

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

In the Matter of )
Australia-Japan Cable (Guam) Limited )
Application for License to Land and Operate in )
the United States a Private Submarine Fiber Optic )
Cable Extending Between Australia, Guam, and )
Japan )
SCL-LIC-20000629-00025

CABLE LANDING LICENSE

Adopted: December 7, 2000

Released: December 8, 2000

By the Associate Chief, Telecommunications Division:

I. Introduction

1. In this Order, we grant the application of Australia-Japan Cable (Guam) Limited ("AJC Guam"), pursuant to the Cable Landing License Act<sup>1</sup> and Executive Order No. 10530,<sup>2</sup> for authority to land and operate a private fiber optic submarine cable system to be called the "Australia-Japan Cable," or "AJC," extending between Australia, Guam and Japan.<sup>3</sup> AJC Guam proposes to operate AJC on a non-common carrier basis. We find that AJC Guam 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 AJC Application, AJC Guam, which will own and control the portion of AJC located in U.S. territorial waters, is a company organized and existing under the laws of Bermuda. AJC Guam is wholly owned by Australia-Japan Cable Limited ("AJC Ltd."), which in turn is wholly owned by Australia-Japan Cable Holding ("AJCH"), both Bermuda companies.<sup>4</sup> AJCH, AJC Ltd., and

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 Australia-Japan Cable (Guam) Limited Application to Land and Operate in the United States a Private Submarine Fiber Optic Cable Network, filed June 29, 2000 (AJC Application); see also Letter from Stephen R. Bell and Sophie J. Keefer, Counsel for AJC Guam, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Oct. 23, 2000 (AJC Oct. 23 Letter).

4 AJC Application at 2.

AJC Guam are 39.9 percent indirectly owned by Telstra Corporation Limited (“Telstra”), the Australian incumbent telecommunications carrier providing local and long distance, including international, services in Australia.<sup>5</sup> Telstra, in turn, is 50.01 percent owned by the Australian Government. Additional owners of AJCH, AJC Ltd., and AJC Guam are: Concert Global Networks Services Limited, a Bermuda corporation ultimately owned 50 percent by AT&T Corporation and 50 percent by British Telecom PLC, both publicly traded communications companies (10.1 percent); Japan Telecom Co., Ltd., a publicly traded Japanese corporation engaged in communications (10 percent); MCI WorldCom Global Network Services Limited, a Bermuda corporation ultimately owned by MCI Worldcom Inc., a publicly traded communications company (15 percent); NTT Communications Corporation, a Japanese corporation and wholly owned subsidiary of Nippon Telegraph and Telephone Corporation, a Japanese corporation engaged in communications that is 46.7 percent owned by the Japanese Government (10 percent)<sup>6</sup>; and Teleglobe Inc., a publicly traded Canadian corporation engaged in communications (15 percent).<sup>7</sup>

3. AJC Guam’s immediate parent, AJC Ltd., also wholly owns: (1) Australia-Japan Cable (Australia) Limited (“AJC Australia”), the entity that will own and control the portion of the cable located in Australian territorial waters; (2) Australia-Japan Cable (Japan) Limited (“AJC Japan”), the entity that will own and control the portion of the cable located in Japanese territorial waters; and (3) Australia-Japan Cable (Management) Limited (“AJC Management”), a Bermuda corporation that will manage the cable pursuant to a contractual arrangement between the owners of the cable and AJC Management. AJC Ltd. itself will own and control the portions of the cable located in international waters.<sup>8</sup>

4. AJC will connect Australia, Guam, and Japan, with two separate landing points in each location. AJC will be configured as a two-fiber pair “collapsed ring” network, with a single backbone in deep water between Australia and Japan and double branch landings to terminals in Australia, Guam, and Japan. The total distance of the cable will be approximately 12,000 kilometers. In addition, AJC will use terrestrial transmission links between the in-country terminals (and optionally a submarine link for Japan) to close the collapsed ring.<sup>9</sup> A map of AJC is attached as Exhibit A. AJC will provide synchronous digital hierarchy (SDH) transmission facilities over optical fiber pairs operated at a nominal wavelength of about 1.5 micrometers and using optical amplification. Each fiber pair will be capable of carrying 32 separate wavelengths in each direction, each modulated to STM-64 level, although the initial equipment provisioning will be linked to that required to support four such separate wavelengths in each direction per fiber pair. Thus, the total design capacity, based on current technology, will be 320 Gbps per fiber pair, initially

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<sup>5</sup> See AJC Oct. 23 Letter at Enclosure, 1. See also, e.g., *Telstra, Inc., Application for Section 214 Authority to Acquire Capacity in International Facilities for the Provision of Switched and Private Line Services Between the United States and Australia*, File No. ITC-97-320, Memorandum Opinion, Order and Certificate, 13 FCC Rcd 205, 208 at paras. 7-9 (IB 1998) (*Telstra Facilities Order*); see also Letter from Stephen R. Bell and Sophie J. Keefer to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Nov. 6, 2000, at Enclosure, 1 (AJC Nov. 6 Letter).

<sup>6</sup> See AJC Oct. 23 Letter at 1.

<sup>7</sup> AJC Application at 2.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 3.

equipped to 40 Gbps per fiber pair.<sup>10</sup>

5. According to the AJC Application, AJC capacity will be available on three paths: Australia-Japan; Australia-Guam; and Guam-Japan. Applicants state that capacity purchasers will be able to interconnect with several other planned and existing cables in Australia, Guam, and Japan, that future use of AJC may comprise other than SDH traffic, such as Internet Protocol traffic through high speed routers, and that AJC will be capable of supporting such alternative use of each wavelength through the provision of suitable transmission equipment. Applicants also state that it will be possible to expand the capacity of AJC, either to carry Internet Protocol traffic or to provide transport of additional SDH traffic. AJC's owners plan to place the cable into commercial service by June 30, 2001.<sup>11</sup>

