

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Assessment and Collection of Regulatory
Fees for Fiscal Year 2008

MD Docket No. 08-65
RM No. 11312

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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SUMMARY

Five years ago, submarine cable operators warned the Commission that its regulatory regime for international bearer circuit (“IBC”) fees was “broken.” The consequences are now clear. Today, IBC regulatory fees can approach, or in some cases exceed, the revenues associated with such service. Other payors of Commission fees, by contrast, pay tiny fractions of their revenues in regulatory fees. The time has now come for the Commission to reform the IBC regulatory fee category. Level 3 Communications, LLC (“Level 3”) urges the Commission to adopt the Joint Proposal filed separately today by a group of submarine cable operators. (A copy of the Joint Proposal is attached as Exhibit A to these Comments.)

The shortcomings of the IBC fees are well documented:

- *The existing IBC fee distorts the market by grossly overcharging high-capacity systems.* Section 9 of the Communications Act imposed a capacity-based methodology for IBC fees at a time when capacity increased only marginally from year to year. Since then, capacity—especially submarine cable capacity—has increased exponentially and prices have dropped accordingly. But regulatory fees have not followed suit. The result is regulatory fees that bear no connection to prices charged in the marketplace. For instance, the regulatory fees on a 10Gbps Linear Wave now account for more than 88 percent of the annual revenue that a submarine cable operator generates by leasing this capacity. Other Commission regulatees pay far less. The fees for cable television operators, for example, represent less than one tenth of one percent of the price of basic cable television service.
- *The existing IBC fee regime no longer bears any relation to the manner in which submarine cable operators are regulated.* When Congress imposed a capacity-based methodology for IBC fees, nearly all submarine cables were, ultimately, owned by common carriers. Submarine cable services, like all international common carrier services, were subject to pervasive regulation. Today, however, non-common carrier submarine cables are subject to far less regulation. And submarine cables are no longer required to obtain Commission consent to add circuits, as they did until 1996. In such circumstances, there is no longer a meaningful relationship between the regulatory fees imposed on submarine cable operators and the regulation to which they are subject. For example, an operator such as Level 3 can triple the capacity on a private submarine cable system simply by altering the electronics on each end. This requires no action whatsoever by the Commission—indeed, the Commission is not even aware of such actions by

undersea cable operators. Yet such addition of capacity produces an absurd result under the existing fee regime: the operator's fees would triple even though the regulatory costs the system imposes on the Commission would not change at all.

- *The existing fee regime discourages innovative submarine cable offerings.* The capacity-based regime requires submarine cable operators to expend significant regulatory resources trying to determine whether and when fees apply. Operators often reach different conclusions for very similar services. At the extremes, operators even hesitate to offer particular services given the difficulty in making sense of the Commission's fee regime as it applies to particularly innovative offerings, and of convincing potential customers to undertake a service subject to potentially conflicting and difficult regulatory interpretations.
- *Even the most intrusive reporting requirements would not fix the structural deficiencies of the existing fee regime.* The Commission presently has no means of monitoring active submarine cable capacity and thus no real way of enforcing submarine cable operator's payment of regulatory fees. Inevitably, some operators that should be paying regulatory fees do not do so. Yet even the most onerous and unwarranted reporting requirements would not address the structural deficiencies described above. Increasing the number of estimated payment units, for example, would do nothing to address the distortions that disfavor high-capacity and non-common carrier systems.

The Joint Proposal, based in substantial part on an earlier proposal by VSNL Telecommunications (US) Inc. ("VSNL"), addresses these shortcomings. As described in more detail below, the Commission would create a separate regulatory fee category of "Submarine Cable Systems" (the "SCS Fee"). Facilities-based common carriers would remain in the IBC fee category (the "New IBC Fee"). The SCS Fee is designed to recover the costs of Commission regulation of submarine cable facilities—much as the analogous category for satellite facilities does today. The New IBC category is designed to reflect the Commission's regulation of international common carrier services, regardless of the facilities used to deliver such services.

The Commission would then create a revenue requirement for the new SCS Fee category. It could begin the process by splitting the existing IBC category ("Old IBC Fee") revenue requirement of \$8,149,636 for FY 2008 equally between the SCS and the New IBC fee categories. The Commission should, however, revise downward the percentage allocated to the

SCS Fee category based on its own internal calculations of the costs of regulating submarine cable facilities.

The Commission would then define the “payment unit” of the SCS Fee category in the simplest possible manner—each international submarine cable for which the Commission has issued a landing license would constitute a payment unit. Purely domestic cables would be excluded from this category, as much of the Commission’s submarine cable regulation is inapplicable to domestic submarine cables. The Commission would then calculate the SCS and New IBC fees accordingly.

