Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	
VSNL Telecommunications (US) Inc. Petition for Rulemaking	RM-11312
and	
Assessment and Collection of Regulatory Fees for Fiscal Year 2006	MD Docket No. 06-___

REPLY COMMENTS

Like the vast majority of parties filing comments in this proceeding, Level 3 Communications, LLC ("Level 3") urges the Commission to reform its rules and policies governing the application of international bearer circuit ("IBC") fees to non-common carrier submarine cable operators.[1] To align its collection of fees with the specific language and policies set forth in the Communications Act of 1934, as amended ("Telecom Act"), and eliminate the market distortion caused by the regulatory fee system, the Commission must change its IBC fee system to reduce the unfair burden on private submarine cable operators, encourage deployment of advanced services and ensure compliance without increasing regulatory burdens on law-abiding companies. The Commission should grant the petition ("Petition") of VSNL Telecommunications (US) Inc. ("VSNL") and immediately issue a rulemaking to address the issues raised in the Petition.

[1] See Comments of Hibernia ("Hibernia Comments") at 1; Comments of Apollo ("Apollo Comments") at 1; Comments of FLAG ("FLAG Comments) at 1.

I. The Current DS0-based Capacity IBC Fee Structure Unfairly Impacts Private Cable Operators, Distorts the Market and Undermines the Commission's Policy of Encouraging Deployment of Broadband Facilities

Most commenters agree with Level 3 that today's capacity-based system unfairly and disproportionately impacts newer submarine cable systems with higher capacity. The record shows that the highest capacity submarine cable systems that supply bandwidth to the Internet and other providers at the lowest per-unit prices nevertheless pay the highest regulatory fees. According to Hibernia, "the prices for higher-capacity circuits have dropped much more steeply than the prices for lower-capacity circuits…".[2] Hibernia further points out that, "at the OC-3 level, the annual regulatory fee is equal to approximately one *month's* rent for the circuit, while at the 10G level, the annual regulatory fee is equal to approximately one *year's* rent for the circuit. As a result, for the very high-capacity circuits, the demand for which has been steadily increasing, the regulatory fee can equal or exceed the price of the capacity itself."[3] By contrast, smaller submarine cable systems that sell smaller capacity increments at higher prices pay far less in regulatory fees. The current system discriminates against submarine cable providers that sell high-bandwidth services to customers and provides a competitive advantage to those on smaller systems by making their smaller increments of capacity appear more economical.

This result distorts and interferes with markets for international submarine cable capacity. The Commission has often recognized that competitive forces – and not

[2] Hibernia Comments at 4.
[3] Id. at 6 (*emphasis in original*).

regulatory policy – should dictate market behavior in the telecommunications industry.[4] Yet, as Hibernia shows, the IBC fee system impacts demand and supply behavior and therefore undermines efficient operation of the market:

> ...disproportionately high fees on high-capacity circuits provide incentives for customers to delay upgrading their networks or instead purchase lower-capacity circuits to minimize the impact of the regulatory fee or to find ways to circumvent or avoid the regulatory fee entirely. These buying decisions should be made based upon business needs and market[-]based pricing, and should not be the product of market distortions created by an unfair or irrational regulatory fee. Unfortunately for consumers, however, the current regulatory fee system discourages the sale and purchase of higher-capacity, more efficient circuits and thus discourages the development of high-capacity international data networks.[5]

Notwithstanding AT&T's claim that the Commission seeks to maintain "both private and common carrier regulatory options ... and ... flexibility in seeking and determining how a cable system will be operated", the Commission's IBC fee system artificially tilts the market in favor of the smaller, common carrier systems that exist today. This approach is unfair, unlawful and, as discussed below, contrary to public policy.

The existing IBC fee system undermines public policy that seeks to encourage the deployment of broadband capacity. After taking steps to encourage the entrepreneurial deployment of high capacity submarine cable systems, the Commission has allowed its regulatory fee system to undermine this pro-bandwidth policy. When these fees are out of proportion to the market prices that carriers can receive for high capacity submarine cable services, they penalize cable operators for their investment in high capacity systems

[4] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, FCC 04-97 at ¶ 18.
[5] Hibernia Comments at 6-7.

at the same time the FCC is promoting the construction of such systems. Moreover, this fee system discourages investment in new capacity that will provide substantial benefits for businesses and consumers.

