January 5, 2004

VIA E-MAIL

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: USTR Section 1377 Request for Comments Concerning Compliance with Telecommunications Trade Agreements; India's Commitments Under The Annex on Telecommunications Negotiated Under the Auspices of the General Agreement on Trade in Services

Dear Ms. Blue:

FLAG Telecom Group Limited ("FLAG") hereby submits comments with respect to the Office of the United States Trade Representative's ("USTR") 2004 Section 1377 Request for Comments Concerning Compliance with Telecommunications Trade Agreements.[1] These comments set forth FLAG's concerns with anticompetitive practices in India that are inconsistent with India's international obligations under the General Agreement on Trade in Services. FLAG is a leading independent provider of communications and network services, with 250 employees and approximately US$200 million in annual revenue. FLAG has more than 100 international

[1] *See Request for Comments Concerning Compliance With Telecommunications Trade Agreements*, 68 Fed. Reg. 68444-5 (Dec. 8, 2003).

carriers as customers, including major U.S. providers such as AT&T, Sprint, MCI, Verizon, and Qwest. Apart from large U.S. and other carriers, FLAG's customers also include resellers of communications products and services, Internet service providers, application service providers and, indirectly, multinational corporations that purchase services from FLAG's customers.

In the "2003 Section 1377 Report," USTR identified significant trade and regulatory concerns relating to the Indian telecommunications services market.[2] Specifically, USTR identified the"[l]ack of an independent regulator with adequate authority" as a priority matter in addressing adverse competitive conditions in India's telecommunications market.[3] USTR also cited U.S. suppliers' concern that "the Indian regulator is not addressing competitive issues in an impartial manner" as an issue warranting additional monitoring.[4] USTR confirmed that an independent regulator with strong enforcement authority and operating under transparent procedures are among the key components needed to ensure adequate implementation of India's WTO commitments.

FLAG appreciates this opportunity to draw the USTR's attention to a specific example of how the regulatory environment in India is adversely impacting the ability of U.S. firms to provide international telecommunications services in the Indian market. FLAG respectfully requests that USTR work urgently with the Indian Government to help it meet its commitments in basic telecommunications and value-added network services under the General Agreement on Trade and Services.

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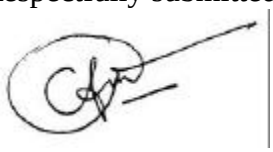
[2] USTR, Results of 2003 "Section 1377" Review of Telecommunications Trade Agreements (Apr. 2, 2003) ("2003 Section 1377 Report").

[3] *Id.* at 4.

[4] *Id.* at 5.

Information supporting these comments is set forth in the attached statement. Please do not hesitate to contact me if FLAG can be of further assistance.

Respectfully submitted,



Kees van Ophem
General Counsel
FLAG Telecom Group Limited

I. ANTICOMPETITIVE PRACTICES IN INDIA'S TELECOMMUNICATIONS SECTOR CREATE BARRIERS TO INTERNATIONAL TRADE IN TELECOMMUNICATIONS SERVICES

FLAG Telecom Group Limited ("FLAG"), a leading independent provider of communications and network services, has for several years been unable to enforce its rights to obtain access to India's telecommunications market for its international carrier customers. Despite having invested hundreds of millions of dollars in the construction of a fiber optic cable that lands in India and having the legal right to sell capacity into India, FLAG remains unable to fully serve this important, growing market.

The obstacle to FLAG's efforts is Videsh Sanchar Nigam Limited ("VSNL"), an Indian telecommunications company in which the Indian Government remains a 26% shareholder.[5] VSNL leverages its dominant market position to restrict access to India's market, creating unlawful barriers to FLAG and its customers, which include major U.S. carriers such as AT&T, MCI, Qwest, Verizon and Sprint. Despite the commitments made by the Indian Government under the General Agreement on Trade in Services ("GATS"), access to India's telecommunications market remains restricted due to VSNL's anticompetitive conduct and control of the international telecommunications gateways into and out of India.

