

C

Federal Communications Commission (F.C.C.)

Cable Landing License

*1 IN THE MATTER OF **FLAG ATLANTIC** LIMITED

Application for a license to land and operate in the United States a private
fiber optic submarine cable system extending between the United States and the
United Kingdom and France
File No. SCL-LIC-19990301-00005

DA 99-2041

Adopted: September 30, 1999

Released: October 1, 1999

****21359** By the Chief, Telecommunications Division:

I. Introduction

1. In this Order, we grant the application of **FLAG Atlantic** Limited (**FLAG Atlantic**) under the Cable Landing License Act [FN1] for authority to land and operate a private fiber optic submarine cable system to be called "**FLAG Atlantic-1**," extending between the United States and the United Kingdom and France. This system will be operated on a non-common carrier basis. We find that **FLAG Atlantic** has provided sufficient information under our rules to comply with the Cable Landing License Act and that it would serve the public interest to grant the cable landing license subject to the conditions listed below.

II. Application

2. **FLAG Atlantic** is a joint venture company organized and existing under the laws of Bermuda. Two Bermuda holding companies, **FLAG Atlantic** Holdings Limited (FAH) and GTS TransAtlantic Holdings, Ltd. (GTS TransAtlantic), hold 50% of **FLAG Atlantic**. FAH is a direct wholly-owned subsidiary of FLAG Telecom Holdings Limited, a Bermuda holding company. GTS TransAtlantic is an indirect wholly-owned subsidiary of Global TeleSystems Group, Inc., a publicly-traded Delaware corporation.

3. The proposed **FLAG Atlantic-1** system will be a loop system consisting of three undersea segments extending between the United States and Europe. As illustrated in the attached Exhibit A, Segment N will be the whole of the submarine cable system provided between and including the system interfaces at the cable stations on the north shore of Long Island, New York and at Cornwall, England. Segment S will

be the whole of the submarine cable system provided between and including the system interfaces at the cable stations on the south shore of Long Island and at Brittany, France. Segment E will be the whole of the submarine cable system provided between and ****21360** including the system interfaces at the cable stations at Cornwall, England and Brittany, France. The exact landing sites and the exact locations of the landing stations have not yet been finalized.

4. **FLAG Atlantic**-1 will use laser-generated light to transmit digital information over four optical fiber pairs on Segments N and S of the system and over six optical fiber pairs on Segment E of the system. The system will be based on synchronous digital hierarchy and will use dense wave division multiplexing. The system will be constructed in a self-healing ring architecture. The total capacity of the system will be 1.28 terrabits per second, which is approximately 25 times the capacity of current trans-Atlantic technology. Initially, the system will have a capacity of 160 Gbps, with upgrade potential in 160 Gbps (or multiples thereof) increments as demand warrants. **FLAG Atlantic** is expected to be placed in service in October 2000.

III. Comments

***2 5.** The International Bureau issued a public notice of the **FLAG Atlantic** application on March 26, 1999. We received no comments on the application. Pursuant to Section 1.767(b) of the Commission's rules, [FN2] the Cable Landing License Act, and [Executive Order No. 10,530](#), we informed the Department of State of the application. [FN3] The Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, stated that it has no objection to issuance of the cable landing license. [FN4]

****21361** IV. Discussion

A. Private Submarine Cable Policy

6. **FLAG Atlantic** proposes to operate **FLAG Atlantic**-1 as a non-common carrier submarine cable system in which capacity will not be offered indifferently to the user public. **FLAG Atlantic** requests a license under the Commission's private submarine cable policy, which is intended to promote competition in the provision of international transmission facilities. [FN5] 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. [FN6]

7. In applying the first 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 facilities to be offered on a common carrier basis. This public interest analysis has gener-

ally focused on whether an applicant will be able to exercise market power because of the lack of alternative facilities. Where there are sufficient alternatives, the Commission has found that the licensee will lack market power and will not be able to charge monopoly rates for cable capacity. The Commission has found that, in those circumstances, the public interest would be served by allowing a submarine cable to be offered on a non-common carrier basis. [FN7]

8. No one has suggested that the public interest requires **FLAG Atlantic-1** to be operated on a common carrier basis. Nor do we find that **FLAG Atlantic** controls any bottleneck facilities in the markets **FLAG Atlantic-1** proposes to serve. [FN8] No commenter has disputed this fact, and we find that, in light of all the circumstances, it would not serve the public interest to impose common carrier regulation on the operations of **FLAG Atlantic-1** at this time. We note, however, that we retain 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 maintain the authority ****21362** to classify facilities 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. [FN9]

***3** 9. Regarding the second prong of the test, we conclude that there is no reason to expect that capacity in the proposed cable system would be held out to the public indifferently. **FLAG Atlantic** states that capacity will not be sold indifferently to the user public. Instead, capacity will be assigned pursuant to "individualized decisions." We therefore conclude that **FLAG Atlantic** will operate **FLAG Atlantic-1** on a non-common carrier basis.