6. According to Applicants, the AJC Ltd. subsidiaries that will own and control the portions of AJC located in territorial waters will obtain Indefeasible Rights of Use ("IRUs") in cable landing stations owned by landing parties other than AJC subsidiaries. AJC Guam will receive an IRU from Concert Global Network USA LLC, a Delaware corporation that owns 100 percent of the existing Tanguisson, Guam and Tumon Bay, Guam landing stations.<sup>12</sup> In Japan, AJC Japan will receive an IRU from NTT Communications Corporation, the 100 percent owner of the Shima, Japan cable landing station and an IRU from Japan Telecom Co., Ltd., the 100 percent owner of the Maruyama, Japan cable landing station.<sup>13</sup> In Australia, AJC Australia will receive an IRU from Telstra Corporation Limited, the 100 percent owner of the Oxford Falls, Australia and Paddington, Australia cable landing stations.<sup>14</sup> Pursuant to the landing party agreements entered into by the AJC Ltd. subsidiaries with the four landing parties, the landing parties are required to provide space and connection with the network at the cable stations to alternative carriers on a nondiscriminatory basis for the provision of backhaul services between the cable station and a central office or international gateway, either for the carriers' own purposes or for purposes of resale to third parties.<sup>15</sup> Applicants state that in Guam, all backhaul services will be provided by carriers unaffiliated with the owners of AJC and that in Australia and Japan, where cable users also have the right to receive backhaul services from the landing parties, these services must be provided on a nondiscriminatory basis to cable users.<sup>16</sup>

### III. Comments

7. We placed the AJC Application on public notice on July 12, 2000.<sup>17</sup> We received no

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 1-2.

<sup>12</sup> *See* AJC Application at 5, 8; *see also* Exhibit B of this Order.

<sup>13</sup> *See* AJC Application at 5, 8-9; *see also* Exhibit C of this Order.

<sup>14</sup> *See* AJC Application at 5, 8-9; *see also* Exhibits D and E of this Order.

<sup>15</sup> *See* AJC Application at 5-6; *see also* AJC Nov. 6 Letter, at Enclosure, 4-5.

<sup>16</sup> *See id.*

<sup>17</sup> *See Non Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-00257NS (rel. July 12, 2000).

comments on the application. Pursuant to Section 1.767(b) of the Commission's rules,<sup>18</sup> the Cable Landing License Act, and Executive Order No. 10530, we informed the Department of State of the AJC Application and the AJC Oct. 23 Letter.<sup>19</sup> 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 the issuance of the cable landing license.<sup>20</sup>

#### IV. Discussion

8. Section 35 of the Cable Landing License Act provides that licenses 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."<sup>21</sup> In the *Foreign Participation Order*,<sup>22</sup> the Commission adopted a presumption in favor of granting applications by applicants that are affiliated with carriers in destination markets that are World Trade Organization (WTO) members. The Commission observed that if a particular application presents unusual risks to competition, the Commission can address most potential problems by imposing conditions on the license.<sup>23</sup> Each of the countries in which the proposed cable would land where AJC Guam has foreign carrier affiliations as described below is a WTO member.

9. AJC Guam certifies that it is affiliated with foreign carriers, within the meaning of 47 C.F.R. Section 63.09(d) of the Commission's rules, in the destination countries of Australia and Japan. Specifically, AJC Guam states that it is affiliated with: Telstra, the incumbent provider of local and long distance services in Australia; Telstra Japan KK, which holds a Type I telecommunications license in Japan but has not yet obtained approval to offer services; and Telstra Singapore Pte Ltd. (Japan Branch), which holds a Type II telecommunications license in Japan, allowing it to resell voice data and fax services in Japan and to offer international telecommunications services.<sup>24</sup> In addition, AJC Guam advises that AJC Australia, a wholly owned subsidiary of AJC Guam's parent AJC Ltd., will apply for a Carrier License in Australia.<sup>25</sup> AJC Guam asserts that, although the Commission previously has found that Telstra possesses market power in Australia, the Commission also has found that carriers have effective competitive

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<sup>18</sup> 47 C.F.R. § 1.767(b).

<sup>19</sup> Letter from George Li, Deputy Chief, Telecommunications Division, International Bureau, Federal Communications Commission, to Steven W. Lett, Deputy U.S. Coordination, Office of International Communications and Information Policy, U.S. Department of State (July 12, 2000); Letter from George Li to Steven Lett (Oct. 24, 2000).

<sup>20</sup> Letter from Richard C. Beard, Acting United States Coordinator, International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (Dec. 6, 2000).

<sup>21</sup> 47 U.S.C. § 35.

<sup>22</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) (*Foreign Participation Order*), Order on Reconsideration, FCC 00-339 (rel. Sept. 19, 2000).

<sup>23</sup> *Id.*, 12 FCC Rcd at 23934, para. 94.

<sup>24</sup> AJC Application at 19-20.

<sup>25</sup> *Id.* at 19.

opportunities to provide international facilities-based services.<sup>26</sup>

10. Because the proposed cable's foreign affiliates are in countries that are WTO members, there is a presumption in favor of granting AJC Guam's application to land and operate AJC in the United States.<sup>27</sup> We find no reason, based on the record before us, to rebut this presumption. However, as we have discussed previously,<sup>28</sup> where there is a risk of competitive harm to U.S. consumers and to competitive providers, including telecommunications service providers and information service providers, due to an applicant's affiliation with dominant foreign carriers and foreign cable landing stations in foreign destinations, we have imposed certain conditions designed to address possible harms to competition.<sup>29</sup>

11. The Commission licenses submarine cables to be operated on either a common carrier or non-common carrier basis,<sup>30</sup> and requires a cable landing license applicant to indicate under which of these two regulatory categories it seeks to operate.<sup>31</sup> AJC Guam proposes to operate AJC as a non-common carrier submarine cable system in which capacity will not be offered indifferently to the user public.

12. The Commission's private submarine cable policy is intended to promote competition in the provision of international transmission facilities.<sup>32</sup> In determining whether a cable system qualifies to be operated on a non-common carrier basis, the Commission uses the two-part test set forth by the United States Court of Appeals for the District of Columbia Circuit in *NARUC I*.<sup>33</sup> Pursuant to this policy, the

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<sup>26</sup> *Id.* at 20, citing *Telstra, Inc., Application for Section 214 Authority to Resell International Message Telephone Service, International Private Line Services Interconnected to the PSN, and International Private Lines Not Interconnected to the PSN for the Provision of Service Between the United States and Australia*, File No. ITC-96-319, Memorandum Opinion, Order and Certificate, 12 FCC Rcd 21692, 21718 at para. 67 (IB 1997) (*Telstra Resale Order*); *Telstra Facilities Order* at 212, para. 23.

