SSI is not a "telecommunications carrier" under the Telecommunications Act of 1996 (1996 Act), [2] and thus is not subject to the requirements imposed by the 1996 Act on such entities. We also find that AT&T-SSI should not be required to operate the proposed cable facility on a common carrier basis under *NARUC I.* [3] There are alternative routes available to carriers such as TLD and Vitelco operating in the facilities markets AT&T-SSI seeks to serve, and thus the proposed system will not be a ***14886** establishing another Caribbean cable landing site at St. Croix, these functions do not mandate common carrier treatment of the facility. In addition, AT&T-SSI will not in fact offer capacity on a common carrier basis. Accordingly, we grant AT&T-SSI's application. We retain, however, the right to change the regulatory status of the cable system to common carrier should conditions change in the future.

II. Application

3. AT&T-SSI is a wholly-owned subsidiary of AT&T Corp. (AT&T), a common carrier. AT&T-SSI, which is not a common carrier, proposes to land and operate the St. Thomas-St. Croix cable system as a non-common carrier system in which bulk capacity would be made available to purchasers on an indefeasible right of user (IRU) basis. [4]

4. The proposed cable system would extend from a landing point at the existing cable station at St. Thomas, a major international cable landing site, to a new cable station at St. Croix. It will be connected to facilities that will provide access to the domestic networks on the U.S. mainland. In addition, the St. Thomas-St. Croix cable system would be extended by other facilities to the terminals of other international communications systems, including cable terminals and satellite earth stations. The proposed cable system would be used for services between and among St. Thomas, St. Croix and points beyond.

5. AT&T-SSI states that the St. Thomas-St. Croix cable system is planned to accommodate future traffic growth, diversity and enhanced restoration capabilities. [5] According to AT&T-SSI, the existing St. Thomas cable station has reached its capacity and cannot physically accommodate future international cable systems. AT&T-SSI states that the proposed cable system would provide a "virtual node" in St. Croix that would, in effect, ***14887** expand the capacity of the existing St. Thomas cable station and provide a viable alternative point for interconnection with future international cable systems in the Caribbean region. This system, AT&T-SSI asserts, also could be used by authorized carriers to provide alternative routing of inter-island traffic within the U.S. Virgin Islands.

****2** 6. In addition, AT&T-SSI asserts that the St. Thomas-St. Croix cable system would fulfill the needs of customers to purchase capacity in cable systems on an "as needed" basis, rather than on the traditional basis of paying all capital costs for long-term capacity needs at the outset. AT&T-SSI states that it will offer IRU capacity to all carriers at then-current market prices, and on the same terms and conditions. AT&T-SSI states that its common carrier affiliate does not now have any plans to use the proposed system.

7. Finally, AT&T-SSI states that, as a non-common carrier, it does not want to own and operate *common carrier* cables. It asserts that, if the Commission were to require common carrier operation of the cable system, AT&T-SSI would not build the proposed cable system at all.

8. Vitelco, a provider of local exchange and interexchange services in the U.S. Virgin Islands, [6] and TLD, an interexchange services provider in the U.S. Virgin Islands-Puerto Rico market, filed petitions to deny AT&T-SSI's application. AT&T-SSI filed an opposition to the petitions, to which Vitelco and TLD replied. On January 31, 1995, Vitelco filed a petition for declaratory ruling that the proposed facility should be operated on a common carrier basis. [7] AT&T-SSI filed an opposition to the petition. Following a conference with Bureau staff, AT&T-SSI, TLD and Vitelco each filed supplemental comments and replies.

***14888** 9. On April 6, 1995 at AT&T-SSI's request, the Bureau Chief met with all of the parties to consider additional factual information. The next day, the Bureau sent a letter to the parties requesting additional written comments regarding issues relating to whether AT&T has the ability to unilaterally determine international cable landing points and whether other cables and stations provide viable; economic alternatives to the St. Croix cable and station. [8] Each of the parties filed a second set of supplemental comments in response.

10. On February 8, 1996, Congress enacted the 1996 Act. Shortly thereafter, TLD filed a motion to accept supplemental comments regarding the effect of the 1996 Act on this proceeding. [9] In its third set of supplemental comments, TLD argues that the 1996 Act includes a new statutory definition of common carrier which requires that the proposed

cable system be operated on a common carrier basis. AT&T-SSI filed an opposition to TLD's motion and third set of supplemental comments, to which TLD replied.

11. Pursuant to our obligations under 47 U.S.C. Sections 34-39 and Executive Order No. 10530 (May 10, 1954), we informed the Department of State of AT&T-SSI's application. The Department of State, in coordination with the National Telecommunications and Information Administration and the Defense Information Systems Agency, replied that it supports grant of the application. [10]

III. Discussion

****3** 12. AT&T-SSI requests a license to land and operate a non-common carrier submarine cable system under the Cable Landing License Act and the Commission's private submarine cable policy. [11] In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international transmission facilities. [12] The Commission has granted a number of licenses to land and operate private cable systems in the ***14889** United States under this policy. [13]

13. Since AT&T-SSI filed its application and the parties submitted their pleadings, the 1996 Act was enacted. The 1996 Act amends the Communications Act of 1934 and imposes certain obligations, including the duty to interconnect with the facilities and equipment of other telecommunications carriers, on entities defined to be a "telecommunications carrier." We thus first consider below whether AT&T-SSI falls within the definition of a "telecommunications carrier" under the 1996 Act in landing and operating the proposed cable system. We find that AT&T-SSI is not a "telecommunications carrier" under the 1996 Act for purposes of this proceeding.

14. In their pleadings, TLD and Vitelco analyze AT&T-SSI's application by applying the *NARUC I* standard, which we traditionally have used to determine whether a proposed facility should be authorized to operate on a non-common carrier basis or should be classified as a common carrier system. In the *NARUC I* decision, the court applied a two-part test to determine when an operation should be classified as common carrier: "We must inquire, first, whether there will be any legal compulsion ... to serve [the public] indifferently, and if not, second, whether there are reasons, implicit in the nature of ... [the] operations to expect an indifferent holding out to the eligible user public." [14]

15. The Commission has not yet addressed the issue of how, if at all, the 1996 Act's introduction of the concept of a "telecommunications carrier" affects the applicability of *NARUC I* standard, which traditionally has been used by the Commission to determine whether an entity is a "common carrier" subject to Title II regulation. We need not decide the issue here, however, because even assuming *NARUC I* still applies, we find that, in analyzing both parts of the *NARUC I* standard, the AT&T-SSI system may be authorized as a non-common carrier system.