II. The Commission is Required to Modify Its Regulatory Fee Structure to Reflect Its Separate Treatment of Private Cable Systems

No party denies that the Commission is legally required to change its Schedule of Regulatory Fees to reflect changes in its regulatory treatment of different services. Section 159 requires amendment to the schedule of regulatory fees when the Commission 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. Regulatory fees must:

> 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.[6]

Section 159 established an initial schedule of regulatory fees to apply until adjusted or amended by the Commission under the procedures established by Section 159, meaning that the fee structure and levels are not fixed.[7]

Section 159(b)(3) directs the Commission to make "permitted amendments". In particular, the Commission:

> shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to

[6] 47 U.S.C. § 159(b)(1)(A).
[7] 47 U.S.C. § 159(b)(1)(C).

> 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.[8]

Thus, as Level 3 and other commenters have demonstrated, changes in the Commission's regulation of cable landing licensees compel the Commission to amend the fee schedule to realign the regulatory fees paid by cable landing licensees with the reduction in Commission activities conducted on behalf of cable landing licensees.

Changes in regulation of submarine cables built on a private carrier basis clearly justify separate treatment from common carrier cable systems. AT&T contends that changes in FCC regulation of submarine cable systems do not justify VSNL's proposals because the changes affected both common carrier and non-common carrier systems. AT&T fails to recognize, however, that these changes (including the entry into force of the WTO basic telecommunications commitments and the Foreign Participation Order) primarily benefited private carrier systems that, unlike common carrier systems, were owned and operated on an end-to-end basis and therefore required the market-opening

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[8] 47 U.S.C. § 159(b)(3). Although Section 9(b)(3) uses the term "services" twice, that usage does not mean that "services" refers in both cases to services offered by particular payors or that the Commission therefore may make permitted amendments only when the payors change the nature of their services. Such a reading would be inconsistent with the Commission's own longstanding interpretation of Section 9(b)(3)'s second reference to services. The Commission itself has long taken the view that the second reference—to the "nature of its services"— means the nature of the *Commission's* activities undertaken on behalf of a particular category of payors, and has even gone so far as to characterize such services as "[our] services." *See*, e.g., Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14,165 ¶ 357 (2004) (stating that "Section 9(b)(3) further provides that permissive amendments to the regulatory fee schedule shall 'reflect additions, deletions, or changes in the nature of [our] services as a consequence of Commission rulemaking proceedings or changes in law.'" (insertion in original)); *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, Notice of Proposed Rulemaking*, 17 FCC Rcd. 4873 ¶ (2002) (noting that there was no need to make a permitted amendment to the fee schedule in connection with the relocation of SMR providers from the 800 MHz band, as "there would be no apparent change in the nature of the *Commission's* services in processing requests for modification of license to effect relocation of incumbents." (emphasis added)).

measures put in place by those instruments. Indeed, after implementation of the WTO basic telecommunications commitments, virtually all of the submarine cable systems put into operation were non-common carrier.[9]

Multiple parties agree that the Commission imposes fewer obligations on private systems than common carrier systems, partly because the Commission has already determined that sufficient competition and capacity exists on private carrier routes.[10] As Apollo points out, the Commission has determined that "sufficient capacity and other conditions exist on the route or routes involved that common carrier regulation is not required in order to achieve the regulatory purposes set forth in the Cable Landing License Act."[11] For these private systems, Apollo continues, the Commission "recognize[d] that increased competition in the provision of international telecommunications services enables the Commission to deregulate and rely instead upon market forces…".[12] As a result, "the Commission created an alternative regulatory regime for non-common carrier submarine cable operators, as appropriate to the circumstances, and therefore also should adopt a separate regulatory fee category."[13] As an initial matter, common carrier cable system must price capacity in accordance with Sections 201 and 202 of the Telecom Act. These provisions prevent common carrier cable systems from using market power to impose unreasonable terms and conditions or

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[9] *See* Federal Communications Commission, 2004 Section 43.82 Circuit Status Data (released December 22, 2005) ("2004 FCC Circuit Status Data") at 34.

[10] Since it began collecting fees on international capacity, the Commission has substantially reduced its obligations on submarine cable operators if they operate on a private carrier basis. Since 1993, for example, the Commission has granted 10 non-common carrier submarine cable licenses and only 1 common carrier license in the Atlantic Ocean region, fundamentally changing its policy with respect to submarine cables compared to prior periods. 2004 FCC Circuit Status Data at 34. Companies building private cable systems on competitive routes were able to benefit from substantially reduced regulation of their services.