<sup>27</sup> *See Foreign Participation Order*, 12 FCC Rcd at 23932-35, paras. 87-96 (concluding that, where an applicant for a submarine cable landing license is a foreign carrier, or affiliated with a foreign carrier, that has market power in a WTO member country where the cable lands, the application is evaluated under a strong presumption that it should be granted).

<sup>28</sup> *See Telefónica SAM USA, Inc. and Telefónica SAM de Puerto Rico, Inc., Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Network Extending Between Florida, Puerto Rico, Brazil, Argentina, Chile, Peru, and Guatemala*, File No. SCL-LIC-20000204-00003, Cable Landing License, DA 00-1826 (IB/TD rel. Aug. 10, 2000) (*Telefónica SAM Order*).

<sup>29</sup> *See Telefónica SAM Order* at para. 8.

<sup>30</sup> *See, e.g., Tel-Optik Limited, Application for a License to Land and Operate a Submarine Cable Extending Between the United States and the United Kingdom*, Memorandum Opinion and Order, 100 FCC 2d 1033 (1985) (*Tel-Optik Order*) (setting forth the Commission's private submarine cable policy).

<sup>31</sup> 47 C.F.R. § 1.767(a)(6).

<sup>32</sup> *See Tel-Optik Order*, 100 FCC 2d at 1040-42, paras. 18-20, 1046-48, paras. 27-31.

<sup>33</sup> *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). 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).

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 of the submarine cable system to expect an indifferent holding-out to the eligible user public.<sup>34</sup>

13. In applying the first prong of *NARUC I* 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, although the Commission has not limited itself to that reasoning.<sup>35</sup> 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.<sup>36</sup>

14. If the Commission finds that there is no public interest reason to require the submarine cable facilities to be offered on a common carrier basis, then, under the second prong of the *NARUC I* test, the Commission considers whether there is reason to expect an indifferent holding-out by the applicant to the eligible user public. If the Commission finds that an applicant has shown that it will make individualized decisions whether and on what terms to provide service and will not undertake to serve all customers indifferently, the Commission has held that the second prong of the test has been met.<sup>37</sup>

15. Notwithstanding a Commission decision not to require a submarine cable system to be operated on a common carrier basis, the Commission retains the authority to impose common carrier or common-carrier-like obligations on the operations of that cable system, if the public interest so requires.<sup>38</sup> Furthermore, the Commission has always maintained the authority subsequently 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.<sup>39</sup>

16. In this case, with respect to the second prong of the test, AJC Guam proposes to operate

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<sup>34</sup> See *NARUC I*, 525 F.2d at 642. See also *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, Cable Landing License, 14 FCC Rcd 13066, 13080, para. 38 (1999) (*Japan-U.S. Order*); *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*, File No. SCL-96-005, Cable Landing License, 12 FCC Rcd 8516, 8520-23 paras. 11-17 (1997) (*Cable & Wireless UK Cable Order*).

<sup>35</sup> *Japan-U.S. Order*, 14 FCC Rcd at 13080, para. 39; *Review of Commission Consideration of Applications Under the Cable Landing License Act*, IB Docket No. 00-106, Notice of Proposed Rulemaking, FCC 00-210 at para. 65 (rel. June 22, 2000) (*Cable Landing License NPRM*).

<sup>36</sup> *Cable Landing License NPRM* at para. 65. See also *Cable & Wireless UK Cable Order*, 12 FCC Rcd at 8522-23, paras. 15-17.

<sup>37</sup> See, e.g., *Cable Landing License NPRM* at para. 66.

<sup>38</sup> See, e.g., *id.* at para. 67; *Japan-U.S. Order*, 14 FCC Rcd at 13080-81, para 40.

<sup>39</sup> See, e.g., *Cable Landing License NPRM* at para. 67; *Foreign Participation Order*, 12 FCC Rcd at 23934, para 95; *Cable & Wireless UK Cable Order*, 12 FCC Rcd 8530, para. 39.

AJC on a non-common carrier basis, offering bulk capacity to a specific class of eligible users, including common carriers, on an original ownership, IRU, or lease of capacity basis. AJC Guam will not hold out to the public indifferently, but will make individualized decisions in particular cases whether and on what terms to deal with prospective customers.<sup>40</sup> Based on these representations, we conclude that there is no reason to expect an indifferent holding-out to the eligible user public.

17. With respect to the first prong of the test, AJC Guam asserts that there are sufficient existing and planned facilities on the route to constrain the ability of AJC Guam to exercise market power.<sup>41</sup> AJC asserts that existing and planned common carrier and private cable systems offer connectivity between Australia, Guam, and Japan, and that AJC is designed not only to provide capacity between these points, but to be a link between cables providing transpacific capacity.<sup>42</sup> AJC Guam states that these systems include the following cables extending to one or more of the countries other than the United States in which AJC would land: (1) NPC (authorized on a non-common carrier basis to serve the U.S. Mainland, Alaska, and Japan);<sup>43</sup> (2) TPC-4 (authorized on a common carrier basis to serve the U.S. Mainland, Canada, and Japan);<sup>44</sup> (3) PacRimWest (authorized on a common carrier basis to serve Australia and Guam);<sup>45</sup> (4) PacRimEast (authorized on a common carrier basis to serve Hawaii and New Zealand);<sup>46</sup> (5) HAW-5 (authorized on a common carrier basis to serve the U.S. Mainland and Hawaii);<sup>47</sup> (6) TPC-5 (authorized on a common carrier basis to serve the U.S. Mainland, Hawaii, Guam, and Japan);<sup>48</sup>

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<sup>40</sup> See AJC Application at 7.

<sup>41</sup> See *id.*; see also AJC Nov. 6 Letter, at Enclosure, 3-4.

<sup>42</sup> See AJC Application at 7-8.

<sup>43</sup> See *Pacific Telecom Cable, Inc., Application for a License to Land and Operate in the United States a Private Submarine Cable Between the United States and Japan*, File No. ISCL-86-002-M, Cable Landing License, 4 FCC Rcd 8061 (1989); see also *Pacific Telecom Cable, Inc., Conditional Cable Landing License*, 2 FCC Rcd 2686 (1987). NPC is currently in service.

<sup>44</sup> See *AT&T et. al, Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable Systems Extending from the United States Mainland to Canada and Japan*, File No. SCL-89-004, Cable Landing License, 4 FCC Rcd 8040 (1989). TPC-4 is currently in service.

