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BY ELECTRONIC MAIL

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Re: Commission Authority to Amend the Schedule of Regulatory Fees Pursuant to Section 9(b)(3)

Dear David:

You have asked us to analyze the Commission's authority to amend its regulatory fee schedule pursuant to Section 9(b)(3) of the Communications Act of 1934, as amended ("Communications Act"), to remedy previously identified problems with the regime as applied to private submarine cable operators. In our opinion, the Commission has ample legal justification—and indeed is compelled—to amend its regulatory fee schedule to reclassify submarine cable operators and establish a new regulatory fee for such operators. While other parties might challenge the Commission's modification of its regulatory fee schedule with respect to submarine cable operators, the ultimate litigation risk is low because the Commission would prevail in court.

In our opinion, the Commission must amend the schedule of regulatory fees to reflect changes in Commission services provided to submarine cable operators resulting from Commission rulemakings and changes in law, including: (1) the entry into force of U.S. commitments in basic telecommunications under the World Trade Organization ("WTO") General Agreement on Trade in Services ("GATS") and the Commission's implementation thereof through rule changes in its *Foreign Participation Order*; (2) the Telecommunications Act

of 1996 ("1996 Act") and the Commission's related international Section 214 streamlining rulemakings; and (3) the Commission's submarine cable streamlining rulemaking. Viewed individually or collectively, these four changes mark a fundamental shift in the nature of the Commission's services. In the past, the Commission focused its regulatory energies on constraining monopolists' power by regulatory fiat. Through these three changes and related initiatives, the Commission reoriented its regulatory direction entirely and now strives to eliminate market distortions by opening borders and spurring competition. As a result of these pro-competitive changes in the law and in the Commission's rules, private submarine cable operators' capacity has skyrocketed, their prices have plummeted, and the cost of regulating them has dropped. Thus, as Tyco argued in comments filed earlier this year, the Commission should amend the regulatory fee regime for private submarine cable operators.[1]

This letter consists of two parts. *First*, we explain the circumstances in which the Commission must amend the schedule of regulatory fees under Section 9(b)(3) of the Communications Act, as interpreted by the D.C. Circuit in *COMSAT v. FCC*. *Second*, we explain why the changes in Commission services to private undersea cable operators resulting from three separate instances of Commission rulemakings or changes in law—(1) U.S. GATS commitments and rule changes in the Commission's *Foreign Participation Order*, (2) the 1996 Act and rule changes in the Commission's international Section 214 streamlining rulemakings, and (3) rule changes in the Commission's submarine cable streamlining rulemaking—compel the Commission to amend its regulatory fee schedule to reclassify submarine cable operators and establish a new regulatory fee for such operators.

I. The Commission Must Amend the Schedule of Regulatory Fees When a Rulemaking or Change in Law Adds, Deletes, or Changes the Commission Services Provided to the Payor

The Commission must amend the schedule of regulatory fees—as set forth in Section 9 of the Communications Act—when a rulemaking or change in law adds, deletes, or changes the services that the Commission provides to the payor. Section 9 directs the Commission to "assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities."[2] Section 9 provides that regulatory fees:

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[1] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Docket No. 04-73, Comments of Tyco Telecommunications (US) Inc. (filed Apr. 21, 2004).

[2] 47 U.S.C. § 159(a)(1).

> be derived by determining the full-time equivalent number of employees performing the activities described in [47 U.S.C. § 159(a)] within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest.[3]

Section 9 established an initial schedule of regulatory fees to apply until adjusted or amended by the Commission under the procedures established by Section 9, meaning that the fee levels are not fixed.[4] Section 9 requires the Commission to adjust and amend that schedule to "ensure[] . . . that an industry or class of users will not pay more than their fair share of costs because of industrial growth or success."[5]

Section 9(b)(3) directs the Commission to make "permitted amendments," stating that the Commission:

> shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.[6]

Thus, Section 9 requires the Commission to amend the schedule of regulatory fees when it finds that a Commission rulemaking or change in law has added, deleted, or changed the Commission services provided to the payor of the fee such that the fee no longer reasonably relates to the benefits of those services.

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[3] 47 U.S.C. § 159(b)(1)(A).

[4] *See* 47 U.S.C. § 159(b)(1)(C).