10. We conclude that **FLAG Atlantic** will not offer capacity in **FLAG Atlantic-1** 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 **FLAG Atlantic-1** on a non-common carrier basis. We also find that **FLAG Atlantic** will not provide a telecommunications service for a fee to such a class of users as to be "effectively available directly to the public" and thus will not be a "telecommunications carrier" under the Telecommunications Act of 1996. [FN10]

B. Ownership and Landing Points

11. **FLAG Atlantic** has provided the ownership information required by sections 1.767(a)(6), 63.18(e)(6), and 63.18(h) of the Commission's rules. A wholly-owned subsidiary of **FLAG Atlantic**, **FLAG Atlantic USA Ltd.**, will own the U.S. cable stations, including real property, buildings and terminal equipment, as well as the U.S. territorial portions of the submarine cable from the landing stations to the U.S. territorial limit. The two foreign cable stations and the portions of the submarine cable within British and French territorial limits will be owned by wholly-owned subsidiaries of **FLAG Atlantic** in each country. [FN11] **FLAG Atlantic** itself will own the remaining portions of the **FLAG Atlantic-1** system.

12. The application states that **FLAG Atlantic-1** will land on both the north and south shore of Long Island, New York; Cornwall, United Kingdom; and Brittany, France. We find the applicant's description of the likely landing points to be sufficient to determine that the proposed cable system complies with the provisions of the Cable Landing License Act and Commission rules. Section 1.767(a) of the Commission's rules permits applicants in an initial application to provide a general description of the landing points. [FN12] The applicant, however, must file a specific description of the landing points, including a map, no later than 90 days prior to construction at that landing point. The ****21363** Commission will give public notice of the filing of the specific description, and grant of the license will be considered final with respect to that landing point unless the Commission notifies the applicant to the contrary no later than 60 days after receipt of the specific description of the landing points.

C. Environmental Impact

13. 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. [FN13] Therefore, the Applicant is not required to submit an environmental assessment, and this application is categorically excluded from environmental processing.

V. Conclusion

***4** 14. We grant **FLAG Atlantic's** application for authority to land and operate a non-common carrier fiber optic submarine cable extending between the United States and the United Kingdom and France, subject to the conditions listed below.

VI. Ordering Clauses

15. Consistent with the foregoing, we hereby GRANT AND ISSUE **FLAG Atlantic** a license to land and operate a non-common carrier fiber optic submarine cable system (consisting of four optical fiber pairs on Segments S and N and six optical fiber pairs on segment E, with 160 Gbps capacity upon completion, and upgradeable to 1.28 terrabits per second) extending between landing points at cable stations in Long Island, New York; Cornwall, United Kingdom; and Brittany, France, 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 Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable system within the territorial waters of the United States, its territories and possessions, and upon its shore shall be in conformity with plans approved by the Secretary of the Army, and the cable shall

be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of U.S. government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cable from injury or destruction by enemies of the United States;

****21364** (3) The Licensee or any persons or companies controlling it, controlled by it, or under direct or indirect common control with it do not enjoy and shall not acquire any right to handle traffic on a common carrier basis to or from the United States, its territories, or its possessions unless such service be authorized by the Commission pursuant to Section 214 of the Communications Act, as amended;

(4) The Licensee or any persons or companies controlling it, controlled by it, or under direct or indirect common control with it shall not acquire or enjoy any right 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 Licensee or any persons controlling it, controlled by it, or under direct or indirect common control with it are parties;

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

(6) The Licensee shall notify the Commission in writing of the precise locations at which the cable will land. Such notification with respect to any given landing location shall occur no later than ninety days prior to commencing construction at the 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 locating 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 Licensee to file an environmental assessment or environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would significantly affect the environment within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules;

(8) 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 Licensee 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 this License;

****21365** (11) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or extended upon proper application, and, upon expiration of this license, all rights granted under it shall be terminated; and

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

***6** 16. This Order is issued under Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, 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, 47 C.F.R. §§ 1.106, 1.115, 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

Rebecca Arbogast

Chief

Telecommunications Division

International Bureau

FN1. 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).

FN2. 47 C.F.R. § 1.767(b) (1998).

FN3. Letter from Rebecca Arbogast, 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 (Apr. 13, 1999).

FN4. Letter from Richard C. Beaird, Acting United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, FCC (Sept. 23, 1999).

FN5. 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) (Cable & Wireless).

FN6. See [Cable & Wireless](#), 12 FCC Rcd at 8522; see also [Optel Communications, Inc., Conditional Cable Landing License](#), 8 FCC Rcd 2267 (1993); [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).

FN7. See, e.g., [Cable & Wireless](#), 12 FCC Rcd at 8523.

FN8. **FLAG Atlantic** is affiliated with several foreign carriers in Europe, including carriers in France and Germany, the destination countries for **FLAG Atlantic-1** (Hermes Europe, Railtel BV, GTS Business Services (UK) Ltd., Espirit Telecom UK Limited, and Espirit Telecom France SA). See application at Attachment B. These are small carriers that do not have more than 50% of the market in any of the key markets for providing international services. See Rule and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997) recon. pending (Foreign Participation Order).

FN9. 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).

FN10. See 47 U.S.C. § 153(44) (defining "telecommunications carrier"); [Cable & Wireless](#), 12 FCC Rcd at 8523.

FN11. **FLAG Atlantic** (UK) Ltd., will own the U.K. landing station as well as the corresponding portions of the system landing in the United Kingdom. **FLAG Atlantic** (France), S.A., will own the landing station in France as well as the corresponding portions of the system located in France.

FN12. 47 C.F.R. § 1.767(a)(5) (1997).

FN13. 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).

1999 WL 777491 (F.C.C.), 15 F.C.C.R. 21,359, 15 FCC Rcd. 21,359

END OF DOCUMENT