<sup>45</sup> See *AT&T et. al, Joint Application for Section 214 Authority to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between the United States Territory of Guam and Australia*, File No. ITC-90-097, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 7362 (1990). PacRimWest is currently in service.

<sup>46</sup> See *AT&T et. al, Joint Application for Section 214 Authority to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between Hawaii and New Zealand*, File No. ITC-90-072, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 7331 (1990). PacRimEast is currently in service.

<sup>47</sup> See *AT&T et.al, Joint Application for Section 214 Authority to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between the United States Mainland and Oahu, Hawaii*, File No. ITC-90-081, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 7344 (1990). HAW-5 is currently in service.

(7) Southern Cross (authorized on a common carrier basis to serve the U.S. Mainland, Hawaii, Fiji, New Zealand, and Australia);<sup>49</sup> (8) China-US (authorized on a non-common carrier basis to serve the U.S. Mainland, China, Taiwan, Japan, South Korea, and Guam);<sup>50</sup> (9) Guam-Philippines (authorized on a non-common carrier basis to serve Guam and the Philippines);<sup>51</sup> (10) Oxygen USA (authorized on a non-common carrier basis to serve the U.S. Mainland and various oversea points, including Australia, Guam, and Japan);<sup>52</sup> and (11) Japan-US (authorized on a non-common carrier basis to serve the U.S. Mainland, Japan, and Hawaii).<sup>53</sup>

18. We find that the public interest would be served by the provision of additional capacity on the routes proposed to be served by AJC, particularly on the Guam-Australia route. Currently, two U.S. cables directly serve Australia: PacRimWest and Southern Cross. Moreover, PacRimEast, a common carrier cable that serves the U.S. Mainland, Hawaii, and New Zealand, indirectly serves Australia via the Tasman-2 cable linking Australia and New Zealand.

19. In its recent Notice of Proposed Rulemaking addressing competition in the submarine cable market, the Commission noted the importance of promoting the expansion of capacity and facilities-based competition, which will result in innovation and lower prices for U.S. consumers of international

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<sup>48</sup> See *AT&T et. al, Joint Application for Section 214 Authority to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, the State of Hawaii, the Island of Guam and Japan*, File No. ITC-92-179, Memorandum Opinion, Order and Authorization, 7 FCC Rcd 7758 (CCB 1992). TPC-5 is currently in service.

<sup>49</sup> See *MFS International, Inc., Application for a License to Land and Operate in the United States A Common Carrier Fiber Optic Submarine Cable Extending Between the United States and Australia and New Zealand*, File No. SCL-97-005, Cable Landing License, 13 FCC Rcd 2932 (TD/IB 1998) (*Southern Cross Cable Order*); *MFS International, Inc.*, ITC-97-622, Memorandum Opinion, Order and Authorization, 13 FCC Rcd 2939 (TD/IB 1998); *MFS International, Inc., MFS Globenet, Inc., Pacific Carriage Limited*, File No. SCL-MOD-19990216-00002, Modification of Cable Landing License, 14 FCC Rcd 13912 (TD/IB 1999); *MFS Globenet, Inc., Pacific Carriage Limited*, File No. SCL-MOD-20000201-00002, Modification of Cable Landing License, 15 FCC Rcd 10145 (TD/IB 2000). Southern Cross is currently in service.

<sup>50</sup> See *AT&T et. al, Joint Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the United States, China, Taiwan, Japan, South Korea, and Guam*, File No. SCL-98-002, Cable Landing License, 13 FCC Rcd 16232 (TD/IB 1998). China-US is currently in service.

<sup>51</sup> See *AT&T et. al, Application for a License to Land and Operate in the United States a Private Fiber Optic Cable System Extending Between Guam and the Philippines, the G-P Cable System*, File No. SCL-AMD-19980902-0018, Cable Landing License, 14 FCC Rcd 1923 (TD/IB 1998) (*Guam-Philippines Cable Order*). Guam-Philippines is currently in service.

<sup>52</sup> See *Project Oxygen (USA) LLC, 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 Various Overseas Points*, File No. SCL-LIC-19981014-00020, Cable Landing License, 14 FCC Rcd 3924 (TD/IB 1999). We note, however, that Project Oxygen is reported to be in the process of ceasing development efforts because of lack of financing. See *Communications Week International Online, Oxygen Collapse Prompts New Pacific Network Plan*, July 17, 2000.

<sup>53</sup> See *Japan-U.S. Order, supra n. 34*, Cable Landing License, 14 FCC Rcd 13066 (1999). Japan-US is not currently in service.



communications services.<sup>54</sup> At the same time, we are concerned about a possible risk of competitive harm to U.S. consumers and competitive providers on the U.S.-Australia route due to AJC Guam's affiliation with a dominant foreign carrier and foreign cable landing stations in the cable's destination market of Australia.<sup>55</sup>

20. With respect to Australia, the International Bureau has found AJC Guam's foreign affiliate in Australia, Telstra, to have market power in the local exchange market in Australia,<sup>56</sup> and thus treats Telstra's wholly owned U.S. subsidiary, Telstra, Inc. (TI) as dominant on the U.S.-Australia route.<sup>57</sup> In 1998, the International Bureau found that U.S. carriers have effective competitive opportunities to provide international facilities-based service in Australia.<sup>58</sup> At the same time, however, Telstra is the landing party for almost all submarine cables in Australia. The Commission, in its *Foreign Participation Order*, determined that the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end.<sup>59</sup> Telstra, therefore, has market power in at least two of the three relevant markets -- cable landing station access and local access facilities or services -- on the Australian end of the U.S.-Australia route.<sup>60</sup> We are concerned that AJC's foreign affiliate, Telstra, might favor AJC or affiliated telecommunications or information service providers. We recently addressed similar concerns about potential competitive harm to U.S. consumers and service providers by attaching a limited set of conditions to a submarine cable license for a network serving the United States and destination countries in South America.<sup>61</sup>

21. In this instance, given that the AJC owners do not plan to commence commercial service until sometime just prior to June 30, 2001 and given that Southern Cross, a new common carrier cable, recently began service, we find that market forces and a limited number of additional conditions will constrain the ability of AJC Guam and its foreign affiliates in Australia to engage in anticompetitive

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<sup>54</sup> See *Cable Landing License NPRM*, at para. 95.

