



Federal Communications Commission (F.C.C.)

Cable Landing License

\*1 IN THE MATTER OF AT&T CORP.

COM TECH INTERNATIONAL CORPORATION

FRONTIER COMMUNICATIONS SERVICES, INC.

GTE HAWAIIAN TEL INTERNATIONAL INCORPORATED

GTE INTELLIGENT NETWORK SERVICES INCORPORATED

INTERNATIONAL EXCHANGE NETWORKS LTD.

LEVEL 3 INTERNATIONAL, LLC

MCI WORLDCOM, INC.

PCI COMMUNICATIONS, INC.

PACIFIC GATEWAY EXCHANGE (BERMUDA), LTD.

PRIMUS TELECOMMUNICATIONS, INC.

PSINET, INC.

QWEST COMMUNICATIONS CORPORATION

RSL COM U.S.A., INC.

SBCI-PACIFIC NETWORKS, INC.

SPRINT COMMUNICATIONS COMPANY L.P.

TELEGLOBE USA INC.

TELEGROUP, INC.

VIATEL INC.

Joint Application for a License to Land and Operate a Submarine Cable Network  
Between the United States and Japan  
File No. SCL-LIC-19981117-00025

FCC 99-167

Adopted: July 8, 1999

Released: July 9, 1999

**\*\*13067** By the Commission: Commissioner Furchtgott-Roth not participating.

## I. Introduction

1. In this Order, we grant the joint application [FN1] of the parties listed in the caption (collectively "Applicants" or "JUS") under the Cable Landing License Act [FN2] for authority to land and operate a non-common carrier submarine fiber optic cable system to be called the Japan-U.S. Cable Network **\*\*13068** ("Japan-US CN"). The Japan-US CN will extend between three landing points in the United States and three landing points in Japan.

2. Global Crossing Ltd. filed a "Petition to Defer" challenging the structure of the Japan-US CN as anticompetitive. Subsequent to the initial filing of the JUS application, the Applicants notified the Commission that they had amended the construction and maintenance agreement ("C&MA") for the Japan-US CN to reduce the risk that the Japan-US CN will facilitate the exercise of market power by some or all of its owners. In light of these amendments, we find that grant of the JUS application to land and operate the Japan-US CN subject to the routine conditions listed below would, on balance, serve the public interest. We do not, in this order, dismiss Global Crossing's claims that consortium cable systems may slow the growth of competition in international telecommunications. Instead, we intend to commence a broader proceeding to examine how our policies regarding licensing submarine cables might best promote competition and benefit consumers. [FN3]

## II. Background

### A. Procedural Background

3. The International Bureau issued public notice of the Japan-US CN application on December 4, 1998. Pursuant to Section 1.767(b) of the Commission's rules, [FN4] the Cable Landing License Act, and [Executive Order No. 10,530](#), [FN5] we informed the Department of State of the application. [FN6] On January 4, 1999, Global Crossing filed a Petition to Defer, asking that the Commission resolve important issues of competition policy raised by the application before granting this license. The Applicants opposed Global Crossing's petition, and Global Crossing replied. On March 1, 1999, the Bureau issued a public notice seeking additional comment on issues raised in Global Crossing's Reply of January 26. [FN7]

**\*2 \*\*13069** 4. On July 7, 1999, the Department of State, after coordinating with the Department of Defense and the National Telecommunications and Information Administration, notified the Commission that it approves grant of this cable landing license. [FN8]

#### B. The Applicants

5. The Application identifies 32 owners of the Japan-US CN. AT&T and PSINet are corporations organized and existing under the laws of New York. Com Tech is a corporation organized and existing under the laws of the state of Washington. Frontier is a corporation organized and existing under the laws of Michigan. GTE HTI, GTE INS, IXnet, Level 3, PRIMUS, Qwest, RSL U.S.A., SBCI, Teleglobe, and Viatel are corporations organized and existing under the laws of Delaware. MCI WorldCom is a corporation organized and existing under the laws of Georgia. PGE is a corporation organized and existing under the laws of Bermuda. PCI is a corporation organized and existing under the laws of Guam. Sprint is a limited partnership organized and existing under the laws of Delaware. The Applicants and other carriers will own the Japan-US CN in the approximate proportions specified in the application. [FN9] In addition to the Applicants, the owners of the Japan-US CN include BT, C&W, CHT-I, DDI, Global One, IDC, JT, KDD, KPN, NTT, SINGTEL, TM, Telstra, and VSNL.

#### C. Description of the Proposed Cable System

6. The Japan-US CN will consist of four optical fiber pairs equipped to operate at 40 Gbps. The capacity of each fiber pair is equivalent to 256 x 155- Mbps Basic System Payload Modules (BSPM), with each BSPM containing 63 minimum investment units (MIUs), for a total capacity, on each fiber pair, of 16,128 MIUs. The system will extend between six landing points, three of which are in the United States and three of which are in Japan. In the United States, the cable system will extend from landing points at San Luis Obispo, California; Point Arena, California; and Makaha, Hawaii. In Japan, the cable system will extend from Shima, Kitaibaraki, and Maruyama. The landing stations at Point Arena, San Luis Obispo, Makaha, and Shima will have four fiber pairs; the landing stations at Maruyama and Kitaibaraki will have two fiber pairs. The Japan-US CN will be connected to suitable facilities providing access to the domestic networks in each country or territory. It will also be extended to the terminals of other communications systems, including other cable terminals and satellite earth stations. This configuration will enable the Japan-US CN to be used for services between and among the continental United States, Hawaii, Japan, and points beyond. The Applicants intend to place the Japan-US CN in commercial service no later than June 30, 2000, with two fiber pairs operating at 40 Gbps per fiber pair for initial service operation.