A. *The Telecommunications Act of 1996*

16. In its supplemental comments, TLD argues that the 1996 Act includes a new statutory definition of common carrier. TLD notes that the 1996 Act defines "telecommunications carrier" as "any provider of telecommunications services.... A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...." [15] "Telecommunications services" is defined as "the offering of telecommunications for a fee ***14890** directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." [16]

**4 17. TLD argues that AT&T-SSI has made clear that the users of the proposed system will be at least one, and possibly more, common carrier consortia. The U.S. common carriers in these consortia are required to serve the public, TLD states, and thus the proposed cable system will be "effectively available directly to the public" under the 1996 Act.

18. In response, AT&T-SSI argues that TLD's motion should be denied because TLD has failed to show good cause in order to submit its additional pleading. AT&T-SSI also contends that its conveyance of bulk capacity, *i.e.,* a private and indefeasible transfer of facilities to other entities, to common carriers is not a "telecommunications service." [17] Like terrestrial fiber, AT&T-SSI asserts, submarine cables are network facilities and nowhere in the 1996 Act is there any statement or reasonable implication that such facilities will now be classified as a common carrier function.

19. AT&T-SSI further contends that the definition of "telecommunications carrier" is similar to the definition of "commercial mobile service" enacted by Congress in the 1993 Budget Act and thus is instructive in this case. AT&T-SSI asserts that its conveyance of bulk capacity is to a "significantly restricted class of eligible users," rather than "to such classes of eligible users as to be effectively available to a substantial portion of the public," using the language from the "commercial mobile service" definition and the Commission's interpretation of that language. Finally, AT&T-SSI asserts that TLD's interpretation of the 1996 Act is contrary to Congress' deregulatory intent in enacting the statute.

20. TLD argues in response to AT&T-SSI's opposition that the language of the 1996 Act covers AT&T-SSI's proposed cable system because the Commission only has the discretion to determine whether "the provision of fixed and mobile satellite services" should be treated as common carriage. [18] In addition, TLD contends that Congress broadened the class of common carrier by requiring common carrier regulation "regardless of the facilities used." [19] TLD states that since wireless services were captured by the 1993 Budget Act and satellite services are exempted, it is difficult to identify what facilities are covered by the new **14891 definition if not fiber optic cable services. [20]

21. TLD further contends that, contrary to AT&T's assertions, the statutory broadening of common carriage is consistent with the purpose and structure of the legislation, which imposes new regulatory obligations. Congress intended these obligations to be placed on all carriers that provide service directly to the public or indirectly to the public through other common carriers, according to TLD. [21] TLD agrees with AT&T-SSI's assertion that the 1993 Budget Act includes a definition of commercial mobile service that is virtually identical the definition of "telecommunications service" in the 1996 Act. But TLD contends that the Commission has interpreted the 1993 Budget Act language to require common carrier treatment of all services except those provided to internal users and services where the Commission's spectrum allocation rules restrict the class of end users. [22] TLD states that the class of eligible end users in this proceeding is virtually unlimited, and may include anyone in the United States making a call to Caribbean, European or South American locations.

**5 22. We grant TLD's motion to accept its supplemental comments in order to ensure a complete record in this proceeding. But we disagree with TLD that AT&T-SSI's landing and operation of the proposed cable system makes it a "telecommunications carrier" under the 1996 Act.

23. The 1996 Telecom Act states that "a telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...." [23] "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." [24] At issue in this case is whether AT&T-SSI is offering telecommunications service for a fee to such class of users as to be effectively available directly to the public.

24. In interpreting the plain language of the 1996 Act, we concur with AT&T-SSI and TLD that the 1993 Budget Act's definition of "commercial mobile service" is relevant to our analysis. This service was defined by Congress as "any

mobile service ... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as ***14892** specified by the Commission." [25] The Commission subsequently defined "to the public" as "any service that is offered without restriction on who may receive it." [26] The Commission also concluded that whether a service if offered to "such classes of eligible users as to be effectively available to a substantial portion of the public" depends on the type, nature, and scope of users for whom the service is intended. If the service is provided only for internal use or only to a specified class of eligible users under the Commission's rules, the Commission found, the service will not meet the "public availability" prong of the CMRS definition. [27]

25. As in the CMRS context, we believe that whether a service is effectively available directly to the public depends on the type, nature, and scope of users for whom the service is intended and whether it is available to a "significant restricted class of users." AT&T-SSI, as owner of the St. Thomas-St. Croix cable system, will make available bulk capacity in its system to a significantly restricted class of users, including common carrier cable consortia, common carriers, and large businesses. Potential users are further limited because only consortia, common carriers, and large businesses with capacity in interconnecting cables or other facilities and, in many cases, operating agreements with foreign operators, will be able to make use of the cable as a practical matter.

26. We disagree with TLD that if AT&T-SSI's customers use the capacity obtained from AT&T-SSI to provide a service to the public, then AT&T-SSI is making a telecommunications service effectively available directly to the public. Such an interpretation is contrary to the plain language of the statute by focusing on the service offerings AT&T-SSI's customers may make rather than what AT&T-SSI will offer. Under the statute, the "telecommunications carrier" is the entity that offers a telecommunications service so as to be "effectively available directly to the public." As we found above, AT&T-SSI, by conveying bulk cable capacity, is not providing a service that is effectively available to the public. Moreover, AT&T-SSI has stated throughout this proceeding that it will make capacity available to large businesses, which would not use the capacity to provide service to the public. Thus, even if we accepted TLD's interpretation that we should consider whether AT&T-SSI's customers are providing service to the public, some of AT&T-SSI's customers may not provide service to the public.

****6** 27. We also reject TLD's contention about the relevancy of the fact that Congress only gave the Commission explicit discretion to determine whether the provision of fixed and mobile satellite services -- and not fiber optic facilities -- should be treated as common carriage. Congress simply made clear that the Commission has the discretion to determine whether the provision of fixed and mobile satellite services, which otherwise might be ***14893** considered "telecommunications services," is common carriage. We believe that there was no need for Congress to state that the Commission has discretion to determine whether the provision of fiber optic facilities is a common carrier activity because, as we found above, the plain language of the 1996 Act is clear that AT&T-SSI is not a "telecommunications carrier." Moreover, Congress gave no indication that it intended that this activity, which would otherwise be considered a non-common carrier activity, be regulated as a "telecommunications service." Nor is there any indication that Congress intended to completely reverse the Commission's private cable policies, which have been successful in promoting more flexibility and choices in the provision of U.S. international facilities.

28. Similarly, we disagree with TLD that the inclusion of the language "regardless of facilities used" in the definition of "telecommunications service" was intended to broaden the class of common carrier, except for satellite facilities. Congress simply made clear that the type of facility involved should not be an issue as the Commission determines whether a particular entity is a "telecommunications carrier." In response to TLD's claim that it is difficult to determine what the new definition covers if not "fiber optic cable services," we note that the conference report associated with the 1996 Act states that the definition of "telecommunications service" is intended to include "commercial mobile service ('CMS'), competitive access service, and alternative local telecommunications services to the extent they are offered to the public or to such classes of users as to be effectively available to the public." [28] Although this list is not exclusive,

if Congress specifically intended to include the provision of cable capacity as a "telecommunications service," as TLD implies, it certainly had the opportunity to express this wish.