<sup>55</sup> We note that a different set of factors exist on the U.S.-Japan route. AJC Guam's foreign affiliates in Japan are small carriers that do not have more than 50 percent of the market share in any of the key markets for providing international services in Japan. Furthermore, although NTT is the dominant local exchange carrier in Japan, NTT's indirect 10 percent interest in AJC Guam does not constitute affiliation within the meaning of Section 63.09(e) of the Commission's rules. See 47 C.F.R. § 63.09(e). Moreover, as noted above, there are numerous cable systems serving U.S. customers between the United States and Japan.

<sup>56</sup> See *Telstra Resale Order*, 12 FCC Rcd at 21711-12, para. 52; *Telstra Facilities Order*, 13 FCC Rcd at 208, para. 9.

<sup>57</sup> See *Telstra Resale Order*, 12 FCC Rcd at 21695, para. 7; *Telstra Facilities Order*, 13 FCC Rcd at 212, para. 22.

<sup>58</sup> See *Telstra Facilities Order*, 13 FCC Rcd 205, 212, para. 23.

<sup>59</sup> See *Foreign Participation Order*, 12 FCC Rcd 23891, para. 145; see also 47 C.F.R. § 63.10(a).

<sup>60</sup> Telstra also has significant market share in international and leased circuits. See, e.g., AJC Nov. 6 Letter, at Enclosure, 6.

<sup>61</sup> See *Telefónica SAM Order* at paras. 16-30, 36(13)-(16).

practices.<sup>62</sup> Moreover, we note that the AJC landing party agreements between the landing parties (including Telstra) and the IRU holders (including AJC Australia and AJC Guam) require the landing parties to provide space and connection with the network at the cable stations to alternative carriers on a nondiscriminatory basis for the provision of backhaul services between the cable station and a central office or international gateway, either for the carriers' own purposes or for purposes of resale to third parties.<sup>63</sup> Further, where the landing parties, such as Telstra, will provide backhaul services or interconnection, they must provide them on a nondiscriminatory basis to cable users.<sup>64</sup> Finally, the availability of regional submarine cable links (SEA-ME-WE-3, APCN and JASURAU<sup>65</sup>), that together connect Australia, via Indonesia, to the Philippines, and the availability of Guam-Philippines,<sup>66</sup> connecting the Philippines to Guam, will help to create competition on the U.S.-Australia route.

22. The AJC Nov. 6 Letter indicates that AJC Guam and its affiliates in AJC are willing to accept certain conditions to the authorization to land and operate AJC.<sup>67</sup> AJC and its affiliates have accepted the following three conditions:

- (1) AJC Guam states that it is willing to commit that it will neither (directly or indirectly) accept from nor offer to an affiliated dominant carrier or foreign landing station owned by an affiliated dominant carrier in Australia a "special concession" as that term is defined in Section 63.14(b) of the Commission's rules, 47 C.F.R. § 63.14(b).
- (2) AJC Guam agrees to provide the Commission with quarterly reports (within 90 days from the end of each calendar quarter) summarizing the provisioning and maintenance of all network facilities and services procured from AJC Guam's dominant affiliates and foreign cable landing stations owned by AJC Guam's dominant affiliates in Australia, including, but not limited to those services procured on behalf of customers or any joint venture in which AJC Guam or any dominant affiliates participate. This report will contain the information required in Section 63.10(c)(4) of the Commission's rules, 47 C.F.R. §

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<sup>62</sup> The Australian landing party for Southern Cross will be Telstra's primary competitor in Australia, C&W Optus. *See Southern Cross Cable Order*, 13 FCC Rcd 2932 at para. 7.

<sup>63</sup> *See* AJC Application at 5-6. *See also* AJC Nov. 6 Letter at Enclosure, 5 ("alternative carrier is defined as "any person, other than the Landing Party, which is a telecommunications carrier or service provider in the country of the Cable Station provided by the Landing Party").

<sup>64</sup> *See id.* at 6.

<sup>65</sup> SEA-ME-WE-3, a 4 x 2.5 Gbps cable (upgradable to 8 x 2.5 Gbps) maintained by non-U.S. entities between foreign destination points, including Australia, Indonesia, and the Philippines, went into service in 1999. APCN, the Asia Pacific Cable Network, a 5 Gbps cable (upgradable to 2 x 5 Gbps) maintained by non-U.S. entities between foreign destination points, including Indonesia and the Philippines, went into service in 1997. JASURAU<sup>65</sup>, a 5 Gbps cable between Australia and Indonesia maintained by Telstra and Indosat, went into service in 1997. *See, e.g.*, "Submarine Cables of the World: Australasian Region," at [http://www.iscpc.org/cabledb/aus\\_cabl\\_page.htm](http://www.iscpc.org/cabledb/aus_cabl_page.htm), listing cables for which Telstra has responsibility in Australian waters, and "Submarine Cables of the World: Western Pacific and Far Eastern Region," at [http://www.iscpc.org/cabledb/wpac\\_page.htm](http://www.iscpc.org/cabledb/wpac_page.htm).

<sup>66</sup> *See, supra* n. 51, *Guam-Philippines Cable Order*.

<sup>67</sup> *See* AJC Nov. 6 Letter at 1-2.

63.10(c)(4).

- (3) AJC states that it is the intent of AJC Guam and its affiliates to provide capacity users direct interface access to the cable network interface as well as the ability to collocate their own equipment on commercially reasonable and non-discriminatory terms at the cable stations in order to access the AJC network. In order to clarify that intention, AJC Guam states that it is willing to agree to a condition that capacity users will (if requested by the user) be provided direct interface access to the cable network interface as well as the ability to collocate their own equipment on commercially reasonable and non-discriminatory terms at the cable stations in order to access the AJC network.

The conditions agreed to by AJC Guam and its affiliates, along with the conditions regularly attached to the grant of non-common carrier cables, should serve to address our concerns that AJC's foreign affiliate, Telstra, might favor AJC or affiliated telecommunications and information service providers.