**\*\*13070** 7. The San Luis Obispo landing station will be provided and owned by MCI WorldCom and will be located at 1101 Los Olivos Ave., Los Osos, California, 35° 18' 45.71" N, 120° 49' 53.71" W. The Makaha landing station will be provided and

owned by AT&T [FN10] and will be located at 21°>> 28.73' N, 158° 13.37' W. The Point Arena landing station will be provided and owned by AT&T and will be located at 38° 58.87' N, 123° 42.24' W. In Japan, the Shima landing station will be provided and owned by KDD, the Maruyama landing station will be provided and owned by Japan Telecom, and the Kitaibaraki landing station will be provided and owned by NTT-WN.

\*3 8. The Applicants intend to operate the Japan-US CN on a non-common carrier basis, and they request that the Commission license the system as a non-common carrier cable system. They have therefore not filed an accompanying Section 214 application for the construction and operation of new common carrier lines.

#### D. Allegations of Anticompetitive Effects

9. Global Crossing's filings allege that the purpose and effect of the proposed structure of the JUS consortium is to slow the development of competition in international telecommunications services on the U.S.-Japan route. [FN11] The major participants in the international telecommunications services market are all members of the JUS consortium, and, Global Crossing alleges, the Japan-US CN would enhance their ability to impede the development of competition. Global Crossing states that those major carriers have market power over important inputs [FN12] necessary for the provision of international telecommunications services, and the consortium structure facilitates their coordination of pricing and other access policies. Global Crossing also argues that, through control of cable landing stations, the landing parties have the incentive and ability to harm competition and raise prices, such as by delaying provisioning of competitors' circuits.

10. Global Crossing asserts that competing carriers could overcome the major carriers' efforts if there were competing cables for carrying traffic, but competing cables are unable to duplicate the key inputs controlled by those major carriers. Thus, according to Global Crossing, carriers will cluster onto the consortium cable system, which makes entry by competing cable systems less attractive. This ultimately discourages additional capacity from being constructed, Global Crossing contends.

11. One of the inputs over which Global Crossing claims the major carriers have market power is access to cable landing stations. KDD controls all of the Japanese landing stations for all **\*\*13071** other significant Japan-bound cable systems, including TPC-5, TPC-4, China-U.S., and HAW-4/TPC-3, with the exception of one of the landing stations of the China-U.S. cable system, which NTT controls. AT&T and MCI WorldCom control the U.S. landing stations of those four cable systems and are participants in the Japan-U.S. CN. Global Crossing contends that having a critical mass of competitors as landing station operators on a single cable makes it more likely that these landing parties can use the management structure of the cable to coordinate their actions with regard to cable station access. According to Global Crossing, landing parties have the incentive, and together the ability, to impose

costs on other carriers by charging supracompetitive rates for backhaul, transit, collocation, and cross-connection and their ability to control the timing of circuit activation. [FN13]

12. Global Crossing further alleges that the consortium structure will increase the ability and incentive of the five landing parties to collude and discriminate against carriers that use competing cable systems. [FN14] Global Crossing asserts that this ability to collude and discriminate is enhanced by provisions of the C&MA [FN15] that state that collocation space at the Japanese cable stations will be provided only "if available" and that collocation rights will be granted to individual parties only for the purpose of servicing their own capacity. This could prevent non-landing parties from achieving economies of scale as backhaul providers. [FN16] JUS responds that these claims are inconsistent with Global Crossing's own experience in successfully constructing a terrestrial fiber optic network in Japan to provide backhaul for its transpacific cable, PC-1. [FN17] JUS also asserts that any owner can choose to terminate its capacity at any of the three independently owned landing stations in Japan; any owner has the right to collocate equipment in those landing stations "at rates that reflect a cost-recovery basis"; and any owner can self-provide backhaul or obtain backhaul from a third party. [FN18]

**\*4 \*\*13072** 13. Another alleged source of market power is operating agreements by which carriers agree to exchange traffic with correspondent carriers in other countries. According to Global Crossing, in order to obtain an operating agreement, a carrier must of physical necessity own circuits on the same cable as a correspondent. Global Crossing states that JUS members "can use their control over correspondent relations to reduce competition from private cables by not entering into correspondent relations with carriers that choose private cables, or by refusing to purchase circuits to implement the correspondent relationship." [FN19] Global Crossing contends that operating agreements are an essential input in part because they are still a common and desirable way of providing voice services. JUS counters that operating agreements are an increasingly unnecessary and irrelevant input to the provision of international telecommunications services. JUS contends that carriers are able to obtain whole circuits and provide service outside the traditional correspondent system, and that they prefer to do so. [FN20]

14. Global Crossing also contends that NTT, the incumbent local carrier and the only provider of terminating access services in Japan, will have the ability and incentive to discriminate in providing interconnection. Global Crossing asserts that NTT benefits from carriers' purchases of capacity on the Japan-US CN because NTT owns capacity on the cable system and because it controls a landing station and earns supracompetitive profits from the provision of backhaul from its landing station in Japan. In response, JUS contends that NTT has no ability to discriminate because it cannot determine the source of traffic it terminates and because other carriers have intercity transport and switching facilities, and because high volumes of traffic can be carried to and from large business customers without us-

ing NTT's facilities. JUS also claims that NTT will have no incentive to discriminate because it owns only 4.4 percent of the cable system.