A. Overview of India's International Telecommunications Market

Despite the rapidly increasing demand for telecommunications in and to India, India is effectively undersupplied by international bandwidth capacity in an oligopoly consisting of the FLAG-owned FLAG Europe-Asia cable (the "FEA"), the SEA-ME-WE 3 cable, a consortium cable owned in part by VSNL,[6] and two regional cable systems.[7] VSNL was India's state-owned

[5] *See* Videsh Sanchar Nigam Limited, Form 20-F for year ended March 31, 2002 (filed Sept. 27, 2002) at 21, *available at* http://www.sec.gov/Archives/edgar/data/1116134/000095014402010063/0000950144-02-010063.txt ("VSNL 2002 Form 20-F").

[6] "SEA-ME-WE" is an acronym for "Southeast Asia - Middle East -Western Europe."

monopoly provider of international telecommunications services until 1999.[8] In 1999, the Indian Government divested itself of all but 26% of VSNL, with a 46% share being sold to Panatone Finvest Limited, a subsidiary of the Tata Group.[9] VSNL was allowed to retain its monopoly over international telecommunications services until 2002, at which point competitive operators were granted licenses to sell international capacity.[10]

Despite such liberalization of India's telecommunications market, VSNL retains dominant market power in the market for international services into and out of India. VSNL owns and controls the cable landing stations at which the FEA and SEA-ME-WE 3 terminate.[11] VSNL is leveraging these critical bottleneck facilities to the detriment of FLAG and U.S. carriers that provide international telecommunications services to India to suppress competition and maintain high prices.

B. VSNL has Severely Hindered FLAG's Efforts to provide International Telecommunications Services in India

FLAG and VSNL, among others, are signatories to the 1995 Fiber Optic Link Around the Globe (FLAG) Cable System – Construction and Maintenance Agreement (the "C&MA").

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[7] Two regional cable systems land in India: SAFE, a cable owned by a consortium of carriers that links India (via a VSNL controlled cable landing site) to South Africa and Malaysia; and i2i, which links the east coast of India to Singapore and is owned primarily by Bharti and Singapore Telecom. VSNL is also expected to be a major investor in SEA-ME-WE 4, the successor cable to SEA-ME-WE 3, which is expected to come online in 2006.

[8] *See* VSNL 2002 Form 20-F, *supra* note 5.

[9] *Id.*

[10] *Id.*

[11] *See The International Bureau Revises and Reissues the Commission's List of Foreign Telecommunications Carriers that Are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 03-1812 (rel. June 5, 2003) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-1812A1.pdf. VSNL also owns and controls the SAFE cable landing station. A cable landing station is the above-ground, on-shore facility where an undersea cable terminates and is interconnected with land-based telecommunications networks. As the owner of the cable landing stations for the FEA and SEA-ME-WE 3 cables, VSNL is able to control the activation of circuits on those cables and their interconnections with India's domestic telecommunications networks.

Under the terms of the C&MA, VSNL is obligated to activate FEA capacity sold by FLAG into India at the cable landing station in Mumbai.[12] In January 2002, the Indian Telecommunications and Information Technology Minister confirmed FLAG's right to sell capacity to any licensed operator in India and directed VSNL to negotiate access and interconnect charges on a "fair and reasonable" basis:

> *"I am also informed by VSNL that in line with the announcement made earlier by the Honourable Prime Minister, the outstanding dispute between VSNL and FLAG Telecom has been resolved. FLAG can now sell its Bandwidth directly to Internet Service Providers with immediate effect. From April 01, 2002, FLAG will also be able to sell its capacity directly to International Long Distance Operators. Access and Interconnect charges will be agreed between VSNL and FLAG on a fair and reasonable basis."*[13]

Following the Minister's directive, FLAG promptly took the initiative to negotiate with VSNL terms for the activation of circuits on the FEA into India. After nearly 12 months of protracted and extremely difficult negotiations, on January 7, 2003, VSNL entered into an agreement (the "Access Agreement") with FLAG which set out the terms on which only 15 STM-1 circuits on the FEA could be activated in India by FLAG as part of the capacity FLAG is entitled to sell under the C&MA.[14] Given that the initial design capacity of the FEA enabled 64 STM-1 circuits to be activated in both an easterly and a westerly direction out of India, the 15 STM-1 circuits represented only about 12% of the FEA's original design capacity.