29. We thus find that in offering capacity in its proposed cable system, AT&T-SSI is not a "telecommunications carrier" providing "telecommunications service" under the 1996 Act.

B. ***First Part of NARUC I Test***

30. In applying the first part of the *NARUC I* test, the Commission must decide whether the public interest requires common carrier operation of a proposed facility. In examining this issue, the Commission generally has focused on whether the applicant has sufficient market power to warrant common carrier regulation. For example, in *NorLight,* the Commission found that the applicant, which was seeking to provide a fiber optic, interexchange network, did not possess sufficient market power to require common carrier regulation. [29] The Commission reached this finding because numerous interexchange carriers already provided communications service in NorLight's proposed area of operation. Likewise, in the *Domestic Transponder Sales* decision, the Commission found that domestic satellite licensees did not possess the significant market power required to impair the reasonable ***14894** availability of transponder supply. [30] Thus, the Commission decided not to impose common carrier regulation on the licensees. In addition, the Commission found that there were sufficient alternative facilities so that satellite operators would not be able to charge monopoly rates in the absence of common carrier regulation.

****7** 31. In reviewing non-common carrier cable applications, the Commission has considered the availability of alternative common carrier facilities in assessing the likelihood that the applicant has market power. For example, in granting a non-common carrier cable landing license in the *Optel* decision, the Commission noted the availability of numerous terrestrial, microwave and satellite common carrier facilities that provided cross-border services between the United States and Canada. [31]

32. TLD and Vitelco argue that, under *NARUC I* and subsequent Commission decisions, the public interest requires that the proposed AT&T-SSI system be operated as a common carrier facility because: (1) there are no available common carrier substitutes for the proposed cable system; and (2) common carrier regulation is needed to prevent AT&T-SSI from favoring its common carrier affiliate, AT&T, over AT&T's common carrier competitors. In addition, TLD states that AT&T has the ability to steer new international consortia cables to the proposed system over other available systems, contrary to the public interest and the interests of other common carriers. Based on our review of the record, we will examine three issues: (1) whether there are alternative common carrier facilities to the proposed cable system; (2) whether the provision of capacity in the proposed cable system to AT&T poses anticompetitive concerns; and (3) the potential effect of AT&T's activity in international cable consortia.

1. Availability of Alternative Common Carrier Facilities to the Proposed Cable System

33. TLD and Vitelco agree with AT&T-SSI that the proposed new cable system would add necessary route diversity and facilities restoration capability for the existing cables that land in St. Thomas. According to TLD, the proposed cable system would provide route diversity for international cable systems operating between the U.S. mainland and Europe, between the U.S. mainland and Latin America, and between Caribbean locations. TLD also states that the proposed cable system would be the only alternative route for major international cable systems such as AMERICAS-1 [32] and COLUMBUS II. [33] In addition, TLD ***14895** and Vitelco argue that the proposed system is essential to enable future international cables to land in the U.S. Virgin Islands and interconnect with existing international cables at the St. Thomas cable station.

34. TLD and Vitelco state that Vitelco's existing microwave and planned fiber optic facilities are not viable alternative facilities to the St. Thomas-St. Croix system because they are designed solely for local Virgin Islands traffic. According to TLD, the proposed Vitelco cable system would land at different cable stations in St. Thomas and St. Croix than the proposed AT&T-SSI system. TLD states that the only interconnection of the proposed Vitelco system to the existing international cables at the St. Thomas cable station would be through local public switched network facilities. TLD contends that the Vitelco facilities are not intended or designed to serve as a critical link for international trans-Atlantic traffic. Therefore, these parties argue, these facilities cannot be used to interconnect international cables landing in St. Thomas and St. Croix, or to provide critical route diversity and facilities restoration for international cables.

****8** 35. AT&T-SSI responds that the proposed system is not "essential," as argued by TLD and Vitelco, because denial of access to the cable would not adversely affect the abilities of TLD and Vitelco to compete as common carriers. AT&T-SSI contends that, under the antitrust law essential facilities doctrine, a facility is "essential" only if control of it carries with it the power to eliminate competition permanently in the downstream market. [34] It claims the "downstream market" in this case is the market for facilities in the Atlantic and Caribbean Basin regions. AT&T-SSI states that neither TLD nor Vitelco has demonstrated that their abilities to compete as common carriers would be handicapped severely by denial of access to the proposed system. [35] AT&T-SSI also asserts that Vitelco is considering building its own such facility, and TLD has diverse routing capabilities through satellite backup and its ownership interest in other cables, including AMERICAS-1 and COLUMBUS II. Finally, AT&T-SSI claims even if its proposed facility is considered "essential," its offer of access to TLD and Vitelco on an IRU basis at market prices satisfies its obligations.

36. TLD argues that the application of the essential facilities doctrine does not control in this case, and the applicable precedent is *NARUC I* and the Commission's private cable decisions. It asserts that the essential facilities doctrine is narrower in scope than the ***14896** Commission's public interest standard, and much more difficult to meet. TLD also notes that the Commission has never applied the essential facilities doctrine to non-common carrier cable landing license applications. Vitelco contends that if the essential facility doctrine is applied, the proposed facility is an essential facility because, according to Vitelco, no other existing facilities duplicate the quality and capacity of the proposed cable. [36]

37. TLD concedes, however, that the landing stations at Puerto Rico and Tortola, which connect through the TAINO-CARIB system to the St. Thomas stations, are viable, economic alternatives to the proposed system. [37] Nonetheless, it states that the Commission has a preference for U.S. landing sites, which eliminates Tortola (a British territory) as an alternative that should be considered.

38. AT&T-SSI asserts that common carriers have a number of alternatives for landing at St. Thomas. [38] First, like TLD, it states that the landing stations at Puerto Rico and Tortola, together with the TAINO-CARIB cable, provide competitive alternatives to the proposed system. Second, AT&T-SSI states that a number of analog cables landing at St. Thomas are scheduled to be retired in the 1996-1997 timeframe. This retirement, AT&T-SSI claims, would ultimately permit up to four new fiber optic common carrier facilities to land at St. Thomas.

39. We find that the *NARUC I* decision and the Commission's precedent provide ample guidance for resolution of the issues raised by AT&T-SSI's application. We thus agree with TLD that the "essential facilities" doctrine as commonly invoked under Section 2 of the Sherman Act does not apply here and that our broader public interest standard must guide resolution of the question of whether the proposed cable should be treated as a common carrier cable. But the factual question of whether the proposed cable system is a competitive "bottleneck" is relevant. Under *NARUC I* and Commission precedent, our decision necessarily must consider whether the proposed cable system is a competitive "bottleneck" (*i.e.,* whether there are no competitive substitutes, enabling the owner to restrict output or raise prices), or whether there are, in fact, competitive alternatives.