15. Global Crossing further asserts that the JUS consortium is overinclusive in that it includes more parties than is necessary to construct and operate the project. It argues that the overinclusiveness of the consortium cable structure causes a "cluster effect" that is self-perpetuating: Because carriers need either correspondent relationships or non-discriminatory interconnection agreements, carriers have a strong incentive to use circuits on the same cable as the largest carriers on the other end. Because U.S. carriers have to use the Japan-US CN in order to obtain necessary inputs from Japanese carriers, and Japanese carriers have to use the Japan-US CN in order to obtain necessary inputs from U.S. carriers, entry by competing cable systems is less attractive. JUS responds that its structure is "the most open and pro-competitive ownership structure of any cable system in the world" because, it claims, "any service provider could (and still can) acquire an ownership interest in JUS-CN capacity at a shared cost of constructing the cable network" and later compete with each other to sell capacity in the Japan-US CN. JUS claims that any owner can choose to terminate its capacity with one of three independently owned cable landing stations in Japan, to collocate **\*\*13073** equipment in those cable landing stations at cost-based rates, and to self-provide backhaul or obtain backhaul from a third party. [FN21] Furthermore, JUS claims that the Japan-US CN was designed to be as open as possible in response to the Applicants' perception of current Commission policies. [FN22]

**\*5** 16. Global Crossing asserts that these anticompetitive effects of consortium cable systems are not offset by any pro-competitive benefits. Although it may have been necessary in the past to use consortia, Global Crossing argues, it is now possible for individual carriers and companies to build cable systems and to sell capacity in those cable systems to other carriers. U S WEST adds that "the American carriers that would be most willing and able to build their own transpacific cables are precisely the carriers that are combining forces to build JUS. Instead of building two or maybe three competing undersea cables, the leading long distance carriers are building one together." [FN23] JUS responds that cable construction remains a high-risk and high-cost venture, and the only way for smaller carriers to obtain ownership interests in a cable system is to join a consortium.

17. Global Crossing argues that "the Commission should not grant this license without taking measures to respond to the competition issues" it raises. [FN24] It argues that common carrier regulations, such as requiring tariffs, would not sufficiently resolve those issues, but that it would be "administratively simpler, and ultimately better for market performance, if the Commission directly addressed the heart of the problem - a Club ownership structure that creates a joint venture among the parties with control over essential inputs into the market." [FN25]

18. To remedy the problems that it alleges, Global Crossing states that the Commission should impose conditions on this license. Those conditions, Global Cross-

ing argues, should address "what percentage of the market the owners of JUS can control on each end of this cable." [FN26] Global Crossing also proposes that we condition the license on the establishment of a "fair marketing period" during which "parties on JUS can choose a trans-Pacific cable based on economics instead of perceptions of market power." [FN27] Global Crossing also proposes that the Commission should initiate a rulemaking proceeding to determine the proper level of concentration of "market power" on consortium cable systems in the future.

**\*\*13074** III. Discussion

A. Legal Authority

19. The Commission's authority to grant, withhold, or condition cable landing license derives from the Cable Landing License Act [FN28] and [Executive Order No. 10,530](#). The relevant portion of the statute provides that "the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed." [FN29] The President's authority under that statute has been delegated to the Commission, provided that "no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary." [FN30]

\*6 20. In our Foreign Participation Order, in a section entitled "Foreign Ownership under the Submarine Cable Landing License Act," we discussed how we would analyze foreign involvement in the context of an application for a cable landing license. [FN31] Previously, the Commission had evaluated cable landing license applications filed by foreign-owned companies under an analysis similar to its "effective competitive opportunities" test. [FN32] In the Foreign Participation Order, we announced that, instead of undertaking a detailed, fact-intensive inquiry of foreign markets, in instances where the foreign ownership is held by an entity from a country that is a member of the World Trade Organization (WTO), we would evaluate that ownership under a strong presumption that the application should be granted. [FN33] We found that, because of the implementation of the WTO agreement on basic telecommunications services, foreign carriers from WTO member countries would rarely be able to harm competition in the U.S. market by acting anticompetitively. We further noted that, consistent with how we review international Section 214 applications, "[e]ven if a particular **\*\*13075** application presents unusual risks to competition, most potential problems can be addressed by imposing conditions on the license," [FN34] and we discussed examples of the kinds of rules that we have imposed on cable landing licenses. For example, the International Bureau has imposed recordkeeping requirements on a licensee where it was deemed

necessary to address anticompetitive concerns specific to one proposed submarine cable system. [FN35]

21. Here, because Japan is a member of the WTO, the Foreign Participation Order's presumption applies. That is, to the extent that the allegations of anticompetitive effects relate to the ability of Japanese carriers to harm competition in the U.S. market by acting anticompetitively, we evaluate that risk under a strong presumption that this application should be granted. As we stated in the Foreign Participation Order, if we find that this application presents unusual risks to competition, we can impose conditions on the license. [FN36]

#### B. Sufficiency of the JUS Application

22. Each of the Applicants has complied with paragraph 6 of Section 1.767 of the Commission's rules by listing its 10-percent-or-greater shareholders and has submitted all of the certifications required by Section 1.767. [FN37]

23. The Applicants have also provided a specific description of the U.S. cable landing stations sufficient to comply with Section 1.767(a)(5) of the Commission's rules. [FN38] With respect to the Japanese cable landing stations, the Applicants have provided only a general geographic description. Pursuant to Section 1.767(a)(5), the Applicants must file a specific description of the Japanese landing points, including a map, no later than 90 days prior to construction. The Commission will give public notice of the filing of the description, and grant of this license will be considered final unless the Commission notifies the Applicants to the contrary no later than 60 days after receipt of the specific description of the landing points.