Although FLAG repeatedly requested that the terms of the Access Agreement cover all available capacity of the FEA, VSNL refused, causing the remainder of the FEA's available capacity to be left to later negotiations. Further, the terms that FLAG was forced to accept in

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[12] When the FEA first entered commercial service in November 1997, these obligations were largely irrelevant because VSNL was the only operator in India licensed to provide international telecommunications services.

[13] Comments from the Minister for Telecommunications and Information Technology, VSNL Press Release, (Jan. 30, 2002). Prior to this announcement, VSNL and FLAG were in a dispute regarding the rights of FLAG to provide service to independent ISPs in India.

[14] An STM-1 is a circuit with a capacity of 155.52 megabits per second.

order to activate *any* capacity on the FEA allow VSNL to charge access and interconnection charges that are well above the norm in the international market and well above the actual costs incurred by VSNL in providing such services.

Following the execution of the Access Agreement, VSNL has refused to activate six of the 15 STM-1 circuits covered by the Access Agreement, and has further refused to provide reasonable terms, as it is required to do under the C&MA, for the activation of any of the remaining initial design capacity on the FEA, of which approximately 20 STM-1s remain available for sale into India. Despite having no authority to do so, VSNL has demanded FLAG to disclose its customers for whom FLAG has entered valid contracts for capacity on the FEA. After receiving this information, VSNL has refused to activate any additional circuits on the FEA, indicating that it would not do so unless and until (i) FLAG preferentially provided circuits to carriers with an established business relationship with VSNL, a demand to which FLAG could not in practice commit due to prior contractual commitments to sell the 15 STM-1 circuits to other carriers, and (ii) FLAG gave assurances that additional circuits would not be sold to VSNL's domestic competitors.

Moreover, recent developments in the electronics technology of fiber optic cable systems has resulted in FLAG being able to enhance the FEA from its original design capacity of 10 gigabits per second ("Gbps") to at least 80 Gbps. This 700% increase in the capacity of the FEA can be implemented within a few months and with relatively low investment – an investment that FLAG has told VSNL that it would incur entirely at its own cost. In order to implement the enhancements to the FEA, each landing party on the cable system is required to provide FLAG physical access to the FEA's cable landing station to allow the installation of new equipment. Such installation requires only a modest amount of additional space within the landing station

facility and does not impact the operation of any other cable system landing in the same facility. During 2003, FLAG has been performing such work on every segment of the FEA cable system west of India and has received cooperation from all eight landing parties concerned. VSNL has so far been the only landing party to oppose the enhancement of the FEA and to refuse to co-operate with FLAG. As a result, there is considerably less international capacity available into India today than there would otherwise be, to the detriment not only of FLAG, but also to local and international carriers wishing to offer services into India and end-user customers requiring higher volumes of capacity at lower prices.

C. VSNL Charges Unreasonably High Access and Interconnection Fees

VSNL also requires FLAG and its customers to pay exorbitant access and interconnect fees for activation of circuits at the Mumbai landing station. The high level of such charges, well above international norms, acts as a severe economic disincentive to U.S. and other international carriers wishing to buy capacity on the FEA.