****9** 40. Under the first prong of *NARUC I,* we must first identify the relevant markets and the potential competitive effects in those markets of the proposed facility. [39] Based on the record before us, we find two specific relevant markets: (1) facilities providing access to the St. Thomas station; and (2) facilities operating between St. Thomas and St. Croix. The first market is relevant because a major purpose of the St. Thomas-St. Croix system is to serve as ***14897** a "virtual node" to interconnect with international cables landing in the U.S. Virgin Islands at the St. Thomas station. The St. Thomas station currently is a major Caribbean landing point for international cables, and thus the ability to interconnect with these cables at the St. Thomas station is critical for common carriers. The second market is relevant because the proposed facility will operate between St. Thomas and St. Croix and thus is potential route for U.S. Virgin Islands-originating or -terminating traffic. Each market is discussed below.

a. Common Carrier Facilities Accessing the St. Thomas Station

41. We first examine the market for common carrier facilities providing access to the St. Thomas station. There are two types of cables that provide access to the St. Thomas station. First, there is a U.S. Virgin Islands cable system, the TAINO-CARIB, that interconnects there. Second, there are two international cable systems, AMERICAS-1 and COLUMBUS 2, that also interconnect at St. Thomas. AMERICAS-1, one of the two major international cables that currently land at St. Thomas, also interconnects with the U.S. mainland, Trinidad, and points in South America. In addition, COLUMBUS 2 connects to the U.S. mainland and Europe.

42. The record indicates that there are at least two viable, economic means of accessing the St. Thomas station via the TAINO-CARIB cable system. The options include: (1) landing at Puerto Rico, interconnecting with the TAINO-CARIB cable system, and landing at the St. Thomas station; or (2) landing at Tortola, interconnecting with the TAINO-CARIB cable system, and landing at the St. Thomas station. [40] The TAINO-CARIB cable, a common carrier facility, currently has ample available capacity. [41] Thus, even in the event carriers are denied access to the St. Thomas-St. Croix system, they can use these existing routes to access the St. Thomas station. Tortola is not a U.S. territory and the Commission traditionally has preferred to rely on the availability of alternative U.S. facilities. Tortola, however, is only one of at least two alternatives to the proposed system. The other alternative, Puerto Rico, is U.S. point. Thus, notwithstanding the fact that Tortola is a foreign territory, we find that common carriers would have several alternatives -- including a common carrier cable connecting to a U.S. station -- to the proposed system.

43. In addition, given the availability of existing alternative facilities, we find it would be uneconomic for AT&T-SSI to deny access to the St. Thomas-St. Croix system or ***14898** charge monopoly rates. This is particularly true because the proposed system will be a high capacity system: AT&T-SSI has an incentive to offer competitive prices to attract customers to use its capacity (and therefore protect its sunk capital investment). Moreover, with the retirement of cables systems in the 1996-1997 timeframe, as projected by AT&T-SSI, new landing opportunities will become available at the St. Thomas station. Thus, any new entry will act as a further constraint on AT&T-SSI's ability to restrict output or raise prices above competitive levels for a sustained period of time.

****10** 44. The St. Thomas-St. Croix system would provide route diversity and restoration functions for international cables such as AMERICAS-1 and COLUMBUS 2 and would allow new international cables to land at St. Thomas via St. Croix. These important functions will improve network reliability. The proposed system also will add an advanced fiber optic facility to the region, and provide a new landing point for international cables, increasing the options for potential users, common carriers, and common carrier consortia. These functions will serve the public interest. Nonetheless, we do not believe these factors require us to regulate the proposed system on a common carrier basis. As we found above, carriers have access to other facilities to carry traffic in the first instance. AT&T-SSI's proposed system will serve to enhance route diversity and restoration of these other facilities, but will not directly affect the ability of carriers to enter and compete in the marketplace. Moreover, requiring current identical substitute common carrier facilities before non-common carrier facilities will be authorized would serve as a disincentive for entities to take risks and expend capital to

expand and upgrade facilities. If we were to require all cable systems that serve route diversity and restoration functions for other cable systems or increase the availability of advanced technology in a region to be common carrier, few cables would ever qualify as non-common carrier. We thus find that there are sufficient competitive alternatives in the facilities market accessing the St. Thomas station.

b. Common Carrier Facilities Operating Between St. Thomas and St. Croix

45. We next examine the market for common carrier facilities operating between St. Thomas and St. Croix. As we noted in paragraph 34 *supra,* TLD and Vitelco argue that Vitelco's existing microwave and planned fiber optic facilities are not viable alternatives to the St. Thomas-St. Croix system. TLD contends that Vitelco's current facilities do not interconnect, and the proposed cable system would not interconnect at the St. Thomas cable station, and interconnection of the proposed Vitelco system to the existing international cables at the St. Thomas cable station would be through the inadequate existing local public switched network. Therefore, these facilities allegedly cannot be used to interconnect international cables landing in St. Thomas and St. Croix, or to provide critical route diversity and facilities restoration for international cables. [42]

***14899** 46. In addition, Vitelco argues that the proposed cable would confer upon AT&T market power over all U.S. Virgin Island originating and terminating domestic and international traffic. It states that 41 percent of all U.S. Virgin Island interstate originating and terminating traffic passes between St. Thomas and St. Croix. Vitelco thus asks us to require that the proposed system not be used to originate or terminate U.S. Virgin Island traffic. [43] It also asserts that as a non-contiguous area, the U.S. Virgin Islands is a separate relevant international market. Vitelco further asserts that because the cable would be the only fiber optic cable between the islands, it would be an essential facility for U.S. Virgin Island -originating and - terminating traffic.

****11** 47. AT&T-SSI initially argued that Vitelco's current microwave facilities could provide the same route diversity and restoration functions to be provided by the proposed cable. In its second supplemental comments, AT&T-SSI emphasizes that any party also could build a facility that connects to the St. Thomas station. AT&T-SSI asserts that creation of a Caribbean Basin cable system does not require the participation of AT&T or any other large carrier, and Vitelco already has proposed to build its own such facility.

48. It appears that Vitelco's current facilities are unsuitable to provide route diversity or restoration capabilities for major international cables because of fading problems and the fact that Vitelco's facilities do not directly interconnect to the St. Thomas station. As we indicated in Section III.A.1.a above, however, we are not prepared to require common carrier treatment simply because the proposed cable system would provide these functions. The route diversity and restoration functions offered by the AT&T-SSI cable would serve the public interest by increasing network reliability, but these functions do not mandate common carrier regulation. The proposed cable system undoubtedly would enhance network reliability, but access to the system is not necessary to enter and provide service in the marketplace. Moreover, carriers seeking to access the St. Thomas station to interconnect with international cables there would have several alternatives to the St. Thomas-St. Croix system, as we described in Section III.A.1.a.