\*7 24. We find that the information submitted by the Applicants is sufficient under our rules to allow us to evaluate the application under the Cable Landing License Act and [Executive Order 10,530](#). [FN39]

#### \*\*13076 C. Analysis of Anticompetitive Effects

25. We believe that the public interest is best served by promoting the rapid expansion of capacity in order to promote facilities-based competition that will result in innovation and lower prices to consumers of international telecommunications services. In order to carry out our responsibilities under the Cable Landing License Act, including the responsibility to "grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed," we intend to pursue policies that best promote expansion of capacity and to make decisions on individual applications that will best serve this purpose. Global Crossing raises serious issues about the control of necessary inputs by entities with incentives to raise the costs of other carriers and deter construction of additional capacity. The result, according to Global Crossing, is that other carriers perceive a need to use capacity on consortium cables. Global Crossing also asserts that there are no efficiency benefits to



offset the competitive harm. On the basis of the record in this proceeding, we cannot conclude that Global Crossing's theories of harm are without merit.

26. In response to the concerns raised by Global Crossing and examined by Commission staff, the JUS Applicants amended the C&MA to provide for a more pro-competitive balance among the parties to that agreement. [FN40] The two amendments address the major carriers' ability to earn supra-competitive profits, which would ultimately result in higher prices for consumers, by controlling backhaul and the timing of the final capacity upgrade of the cable system.

27. Provisions of the original C&MA provided that the landing parties - AT&T, MCI WorldCom, Japan Telecom, KDD, and NTT - would provide "suitable space" at the landing stations to other consortium members "for operating and technical control purposes relating to capacity allocated, or to be allocated, to them in the Network." [FN41] These provisions could have been interpreted to allow the landing parties to deny other consortium members the space necessary to collocate equipment in order to provide backhaul for other members, thus limiting backhaul competition and providing an opportunity for the landing parties to earn supracompetitive profits from providing backhaul. With respect to the Japanese landing stations (but not the U.S. landing stations), the original C&MA also stated that suitable space would be provided "if available."

28. JUS has amended the C&MA to provide explicitly that sufficient space at all landing stations in the United States and Japan will be made available to any other owner for the purpose of collocating equipment to provide backhaul. The amended C&MA also provides that all owners may use such space "for the provision by them of backhaul services to others." The phrase "if available," which limited the right to space for collocation at the landing stations in Japan, was removed as well. Consequently, if insufficient space exists at a landing station, the landing party may provide such space in a separate building adjacent to the landing station. Furthermore, the owner desiring collocation may "establish a separate facility near the landing station property which shall be **\*\*13077** connected to the Network by the Terminal Party." The amendments also provide that "[s]pace, connection facilities and necessary services shall be provided promptly and without discrimination." [FN42]

**\*8** 29. The amended provision will facilitate the provision of competing backhaul services on the Japan-US CN. [FN43] This improves the likelihood that backhaul prices will reflect competitive levels, which could help lower prices to consumers of telecommunications services. Also, by reducing the ability of the landing parties to extract supracompetitive profits from providing backhaul services on the Japan-US CN, the amended provision may reduce those parties' incentive to induce clustering on the Japan-US CN.

30. Another provision of the original C&MA provided that the final upgrade of the cable's capacity from 400 Gbps ("interim equipped capacity") to 640 Gbps

("design capacity") would be approved only with the affirmative vote of members of the Management Committee representing at least two-thirds of the total voting interests. [FN44] This upgrade would provide a 60 percent increase in capacity. As a result of the larger voting interests in the Japan-US CN held by the landing parties and a few other major carriers, a very small group of carriers could have prevented this upgrade even if a large majority of owners desired to increase capacity. [FN45] This provision could have enhanced the ability of a few major carriers to slow the growth of capacity on the U.S.- Japan route.

31. JUS has amended the C&MA to provide that a vote of only half of the total voting interests is necessary to approve the final upgrade of capacity. [FN46] This reduction of the voting requirement reduces the likelihood of a delay in the upgrade by increasing the number of major carriers required to block an upgrade decision. As a result, this capacity increase may be deployed sooner, which could help lower prices to consumers.

32. Together, these two amendments reduce certain potential competitive harms arising from the structure of the Japan-US CN. Because they reduce the landing parties' incentive to induce clustering, the amendments address, to some extent, Global Crossing's allegations that the consortium structure deters the construction and use of competing cable systems. The amendments also could have the effect of lowering retail prices by introducing more competition into the backhaul markets and ensuring that the upgrade to design capacity is not delayed.