1. Access Charges

Access charges are those fees levied by the owner of a cable landing station against parties that lease circuits on an undersea cable terminating in that station. The C&MA obligates landing parties for the FEA to provide landing stations at their own cost and entitles them to recoup their costs by levying an access charge on each FEA circuit terminating in their respective landing stations. The guiding principle of the C&MA is that the total access charges collected by a landing party should not exceed the landing party's reasonable costs of providing that part of the landing station that is attributable to the FEA (as opposed to any other cable system that lands at the same building).

The access charges specified in the Access Agreement of $300,000 per STM-1 circuit would result in VSNL receiving $4.5 million for the 15 STM-1s circuits covered by the Access Agreement. As the Mumbai landing station consists of approximately 60 square meters of space in an existing VSNL building, FLAG believes that $4.5 million is considerably more than the actual cost of providing such a facility. Indeed, FLAG estimates that the average cost of three other comparable FEA landing stations is only $705,732.[15] Notwithstanding these current exorbitant access fees, VSNL has refused to cap the total access charges at $4.5 million, leaving open the possibility that VSNL could ask for even more money in the future if the Access Agreement is later expanded to allow more capacity.[16] In short, VSNL compels FLAG and its customers to pay access charges that are well above the reasonable costs of providing the FEA facilities in the landing station in Mumbai.

2. Interconnection Charges

Under the C&MA, landing parties are obliged to interconnect capacity on the FEA cable system with domestic networks in their own country. The specific terms of interconnection are to be subject to separate agreements between the landing party and the domestic licensed operator seeking to use the FEA capacity.

[15] This cost estimate is based upon information FLAG has obtained concerning the cost of FEA landing stations in Spain, Italy, and Malaysia. Each of these landing stations is comparable to the VSNL station in Mumbai. Please note, however, that a comparison with access charges on other cable systems around the world is difficult because FLAG operates a private network in many regulated markets and, as such, is in a unique situation. Most private cable systems operate in deregulated markets where the network owner can obtain licenses to build its own landing stations. Landing party access charges are therefore not required because there is no need for a separate landing party. Even consortium systems in the deregulated markets – such as the Japan-U.S. Cable Network – are now following a similar approach by incorporating the cost of landing stations into the overall construction cost of the system.

[16] VSNL has also rejected FLAG's offer to "buy out" all of the access charges (i.e. pay for the whole landing station in one payment) so that FLAG's customers did not have to pay the access charges each time they bought capacity on the FEA.

VSNL charges an interconnection fee to any carrier in India wishing to connect its domestic network to the FEA cable system in the Mumbai landing station.[17] Thus, any U.S. carrier wishing to interconnect a circuit it has leased or purchased on the FEA cable to a network in India must pay for (or share with its local Indian licensed partner the cost of) that interconnection charge. For each STM-1 circuit requiring this interconnection, VSNL charges FLAG's customers an exorbitant one-time fee of $300,000 and an annual fee of approximately $49,000, amounts which greatly exceed the cost of providing such interconnection.

FLAG believes VSNL is deliberately setting these charges at excessive levels in order to (i) prevent its competitors from getting access to international capacity at reasonable prices, thereby helping VSNL to maintain its dominant position in the market and (ii) keep the prices for services to the end user as high as possible.

D. VSNL's Anticompetitive Behavior Impedes Trade in International Telecommunications Services

VSNL's restriction of the capacity available on the FEA will divert international traffic to the SEA-WE-ME undersea cables, in which VSNL is a major investor. More importantly, by refusing to allow FLAG to activate additional circuits into India on the FEA, VSNL is able to restrict the total amount of India's international capacity and dictate the terms on which all capacity into India is sold. VSNL's behavior therefore severely damages the interests of (i) U.S. and international carriers that wish to provide international telecommunications services on the U.S.–India and other key routes and (ii) U.S. businesses that require the use of international telecommunications on the U.S.–India route to provide services in the Indian market.

[17] The interconnection "service" VSNL is providing in such an instance is the provision of a cable between the FLAG terminal equipment in the space assigned to FLAG in the VSNL building in Mumbai and FLAG's customer's equipment located in another room within the same building.