[5] H.R. REP. NO. 102-207, pt. 3 (1991). Congress passed the provisions that became Section 9 as part of the Omnibus Budget Reconciliation Act of 1993. *See* Pub. L. No. 103-66, § 6003(a), 107 Stat. 312 (1993). The House Conference Report accompanying that legislation states that the regulatory fee provisions were "virtually identical" to provisions included in a previous bill, and it incorporated by reference "the appropriate provisions" from a House Report analyzing that bill. H.R. CONF. REP. NO. 103-213, pt. 4 (1993). The discussion in the text relates to the "incorporated" discussion from the earlier House Report. *See* H.R. REP. NO. 102-207.

[6] 47 U.S.C. § 159(b)(3).

The Commission must premise a permitted amendment upon changes in its services resulting from a Commission rulemaking or a change in law because the D.C. Circuit held in *COMSAT v. FCC*, Section 9(b)(3) authorizes an amendment to the fee regime only "in response to [a] 'rulemaking proceeding[] or change[] in law.'"[7] As discussed in detail below, we believe that the Commission's proposed amendment of the fee schedule to reclassify submarine cable operators and establish a new fee for those operators satisfies the requirements of Section 9(b)(3) as construed by the D.C. Circuit in *COMSAT*.

II. The Commission Must Amend the Schedule of Regulatory Fees to Reflect Changes in the Commission Services Provided to Submarine Cable Operators Resulting from Three Separate Sets of Changes in Law and Changes in the Commission's Rules

In *COMSAT*, "the Commission conceded . . . that the signatory fee . . . was not charged pursuant to any rulemaking or change in law."[8] By contrast, three separate changes support amendment of the regulatory fees schedule as applied to submarine cable operators.

A. U.S. GATS Commitments in Basic Telecommunications and the Commission's Implementation Thereof in Its *Foreign Participation Order* Changed the Commission Services Provided to Submarine Cable Operators

The U.S. GATS commitments in basic telecommunications and the Commission's implementation thereof in its *Foreign Participation Order* changed the Commission services provided to submarine cable operators. The implementation of these changes in law and regulations therefore satisfy the requirements of Section 9(b)(3), as interpreted by the D.C. Circuit in *COMSAT*.

The U.S. GATS commitments in basic telecommunications constitute a change in law governing the regulation of submarine cable operators in the United States.[9] In February 1997, the United States and 68 other nations made specific commitments (of varying degrees) to liberalize trade in basic telecommunications services.[10] These commitments aimed "to replace

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[7] *COMSAT v. FCC*, 114 F.3d 223, 225 (D.C. Cir. 1997) (quoting 47 U.S.C. § 159(b)(3)).

[8] *COMSAT*, 114 F.3d. at 227-28.

[9] *See, e.g., Cheung v. United States*, 213 F.3d 82, 94 (2d Cir. 2000) (explaining that the Constitution, federal law, and *treaties* are "the Supreme Law of the Land" under the Supremacy Clause of the Constitution, and that a self-executing treaty "is to be regarded in the courts as equivalent to an act of the legislature").

[10] The commitments in basic telecommunications undertaken by individual WTO members are incorporated into the GATS by the Fourth Protocol to the GATS. *Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 354, 366 (1997). The GATS was concluded in conjunction with the establishment of the WTO in 1994. General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade

the traditional regulatory regime of monopoly telephone service providers with pro-competitive and deregulatory policies."[11] Under the agreement, the United States committed to open its borders to foreign suppliers of a wide range of basic telecommunications services. The Commission "expect[ed] that entry by foreign telecommunications carriers and other investors will increase competition in the U.S. telecommunications service market, providing lower prices and increased quality of service."[12]

In particular, the United States committed to eliminate its long-standing reciprocity-based approach to the licensing of submarine cables.[13] Under this approach—epitomized by the effective competitive opportunities ("ECO") test—the Commission required *inter alia* that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market.[14] In making specific commitments of market access and national treatment, undertaking general obligation of most-favored nation ("MFN") treatment, and adopting the WTO Reference Paper, the United States liberalized significantly, eliminating legal restrictions and granting significant new legal rights of access to the U.S. telecommunications market.