**\*\*13078** 33. We also find it significant that, in recent meetings between the governments of Japan and the United States, the government of Japan made commitments that elaborate on or supplement its WTO basic telecommunications commitments. [FN47] For example, Japan's Ministry of Posts and Telecommunications (MPT) will ensure that NTT cannot hinder local competition by the way it prices interconnection relative to retail rates. MPT also has committed to arbitrate disputes concerning access to cable landing stations, including collocation of equipment in those landing stations, in the context of interconnection arrangements. These commitments are encouraging because they provide further evidence that the government of Japan will take steps to introduce more competition into its telecommunications markets. If these commitments are implemented, there is likely to be a more favorable environment in Japan for the participation of independent submarine cable systems and for carriers that use capacity on those cable systems. We also note that the government of Japan is bound by the Reference Paper on Regulatory Principles, which it included in its WTO commitment. If its commitments are not implemented, the United States could seek remedies in a WTO dispute resolution proceeding.

**\*9** 34. Furthermore, our regulatory safeguards should reduce the risk that grant of this license will have anticompetitive effects. In particular, our rules prohibit any U.S. carrier from accepting exclusive arrangements from any carrier with market power in Japan where those arrangements involve services, facilities, or

functions in Japan that are necessary for the provision of basic telecommunications services. [FN48] Any U.S. carrier that, for example, accepts interconnection from NTT or operating agreements from KDD on terms more favorable than those offered to other similarly situated carriers would be in violation of this rule unless it submits information sufficient to demonstrate that the foreign carrier lacks sufficient market power to affect competition adversely in the U.S. market. Merely bringing traffic into Japan on a different cable system does not qualify a carrier as other than "similarly situated."

35. This application requires us to decide whether, and on what terms, to authorize the landing and operation of the Japan-US CN. We believe that the amendments to the C&MA, the Japanese government's commitments, and our regulatory safeguards reduce the risk that the Japan-US CN will cause competitive harm. Global Crossing proposes policies that, going forward, would be intended to promote a more competitive market for undersea cable capacity by encouraging the construction of new cable systems. In this proceeding, however, some of the remedies proposed by Global Crossing would have the effect of creating regulatory uncertainty and possibly delaying the deployment or use of the new capacity represented by the Japan-US CN. In part, we are persuaded by **\*\*13079** the strong statements filed by several applicants [FN49] that any further regulatory delay would harm the plans of carriers to commence service using the Japan-US CN. We therefore conclude that, in this particular instance, the possible pro-competitive benefits of requiring divestiture of one or more parties, prohibiting discriminatory pricing, [FN50] or mandating a "fair marketing" or "fresh look" period would be outweighed by the public interest harms of creating regulatory uncertainty about the deployment of the Japan-US CN capacity. The Applicants claim they formed the JUS joint venture in light of what they believed to be Commission policies encouraging carriers to form open consortia for the construction and operation of submarine cable systems. In view of these considerations, we decline, in this proceeding, to adopt the conditions proposed by Global Crossing.

36. We do not find that all potential competitive problems have been solved by the recent amendments to the C&MA; rather, we find that, given those amendments and the need for more capacity on the U.S.-Japan route, the benefits of licensing this cable system in this case outweigh the risk that doing so will have anticompetitive effects. We do not, in this proceeding, dismiss the claims that consortium cable systems may slow the growth of competition in international telecommunications, nor do we address whether there are any efficiency benefits to consortium cable systems. We believe that these issues are more appropriately addressed in a broader proceeding. We therefore intend to commence such a proceeding in the near future to examine how our policies regarding licensing submarine cables might best promote competition and benefit consumers.

#### D. Non-Common Carrier Status

**\*10** 37. The Applicants submit that the Japan-US CN should be licensed as a non-

common carrier cable network. As a non-common carrier cable system, the Japan-US CN would not be required to make its capacity available indifferently to the user public. The cable system would be permitted to offer bulk capacity to a specific class of eligible users, including common carriers, on the basis of original ownership, [FN51] infeasible rights of user (IRU), or leases of capacity.

**\*\*13080** 38. The Commission's private submarine cable policy is intended to promote competition in the provision of international transmission facilities. [FN52] Pursuant to this policy, the Commission has authorized non-common carrier cables 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 an indifferent holding-out to the eligible user public. [FN53] This two-part test is derived from a court decision known as [NARUC I](#). [FN54]

39. The first part of the [NARUC I](#) test directs us to consider whether there is any legal compulsion to serve the public indifferently. In applying this prong of the test to submarine cable authorizations, the Commission has stated that there will be no legal compulsion to serve the public indifferently where there is no public interest reason to require the facilities to be offered on a common carrier basis. Although this public interest analysis has generally focused on the availability of alternative facilities, [FN55] we are not limited to that reasoning. In this case, we find that competing facilities [FN56] will at least partially constrain the operations of the Japan-US CN so that it will not become a bottleneck facility. Moreover, the Applicants have amended provisions of the original C&MA in ways that will both reduce the costs of inputs necessary to the provision of international telecommunications services and reduce the ability and incentives of the major carriers on the route to constrain capacity. We also concluded, above, that any public interest benefits of imposing additional burdensome regulation in this case would be outweighed by the benefits of promoting the certainty that the Japan-US CN will be deployed as scheduled. In these circumstances, our authority under the Cable Landing License Act is sufficient to ensure that operation of the Japan-US CN will serve the public interest, and common carrier regulation is not necessary. Therefore, we find that there is no public interest reason to require the facilities to be offered on a common carrier basis. Accordingly, pursuant to the first prong of the [NARUC I](#) test, we conclude that there is no legal compulsion for the Japan-US CN to serve the public indifferently.