1. VSNL's Anticompetitive Behavior Impedes Trade in International Telecommunications Services on the U.S.–India Route

As a major investor in SEA-ME-WE 3, the other primary undersea cable system providing international capacity into India, VSNL can ensure that the prices for international circuits on the U.S.–India route are maintained at artificially high levels by preventing the sale of capacity on the FEA. In addition, VSNL imposes punitive access and interconnection charges on FLAG and its customers that must be paid before VSNL will activate capacity at the Mumbai landing station. Thus, all carriers that wish to provide telecommunications services on the U.S.–India route must pay artificially high rates, which in some cases make the provision of service economically unfeasible.

VSNL also has taken action to ensure that international capacity is available only to carriers with which VSNL is allied and is not provided to carriers VSNL views as competitors. As discussed above, VSNL has specifically informed FLAG that it will not activate any additional circuits on the FEA until FLAG agrees that it will provide top priority to circuits that have been purchased by carriers that have an established business relationship with VSNL. FLAG, as a result, is unable to meet its contractual commitments and to receive the commercial benefit from such commitments. Further, this anticompetitive conduct prevents U.S. and other international carriers that do not have existing business relationships with VSNL from seeking to provide telecommunications services on the U.S.–India route via the FEA.

In addition, VSNL's anticompetitive behavior impacts the ability of carriers serving the Indian market to compete on the basis of quality of service. To safeguard against service interruptions, many carriers prefer to buy capacity on both the FEA and SEA-ME-WE 3, using one cable as a back-up in the event of technical interruptions on the other. Carriers' inability to

purchase capacity on the FEA, which has a far better reliability record than SEA-ME-WE 3, is therefore impacting the quality of service carriers can offer to their customers.

2. VSNL's Anticompetitive Behavior Impedes Trade in Services that Rely on International Telecommunications

By maintaining prices for circuits on the U.S.–India route at artificially high levels, VSNL is impeding the provision of services by U.S. businesses that rely on U.S.–India route circuits. The high circuit prices that carriers are forced to pay are passed on to companies that wish to offer information technology based services to India, such as application service providers, internet content providers, and e-commerce solution providers. These costs damage the ability of such companies to compete in a highly competitive market, and may in fact be making it economically unfeasible for some companies to even attempt to offer information technology services in India. In addition, U.S. companies that wish to establish communications-dependant functions such as call centers and customer support operations are hindered from doing so by the restrictions on available capacity, the high prices charged and the poor quality of service resulting from a lack of choice of supplier.

In summary, despite contractual commitments and Indian government policies to the contrary, VSNL is improperly leveraging its control over the FEA and SEA-ME-WE 3 cable landing stations by (i) refusing to allow FLAG to activate its readily available capacity on the FEA and to sell such capacity to carriers that provide service on, among others, the U.S.–India route; (ii) using its control over the cable landing station to enhance its own competitive position by refusing to activate circuits validly sold by FLAG to VSNL's competitors; and (iii) charging excessive access and interconnection charges on those few circuits that VSNL has actually allowed to be activated. VSNL's leveraging of these critical bottleneck facilities is damaging FLAG and its U.S. carrier customers by creating an artificial capacity shortage which: (i)

prevents carriers not affiliated with VSNL from gaining access to international capacity on their preferred cable system; (ii) results in artificially high prices for capacity on the U.S.–India and other key routes; and (iii) severely restricts the ability of U.S. carriers and their customers to provide telecommunications services to India. VSNL currently has no incentive whatsoever to cease this anticompetitive behavior as it retains dominant market power and is therefore the main recipient of the benefit of high market prices.

