

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

In the Matter of)
TYCOM ATLANTIC (US) INC.)
Application for a License to Land and) File No. SCL-LIC-20000308-00007
Operate a Private Fiber-Optic Cable)
System Between the United States)
Mainland and the United Kingdom)

CABLE LANDING LICENSE

Adopted: August 8, 2000

Released: August 8, 2000

By the Chief, Telecommunications Division, International Bureau:

I. Introduction

1. In this Order, we grant the Application of TyCom Atlantic (US) Inc. (TyCom) under the Cable Landing License Act and Executive Order No. 10530 for authority to land and operate a private fiber optic submarine cable system extending between the United States and the United Kingdom (TyCom Atlantic). This system will be operated on a non-common carrier basis. We find that TyCom 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. According to the Application, TyCom, a Nevada corporation, is a wholly-owned subsidiary of TyCom Networks Limited (TyCom Networks) a Bermuda company, itself a subsidiary of Tyco International Ltd. (Tyco) also a Bermuda company. TyCom has certified that it is not itself a carrier

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

2 Exec. Ord. No. 10530 reprinted as amended in 3 U.S.C. § 301.

3 See TyCom Atlantic (USA) Inc. Application for a License to Land and Operate a Private Fiber-Optic Submarine Cable System between the United States Mainland and the United Kingdom, filed March 8, 2000, at 2, 10 (Application). Since filing its initial application, TyCom notified the Commission that it has changed its name to TyCom Networks (US) Inc. See Letter from Kent D. Bressie, Counsel for TyCom Networks (US) Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (July 14, 2000).

nor is it affiliated with any foreign carrier.⁴

3. According to the Application, the proposed cable system will be a digital fiber-optic system consisting of four fiber pairs (with a possible upgrade to eight fiber pairs) with a minimum design capacity of 640 Gbps per fiber pair. The system will have a self-healing ring configuration consisting of a northern segment and a southern segment each of which will contain four optical fiber pairs and each of which will be capable of carrying a minimum of 64 wavelengths of traffic with each wavelength operating at a nominal rate of 10 Gbps. The cable will connect Wall Township, New Jersey, and Bream, United Kingdom.⁵

III. Comments

4. We placed the Application on public notice on March 17, 2000.⁶ We did not receive any comments. Pursuant to Section 1.767(b) of the Commission's rules,⁷ the Cable Landing License Act, and Executive Order No. 10530, we informed the Department of State of the Application.⁸ 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.⁹

IV. Discussion

A. Private Submarine Cable Policy

5. TyCom proposes to operate the cable as a non-common carrier submarine cable system under which capacity will not be offered indifferently to the user public.¹⁰ TyCom requests a license under the Commission's private submarine cable policy, which is intended to promote competition in the provision of international transmission facilities.¹¹ Pursuant to this policy, the Commission has authorized non-

⁴ *Id.* at 10.

⁵ *Id.* at 3-4.

⁶ *See Non Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-00203NS (rel. March 17, 2000).

⁷ 47 C.F.R. § 1.767(b).

⁸ 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 (March 17, 2000).

⁹ Letter from Malcolm R. Lee, United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, FCC (August 3, 2000).

¹⁰ Application at 1-2, 6-9.

¹¹ *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*).

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 the applicant would make capacity available to the public indifferently and indiscriminately.¹²

6. 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.¹³ This public interest analysis has generally focused on whether an applicant will be able to exercise market power because of the lack of alternative facilities.¹⁴ 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.¹⁵ 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.¹⁶

7. TyCom asserts that there are sufficient existing and planned facilities on the route to prevent TyCom from exercising market power in offering services to the public including numerous existing common carrier cables and existing and planned non-common carrier cables.¹⁷ The cable systems cited by TyCom include the following cables extending between the United States and the United Kingdom: (1) PTAT,¹⁸ (2) Gemini,¹⁹ (3) TAT-8,²⁰ (4) TAT-9;²¹ (5) TAT 11,²² (6) TAT-12/13,²³ (7) Atlantic

¹² 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).

¹³ See, e.g., *Cable & Wireless*, 12 FCC Rcd at 8522-23.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Application at 7-8.

¹⁸ See *Tel Optik Limited*, 100 F.C.C. 2d 1033 (1985).

¹⁹ See *MFS Globenet, Inc.*, Application for a license to land and operate in the United States a private submarine fiber optic cable extending between the United States and the United Kingdom, Cable Landing License, 11 FCC Rcd 12,732 (Tel. Div. 1996), modified by *MFS Globenet, Inc., & Cable & Wireless, plc*, Modification of Cable Landing License, 12 FCC Rcd 8637 (Tel. Div. 1996) (change in ownership of the Gemini cable system).

²⁰ See *American Telephone and Telegraph Co. et al*, Application for Authorization under Section 214 of the Communications Act of 1934, as amended, to Construct and Acquire a High Capacity, Digital, Submarine Cable System, Memorandum Opinion and Order, Authorization, 98 F.C.C. 2d 440 (1984).

²¹ See *American Telephone and Telegraph Company et al*, Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System, Cable Landing License, 3 FCC Rcd 7304 (CC Bur. 1988).