40. We note, however, that we always have the ability to impose common carrier or common-carrier-like obligations on the operations of this or any other submarine cable system if the public interest so requires. Furthermore, we have always maintained the authority to classify facilities **\*\*13081** as common carrier facilities subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently. [FN57] As noted above, in the near future, we will consider a broader proceeding to examine how the Commission's submarine-cable policies may most benefit consumers of telecommunications services. It is possible that, in such a proceeding, we would impose rules

on the operations of already-licensed cable systems, including the Japan-US CN. As has consistently been our practice, we will grant this license "subject to all rules and regulations of the Federal Communications Commission [and] any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person hereunder." [FN58]

\*11 41. The second prong of the NARUC I test directs us to consider whether there is reason to expect an indifferent holding-out to the eligible user public. The Applicants have requested a non-common carrier cable landing license, and the terms of the JUS C&MA, which the Applicants submitted with the application, reveal that, after the network is fully funded, any party may sell its allocated capacity. The C&MA also provides that the network administrator is authorized to execute agreements to sell unused capacity on an IRU basis. Because there are no restrictions on the ability of the network administrator or the individual owners of the Japan-US CN to sell capacity, it appears that there will be competition in the sale of Japan-US CN capacity after the network is fully funded. It is reasonable to conclude that that competition will require parties selling capacity to make flexible offers and not to offer capacity indifferently. Accordingly, pursuant to the second prong of the NARUC I test, we conclude that there is no reason to expect an indifferent holding-out to the eligible user public.

42. Based on the above analysis, we conclude that the Applicants will not offer capacity in the Japan-US CN to the public on a common carrier basis and that the public interest does not require that they do so. Accordingly, we conclude that it is appropriate to license the Japan-US CN on a non-common carrier basis.

#### E. Environmental Effects

43. The Commission has found that the construction of new submarine cable systems, individually and cumulatively, will not have a significant effect on the environment and therefore should be expressly excluded from our procedures implementing the National Environmental Policy Act of 1969. [FN59] Therefore, the Applicants are not required to submit an environmental assessment, and this application is categorically excluded from environmental processing.

#### IV. Conclusion

44. Accordingly, we conclude that the public interest under the Cable License Landing Act will be served by grant of the license to the Joint Applicants to land and operate the Japan-US CN, subject to the conditions listed below.

#### V. Ordering Clauses

45. Consistent with the foregoing, we hereby GRANT AND ISSUE the Applicants a license to land and operate an optical fiber submarine cable system (consisting of four working fiber pairs initially operating at 40 Gbps per fiber pair in a self-

healing ring configuration, expandable to 160 Gbps per fiber pair, for a total design capacity of 640 Gbps) extending between landing points at cable stations in San Luis Obispo and Point Arena, California; Makaha, Hawaii; Shima, Japan; Maruyama, Japan; and Kitaibaraki, Japan, under the provisions of the Cable Landing License Act and [Executive Order 10,530](#). This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

**\*12** (1) The location of the cable system within the territorial waters of the United States of America, its territories and possessions, and upon its shore shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their 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 Licensees shall at all times comply with any requirements of United States government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cables from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them, controlled by them, or under direct or indirect common control with them do not enjoy and shall not acquire any right to handle traffic to or from the United States, its territories, or its possessions unless such service be authorized by the Commission pursuant to Section 214 of the Communications Act, as amended;

**\*\*13083** (4) The Licensees or any persons or companies controlling them, controlled by them, or under direct or indirect common control with them shall not acquire or enjoy any right to land, connect, or operate submarine cables that is denied to any other United States company by reason of any concession, contract, understanding or working arrangement to which the Licensees or any persons controlling them, controlled by them, or under direct or indirect common control with them are parties;

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

(6) The Licensees shall notify the Commission in writing of the precise locations at which the cable will land in Japan. Such notification with respect to any given landing location shall occur no later than ninety days prior to commencing construction at that landing location. The Commission will give public notice of the filing of each description, and grant of this license will be considered final with respect to that landing location unless the Commission issues a notice to the contrary no later than sixty days after receipt of the specific description;

(7) The Commission reserves the right to require the Licensees to file an environmental assessment or environmental impact statement should it determine that the landing of the cables at those locations and construction of necessary cable landing stations would significantly affect the environment within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules;

\*13 (8) Pursuant to Section 2 of the Cable Landing License Act, 47 U.S.C. § 35; Executive Order No. 10,530, as amended; and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the Commission reserves the right to impose common carrier regulation or other regulation consistent with the Cable Landing License Act on the operations of the cable system if it finds that the public interest so requires;

(9) The Licensees shall maintain de jure and de facto control of the U.S. portion of the cable system, including the cable landing stations in the United States, sufficient to comply with the requirements of this license;

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

(11) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or \*\*13084 extended upon proper application, and, upon expiration of this license, all rights granted under it shall be terminated; and

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

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. AT&T Corp. et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, File No. SCL-LIC-19981117-00025, filed Nov. 17, 1998 (Application). A list of the applicants and the short-form names used in this Order is included in Appendix A.

FN2. 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).

FN3. See *infra* para. 36.

FN4. 47 C.F.R. § 1.767(b) (1998).

FN5. Exec. Ord. No. 10,530, reprinted as amended in 3 U.S.C. § 301 (1994).