II. DESPITE FLAG'S BEST EFFORTS, THERE SEEMS NO PROSPECT OF AN IMMEDIATE ELIMINATION OF THE TRADE BARRIER CREATED BY VSNL'S ANTICOMPETITIVE ACTIONS

FLAG has employed and continues to employ all reasonable means to cause VSNL to cease its anticompetitive behavior. FLAG continues to try to reach a commercially reasonable agreement with VSNL, although its efforts to date have been firmly rebuffed. Further, FLAG has pursued alternative means of achieving a resolution of this matter, including working with the Indian Government.[18] VSNL has to date, however, failed to comply with India's telecommunications policies as stated by the Indian Government, and the Indian Government has taken no affirmative steps to force such compliance.

A. The Indian Government Has Not Intervened to Date

Over the past three months, FLAG has raised its concerns with Indian Government officials and continues to lobby Government officials for a fast resolution to this issue. FLAG has met with representatives of the Telecom Regulatory Authority of India ("TRAI") to discuss VSNL's anticompetitive behavior and to request action by TRAI. Importantly, TRAI officials

[18] It should also be noted that FLAG has filed with the Federal Communications Commission ("FCC") a petition to deny the application of VSNL America, Inc. ("VSNL America"), a wholly owned subsidiary of VSNL, for authority to provide facilities-based and resale service in the United States pursuant to Section 214 of the Telecommunications Act of 1934, as amended, and Section 63.18 of the Commission's rules. The Commission on December 4, 2003, extended by 90 days its review of VSNL America's application because it raises "issues of extraordinary complexity." On December 9, 2003, VSNL America and the United States Department of Justice

acknowledged the absence of effective regulations designed to prevent and remedy VSNL's behavior and the fact that VSNL is taking advantage of this regulatory loophole. However, the TRAI officials have, as of yet, made no commitment to address this regulatory loophole which provides VSNL the ability to continue to engage in anticompetitive practices to the detriment of FLAG and U.S. carriers.[19]

B. Other Interested Parties have Criticized the Actions of VSNL and Requested the Intervention of the Indian Government

In a letter to representatives of the Government of India dated November 24, 2003, the CompTel/ASCENT Alliance (the "Alliance"),[20] which represents a number of the largest U.S. carriers, has confirmed FLAG's contention that VSNL's anticompetitive behavior is damaging U.S. carriers and competition in the U.S. market, and that VSNL's actions, absent intervention by the Government of India, violate India's international trade commitments.[21]

Specifically, the Alliance observed that although undersea cables such as the FEA contain unused capacity which could be sold to the Alliance's carrier members, "the commercial practices of VSNL have created an artificial shortage of capacity, which prevents competitive carriers from meeting the full bandwidth demands of their customers and keeps bandwidth prices for the capacity that is available at much higher levels than the prices for the similar capacity on

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filed a Joint Petition to Defer consideration of VSNL America's application pending resolution of "potential risks posed to national security, law enforcement and public safety." *See* FCC File No. ITC-214-20030728-00376.

[19] During these meetings, FLAG has provided TRAI with examples of other recently-liberalized countries where regulators have taken positive action to prevent incumbents from misusing their dominant positions with respect to access to international cable systems.

[20] The Alliance was formed in October 2003 by the merger of the two leading trade associations in the competitive telecommunications industry. With 400 members, the Alliance is the largest association representing facilities-based carriers, providers using unbundled network elements, global integrated communications companies, and their supplier partners. The Alliance represents international carrier companies such as AT&T, Cable and Wireless, Global Crossing, MCI, Qwest, Sprint and others.

[21] Letter from Carol Ann Bischoff, Chief Legal Officer, CompTel/Ascent Alliance to the Honorable Lalit Mansingh, Ambassador to the United States, Embassy of India and Mr. N.P. Singh, Director (IP), Government of India, Ministry of Communications and Information Technology, Department of Telecommunications (Investment Policy Cell) (Nov. 24, 2003) *available at* http://www.comptel.org/filings/india_cable_nov24_2003.pdf.

