



Arun Gupta
Vice President (Wholesale Business)

January 28, 2004

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: Reply Comments of VSNL to Section 1377 Request

Dear Ms. Blue:

Videsh Sanchar Nigam Limited ("VSNL") hereby responds to the January 5, 2004 comments submitted by FLAG Telecom Group Limited ("FLAG"), a foreign carrier that provides submarine fiber optic cable services; the January 7, 2004 comments submitted by the CompTel/ASCENT Alliance ("Alliance"); and the January 12, 2004 comments submitted by the United States Council for International Business ("USCIB") in the USTR's annual Section 1377 review regarding compliance with certain telecommunications trade agreements. The stated purpose of this review is to examine whether U.S. trading partners have violated their telecommunications trade commitments.

In their comments, FLAG, the Alliance and USCIB accuse the Indian Government of violating its commitments under the WTO Basic Telecommunications Agreement, the Annex on Telecommunications ("Annex"), and the Reference Paper. However, these parties misstate India's telecommunications trade commitments. India is a signatory to the WTO Basic Telecommunications Agreement and is subject to the Annex. India's commitments are identified in its Schedule of Specific Commitments.¹ Pursuant to paragraph 5(g) of the Annex, India placed certain conditions on access to its telecommunications networks, which are specified in its schedule of commitments. Thus, contrary to the Alliance's claim (p. 19), India is not bound by Section 5(a) of the Annex. Moreover, India adopted only limited sections of the

¹ See India Schedule of Specific Commitments, WTO Doc. GATS/SC/42/Supp.3 (11 Apr. 1997).

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Reference Paper.² While India agreed to ensure that the technical quality of interconnection with a major supplier is no less favorable than that provided for the major supplier's own like services, India did not make other substantive commitments regarding interconnection, nor did it make any commitments regarding pricing.

In light of India's commitments, FLAG, the Alliance and USCIB have failed to identify any act or practice that violates India's telecommunications trade obligations. Rather than providing evidence of any particular violation of India's telecommunications trade commitments, these parties at most express their view that the Indian regulatory authorities and VSNL are not doing what FLAG, the Alliance and USCIB want them to do.

With regard to FLAG's specific allegations about VSNL's conduct, VSNL submits that FLAG filed its comments in an effort to use this proceeding as a forum to litigate a very complicated foreign commercial dispute. FLAG is seeking assistance from USTR even though FLAG is a foreign telecommunications carrier with limited operations and interests in the United States. Although VSNL believes that it is inappropriate for FLAG to inject its Indian contract dispute into this proceeding, VSNL would like to briefly share its perspective on FLAG's allegations to ensure that they do not remain un rebutted on the record. VSNL is the largest international carrier in India and a relatively new entrant in the Indian long distance market. VSNL does not rely upon a single transmission medium, or a single provider within any given medium, to obtain the capacity it needs to provide service. VSNL has various ownership interests in several different satellite and undersea cable systems with a view towards fulfilling its overriding desire to ensure a robust and competitive intermodal system for providing global transmission capacity to its customers. VSNL has taken a proactive role to ensure that the Service Level Agreements required by the IT industry in India are fully satisfied even though some undersea cable systems are susceptible to disruptions from certain external factors. FLAG's allegation that VSNL desires to ensure efficient use of competing cables (e.g., SEA-ME-WE 3) is correct, but only in the context that VSNL desires to promote the use of multiple cables and satellite transmission facilities, including the FLAG Europe-Asia cable (the "FEA cable") in which VSNL has an investment interest in excess of \$30 million.

By contrast, FLAG's viewpoint is much narrower. FLAG operates one of the largest, wholly-owned fiber optic cable systems in the world, and FLAG was forced into bankruptcy in 2002 due to unfavorable economic and technological factors. Seeking to regain its economic footing after restructuring its operations, FLAG's apparent objective has been to do

² The Reference Paper sets forth certain principles for the regulation of telecommunications. The Reference Paper, in its entirety, is binding only when a government includes it as part of the country's schedule of commitments. India did not incorporate the Reference Paper in its schedule of commitments. The Explanatory Paper on Additional Commitments, which is annexed to Supplement 3 of India's Schedule of Specific Commitments, details India's position with regard to the regulatory measures enunciated in the Reference Paper.

anything and everything to maximize revenues from the FEA cable system in a still difficult market environment regardless the impact on other carriers or systems or the limitations imposed by its contracts with other parties. When other parties have appropriately responded to FLAG's such proposals by referring to/seeking to enforce existing contractual arrangements that FLAG entered into voluntarily, FLAG's response has been to adopt an aggressive and public confrontational posture in which it seeks to impose pressure on VSNI through all possible means, including the filing of baseless allegations with USTR about India's compliance with its international treaty obligations.

