

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

In the Matter of)
FLAG Pacific Limited)
Application for a License to Land and Operate in)
the United States a Digital Submarine Cable)
System Between the United States and Canada and)
Japan and Korea)
File No. SCL-LIC-20000606-00023

CABLE LANDING LICENSE

Adopted: November 8, 2000

Released: November 9, 2000

By the Chief, Telecommunications Division:

I. Introduction

1. In this Order, we grant the application of FLAG Pacific Limited (FLAG Pacific) pursuant to the Cable Landing License Act and Executive Order No. 10530, for authority to land and operate a private fiber optic submarine cable system to be called "FLAG Pacific-1," extending between the United States and Canada, Japan, and Korea. FLAG Pacific proposes to operate FLAG Pacific-1 on a non-common carrier basis. We find that FLAG Pacific 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 set out below.

II. Application

2. According to the Application, FLAG Pacific is a company organized and existing under the laws of Bermuda. FLAG Pacific is more than 90 percent owned by FLAG Pacific Holdings Limited, a Bermuda intermediary holding company which in turn is a wholly-owned subsidiary of FLAG Telecom Holdings Limited (FLAG Telecom), a publicly-traded Bermuda holding company.

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 FLAG Pacific Limited, Application for a License to Land and Operate in the United States a Digital Submarine Cable System Between the United States and Canada and Japan and Korea, filed June 6, 2000 (Application).

4 There are three direct shareholders of FLAG Telecom that have a 10 percent or greater indirect interest in the Applicant: (1) Bell Atlantic Network Systems Co., a U.S. telecommunications company holding approximately 29.8 percent in FLAG Telecom; (2) Rathburn Limited, a British Virgin Islands investment company whose (continued....)

3. The proposed FLAG Pacific-1 cable will be a loop system consisting of undersea segments extending from south of Tokyo, Japan to Pusan, Korea; the Aleutian Islands, Alaska; Vancouver Island, Canada; San Francisco, California (or, alternatively, Portland, Oregon); and the Hawaiian Islands. As illustrated in Exhibit A, Segment N will extend north from the western coast of the United States, either from a point near Portland, Oregon or a point south of San Francisco, California, to Vancouver Island, Canada, to the Aleutian Islands in Alaska, and across the Pacific Ocean to Pusan, Korea, and on to a point south of Tokyo, Japan; Segment S will extend either from a point near Portland, Oregon or a point south of San Francisco, California to the Hawaiian Islands, and across the Pacific Ocean to a point south of Tokyo, Japan. The exact landing sites and the exact locations of the landing stations, including whether FLAG Pacific-1 will land on the western shore of Oregon as opposed to south of San Francisco, California, have not yet been finalized.⁵

4. FLAG Pacific-1 will use laser-generated light to transmit digital information over eight optical fiber pairs on Segments N and S 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 system is designed to carry voice, high-speed data, and video traffic with capacity of 5.12 terabits per second on each of the trans-Pacific segments, which is approximately 25 times the capacity of current trans-Pacific cable technology. FLAG Pacific-1 is expected to begin service in the fourth quarter of 2001.⁶

III. Comments

5. We placed the Application on public notice on June 16, 2000.⁷ We received no comments on the application. Pursuant to Section 1.767(b) of the Commission's rules,⁸ the Cable Landing License Act, and Executive Order No. 10530, we informed the Department of State of the Application.⁹ 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.¹⁰

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ultimate parent is Dallah Al Baraka Holding Company B.E.J.S.C., a Bahraini corporation, holding approximately 15.5 percent in FLAG Telecom; and (3) K.I.N. (Thailand) Co., Ltd., a Thailand investment company whose ultimate parent is Telecom Asia Corporation Public Co. Ltd., a Thailand company principally engaged in fixed line local network operations in Bangkok, cable television operations, and the provision of Internet service, holding approximately 10.9 percent in FLAG Telecom. *See* Application at 12-13.

⁵ *See* Application at 1-2, 5.