routes where the market is more competitive."[22] The Alliance also noted that VSNL's practices "lead to higher prices for the customers of the Alliance's Members, which in turn has forced those customers to consider offshore locations other than India for their IT-related activities."[23] The Alliance further observed that "VSNL's restrictions on access to submarine cable capacity are inconsistent with India's international trade commitments," and that "the current distortions in the market for international bandwidth are highly unlikely to improve unless the Government of India enacts pro-competitive safeguards and enforces its competition policies and international trade commitments to bring an end [to] such anticompetitive and discriminatory practices."[24]

The Alliance is not the only party that has voiced concerns over VSNL's anticompetitive behavior. On December 23, 2003, the European Competitive Telecommunications Association ("ECTA"), a trade organization representing around 200 European telecommunications companies, sent the Chairman of the TRAI a letter expressing concerns similar to those set forth in the Alliance letter. Further, a number of leading international carriers are individually taking action to address VSNL's behavior. For example, the Chairman of British Telecom ("BT") recently intervened personally and publicly to urge the Indian government to take immediate action against VSNL as the lack of capacity into India is severely harming BT's plans not only for offering international telecoms services to India but also for moving many of its own call center operations out to India.[25]

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[22] *Id.* at 2.

[23] *Id.*

[24] *Id.*

[25] *See* "Bland pleads BT's case with Delhi," Mail On Sunday, Dec. 14, 2003, *available at* http://www.thisismoney.com/20031214/nm71866.html. The reference in the article to "a network of undersea fibre optic cables owned by Reliance" is in fact a reference to the FLAG cable system. FLAG is currently the subject of a merger with a subsidiary of the Indian company, Reliance Infocomm.

III. THIS ANTICOMPETITIVE ENVIRONMENT IS INCONSISTENT WITH INDIA'S GATS COMMITMENTS

Pursuant to Paragraph 5 of the Annex on Telecommunications, the Government of India is obligated to ensure access to public telecommunication transport networks on "reasonable and non-discriminatory terms and conditions." This obligation encompasses interconnectivity between privately owned or leased circuits, such as the circuits on the FEA, and VSNL's public telecom network. Notwithstanding India's initial refusal in 1994 to bind its commitments on market access for international telecommunication services,[26] India has since implemented concrete policy changes aimed at liberalizing its market. Specifically, in 2002, as discussed above, the Indian Government reversed its policy that enabled VSNL to prevent FLAG and other undersea cable operators from selling capacity on the FEA to ISPs and licensed long-distance carriers.[27]

India's current policy, which reflects its decision to expedite its telecommunication reforms, obligates the Indian government to impose disciplines on its dominant telecommunications suppliers, such as VSNL, to refrain from anticompetitive conduct that hinders access to its public telecommunications network. As demonstrated above, VSNL has leveraged its dominant market power to artificially create a shortage in capacity, unreasonably restrict access to its telecommunications network, and direct international carriers to the SEA-ME-WE-3 cable, which VSNL partly owns. VSNL's conduct is precisely the anticompetitive behavior that the access obligations under Paragraph 5 are designed to address.

In addition, India has made specific commitments to impose certain competitive safeguards against anticompetitive behavior of its major telecommunications suppliers. Based

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[26] *See, e.g.*, India: Schedule of Specific Commitments, GATS/SC/41 (April 15, 1994).

[27] *See supra* n. 13.

upon the Reference Paper developed by the Negotiating Group on Basic Telecommunications in April 1996, India's Schedule of Commitments includes the following commitment:

> ***1. Competitive Safeguards***
>
> ***Appropriate measures <u>shall</u> be maintained for the purpose of preventing service suppliers from engaging in or continuing in anticompetitive practices of the following type:***
>
> ***(a) using information obtained through competitors with anticompetitive results . . .***[28]

As demonstrated above, in the course of their negotiations, FLAG was required to disclose to VSNL which carriers have purchased capacity on the FEA. VSNL has used this information in forming its decision to refuse to activate additional circuits on the FEA, and to thereby create an artificial shortage of capacity into India to the detriment of U.S. and other international carriers. VSNL's demand that FLAG identify its customers and VSNL's use of that competitive information to limit access to the FEA cable falls squarely in contradiction to the Indian government's telecommunications commitments under GATS.