Crossing-1 (AC-1),²⁴ (8) FLAG Atlantic-1,²⁵ (9) Hibernia,²⁶ (10) Level 3's transatlantic cable,²⁷ (11) TAT-14,²⁸ and (12) PTAT. PTAT, Gemini, TAT-8, TAT-9, TAT-11, TAT-12/13, and AC-1 are all operational cables that extend between the United States and the United Kingdom. The FLAG Atlantic-1, TAT-14, Hibernia, and Level 3 cable systems have been authorized by the Commission, but we are not yet aware of whether or not these cables are operational. In addition, TyCom has stated that it is not affiliated with any foreign carriers and, accordingly, does not control any bottleneck facilities in the market the proposed cable system will serve.²⁹

8. No one has advocated that the public interest requires TyCom to operate its cable on a common carrier basis. Given the unopposed evidence of the availability of alternative cables and TyCom's representation it does not have any affiliate carriers with market power in the cable landing country, we find that it would not serve the public interest to impose common carrier regulation on the operations of TyCom's proposed system at this time. We note, however, that we maintain the ability to impose common carrier or common-carrier-like obligations on the operations of this or any other submarine cable system if

²² See *American Telephone and Telegraph Company et al*, Application for a License to Land and Operate a High Capacity Digital Submarine Cable System, Cable Landing License, 7 FCC Rcd 134 (1992).

²³ See *American Telephone and Telegraph Company et al*, Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System, Cable Landing License, 8 FCC Rcd 4808 (CC Bur. 1993).

²⁴ See *SSI Atlantic Crossing, LLC*, Application for a License to Land and Operate in the United States a Digital Submarine Cable System, File No. SCL-97-002, Cable Landing License, 13 FCC Rcd 5961 (Tel. Div. 1997); Order on Reconsideration, File No. SCL-97-002, 12 FCC Rcd 17435 (Tel. Div. 1997); Modification of Cable Landing License, File No. SCL-97-002(M), 13 FCC Rcd 7171 (Tel. Div. 1998); and Order and Authorization, File No. SCL-ASG-19981207-00028, 14 FCC Rcd 10492 (Tel. Div. 1999).

²⁵ See *Flag Atlantic Limited*, Application for a License to Land and Operate in the United States a Private Fiber Optic Submarine Cable System, Cable Landing License, DA 99-2041, File No. SCL-LIC-19990301-00005 (Tel. Div., rel. Oct. 1, 1999).

²⁶ See *Worldwide Telecomm (USA) Inc.*, Application for a License to Land and Operate in the United States a Private Fiber Optic Submarine Cable System extending between the United States, Canada, Ireland, and the United Kingdom, Cable Landing License, 15 FCC Rcd 765 (Tel. Div. 2000).

²⁷ See *Level 3 International, Inc.*, 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, Cable Landing License, 15 FCC Rcd 842 (Tel. Div. 2000).

²⁸ See *American Telephone and Telegraph Co. et al*, Application for a License to Land and Operate a Submarine Cable System Extending between the United States and Denmark, Germany, the Netherlands, France and the United Kingdom, Cable Landing License, DA 99-2042, File No. SCL-LIC-19990303-00004 (Tel. Div., rel. Oct. 1, 1999).

²⁹ Application at 10-11.

the public interest so requires.³⁰ Furthermore, we have always maintained the authority 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.³¹

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. TyCom states that capacity will not be sold indifferently to the user public. Instead, capacity will be assigned pursuant to "individualized decisions."³² We therefore conclude that TyCom intends to operate the cable system on a non-common carrier basis.

10. We conclude that TyCom will not offer capacity in the TyCom Atlantic system 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 TyCom Atlantic system on a non-common carrier basis. We also find that TyCom 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 1996.³³

B. Ownership and Landing Points

11. TyCom has provided the ownership information required by Section 1.767(a)(6) and Section 63.18 of the Commission's rules.³⁴ The Applicant will own the United States landing site as well as the wet portion of the cable within U.S. territorial waters. The wet portion of the cable in international waters will be owned by TyCom Networks. The United Kingdom landing site as well as the wet portion of the cable within the territorial waters of the United Kingdom will be owned or otherwise controlled by a wholly-owned U.S. subsidiary of TyCom Networks.

³⁰ See 47 U.S.C. § 35 (providing that a license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed").

³¹ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB 97-142, *Market Entry and Regulation of Foreign Affiliated Entities*, IB 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23934 ¶ 95 (1997), *recon. pending*; *Cable & Wireless*, 12 FCC Rcd at 8530 ¶ 39; *AT&T Corp. et al.*, Cable Landing License, 13 FCC Rcd 16232, 16237 ¶15 (Int'l. Bur. 1998).

³² See Application at 6.

³³ See 47 U.S.C. § 153(44) (defining "telecommunications carrier"); *Cable & Wireless*, 12 FCC Rcd at 8523.

³⁴ See Application at 9-12.

12. The Application states that the TyCom Atlantic cable landing station in the United States will be located in Wall Township, New Jersey at coordinates 47 degrees 08.00' north, 74 degrees 03.00' west.³⁵ In the United Kingdom, the cable landing station will be located in Brean, U.K. at coordinates 51 degrees 15.500' north, 2 degrees 57.800' west.³⁶ Maps of both cable landing sites are included with the Application.

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 1969.³⁷ Therefore, the Applicant is not required to submit an environmental assessment, and this Application is categorically excluded from environmental processing.

V. Conclusion

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

VI. Ordering Clauses

15. Consistent with the foregoing, we hereby GRANT AND ISSUE TyCom a license to land and operate a non-common carrier fiber optic submarine cable system (consisting of four fiber pairs (with a possible upgrade to eight fiber pairs) extending between landing points at cable stations at Wall Township, New Jersey and Brean, United Kingdom) under the provisions of the Cable Landing License Act and Executive Order 10530. 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;

³⁵ *Id.* at Attachment B.

³⁶ *Id.* at Attachment C.

³⁷ *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, 14 FCC Rcd 4909, ¶¶ 67-69 (1999).

- (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;
- (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 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) 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 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;
- (7) Pursuant to Section 2 of the Cable Landing License Act, 47 U.S.C. § 35; Executive Order No. 10530, 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 additional common carrier or common-carrier-like regulation on the operations of the cable system if it finds that the public interest so requires;
- (8) 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;
- (9) 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;

(10) 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

(11) 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.

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

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