49. We disagree with Vitelco's contention that the proposed system would confer AT&T with market power for the provision of U.S. Virgin Islands-originating or -terminating traffic. The Commission recently reclassified AT&T as a non-dominant carrier for the provision of interstate, domestic, interexchange services. In that decision, the Commission restated its longstanding view that the U.S. Virgin Islands is part of a "single national relevant geographic market." [44] We see no reason to deviate from that finding in this proceeding, and thus we decline to find that the U.S. Virgin Islands is a separate relevant international market. Moreover, there is no record evidence to indicate that the construction and operation of the proposed cable system will confer market power on AT&T for the provision of these services. ***14900** Indeed, the St. Thomas-St. Croix cable system likely will enhance competition in the provision of U.S. Virgin Islands-

originated or - terminated interstate domestic interexchange services by increasing routing choices for common carriers and individual users. We thus decline to prohibit the use of the proposed cable system for the provision of U.S. Virgin Islands-originated or -terminated domestic interexchange traffic.

50. We also deny Vitelco's request that the St. Thomas-St. Croix system be prohibited from carrying U.S. Virgin Islands-originating or -terminating international traffic Vitelco bases this request on its belief that the proposed cable system would confer market power on AT&T for the provision of these services. But AT&T has not requested Section 214 authority to use the proposed facility to provide such services. Issues such as those raised by Vitelco are more properly addressed if they arise in the Section 214 application context. As a general matter, we see no reason to limit unnecessarily the use of the cable by other carriers to provide competitive services in the U.S. Virgin Islands domestic interexchange and international markets, which are open to competition. [45]

**12 51. Finally, we decline to require common carrier treatment based on Vitelco's argument that the St. Thomas-St. Croix system would be the first fiber optic facilities to exist along this route. Vitelco, the sole provider of U.S. Virgin Islands local exchange services, currently has its own, if technically inferior, facilities. Thus, it would not be dependent upon AT&T-SSI in the first instance for the routing of traffic or the fulfillment of its local exchange service obligation. Moreover, Vitelco remains free to build its own facility along this route, as it had planned. Although this option may be less cost effective given AT&T-SSI's proposed high-capacity cable, it nonetheless remains an option that would become more viable if AT&T-SSI drives competitors of its common carrier affiliates from its cable system by engaging in anticompetitive conduct, as Vitelco fears. Indeed, the possibility that Vitelco would build such a facility should serve as a further incentive to AT&T-SSI to provide competitive offerings.

2. The Provision of Capacity in the Proposed System to AT&T

52. TLD and Vitelco contend that the proposed system should be operated on a common carrier basis to avoid any possibility of AT&T-SSI's discriminating in favor of AT&T. They assert that AT&T's dominant position in cable manufacturing and in the long distance market would permit AT&T-SSI to discriminate against its affiliate's common carrier competitors. Although AT&T-SSI has stated that it will offer capacity to all common carriers, including its common carrier affiliate, on a nondiscriminatory basis, TLD and Vitelco contend there is no legal compulsion for AT&T-SSI to do so. They also argue that it would be difficult to determine whether such discrimination was occurring because the terms of AT&T-SSI's contract with its affiliate would not be public. In addition, even if the terms are *14901 nondiscriminatory, they assert, AT&T-SSI could charge monopoly prices, since the payments by its common carrier affiliate would be merely an intracorporate transfer payment. [46]

53. In response to the assertions that it could discriminate in favor of its common carrier affiliates, AT&T-SSI reiterates that all customers, whether affiliated with AT&T-SSI or not, would be charged the current market price for capacity in the proposed system. It states that failure to do so would violate the Commission's affiliate transaction and IRU rules. AT&T states that the affiliate transaction rules require AT&T-SSI to sell capacity in the proposed system to its common carrier affiliates at then market prices. [47] In addition, AT&T asserts that the Commission's decisions regarding the sale of IRU interests require U.S. carriers to sell such interests at market prices. [48]

54. AT&T-SSI also claims that it is likely that future cable systems landing at St. Croix and connecting to the St. Thomas cable station would be consortium-owned cable systems. If AT&T-SSI is the supplier for such a consortium-owned cable system, capacity in the St. Thomas-St. Croix link would be sold to the consortium. AT&T-SSI states that under current practices, an AT&T common carrier affiliate, as a member of the consortium, would pay the supplier, AT&T-SSI, its pro rata share of the supply contract, the same as other consortium owners like TLD.

**13 55. We note that as the owner of a non-common carrier cable system, AT&T-SSI would be free to tailor its capacity offerings to individual purchasers. Notwithstanding this ability to discriminate among customers, we do not believe there is sufficient incentive for anticompetitive conduct to arise given our findings in Section III.A.1 above about the availability of competitive alternatives to the proposed cable system. Potential users of the St. Thomas-St. Croix cable system, including TLD and Vitelco, have access to alternative facilities that land at the St. Thomas station. If AT&T-SSI discriminates in favor of its common carrier affiliate, these customers can go elsewhere. Also, since the proposed system will be high capacity, AT&T-SSI will have an incentive to attract -- rather than rebuff -- potential customers in order to use capacity and cover sunk costs. In addition, given the *14902 decreasing cost of constructing cables, the short length of the system, and the increasing number of entrepreneurial non-common carrier cable ventures, it is likely that another party (perhaps even Vitelco) would respond to this type of conduct by building additional alternative facilities on this route. Thus, we question AT&T-SSI's incentive to engage in such anticompetitive conduct. Nonetheless, we retain the right to change the regulatory status of the cable to common carrier if the public interest so requires in the future, including, for example, if market conditions change and anticompetitive conduct occurs. [49]

3. Potential Effect of AT&T Activity in International Cable Consortia

56. TLD asserts, as an additional consideration in our public interest analysis, that AT&T will tie its participation in common carrier consortia that construct and operate international cables to the use of the proposed cable system by those consortia. This steering of cables to its own facilities or those of its affiliate, AT&T-SSI, TLD asserts, is detrimental to AT&T's competitors, who would prefer that these cables land elsewhere. According to TLD, AT&T controls two-thirds of U.S. outbound traffic, and thus has a significant voice in international common carrier cable consortia. [50] In addition, TLD asserts, AT&T often is the only U.S. carrier that is an initial party in international common carrier cable consortia and, therefore, has major influence in the choice of landing sites. TLD argues that landing points are well established before the initial agreement among the parties to the consortia is even drafted. TLD also states that AT&T owns most of the U.S. cables stations in the Caribbean (including Miramar in Puerto Rico and the St. Thomas station). TLD claims that AT&T has offered capacity in the proposed system for free to the Pan American cable system, a major multi-continent cable, that currently is seeking a landing site in the Caribbean. [51]

57. On August 5, 1995, Vitelco filed a motion to accept a third supplemental filing on the issue of AT&T's ability to determine landing points for fiber optic cables in the Caribbean region. [52] In support of its request, Vitelco states that AT&T has distributed a “white paper” in the U.S. Virgin Islands in support of its request of U.S. Virgin Islands government authorities that confirms AT&T's ability to control the landing sites of major *14903 international cables. [53] Vitelco includes a copy of the white paper with its third supplemental filing. In its filing, Vitelco asserts that AT&T-SSI has admitted in the white paper that the proposed system will be a major hub for international cables and that, contrary to its assertions in this proceeding, AT&T-SSI will build the proposed system whether or not the Commission authorizes the facility to be non-common carrier.