Recognizing the United States' GATS commitments in basic telecommunications, as well as the commitments of U.S. trading partners, the Commission "adopt[ed] rules . . . to complete [its] goal of opening the U.S. market to competition from foreign companies."[15] Among other

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Organization. 33 I.L.M. 1167 (1994). These original 1997 commitments are colloquially referred to as the "WTO Basic Telecommunications Agreement," though they are not technically contained in a stand-alone agreement. Moreover, as of December 2004, almost 100 countries have made GATS commitments in basic telecommunications.

[11] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, 23,893 ¶ 2 (1997) ("*Foreign Participation Order*").

[12] *Id.* at 23,894 ¶ 4.

[13] *See* WTO, United States of America – Schedule of Specific Commitments, Supplement 2, WTO Doc. 97-1457, GATS/SC/90/Suppl.2 (Apr. 11, 1997); *Foreign Participation Order*, 12 FCC Rcd. at 23,933-35 ¶¶ 93-96 (noting that the market-opening commitments of other WTO-member countries would "render the ECO test unnecessary"), *aff'd Order on Reconsideration*, 15 FCC Rcd. 18,158 (2000). The original U.S. offer maintained reciprocity-based restrictions on foreign ownership of submarine cables. *See* WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Draft Offer on Basic Telecommunications, WTO Doc. 95-2367, S/NGBT/W/12/Add.3 (July 31, 1995). These restrictions were later dropped. *See* WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), WTO Doc. 96-4832, S/GBT/W/1/Add.2 (Nov. 13, 1996).

[14] *See Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd. 3873, 3890 ¶¶ 42-44 (1995).

[15] *Foreign Competition Order*, 12 FCC Rcd. at 23,893 ¶ 2.

market-opening regulatory changes, the *Foreign Participation Order* implemented the U.S. treaty obligation to eliminate the ECO test for submarine cable licensing vis-à-vis other WTO-member countries. In its place, the Commission adopted "an open entry standard for applicants from WTO Member countries," explaining that WTO-member countries' GATS commitments in basic telecommunications would result in "a shift away from monopoly provision of telecommunications services and toward competition, open markets and transparent regulation."[16] Consequently, parties no longer file "ECO briefs," and the Commission no longer expends resources evaluating bilateral market access opportunities on the foreign end(s) of the submarine cable system.

As the Commission expected, the U.S. GATS commitments and the *Foreign Participation Order* created "new competitive conditions" that have "significantly reduced the possibility of market distortion" and allowed the Commission to scale back its regulatory oversight of private submarine cable operators and others.[17] Between 1998 and 2002—the most recent year for which comprehensive capacity and pricing information is available—bandwidth capacity increased exponentially while prices plunged.[18] This robust competition and its attendant benefits further reduced the need for extensive regulatory oversight by the Commission.

As a result of the U.S. GATS commitments and the *Foreign Participation Order*, the Commission devotes fewer resources to submarine cable operators, as it no longer analyzes "ECO briefs" or applies the fact-intensive ECO test when considering cable landing license applications. These changes in Commission services therefore justify a permitted amendment pursuant to Section 9(b)(3).

B. The 1996 Act and the Commission's International Section 214 Streamlining Rulemakings Changed the Commission Services Provided to Submarine Cable Operators

The 1996 Act and the Commission's international Section 214 streamlining rulemakings changed the Commission services provided to submarine cable operators. The 1996 Act, through which Congress directed the Commission to eliminate unnecessary regulations, and the Commission's subsequent international Section 214 streamlining rulemakings—which also

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[16] *Id.* at 23,896 ¶ 9.

[17] *1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations*, Notice of Proposed Rulemaking, 13 FCC Rcd. 13,713, 13,716 ¶ 5 (1998).