FN6. Letter from Diane J. Cornell, Chief, Telecommunications Division, International Bureau, Federal Communications Commission, to Steven W. Lett, Deputy U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State (Dec. 7, 1998).

FN7. See Public Notice, International Bureau Issues Supplemental Comment Schedule for Application to Obtain Japan-US Submarine Cable Landing License, DA 99-419 (Mar. 1, 1999).

FN8. Letter from Steven W. Lett, Deputy United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (July 7, 1999).

FN9. See *infra* Appendix B.

FN10. Attachment A to the application, a general route sketch of the Japan-US CN, indicates that the Hawaii landing station will be provided by AT&T. The C&MA filed with the application indicates that the landing station in Hawaii will be provided by GTE HTI. On June 23, 1999, the Applicants submitted a letter clarifying that the Hawaii landing station will be in Makaha and operated by AT&T. See JUS *ex parte* letter (June 23).

FN11. See Global Crossing Statement of Position (filed Apr. 15).

FN12. An "input market" is the market for a facility or service necessary for the provision of another ("downstream") service. In this case, some of the relevant inputs for the provision of international telecommunications services are cable landing stations, backhaul, operating agreements, and interconnection.

FN13. See Global Crossing Response (Mar. 15) at 22-24. "Backhaul" refers to the provision of transport from a cable landing station to a carrier's international switch or point of presence. "Transit" refers to a service that allows traffic to be routed through one country or cable landing station to other cable systems and other countries. "Collocation" refers to the ability to install in a landing station equipment that may be necessary to service a carrier's capacity or to provide backhaul for that capacity. "Cross-connection" is the act of physically connecting a circuit in the cable system to a particular carrier's equipment within the cable landing station.



FN14. See also Comments of U S WEST, Inc. (Mar. 8) at 3-4 (stating that the consortium structure requires consortium members to exchange information, and that "such exchanges are conducive to both tacit and explicit collusion that can negatively impact carriers left out of the loop and that can leave consumers facing higher prices and less competitive terms than might otherwise be the case").

FN15. The "Construction and Maintenance Agreement," or "C&MA," is an agreement among the owners of a submarine cable system. It governs the terms of construction and operation of the cable system, including the ownership shares and governance rights of each owner. See Application Attachment D, **Japan-US Cable Network Construction & Maintenance Agreement** (July 31, 1998) (C&MA).

FN16. See C&MA ¶¶ 7.2, 7.3; Joskow Affidavit at 30, in Global Crossing Response (Mar. 15).

FN17. JUS Supplemental Comments (Mar. 8) at 21.

FN18. JUS ex parte letter (Apr. 8) at 3.

FN19. Global Crossing Response (Mar. 15) at 14.

FN20. JUS ex parte letter (April 8) at 4-5; see also Reply. Comments of KDD Corporation (Mar. 15) at 4-5 (stating that any U.S. carrier that desires to enter into an operating agreement with a facilities-based Japanese carrier will have more than ten to choose from, that carriers can terminate their own traffic in Japan, and that carriers can enter into termination arrangements or provide their own termination).

FN21. See JUS letter (Apr. 8) at 3.

FN22. See id. at 3 & n.4.

FN23. Comments of U S WEST, Inc. (Mar. 8) at 4.

FN24. Global Crossing Response (Mar. 15) at 55.

FN25. Id.

FN26. Global Crossing, "Suggested Remedies for JUS" (undated).

FN27. Id.

FN28. [47 U.S.C. §§ 34-39](#).

FN29. [47 U.S.C. § 35](#).

FN30. See [Exec. Ord. No. 10,530](#) § 5(a).

FN31. Rules and Policies on Foreign Participation in the U.S. Telecommunications

Market, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, 23,932-35 ¶¶ 87-96 (1997), recon. pending (Foreign Participation Order).

FN32. See Telefonica Larga Distancia de Puerto Rico, Inc., [Memorandum Opinion and Order](#), 12 FCC Rcd 5173 (1997); [Cable & Wireless, plc, Cable Landing License](#), 12 FCC Rcd 8516 (1997). The "effective competitive opportunities" analysis was developed and discussed in the Foreign Carrier Entry Order. See [Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order](#), 11 FCC Rcd 3873 (1995).

FN33. [Foreign Participation Order](#), 12 FCC Rcd at 23,933-35 ¶¶ 93-96.

FN34. *Id.* at 23,934 ¶ 94.

FN35. See *id.* at 23,934 ¶ 95 & n. 188.

FN36. See *id.* at 23,934 ¶¶ 94-95.

FN37. See Application Attachment C.

FN38. See [47 C.F.R. § 1.767\(a\)\(5\)](#) (as amended 1999).

FN39. See [47 C.F.R. § 1.767\(a\)\(1\)-\(7\)](#) (as amended 1999).

FN40. See JUS ex parte letter (June 18).

FN41. C&MA ¶ 7.3.

FN42. See JUS ex parte letter (June 18).

FN43. We note that even non-owners could presumably provide backhaul services by contracting with an owner of the Japan-US CN to provide space for equipment collocation.

FN44. See C&MA ¶ 14.1.

FN45. For example, the five landing parties, AT&T, MCI WorldCom, KDD, NTT, and JT, together will have over 37 percent of the voting rights. Similarly, the combination of AT&T, MCI WorldCom, and BT together will have over 37 percent of the voting rights. See *infra* Appendix B. Under the original C&MA, either of those two collections of carriers would have been able to block the upgrade.