**14 58. In response to TLD's claims, AT&T-SSI asserts that consortia make decisions about cable landing sites based on, at minimum, a majority vote. AT&T-SSI states that AT&T has had significantly less than a majority vote in Caribbean Basin cables. In addition, AT&T-SSI denies TLD's claims that it has offered free capacity to the Pan American cable consortia to land their cable at St. Croix. [54]

59. AT&T-SSI argues that Vitelco's motion to accept supplemental comments should be denied because Vitelco has failed to show good cause for permitting additional pleadings. [55] AT&T-SSI also asserts that the white paper contains no new factual information that is relevant to this proceeding.

60. We grant Vitelco's motion in the interest of developing a full record in this proceeding. But we are unpersuaded by the record evidence that AT&T has the ability to control where international common carrier consortia cables land. It certainly has significant influence in the process. AT&T has the resources -- that other U.S. carriers may not have -- to participate in the consortia process in the initial phases. In addition, AT&T's sizable traffic flow is likely to be a consideration. These factors indicate that AT&T likely has a significant voice in the determination of the cable landing sites. AT&T's bargaining position on these matters, however, has existed for other cables and will continue to exist notwithstanding whether we impose common carrier regulation on the proposed facility. Moreover, classification of the proposed facility as common carrier would not necessarily remove AT&T's incentive and ability to steer common carrier consortia cables to the St. Croix station.

61. The most relevant question for this proceeding is, if AT&T can influence the choice of landing sites, will this situation diminish the availability of alternative facilities to St. Thomas-St. Croix system? AT&T owns a number of common carrier cable stations in the Caribbean. Nonetheless, the Puerto Rico Telecommunications Authority (a 19 percent owner of TLD) and Cable & Wireless own competitive cable stations in Puerto Rico and Tortola, ***14904** respectively. [56] Facilities landing at these stations and connecting at St. Thomas currently offer viable alternatives to the St. Croix station. Although the proposed system is likely to become an attractive new link for major international cables, there is no indication that this situation will change.

C. *Second Part of NARUC I Test*

62. Under the second part of the *NARUC I* test, we must determine whether AT&T-SSI will make capacity available to the public indifferently. If so, the proposed facility should be provided on a common carrier basis. In this case, AT&T-SSI has stated its intent to offer capacity on an IRU basis at then-current market prices. It also has offered to make capacity available to common carriers on the same terms and conditions at market prices. TLD and Vitelco argue that this proposal implies an indiscriminate offering.

****15** 63. In reviewing previous non-common carrier cable applications, the Commission also has found the availability of individualized offerings to users to be a public interest benefit. [57] We note that this factor has not been a prerequisite for non-common carrier treatment. Rather, it is an additional public interest benefit of many non-common carrier cable systems. In this case, as a practical matter, AT&T-SSI's proposed cable likely would be used more by common carriers through consortia or individually to link international facilities. In addition, none of the parties has argued that the proposed cable system would create significant overcapacity so as to threaten the economic viability of existing common carrier cables and satellite facilities, a potential consideration noted in other non-common carrier cable decisions. [58] Thus, we will not address these factors in our public interest analysis below.

64. We find that AT&T-SSI's offer of access, nondiscriminatory terms and conditions and market pricing of IRUs does not rise to the level of an "indiscriminate" offering. In the *Tel-Optik* decision, the Commission found that selling bulk cable capacity through individual negotiations with potential customers in order to meet the customers' particular technological or marketing needs did not constitute common carrier activity. [59] Similarly, in the *Transponder Sales* decision, the Commission concluded that the sale or long-term lease of domestic satellite transponders by satellite owners was not common carrier activity because the sellers of transponders did not hold themselves out indifferently to the ***14905** public. [60] As in *Tel-Optic,* AT&T-SSI will be selling bulk capacity tailored to meets customers' particular needs. [61] Similarly, notwithstanding its offer of IRU capacity at market prices, AT&T-SSI must engage in individual negotiations with customers to reach agreement regarding the market price of the particular amount of capacity needed for the certain time period of usage sought. In addition, AT&T-SSI will negotiate for the cost of maintenance and repairs. [62] The end result is an offering that is tailored to meet the needs of the particular customer.

65. Moreover, AT&T-SSI's offer of capacity at market prices conforms with the practices employed by other non-common carrier cable owners. Like AT&T-SSI, other high capacity non-common carrier cable owners offer capacity at market prices. And, in practice other non-common carrier cable owners (particularly those owned by entities not affiliated with carriers) make their capacity available to all interested carriers, as AT&T-SSI has suggested it will, to ensure that sunk costs are recovered. But the Commission has never found, and we do not believe, that these practices constitute indiscriminate offerings.

**16 66. Finally, we reject Vitelco's contention that the proposed cable system will in fact be a common carrier system because it will be carrying common carrier traffic. [63] Vitelco overlooks the fact the Commission has long authorized non-common carrier facilities to carry common carrier traffic in order to enhance facilities competition. [64] The Commission retains jurisdiction through the Section 214 authorization process over the use of these facilities to provide common carrier services. We thus find that AT&T-SSI will not be acting in fact as a common carrier.

D. ***Possible Conditions***

67. We decline to impose the conditions proposed by TLD to prevent anticompetitive conduct. We do not believe such conditions are necessary or justified. If we did, we would be ruling, in effect, that the cable system should be operated on a common carrier basis, which is contrary to the conclusions we have reached above. With respect to its use of the cable to provide interstate domestic interexchange services, AT&T is a non-dominant carrier and we have found no record evidence to indicate that the existence of the *14906 proposed cable should change this status in any way. [65] We will examine issues that may arise regarding AT&T's use of the cable for the provision of U.S. international services in the context of an appropriate Section 214 application. [66]

E. ***Environmental Impact***

68. AT&T-SSI has provided the information required by Section 1.767 of the Commission's rules. [67] Based on this information, we conclude that grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969. [68] Consequently, no environmental assessment is required to be submitted with this application under Section 1.1311 of the Commission's rules. [69]

IV. Conclusion

69. We conclude that AT&T-SSI is not a "telecommunications carrier" as defined by the 1996 Act. In applying the *NARUC I* standard, we conclude that the public interest does not require common carrier regulatory treatment of the St. Thomas-St. Croix cable system. There are sufficient alternative facilities in the relevant markets that the proposed cable system should have a procompetitive, rather than anticompetitive, effect. Finally, we conclude that AT&T-SSI will not be offering capacity on a common carrier, or indiscriminate, basis. Therefore, we grant AT&T-SSI's application.