23. Based on the analysis above, we conclude that AJC Guam will not offer capacity in AJC to the public on a common carrier basis, and that the public interest does not require that it do so. Accordingly, we conclude that it is appropriate to license AJC on a non-common carrier basis, but with certain common-carrier-like conditions designed to detect and deter anticompetitive activity detrimental to U.S. consumers. We emphasize that our decision to grant this cable landing license to AJC Guam on a non-common carrier basis is predicated in part upon the current and planned facility alternatives in the region. Because of these alternatives, carriers and users alike will have viable choices other than AJC when seeking capacity. If the public interest should require, we retain the authority to modify these conditions and to classify these facilities as common carrier facilities subject to Title II of the Communications Act. We also find that AJC Guam will not provide a telecommunications service for a fee to such class of users as to be "effectively available directly to the public" and thus will not be a "telecommunications carrier" under the 1996 Act.<sup>68</sup>

## V. Ownership And Landing Points

24. AJC Guam has provided the ownership information required by Sections 1.767(a)(6) and 63.18 of the Commission's rules. According to the AJC Application, AJC Guam is 39.99 percent indirectly owned by Telstra, itself 50.01 percent owned by the Australian Government; 15 percent indirectly owned by MCI Worldcom; 15 percent indirectly owned by Teleglobe Inc.; 10.01 percent owned by Concert Global Network Services, a 50/50 joint venture of AT&T Corporation and British Telecom PLC; 10 percent indirectly owned by Japan Telecom Co., Ltd.; and 10 percent indirectly owned by NTT, itself 53 percent owned by the Japanese Government. AJC Guam will hold an IRU in the Tanguisson, Guam and Tumon Bay, Guam landing stations and will own and control the portion of AJC located in U.S. territorial waters. Wholly-owned subsidiaries of AJC Guam's direct parent, AJC Ltd., will hold IRUs in the Japan and Australia cable stations. These subsidiaries will own the portions of AJC located, respectively, in Japanese and Australian territorial waters, while AJC Ltd. itself will own and control the portions of the cable located in international waters. AJC Guam states that it is affiliated, in AJC's destination markets, with Telstra, Telstra Japan KK, and Telstra Singapore Pte Ltd.<sup>69</sup>

25. AJC Guam states that AJC will land at: Shima, Japan; Maruyama, Japan; Tanguisson,

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<sup>68</sup> See 47 U.S.C. § 153(44) (defining "telecommunications carrier"); *Cable & Wireless UK Cable Order*, 12 FCC Rcd at 8523, para. 17.

<sup>69</sup> See AJC Application at 8-20.

Guam, U.S.A.; Tumon Bay, Guam, U.S.A.; Oxford Falls, Australia; and Paddington, Australia. AJC Guam has complied with Section 1.767(a) of the Commission's rules, which requires applicants to file a specific description of any landing point, including a map.<sup>70</sup> AJC Guam has filed, with the AJC Application, the specific description of each landing point, maps showing specific coordinates of each landing station, and the identity, citizenship, and specific ownership share of each owner of each U.S. landing station. These are attached as Exhibits B-E. The license therefore is not subject to any further public notice or Commission approval of the cable system's landing points pursuant to the procedure in Section 1.767(a).

## **VI. Environmental Impact**

26. Based on the information provided by AJC Guam and pursuant to the Commission's procedures implementing the National Environmental Policy Act of 1969,<sup>71</sup> we find that acting on the AJC Application would not significantly affect the environment according to Section 1.1307(a) or (b) of the Commission's rules. Therefore, pursuant to Section 1.1306 of the Commission's rules, we conclude that grant of the requested license would not significantly affect the environment. Consequently, AJC Guam is not required to submit an environmental assessment, and the AJC Application is categorically excluded from environmental processing.

## **VII. Conclusion**

27. We grant the AJC Application for authority to land and operate a non-common carrier fiber optic submarine cable extending between Tanguisson and Tumon Bay, Guam; Shima and Maruyama, Japan; and Oxford Falls and Paddington, Australia, subject to the conditions listed below.

## **VIII. Ordering Clauses**

28. Consistent with the foregoing and pursuant to the Cable Landing License Act and Executive Order 10530, we hereby GRANT AND ISSUE AJC Guam a license to land and operate a non-common carrier fiber optic cable two-fiber pair "collapsed ring" network that uses SDH technology to provide an initial system capacity of 40 Gbps per fiber pair for service and protection, upgradable to a total design capacity of 320 Gbps per fiber pair, extending between Guam, U.S.A. and Japan and Australia. 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

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<sup>70</sup> See 47 C.F.R. § 1.767(a).

<sup>71</sup> 47 C.F.R. §§ 1.1301-1.1319.

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

## Federal Communications Commission

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20554, within 30 days of the release of the cable landing license;