[11] Apollo Comments at 3.

[12] Id. at 5.

[13] Id. at 3.

to discriminate unreasonably against third parties.[14] They must obtain FCC permission to discontinue services under Section 214 to make sure that captive customers are able to ensure continuity of services.[15] They must file (or retain) contracts under Section 211 to make sure they are not receiving special concessions from bottleneck providers.[16] And they are subject to complaints under Section 208.[17] All of these obligations apply to common carrier systems but not to private systems and therefore impose a much greater burden on the Commission's regulation of submarine cable systems.[18]

The Satellite Industry Association ("SIA") agrees with the assessment of VSNL and others that capacity-based fees fail to apportion the costs of FCC regulation fairly among regulated entities. According to SIA, "the Commission should re-evaluate the basis for collection of IBC regulatory fees in an attempt to align the fees more closely to the regulatory costs imposed by IBC providers."[19] SIA further agrees that the Commission has the legal authority to modify the IBC fee category.[20]

III. As Part of Its Rulemaking, the Commission Should Explore Alternative Solutions to the Problems Plaguing the Current IBC Fee System

Although Level 3 supports VSNL's proposal, the Commission should explore other alternatives that would create a fair, transparent, predictable and enforceable regulatory fee system applicable to international capacity. Section 159(b)(3) requires the Commission to amend the Regulatory Schedule of Fees, but the Telecom Act does not

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[14] 47 U.S.C. §§ 201, 202.
[15] 47 U.S.C. §§ 214.
[16] 47 U.S.C. §§ 211.
[17] 47 U.S.C. §§ 208.
[18] To the extent that common carrier regulation is no longer necessary on certain routes, these systems have the right and the opportunity to change their classification from common carrier to private cable systems.
[19] Comments of the Satellite Industry Association ("SIA Comments") at 3.
[20] Id. at 3-4. Level 3 agrees with SIA that changes to the regulatory fees assessed to the satellite industry may be required to the extent that SIA can show that the changes in regulation of the satellite industry trigger the Permitted Amendments requirements of Section 159,

specify how it does so as long as it "reflect[s] additions, deletions, or changes in the nature of its services."[21] VSNL has suggested a transparent, coherent and enforceable plan that would account for the changes in the nature of the Commission's regulation of international submarine cable systems. To the extent that the Commission or other commenters are concerned that the proposal would impose unfair and disproportionate increases in the fees paid by other regulated entities, Level 3 would be open to other alternatives that solve what all commenters understand to be a serious and immediate problem with the way the Commission collects regulatory fees.

Level 3 continues to support application of a flat, per-system fee on submarine cable systems. In its Petition, VSNL proposed a per-system fee on private submarine cable systems. In its Comments, Level 3 explained that this approach would provide simplicity and transparency, resulting in greater compliance without establishment of new regulations. Moreover, the approach would not be overly burdensome to common carrier systems. Indeed, based on information contained in FCC reports, common carrier submarine cable operators would likely pay less regulatory fees if VSNL's proposal were adopted but 65% (rather than 90%) of IBC fee requirements were allocated to common carrier cable systems,[22] regardless of whether IBC fees are assessed against submarine cable system consortia or against their members or their customers.[23]

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[21] 47 U.S.C. § 159(c)(3).

[22] This result assumes that IBC fees are paid on 100% of common carrier submarine cable capacity listed in the FCC's 2005 Circuit Status Report. For example, the Circuit Status Report shows that the TAT 12/13 submarine cable system has 362,880 DS0s of capacity, resulting in an overall theoretical fee obligation of $515,290 based on a $1.42 per unit fee as announced by the Commission. 2004 FCC Circuit Status Data at 32; Assessment and Collection of Regulatory Fees for Fiscal Year 2006, MD Docket No. 06-68, Notice of Proposed Rulemaking, FCC 06-38 (released March 27, 2006) at Attachment D (setting IBC fee at $1.42 per 64 Kbps equivalent). Under the VSNL proposal and a 65/35 split, the fee for common carrier cable systems would be $1.10 per unit, resulting in a total fee of $399,168 for TAT 12/13.