70. Accordingly, in view of the above, we conclude that U.S. interests under the Cable Landing License Act will be served by grant of a license to AT&T-SSI, as conditioned below.

V. Ordering Clauses

71. Consistent with the foregoing, we hereby GRANT AND ISSUE, under the provisions of the Cable Landing License Act and Executive Order 10530, to AT&T Submarine Systems, Inc. a license to land and operate a high-capacity fiber optic digital *14907 submarine cable (622 Mbps on each of 12 fiber pairs), associated regenerators and

supervisory circuits extending between the island of St. Thomas and the island of St. Croix in the Caribbean. This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States of America is or may hereafter become a party; any action by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

****17** (1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensee or any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall not acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States of America, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons controlling it or controlled by it are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) The Commission reserves the right to require the Licensee to file an environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would have a significant impact upon the environment within the meaning of Sections 1.1305-1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335 (1995); this license is subject to modification by the Commission upon its review of any environmental impact statement that it may require pursuant to its Rules;

***14908** (6) The Commission reserves the right to change the regulatory status of the cable system to common carrier in the future if it finds the public interest so requires.

(7) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirement specified in Section 2 of the Cable Landing License Act, 47 U.S.C. §§ 34-39, or for failure to comply with the terms of this authorization;

****18** (8) The Licensee shall, by application, obtain Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of U.S.-owned and -controlled AT&T-SSI stock;

(9) The Licensee shall notify the Federal Communications Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

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

72. Accordingly, IT IS HEREBY ORDERED that the petitions to deny filed by TLD and Vitelco ARE DENIED.

73. IT IS FURTHER ORDERED that the petition for declaratory ruling filed by Vitelco IS DENIED.

74. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief
International Bureau

ERRATUM

Erratum Released: November 15, 1996

****19** On May 8, 1996, the Commission granted the application of AT&T Submarine Systems, Inc., under the Cable Landing License Act, 47 U.S.C. Sections 34-39 (1994), for authority to land and operate a digital submarine cable system extending between St. Thomas and St. Croix in the U.S. Virgin Islands on a non-common carrier basis. The decision was incorrectly identified as DA 96-719. The correct number for this decision should be DA 96-718.

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief
Telecommunications Division
International Bureau

Footnotes

1 An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (1994) (Cable Landing License Act).

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

3 *See National Association of Regulatory Utility Commissioners v. Federal Communications Commission,* 525 F.2d 630 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 992 (1976) (*NARUC I*).

4 AT&T-SSI states that the St. Thomas-St. Croix system would consist of three segments: (1) a cable station at St. Thomas; (2) a submarine cable and system interfaces at the cable stations at St. Thomas and St. Croix; and (3) a cable station at St. Croix. The St. Thomas-St. Croix cable system will employ SL100 fiber optic repeaterless technology and will operate at 622 Mbps on each of 12 optical fiber pairs. The operating capacity is 8064 64 Kbit/s circuits per fiber pair of up to 40,320 virtual voice circuits per fiber pair when Digital Circuit Multiplication Equipment is used. AT&T-SSI Application for a License to Land and Operate a Digital Submarine System Between St. Thomas and St. Croix in the U.S. Virgin Islands at 2 (filed Sep. 2, 1994); AT&T First Supplemental Comments at 1 (filed Jan. 6, 1995).

5 "Route diversity" refers to the availability of more than one independent route to carry traffic to a particular location. It enhances service reliability by increasing the number of independent routes that carry traffic to a given location. "Restoration"

refers to the ability to route traffic via alternative facilities in order to maintain an adequate grade of service in the event of a facilities outage. *See AT&T, et. al.,* 8 FCC Rcd 4808 (1993) (TAT-12/TAT-13 Cable Landing License).

6 Vitelco currently operates microwave facilities between St. Thomas and St. Croix. It states that before the Commission gave public notice of AT&T-SSI's application, Vitelco's board of directors approved plans for its own fiber optic facility as a back-up to its microwave facilities and to expand its capacity for local broadband service. According to Vitelco, it is undecided how it will proceed in light of AT&T-SSI's application. Vitelco Petition to Deny at 1 (filed Oct. 14, 1994).

7 Vitelco seeks a declaratory ruling that the proposed facility must be operated on a common carrier basis under *NARUC I,* discussed *infra.* It argues that the proposed operation of the facility mandates common carrier regulation of the proposed facility. In addition, Vitelco states that the public interest requires that AT&T-SSI be legally compelled to operate as a common carrier. Finally, Vitelco seeks a ruling that unless the proposed system is operated on a common carrier basis, discrimination against unaffiliated common carriers will result. Vitelco Petition for Declaratory Ruling (filed Feb. 10, 1995). Each of these issues already has been raised in this proceeding. Thus, instead of initiating a separate proceeding to address the petition, we have included Vitelco's petition, and AT&T-SSI's subsequent opposition, in the record in this proceeding. We address the issues raised in Vitelco's petition in Section III below.

8 *See* Letter from Scott Blake Harris, Chief, International Bureau to David T. Matsushima (AT&T-SSI), John W. Hunter (Counsel for Vitelco) and Alfred M. Mamlet (Counsel for TLD) (Apr. 7, 1995).

9 *See* Motion to Accept Supplemental Comments of TLD (filed Feb. 9, 1996).

10 Letter from Richard C. Beaird, Senior Deputy Coordinator, Bureau of International Communications and Information Policy, Department of State, to Scott Blake Harris, Chief, International Bureau (Aug. 29, 1995).

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

12 *See Tel-Optik, Ltd.,* 100 F.C.C.2d 1033, 1046-47 (1985) (*Tel-Optik*).

13 *See, e.g., Pacific Telecom Cable, Inc.,* 2 FCC Rcd 2686 (1987); 4 FCC Rcd 8061 (1989); *Transnational Telecom Ltd.,* 5 FCC Rcd 598 (1990); *Transgulf Communications, Ltd., Inc.,* 6 FCC Rcd 2335 (1991); and *Optel Communications, Inc.,* 8 FCC Rcd 2267 (1993).

14 *Id.* at 641, 642.

15 47 U.S.C. § 153(44).

16 47 U.S.C. § 153(46).

17 AT&T Opposition to TLD's Motion to Accept Supplemental Comments and Reply to Supplemental Comments Regarding the Effect of the Telecommunications Act of 1996 at 5-6 (filed Feb. 20, 1996).

18 TLD Reply in Support of Motion to File Supplemental Comments Regarding the Effect of the Telecommunications Act of 1996 at 4 (filed Mar. 1, 1996) (citing 47 U.S.C. § 153(44)).