FN46. See JUS ex parte letter (June 18).

FN47. See Office of the United States Trade Representative, Executive Office of the President, Second Joint Status Report under the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy (May 3, 1999), available at < <http://www.ustr.gov/releases/1999/05/drgagr.pdf> >.

FN48. See [47 C.F.R. § 63.14](#) (as amended 1999).

FN49. See, e.g., Reply Comments of MCI WorldCom, Inc. (Mar. 15) at 3; Supplemental Reply Comments of PSINet (Mar. 15) at 2-3; Comments of Qwest Communications Corporation (Mar. 8) at 5-6; Reply Comments of SBCI-Pacific Networks, Inc. (Mar. 15) at 5; Supplemental Comments of Viatel, Inc. (Mar. 8); see also CompTel letter (Apr. 20).

FN50. As Global Crossing notes, "pricing" in the context of a consortium cable actually refers to sharing of capital costs among the consortium members. See Joskow Affidavit at 42, in Global Crossing Response (Mar. 15). Volume-discount pricing allocates more capacity per investment unit to consortium members that make greater investments in the cable system.

FN51. Acquisition of capacity on the U.S. end of the cable system on an original ownership basis would require modification of this license.

FN52. See Tel-Optik, Ltd., [Memorandum Opinion and Order, 100 F.C.C.2d 1033, 1040-42, 1046-48 \(1985\)](#); see also [Cable & Wireless, plc, Cable Landing License, 12 FCC Rcd 8516 \(1997\)](#).

FN53. See [Cable & Wireless, 12 FCC Rcd at 8520-23 ¶¶ 11-17](#); see also [Optel Communications, Inc., 8 FCC Rcd 2267 \(1993\)](#) (conditional license).

FN54. [National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 \(D.C. Cir.\) \(NARUC I\), cert. denied, 425 U.S. 992 \(1976\)](#).

FN55. See, e.g., [Cable & Wireless](#); [Tel-Optik](#); [Optel Communications](#).

FN56. The U.S.-Japan route is also served by a number of existing and planned fiber optic cable systems, including NPC, TPC-5, China-US, PC-1, and Project Oxygen, as well as by satellite capacity over Intelsat and other satellite systems. U.S.-Japan traffic can also be carried indirectly over alternative cable systems such as FLAG, which connects Japan to the United Kingdom.

FN57. See, e.g., [Foreign Participation Order, 12 FCC Rcd at 23,934 ¶ 95](#); [Cable & Wireless, 12 FCC Rcd at 8530 ¶ 39](#); [AT&T Corp. et al., Cable Landing License, 13 FCC Rcd 16,232, 16,237 ¶ 15 \(Int'l Bur. 1998\)](#) (China-US Cable Landing License).

FN58. See [infra para. 45](#); see also, e.g., [Cable & Wireless, 12 FCC Rcd at 8531 ¶ 43](#); [China-US Cable Landing License, 13 FCC Rcd at 16,240 ¶ 24](#); [PC Landing Corp., Cable Landing License, 13 FCC Rcd 23,384, 23,389 ¶ 19 \(1998\)](#) (PC-1 Cable Landing License).

FN59. See [47 C.F.R. § 1.1306 Note 1](#) (as amended 1999); 1998 Biennial Regulatory Review - Review of International Common Carrier Regulations, IB Docket No. 98-118, [Report and Order, FCC 99-51, ¶¶ 67-69 \(rel. Mar. 23, 1999\)](#).

**\*\*13085** Appendix A

List of Parties and Short-Form Names

Applicants

\*14 AT&T Corp. ("AT&T")  
Com Tech International Corporation ("Com Tech")  
Frontier Communications Services, Inc. ("Frontier")  
GTE Hawaiian Tel International Incorporated ("GTE HTI")  
GTE Intelligent Network Services Incorporated ("GTE INS")  
International Exchange Networks Ltd. ("IXnet")  
Level 3 International, LLC ("Level 3")  
MCI WorldCom, Inc. ("MCI WorldCom")  
PCI Communications, Inc. ("PCI")  
Pacific Gateway Exchange (Bermuda), Ltd. ("PGE")  
PRIMUS Telecommunications, Inc. ("PRIMUS")  
PSINet, Inc. ("PSINet")  
Qwest Communications Corporation ("Qwest")  
RSL COM U.S.A., Inc. ("RSL USA")  
SBCI-Pacific Networks, Inc. ("SBCI")  
Sprint Communications Company L.P. ("Sprint")  
Teleglobe USA Inc. ("Teleglobe")  
Telegroup, Inc. ("Telegroup")  
VIATEL Inc. ("VIATEL")

Other parties

Signal Global Communications, Inc. ("Signal")  
Competitive Telecommunications Association, International Communications Committee ("CompTel")

Computer and Communications Industry Association ("CCIA")

Global Crossing Ltd. ("Global Crossing")

KDD Corporation ("KDD")

USA Global Link, Inc. ("USA Global Link")

U S WEST, Inc. ("U S WEST")

**\*\*13086** Appendix B

Schedules B, C, E, and F and Annex 5 of the **Japan-US Cable Network** Construction  
and Maintenance Agreement

1999 WL 476819 (F.C.C.), 14 F.C.C.R. 13,066, 14 FCC Rcd. 13,066

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