[23] Common carrier submarine cable system Construction and Maintenance Agreements ("C&MAs") generally contain provisions allowing landing parties to assess other consortia members for costs related to

If the Commission declined to apply different regulatory fee mechanisms to common carrier and non-common carrier submarine cable systems, however, it should apply a per-system mechanism to all submarine cable systems. To meet its obligations under Section 159 the Telecom Act in a per-system regulatory fee plan, the Commission could apply a sliding scale to a per-system fee. For example, the Commission should consider applying a base unit to lower capacity systems and unit multiples to higher capacity systems that reflect the lower per unit revenues obtainable for such higher capacities.[24] For example, one mechanism might require payment of X dollars for systems of less than 20G of potential capacity, 2X dollars for systems between 21-80G of potential capacity and 6X dollars for systems of 81G or potential capacity or larger.[25] This approach would allocate regulatory fee responsibility among larger and smaller systems that serve different types of customers and generally provide different levels of service. It would not penalize deployment of new capacity and will therefore encourage it. Moreover, like VSNL's proposal, this mechanism would be transparent and predictable, resulting in greater compliance with the FCC's regulatory fee payment

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taxes and regulatory licensing. *See, e.g.*, Columbus II C&MA at ¶¶ 8, 9, 14, 17 and 23. Accordingly, applying IBC fees to cable system landing parties would not prevent those parties from recovering fees rightfully allocated to other consortia members or customers.

[24] Under Hibernia's proposal, the Commission would add multiple fee tiers to the current "per 64K circuit" methodology, but would still require payment (albeit decreasing payment as units increase) per 64K circuit. A plan that reduced per unit payments by fractions of units for higher unit multiples, for example, would have the benefit recognizing the unique characteristics of larger capacity systems and encouraging the continued deployment of high capacity systems. Nevertheless, the plan would not ensure full compliance or predictability, and would likely result in greater rather than reduced regulation of private submarine cable systems.

[25] Under this approach, Level 3 calculates that 18 submarine cable systems would have greater than 81G and would pay approximately $355,201 each; 6 submarine cable systems would have between 21 and 80G and would pay approximately $118,340 each; and 11 submarine cable systems would have 20G or less and would pay approximately $59,170 each. The capacity could be stated in terms of DS0 equivalents rather than Gbps if necessary.

requirements.[26] Each cable system would know each year that they are obligated to pay regulatory fees and how much those fees will be based on publicly-available FCC data. As a result, they could build these costs into their pricing or otherwise arrange for payment by their customers or other cable capacity owners. The increased certainty would bring more money into the system, reducing the fees for those companies currently paying IBC fees.

Finally, the Commission should reject AT&T's suggestion that increasing the number of payment units would resolve the issues raised by VSNL. Merely raising the number of payment units (presumably by imposing reporting requirements on private submarine cable systems) would require increasing the regulatory burden on private cable systems without substantially resolving the problems identified in this proceeding. For example, this solution would not make it easier for companies to predict their annual fees and would continue to rely on self-reporting by submarine cable operators. Rather than accepting AT&T's diversionary, short-sighted suggestion, the Commission should seek comment on the proposals submitted by VSNL and other parties that have identified the Commission's obligation to change the way it collects regulatory fees from private carrier submarine cable system operators.

CONCLUSION

The vast majority of Comments on VSNL's Petition reflect a consensus that applying a per-DS0 circuit fee on both common carrier and non-common carrier submarine cable systems violates Section 159(a) of the Telecom Act, distorts the international capacity market and must be changed immediately. This patently unfair

[26] Submarine cable owners paying regulatory fees on behalf of the cable could collect reimbursement from other cable owners based on the submarine cable operating agreements in effect between the parties. These entities could pass the regulatory fee through to their customers if they desire.

method of collecting regulatory revenues penalizes law-abiding companies that have deployed large amounts of international capacity in response to the Commission's private submarine cable policies and rewards companies that fail to pay their fair share or remain invested in lower-capacity systems. By contrast, the proposals filed by VSNL and others would meet the requirements of the Telecom Act, encourage the continued deployment of international submarine cable capacity, provide transparency and predictability and ensure full compliance by entities that own or operate capacity in submarine cables landing in the United States. Accordingly, the Commission should immediately issue a Notice of Proposed Rulemaking and proceed to change its IBC fee systems as set forth in the VSNL Petition or alternative proposals.

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