In order to comply with its GATS obligations, the Indian government must act to ensure that VSNL ceases its anticompetitive practices and discipline VSNL and other dominant telecommunications suppliers, holding them accountable for actions that are contrary to its GATS obligations. As FLAG demonstrates below, VSNL's anticompetitive conduct is causing severe economic harm to U.S. international carriers and other telecommunications service providers.

[28] *See* India, Schedule of Specific Commitments, Supplement 3, GATS/SC/42/Suppl.3 (April 11, 1997) (emphasis added).

IV. POTENTIAL IMPACT OF VSNL'S ANTICOMPETITIVE BEHAVIOR

By refusing to activate additional circuits on the FEA and imposing such punitive access and interconnect charges on those circuits that are activated, VSNL is attempting to limit the amount of available capacity into India and limit the ability of its competitors to offer services in order to maintain its dominant market position and keep prices high. Such anticompetitive and restrictive behavior stifles economic growth generally, as both local companies and international businesses operating in India, in particular those in the IT services sector, require high quality and low cost international communications links. As a result, VSNL's continued anticompetitive behavior impacts not only FLAG, but also FLAG's U.S. carrier customers who seek to provide cost effective voice and data links between the United States and India.

A. FLAG's Lost Revenues

As described above, VSNL has currently allowed FLAG to activate only a limited amount of its available capacity into and out of India on the FEA. Though much of the capacity on the FEA has now been utilized for countries other than India, approximately 20 STM-1 circuits of capacity remain available to be sold into India today, notwithstanding the huge potential capacity that could be made available from enhancements to the FEA as described above. The pricing of capacity varies greatly depending on the route,[29] but based on current lease rates for capacity out of India, the loss suffered by FLAG from the inability to lease these 20 STM-1 circuits into India is in the order of tens of millions dollars of annual revenue.

B. Revenues Lost by FLAG's Carrier Customers and End-users

Perhaps the greatest economic impact of VSNL's artificial restriction on capacity is on FLAG's carrier customers and the end-users for the capacity services, which are often

[29] For example, a circuit between India and Saudi Arabia is much less expensive than a circuit between India and the United States.

businesses. FLAG's carrier customers are unable, in many cases, to provide service to India because VSNL's artificial restriction on the amount of available international telecommunications capacity causes carriers to pay higher prices for available circuits, if they are able to obtain capacity at all. This barrier makes many business propositions economically unfeasible. Further, the fact that U.S. carriers cannot provide international connectivity between the U.S. and India at reasonable rates prevents U.S. businesses from providing a vast array of information technology products and services to the Indian market and, conversely, prevents U.S. businesses from taking advantage of the rapidly expanding information services sector in India.

FLAG is not in a position to calculate the magnitude of this harm being visited on U.S. carriers and U.S. businesses by the artificially restricted supply of telecommunications capacity on the U.S.–India route. However, given that the retail rate for international telecommunications services is often a multiple of the wholesale cost of the underlying capacity that underpins the services (i.e., the capacity provided by FLAG), it is likely that the scale of the business impact on FLAG's carrier customers is several times greater than the financial impact on FLAG itself, which is estimated above as tens of millions of dollars per year. Furthermore, the telecommunications services being procured from the carriers by end-user business customers are only part of the cost of the overall operations of these businesses and if these businesses are making decisions to alter their wider business operations as a result of poor quality telecommunications services the overall impact is amplified once again.

V. CONCLUSION

As set forth above, VSNL's anticompetitive behavior is a significant barrier to trade in telecommunications services for FLAG, its major U.S. customers and U.S. businesses. India's GATS obligations require swift intervention to compel VSNL to cease and desist its anticompetitive practices and impose measures that will prevent future abuses.