When FLAG, VSNL and other parties negotiated the Construction and Maintenance Agreement ("C&MA") for the FEA cable in December 1995, FLAG and the other Signatories agreed that certain obligations were necessary to promote the interests of all parties, including FLAG. For example, the parties sought to protect the integrity of the service to be offered by FEA cable system by ensuring sufficient latent capacity (*i.e.*, unused capacity) for restoration purposes, and so FLAG was limited to marketing assignable capacity as defined in Section 1.1.7 of the C&MA. As another example, Sections 3 and 11.1 of the C&MA were crafted to ensure that all Signatories, including FLAG, would make a reasonable contribution towards Operations and Maintenance ("O&M") costs, and that their O&M obligations would equitably reflect any diminution of their ownership interests in the FEA. This ensures that new purchasers of FEA cable capacity do not obtain artificial (and anti-competitive) reductions in O&M costs compared to the original Signatories. As a third example, FLAG agreed that it should be able to market capacity only to International Telecommunications Entities ("ITEs"), which FLAG and the other Signatories carefully defined in Section 1.1.12 to be duly licensed and authorized carriers. Hence, Section 8.3 precluded FLAG from undermining national regulatory regimes by marketing capacity to gray-market or unauthorized operators or to any entity not holding a valid licence for provisioning of telecommunication services.

These contractual limitations on FLAG's ability to commercially exploit the FEA cable have come under increasing pressure in light of the recent downturn in the global telecommunications industry, which has hit the wholesale capacity segment forcefully. As FLAG has sought to end-run limitations on its marketing efforts in the C&MA, the result has been an escalating series of disputes between FLAG and the FEA Signatories, including but not limited to VSNL. As one example, VSNL has been unable, despite repeated requests, to obtain from FLAG a reliable, definitive and accurate statement as to the amount of assignable capacity still available for marketing to ITEs, leading VSNL and other Signatories to have concerns that FLAG is undermining the integrity of the service (and restoration capabilities) on the FEA cable system by transforming latent capacity into assignable capacity to generate additional revenues for FLAG at the expense of the original Signatories. Similarly, FLAG (the Founding Signatory) has failed to reduce O&M charges for existing Signatories as envisioned by the C&MA. In derogation of this principle, FLAG has marketed incremental capacity to new buyers at lower

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prices due to an artificially reduced O&M loading, thereby disadvantaging VSNI. and other initial Signatories.

FLAG itself has raised in this proceeding issues regarding its marketing of capacity requiring use of the FEA cable landing station in Mumbai, India. Section 8.3 of the C&MA authorizes FLAG to lease assignable capacity to ITEs pursuant to "reasonable terms and conditions" to be negotiated with VSNL. However, FLAG has used classic bait-and-switch tactics by signing an agreement with VSNL to provide capacity to specified ITEs, but subsequently unilaterally re-assigning that capacity to other entities after the agreement has been signed. One example is the January, 2003 agreement wherein VSNL authorized the sale of 15 STM-1 circuits by FLAG in the FEA cable. That agreement specified the assignment of at least five STM-1 circuits to certain identified ITEs, but after the contract was signed FLAG unilaterally re-assigned certain capacity to other, apparently more favored entities. This is an unsavory practice which breeds confusion and business uncertainty, to say nothing of the disruption in service it can cause to the existing users of FEA capacity as well as VSNL's relationships with the carriers whose capacity FLAG is trying to reassign unilaterally against their wishes.

FLAG has made no secret of its intention to sell FEA capacity to parties that do not qualify as ITEs. In an email dated August 13, 2003, that was forwarded to the Indian Embassy in Washington, D.C., FLAG's U.S. counsel indicated that FLAG has actively marketed FEA cable capacity to a company that does not qualify as an ITE under Section 1.1.12 of the C&MA and is not entitled to purchase capacity in the FEA cable.³ In addition to FLAG's marketing efforts aimed at selling capacity directly to non-ITEs, VSNL has a more general concern that FLAG will seek to disguise its capacity sales to non-ITEs by using transparent pass-through agreements with cooperative ITEs. FLAG's aggressive marketing to non-ITEs, as well as its refusal to provide capacity to the ITEs whom it has contractually agreed are to be the recipients of particular STM-1 circuits, are symptomatic of FLAG's repeated efforts to undermine the C&MA provisions that FLAG carefully negotiated and consciously agreed with other Signatories including VSNL in 1995.

VSNL is raising these issues only to give the USTR a contextual basis for understanding the commercial issues that FLAG has raised in its comments. While VSNL and FLAG clearly have significant disagreements, VSNL has not given up on its relationship with FLAG and will continue to work with FLAG towards a business resolution of these issues that both parties can live with.

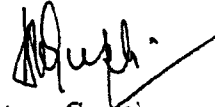
In this reply, VSNL has not sought to respond to each and every allegation made by FLAG, but it does wish to assert that VSNL is in full compliance with all applicable

³ See email dated August 13, 2003 from Tom Davidson to Barney Skladany.

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telecommunications and antitrust laws and policies in India, and that VSNL is not seeking to ensure an artificial shortage of transmission capacity on the U.S.-India route. Further, VSNL categorically rejects any allegation that the Government of India has violated any international telecommunications treaty obligations. VSNL requests that the USTR decline FLAG's invitation to embroil itself in the ongoing foreign negotiations over the use of the FEA cable landing station in Mumbai.

Yours faithfully,
for Videsh Sanchar Nigam Limited



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Vice President
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