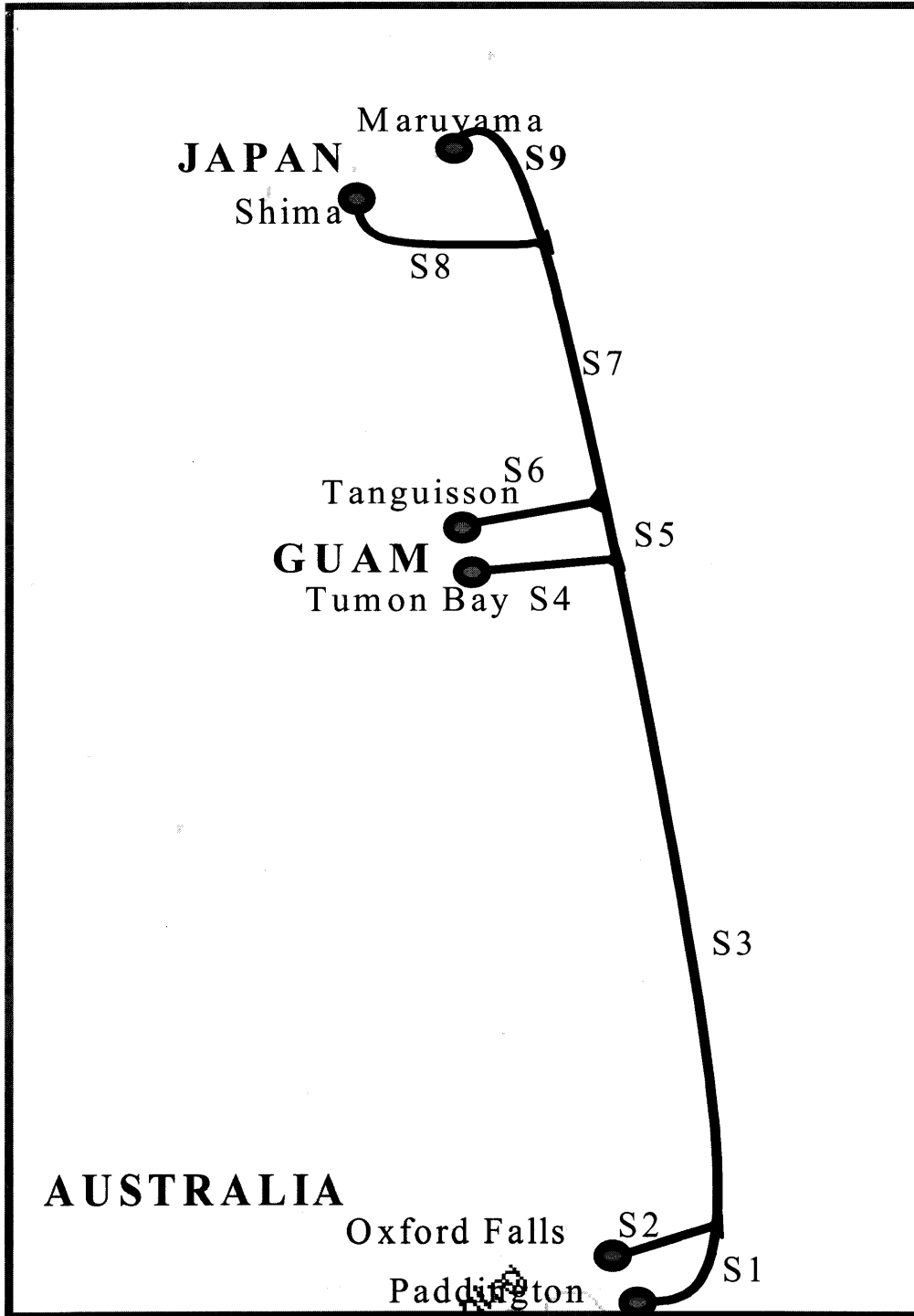
- (12) The Licensee shall not either directly or indirectly accept from nor offer to an affiliated dominant carrier or foreign landing station owned by an affiliated dominant carrier in Australia a “special concession,” as that term is defined in Section 63.14(b) of the Commission’s rules, 47 C.F.R. § 63.14(b);
- (13) The Licensee shall provide the Commission with quarterly reports (within 90 days from the end of each calendar quarter) summarizing the provisioning and maintenance of all network facilities and services procured from the Licensee’s dominant affiliates and foreign cable landing stations owned by AJC Guam’s dominant affiliates in Australia, including, but not limited to those services procured on behalf of customers or any joint venture in which the Licensee and any dominant affiliates participate; this report will contain the information required in Section 63.10(c)(4) of the Commission’s rules, 47 C.F.R. § 63.14(c)(4); and
- (14) The Licensee and its affiliates will provide capacity users direct interface access (if requested by the user) to the cable network’s interface as well as the ability to collocate their own equipment on commercially reasonable and non-discriminatory terms at the cable stations in order to access the AJC network.

29. 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

Jacquelynn Ruff  
Associate Chief, Telecommunications Division  
International Bureau