[18] *See* INTERNATIONAL BANDWIDTH, VOL. 1: SUBMARINE NETWORKS (Telegeography 2003) (noting that for 1998-2002, installed trans-Atlantic capacity increased by approximately 1800 percent while market prices for capacity declined by an estimated 90 percent, and that during the same period, installed trans-Pacific capacity increased by approximately 2500 percent while market prices for capacity have declined by an estimated 90 percent).

addressed cable landing licenses under the Cable Landing License Act—altered the regulatory requirements landscape for private submarine cable operators.[19]

Reflecting Congress' deregulatory purpose, the 1996 Act obligates the Commission to "review all regulations" issued under the Communications Act, and to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[20] Pursuant to the 1996 Act, the Commission must "repeal or modify" those regulations.[21]

This statutory requirement—which represents a "change in law" under Section 9(b)(3)—altered the nature of the Commission's services significantly, as it launched a pro-competitive regulatory approach that differed sharply from the managed-monopoly approach of the past. Indeed, it prompted the Commission to streamline the international Section 214 authorization process—a proceeding that ultimately reoriented its regulation of private submarine cable operators and other international service providers.

In the *Section 214 Streamlining NPRM*, the Commission proposed reducing regulatory burdens in several areas (including with respect to private submarine cable operators) on the ground that "[t]he dramatic growth in international competition means that, in some areas, regulatory oversight can be reduced."[22] The Commission recognized the growth of competition in the area of private satellite and submarine cable systems, and, as a result, it "propose[d] to repeal" its rule requiring "Section 214 authorizations for additional circuits."[23] (The Commission had previously required Section 214 authorization "to assure compliance with Commission conditions placed on non-common carrier systems."[24])

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[19] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Notice of Proposed Rulemaking, 10 FCC Rcd. 13,477 (1995) ("*Section 214 Streamlining NPRM*"); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Report and Order, 11 FCC Rcd. 12,884 (1996) ("*Section 214 Streamlining Order*"); *1998 Biennial Regulatory Review – Review of International Common Carrier Regulations, Report and Order*, 14 FCC Rcd. 4909 (1999) ("*Section 214 Further Streamlining Order*").

[20] 47 U.S.C. § 161(a).

[21] 47 U.S.C. § 161(b).

[22] *Section 214 Streamlining NPRM*, 10 FCC Rcd. at 13,478 ¶ 1. Although all submarine cables are licensed under a law separate from the Communications Act of 1934, which the 1996 Act amended, the Commission has traditionally considered these two licensing processes in tandem. *See* "An act relating to the Landing and Operation of Submarine Cables in the United States," *codified at* 47 U.S.C. §§ 34-39 ("Cable Landing License Act").

[23] *Id.* at 13,487 ¶ 26.

[24] *Section 214 Streamlining Order*, 11 FCC Rcd. at 12,901 ¶ 38.

The Commission followed through on these deregulatory proposals in its *Section 214 Streamlining Order*. It explained that "necessary conditions on the non-common carrier facilities are normally placed on the original authorization for construction and operation of those facilities and not on the subsequent Section 214 facilities authorizations for acquiring capacity on them."[25] Thus, the Commission concluded, "there is no longer a need to maintain the individual Section 214 applications for carriers seeking to acquire additional capacity on U.S. non-common carrier systems."[26]

The Commission went further in the *Section 214 Further Streamlining Order*. Most notably, it eliminated its restrictions on carriers' use of "any foreign cable system to provide its authorized international services," concluding that the pre-existing "Exclusion List" limited choice and undersea cable competition.[27] In addition, the Commission "amend[ed] its environmental rules to reflect a new categorical exclusion for the construction of new submarine cable systems" on the grounds that laying transoceanic cables results in negligible environmental consequences.[28]

As a result of the 1996 Act and the Commission's international Section 214 streamlining rulemakings, the Commission reduced regulatory oversight of submarine cable operators. This change in Commission services therefore justifies a permitted amendment pursuant to Section 9(b)(3).

C. The Submarine Cable Streamlining Rulemaking Changed the Commission Services Provided to Submarine Cable Operators

The Commission's efforts to streamline the licensing process for cable landing licensees also calls for an amendment to the regulatory fee regime applicable to private submarine cable operators. The cable landing license streamlining proceeding, which followed and largely emulated the Section 214 Streamlining Proceeding described above, resulted in rule changes that encourage capacity growth in the submarine cable market, reduce regulatory burdens, and spur competition.[29]

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[25] *Id.*

[26] *Id.*

[27] *Section 214 Further Streamlining Order*, 14 FCC Rcd. at 4933-34 ¶¶ 59-60 (describing, *inter alia*, Tyco's arguments that the pre-existing restrictions stunted competition, conflicted with global deregulatory efforts, and distorted carriers' incentives to increase capacity).