⁶ *Id.* at 3-4.

⁷ *See Non Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-00247NS (rel. June 16, 2000).

⁸ 47 C.F.R. § 1.767(b).

⁹ Letter from George Li, Deputy 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 (June 15, 2000).

¹⁰ Letter from Geoffrey W. Chapman, Acting United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (November 8, 2000).

IV. Discussion

A. Private Submarine Cable Policy

6. FLAG Pacific proposes to operate FLAG Pacific-1 as a non-common carrier submarine cable system in which capacity will not be offered indifferently to the user public. FLAG Pacific 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-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.¹²

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 generally has 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 public interest does not require the licensee to offer capacity on the proposed cable on a common carrier basis, but rather, in those circumstances, the public interest would be served by allowing a submarine cable to be offered on a non-common carrier basis.¹³

8. In the Application, FLAG Pacific states that it is not affiliated with any foreign carrier with market power in the markets where FLAG Pacific-1 will land.¹⁴ In addition, FLAG Pacific asserts that there are sufficient existing and planned cables on the route to prevent FLAG Pacific-1 from becoming a bottleneck facility,¹⁵ including: (1) CANUS-1;¹⁶ (2) Japan-US;¹⁷ and (3) China-US.¹⁸

¹¹ See *Tel-Optik Limited*, Memorandum Opinion and Order, 100 F.C.C. 2d 1033, 1044-42, 1046-48 (1985); see also *Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, Cable Landing License, 12 FCC Rcd 8516 (1997) (*Cable & Wireless*).

¹² See *Cable & Wireless*, 12 FCC Rcd at 8522; see also *National Association of Regulatory Utility Commissioners v. FCC*, 525 F. 2d 630, 642 (D.C. Cir. 1976) (*NARUC I*), cert. denied, 425 U.S. 992 (1976). The D.C. Circuit recently affirmed the continuing use of the *NARUC I* test in the context of reviewing an undersea cable license in light of the addition of the terms "telecommunications carrier" and "telecommunications service" in the Communications Act as part of the Telecommunications Act of 1996. See *Virgin Islands Telephone Corporation v. FCC*, 198 F. 3d 921 (D.C. Cir. 1999).

¹³ See, e.g., *Cable & Wireless*, 12 FCC Rcd at 8523.

¹⁴ See Application at 15. FLAG Pacific has no foreign affiliates in Canada or Korea. In Japan, FLAG Pacific is affiliated with FLAG Telecom Japan Limited, which is licensed to provide telecommunications service in Japan, through FLAG Pacific's ultimate parent FLAG Telecom, which wholly owns and controls FLAG Telecom Japan Limited. *Id.* at 11, 15. FLAG Telecom Japan Limited is a small carrier that does not have more than 50 percent of the market share in any of the key markets for providing international services in Japan. See 47 C.F.R. §§ 63.09(f), 63.10(a)(3).

¹⁵ Application at 8-10.

¹⁶ *Optel Communication, Inc., Application for a License to Land and Operate a Submarine Cable Between Canada and the United States*, Conditional Cable Landing License, 8 FCC Rcd 2267, 2268-69, ¶ 11 (CCB 1993) (continued....)

9. No one has advocated that the public interest requires FLAG Pacific-1 to be operated on a common carrier basis. Given the unopposed evidence on the availability of alternative cables and FLAG Pacific's representation that none of its affiliates has market power in any of the cable's landing countries, we find that it would not serve the public interest to impose common carrier regulation on the operations of FLAG Pacific-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 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.¹⁹

10. 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 Pacific states that capacity will not be sold indifferently to the user public. Instead, capacity will be assigned pursuant to "individualized decisions."²⁰ We therefore conclude that FLAG Pacific will operate FLAG Pacific-1 on a non-common carrier basis.