Exhibit A



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Exhibit B

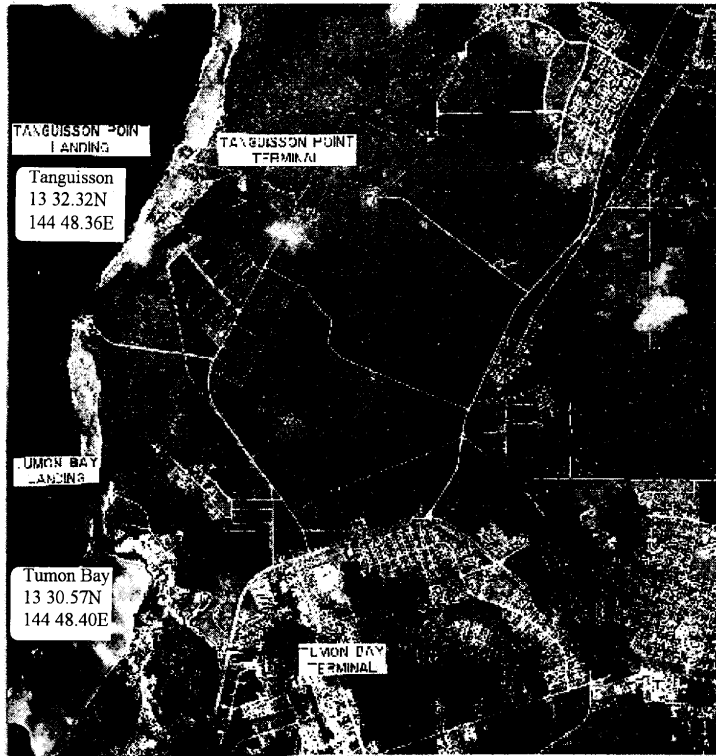




Exhibit C

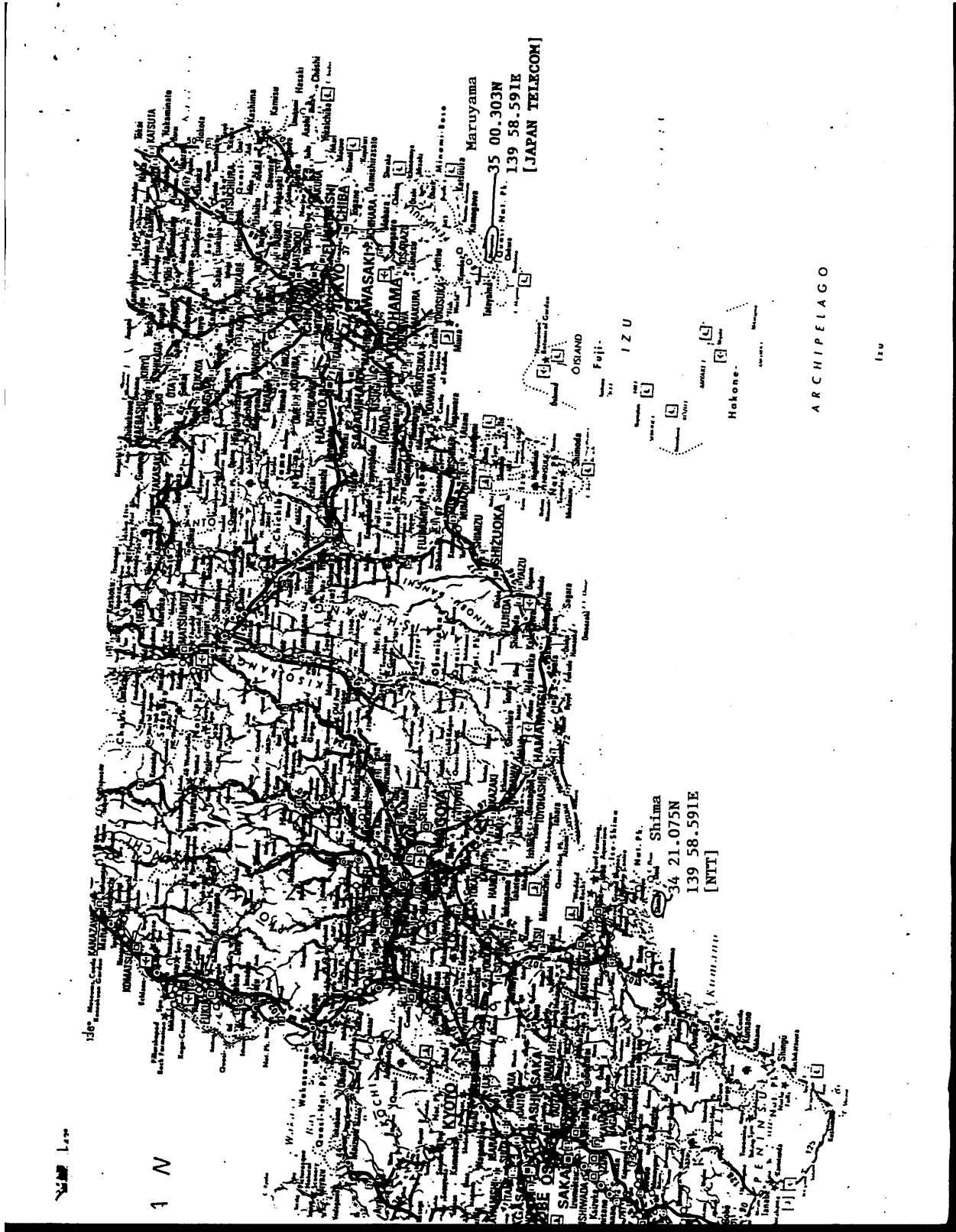


Exhibit D

20 Sydney Region, New South Wales

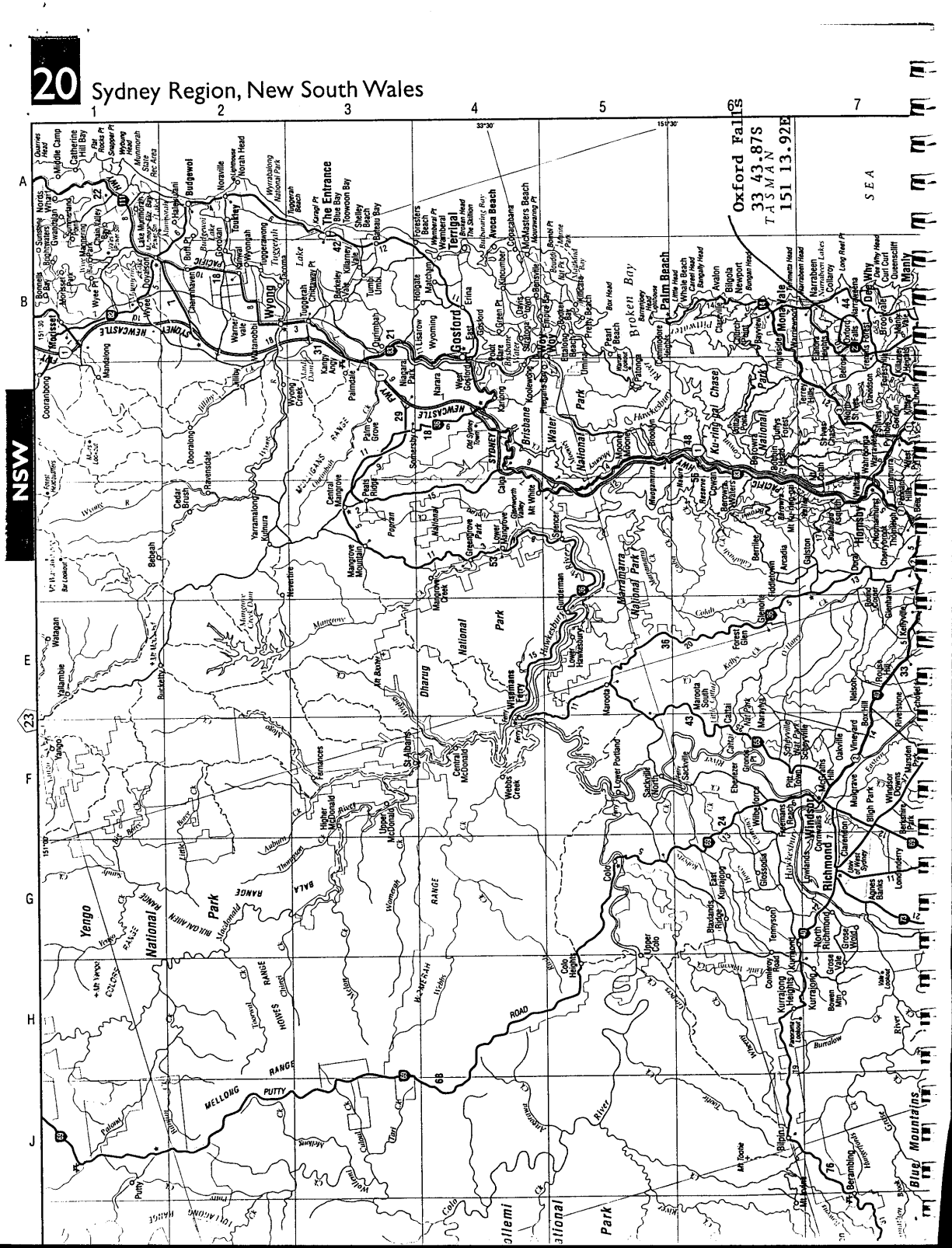


Exhibit E