19 *Id.* at 4-5 (citing 47 U.S.C. § 153(46)).

20 *Id.*

21 *Id.* at 5-6.

22 *Id.* at 7-8.

23 47 U.S.C. § 153(44).

24 47 U.S.C. § 153(46).

25 47 U.S.C. § 332(d)(1)(1995).

26 *See Regulatory Treatment of Mobile Services,* 9 FCC Rcd 1411, 1509 (1994).

27 *Id.*

28 *See* S. Rep. No. 230, 104th Cong., 2d Sess. at 114-115 (1996).

29 *See NorLight,* 2 FCC Rcd 132, 134 (1987).

30 *See Domestic Fixed-Satellite Transponder Sales,* 90 F.C.C.2d 1238, 1252-53 (1982) (*Transponder Sales*), *aff'd Wold Communications, Inc. v. F.C.C.,* 735 F.2d 1465 (D.C. Cir. 1984).

31 *See Optel,* 8 FCC Rcd at 2269; *see also Pacific Telecom Cable,* 2 FCC Rcd at 2687; *Transnational Telecom,* 5 FCC Rcd at 599.

32 *See AT&T, et. al.,* 8 FCC Rcd 5041 (1993) (AMERICAS-1 Cable Landing License).

33 *See AT&T, et. al.,* 8 FCC Rcd 5038 (1993) (COLUMBUS II Cable Landing License).

34 AT&T First Supplemental Comments at 6-9 (citing *Alaska Airlines v. United Airlines,* 948 F.2d 536, 544-5 (9th Cir. 1991)).

35 In addition, AT&T-SSI claims that, if an alternative service is available and use of the alternative does not cause a "severe hardship," the facility is not essential even though the potential alternative is not an exact substitute or is not the preferred means of operation. *Id.* at 8-12 (citing *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.,* 924 F.2d 539, 544-45 (4th Cir. 1991)).

36 Vitelco Supplemental Reply Comments at 2-4 (filed Jan. 13, 1995).

37 TLD Second Supplemental Comments at i-iii (filed May 19, 1995).

38 AT&T-SSI Second Supplemental Comments at 11-12 (filed Apr. 28, 1995).

39 *See NARUC I,* 525 F.2d at 638.

40 Although AT&T-SSI asserts that there are satellite alternatives the proposed system, Vitelco and TLD argue that those currently available are not viable because of quality problems. *See* AT&T First Supplemental Comments at 10-11; Vitelco Petition for Declaratory Ruling at 9 n.8; TLD First Supplemental Reply Comments at 7 (filed Jan. 13, 1995). Thus, we do not rely on the availability of satellite facilities in finding that there are competitive alternatives to the proposed cable system.

41 TLD Second Supplemental Comments at ii; *Telefonica Larga Distancia de Puerto Rico, et. al,* 7 FCC Rcd 4275 (1992).

42 *See* TLD First Supplemental Reply Comments at 6-7.

43 *See* Vitelco Second Supplemental Comments at 4 (filed May 19, 1995).

44 *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* 11 FCC Rcd 3271, at ¶ 22 (1995).

45 The Commission deferred consideration of AT&T's request for non-dominant treatment in its provision of international services. *See id.*

46 TLD proposes that, if the proposed system is permitted to operate on a non-common carrier basis, AT&T-SSI be required to: (1) file all agreements with affiliated AT&T carriers with the Commission and serve copies on all facilities-based carriers; (2) sell capacity to all common carriers at the same per circuit rate charged to affiliated AT&T carriers and on a nondiscriminatory basis; and (3) cost justify rates charged to third parties. *See* TLD Reply Comments in Support of Petition to Deny at 7 n.9 (filed Nov. 15, 1994).

47 *See* AT&T Reply to First Supplemental Comments at 7-8 (citing 47 C.F.R. § 32.27) (filed Jan. 13, 1995).

48 *See id.* at 8-10 (citing *Revaluation of the Depreciated-Original-Cost Standard in Setting Prices For Conveyances of Capital Interests in Overseas Communications Facilities Between and Among U.S. Carriers,* 7 FCC Rcd 4561, 4563 (1992)).

49 We note that notwithstanding the Commission's authority under Title II to require such a change in regulatory status to common carrier, Section 2 of the Cable Landing License Act states that a cable landing license may be granted "upon such terms as shall be necessary to ensure just and reasonable rates and service in the operation and use of cables so licensed." Cable Landing License Act, 47 U.S.C. § 35.

50 TLD's Reply to AT&T-SSI's Second Set of Supplemental Comments, at 8-10 (filed May 19, 1995).

51 TLD's Reply to AT&T-SSI's Second Set of Supplemental Comments, at 10; Letter from Alfred M. Mamlet, Counsel to TLD, to William F. Caton, Acting Secretary, Federal Communications Commission (Jul. 11, 1995).

52 *See* Vitelco Motion to Accept Additional Pleading (filed Aug. 4, 1995).

53 Vitelco Third Supplemental Filing at 2-4 (filed Aug. 4, 1995).

54 Letter from David T. Matsushima, AT&T-SSI, to William F. Caton, Acting Secretary, Federal Communications Commission, at 2 (filed June 13, 1995).

55 AT&T-SSI Opposition to Vitelco's Motion to Accept Additional Pleadings and Third Supplemental Filing, at 4-5 (filed Aug. 17, 1995).

56 *Telefonica Larga Distancia de Puerto Rico,* 5 FCC Rcd 3546 (1993); TLD Second Supplemental Comments at 8 n.16.

57 *See, e.g., Pacific Telecom Cable,* 2 FCC Rcd at 2687; *Transnational Telecom,* 5 FCC Rcd at 599.

58 *See id.*

59 *See Tel-Optik,* 100 F.C.C.2d at 1046.

60 *See Transponder Sales,* 90 F.C.C.2d at 1252.

61 *See* AT&T Opposition to Petitions to Deny at 5 (filed Oct. 27, 1994).

62 *See* AT&T Opposition to Vitelco's Petition for Declaratory Ruling at 6-7 (filed Feb. 13, 1995)

63 *See* Vitelco Petition for Declaratory Ruling at 6.

64 *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables,* 4 FCC Rcd 4454, 4455 (1989); *US Sprint Communications Company Limited Partnership,* 4 FCC Rcd 6279 (Com. Car. Bur. 1989).

65 *See supra* paragraph 49.

66 AT&T-SSI states that AT&T has no present plans to provide service using the cable system, nor has AT&T sought Section 214 authorization to do so. *See* AT&T Opposition to Petitions to Deny at 8.

67 47 C.F.R. § 1.767 (1994).

68 42 U.S.C. §§ 4321-4335 (1995).

69 47 C.F.R. § 1.311 (1994).

11 FCC Rcd. 14885 (F.C.C.), 11 F.C.C.R. 14885, 1996 WL 239418

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