11. We conclude that FLAG Pacific will not offer capacity in FLAG Pacific-1 to the public on a common carrier basis and that the public interest does not require it to do so. Accordingly, we conclude that it is appropriate to license FLAG Pacific-1 on a non-common carrier basis. We also find that FLAG Pacific 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" pursuant to the Telecommunications Act of 1996.²¹

B. Ownership and Landing Points

12. FLAG Pacific has provided the ownership information required by Sections 1.767(a)(6) 63.18 of the Commission's rules. A wholly-owned subsidiary of FLAG Pacific, FLAG Pacific 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. In Japan, either a wholly-owned subsidiary of FLAG Pacific or a wholly-owned subsidiary of FLAG Pacific's parent FLAG Telecom, FLAG Telecom Japan Limited, will own or have the right to use the landing station south

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(common carriers operate terrestrial, microwave and satellite facilities providing cross-border services between United States and Canada).

¹⁷ *AT&T et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, Cable Landing License, 14 FCC Rcd 13066, 13080, ¶ 39 n. 56 (1999) (U.S.-Japan route is served by several existing and planned cable systems).

¹⁸ *AT&T Corp. et al., Joint Application for a License to Land and Operate a Submarine Cable System Between the United States, China, Taiwan, Japan, South Korea, and Guam*, Cable Landing License, 13 FCC Rcd 16232 (IB 1998).

¹⁹ *See, e.g., Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket No. 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23934 at ¶ 95 (*Foreign Participation Order*); *Cable & Wireless*, 12 FCC Rcd at 8530, ¶ 39.

²⁰ *See* Application at 10.

²¹ *See* 47 C.F.R. § 153(44) (defining "telecommunications carrier"); *Cable & Wireless*, 12 FCC Rcd at 8523, ¶ 17.

of Tokyo, Japan and the corresponding portions of the system in Japan.²² The foreign cable stations and the portions of the submarine cable within Canadian and Korean territorial limits will be owned by wholly-owned subsidiaries of FLAG Pacific in each country.²³ FLAG Pacific itself will own the remaining portions of the FLAG Pacific-1 system.

13. The application states that FLAG Pacific-1 will land either south of San Francisco, California or, alternatively, on the coast near Portland, Oregon, will have a system interface at the cable landing station on the Hawaiian Islands, a regeneration point/landing station on the Aleutian Islands in Alaska, and system interfaces at the landing stations in Canada, Japan, and Korea. We find the applicant's description of the likely landing points to be sufficient to determine that the proposed 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 landing points.²⁴ 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 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

14. 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 1969.²⁵ Therefore, the Applicant is not required to submit an environmental assessment, and this application is categorically excluded from environmental processing.

V. Conclusion

15. We grant FLAG Pacific's application for authority to land and operate a non-common carrier fiber optic submarine cable extending between the United States and Canada, Japan, and Korea, subject to the conditions listed below.

VI. Ordering Clauses

16. Consistent with the foregoing, we hereby GRANT and ISSUE FLAG Pacific a license to land and operate a non-common carrier fiber optic submarine cable system (consisting of eight optical fiber pairs on Segments S and N, with capacity of 5.12 terabits per second) extending between landing points at cable stations in San Francisco, California (or, alternatively, Portland, Oregon); the Aleutian Islands, Alaska; the Hawaiian Islands; Vancouver Island, Canada; Tokyo, Japan; and Pusan, Korea, under the

²² See Application at 11.

²³ FLAG Pacific Canada Limited will own or have the right to use the landing station in Vancouver Island, Canada and the corresponding portions of the system in Canada. FLAG Pacific Korea Limited will own or have the right to use the landing station in Pusan, Korea and the corresponding portions of the system in Korea. See Application at 11-12.

²⁴ 47 C.F.R. § 1.767(a)(5).

²⁵ 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, at ¶¶ 67-69 (1999).

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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;
- (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 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) 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 90 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 60 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. 10530, as amended; and Section 214 of the Communications Act of 1934, as amended,

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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 the Cable Landing License Act, 47 U.S.C. § 35, or for failure to comply with the terms of this license;
- (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.

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
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Exhibit A
FLAG Pacific-1 Route Sketch