[28] *Id.* at 4937-38 ¶ 67.

[29] *See Review of Commission Consideration of Applications under the Cable Landing License Act*, Notice of Proposed Rulemaking, 15 FCC Rcd. 20,789, (2000) ("*Submarine Cable Streamlining NPRM*"); *Review of Commission Consideration of Applications under the*

In 2000, the Commission issued its *Submarine Cable Streamlining NPRM* in recognition of "explosive growth in the number and capacity of submarine cables, . . . the rapid pace of technological development, and the emergence of non-traditional ownership and financing structures in the submarine cable marketplace."[30] After considering its own proposals as well as comments from the industry (including Tyco's comments, which featured prominently in the resulting order), in late 2001 the Commission adopted "bright-line" streamlining procedures that simplified the licensing process significantly.[31] The Commission explained that it streamlined the process "to facilitate the expansion of capacity and facilities-based competition in the submarine cable market," and "to enable submarine cable applicants and licensees to respond to the demands of the market with minimal regulatory oversight and delay, saving time and resources for both industry and government, while preserving the Commission's ability to guard against anticompetitive behavior."[32] In addition, the Commission noted that the streamlined rules would decrease "the costs of deploying submarine cables . . . to the ultimate benefit of U.S. consumers."[33]

Among other things, the streamlined rules require the Commission to act on qualified applications within 45 days and to grant such applications by public notice.[34] Unlike the prior rules, which required all entities using the U.S. end of a cable to apply for a license, the new rules eliminate the licensing requirement for "entities that do not own or control a landing station in the United States or a five percent or greater interest in the proposed cable system."[35] In addition, the Commission amended rules barring the assignment or transfer of an interest in a cable landing license without the prior approval of the Commission. The new rules, by contrast, "allow for post-transaction notification of pro forma assignments and transfers of control of interests in cable landing licenses."[36]

Like the rule changes resulting from the international Section 214 streamlining rulemakings, the rule changes resulting from the submarine cable streamlining rulemaking

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Cable Landing License Act, Report and Order, 16 FCC Rcd. 22,167 (2001) ("*Submarine Cable Streamlining Order*").

30 *Submarine Cable Streamlining NPRM*, 15 FCC Rcd. at 20,790 ¶ 1.

31 *See Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,168-69 ¶¶ 1-3.

32 *Id.* at 22,168 ¶ 1.

33 *Id.*

34 *See id.* at 22,168 ¶ 2; *see also id.* at 22,190 ¶ 45 n.98 (referring to data, supplied by Tyco, showing that, before streamlining, "the application processing time for obtaining a cable landing license in the United States [took] from 137 to 451 days for various cable systems").

35 *Id.*

36 *Id.*

changed—and greatly reduced—the Commission services provided to submarine cable operators, while fostering tremendous capacity growth on private submarine cables and corresponding reductions in bandwidth prices. These changes therefore justify a permitted amendment, pursuant to Section 9(b)(3), to the fee schedule with respect to submarine cable operators.

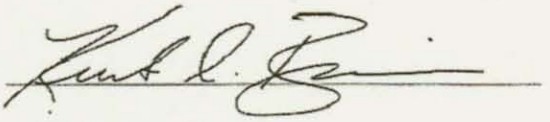
As a result of the submarine cable streamlining proceeding, the Commission revised its rules to require only "minimal regulatory oversight" by the Commission of submarine cable operators. This change in Commission services therefore justifies a permitted amendment pursuant to Section 9(b)(3).

CONCLUSION

Section 9(b)(3), as construed in *COMSAT*, directs the Commission to amend its regulatory fees schedule when a rulemaking proceeding or a change in law results in the Commission devoting fewer of its resources to serving a class of payors. As described above, three separate changes support amendment of the regulatory fees schedule as applied to submarine cable operators. On account of these changes, the Commission has ample legal justification—and indeed is compelled—to amend its regulatory fee schedule to reclassify submarine cable operators and establish a new regulatory fee for such operators.

Please contact Kent Bressie by telephone at +1 202 730 1337 or by email at kbressie@harriswiltshire.com should you have any questions.

Respectfully,



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