Once adopted, the Joint Proposal would eliminate the ever-increasing market distortions caused by calculating regulatory payments based on capacity where competitive pressure has brought prices down more than 90 percent. It would restore the relationship between regulatory fees and regulatory benefits by distinguishing between two very different sets of regulation—the light regulation of submarine cable facilities and the pervasive regulation of common carrier services. It would also eliminate at a stroke questions of regulatory interpretation and incentives to abuse the regulatory process.

The Commission has ample legal authority to adopt the Joint Proposal. The regulatory fees paid by private submarine cable operators are no longer “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities,” as the Communications Act requires. The Commission therefore should, and must, use its “permitted amendment” authority to reclassify private submarine cable operators in a new and separate fee category using a methodology that reasonably relates payor benefits to Commission regulatory activities. The Joint Proposal meets this criterion, and the Commission should adopt it now.

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COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”) urges the Commission to adopt the Joint Proposal submitted today by a group of submarine cable operators in response to the Commission’s request for comment on potential changes to the current methodology.¹ Five years ago, submarine cable operators warned the Commission that its regulatory regime for international bearer circuit (“IBC”) fees was “broken.”² The consequences are now clear. Today, IBC regulatory fees can approach, or in some cases even exceed, the revenues associated with such service. Other entities regulated by the Commission, by contrast, pay tiny fractions of their revenues in regulatory fees. The time has come for the Commission to reform the IBC regulatory fee category.

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, FCC 08-126, MD Docket No. 08-65 ¶ 8 (rel. May 8, 2008) (“*NPRM*”). A copy of the Joint Proposal is attached as Exhibit A to these Comments.

² Comments of Tyco Telecommunications (US) Inc., MD Docket No. 04-73, at i (filed Apr. 21, 2004) (“*Tyco Telecom 2004 Rulemaking Comments*”).

The shortcomings of the existing IBC fee regime are well documented. It distorts the market by grossly overcharging high-capacity systems. It bears no relation to the manner in which submarine cable operators are regulated. It discourages innovative submarine cable offerings. And even the most invasive attempts to remedy the pervasive administrative issues associated with the existing system would not address these systematic problems.

The Joint Proposal, based in large part on an earlier proposal by VSNL Telecommunications (US) Inc. (“VSNL”), addresses these shortcomings.³ As described below, the Commission would create a separate regulatory fee category of “Submarine Cable Systems” (the “SCS Fee”). Facilities-based common carriers would remain in the IBC fee category (the “New IBC Fee”). The Commission would then create a revenue requirement for the new SCS Fee category. It could begin the process by splitting the existing IBC category (“Old IBC Fee”) revenue requirement of \$8,149,636 for FY 2008 equally between the SCS and the New IBC Fee categories. The Commission should, however, revise downward the percentage allocated to the SCS Fee category based on its own internal calculations of the costs of regulating submarine cable facilities. The Commission would then define the “payment unit” of the SCS Fee category in the simplest possible manner—each international submarine cable for which the Commission has issued a landing license would constitute a payment unit. The Commission would then calculate the SCS and New IBC fees accordingly.

The Commission has more than ample legal authority to adopt the Joint Proposal. The regulatory fees paid by submarine cable operators are no longer “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities,” as the Communications

³ See Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM-11312 (filed Feb. 3, 2006) (“VSNL Petition”).

Act requires.⁴ The Commission therefore must use its “permitted amendment” authority to reclassify private submarine cable operators in a new and separate fee category using a methodology that reasonably relates payor benefits to Commission regulatory activities. The Joint Proposal meets this criterion, and the Commission should adopt it now.

I. BACKGROUND

A. Level 3 Communications, LLC

Level 3 and its affiliates are leading providers of domestic and international Internet backbone and broadband capacity. With an advanced nationwide fiber optic system and metropolitan area fiber networks in the United States and Europe, Level 3 provides and uses large amounts of telecommunications bandwidth. To link its European and U.S. networks, Level 3 owns and operates the Yellow System, a submarine cable system connecting landing stations in Brookhaven, New York, and Bude, England, on a non-common carrier basis. Level 3 also owns or leases capacity on other submarine cable systems, both common carrier and non-common carrier. Level 3 pays IBC fees annually for active capacity on the Yellow System and for its leases on other systems.

B. The Current Regulatory Fee Regime for International Bearer Circuits

The Commission does not assess separate regulatory fees on submarine cable operators. Instead, it groups both private and common carrier submarine cables with other operators of

⁴ 47 U.S.C. § 159(b)(1)(A).

“international bearer circuits.”⁵ While it has never codified the scope of those subject to IBC fees, the Commission has made its most definitive statements on the issue in annual informal fact sheets. The latest version states:

Who Must Pay: Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active international bearer circuits as of December 31, 2006 in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. If you are required to pay regulatory fees, you should pay based on your active 64 KB circuit count as of December 31, 2006.⁶

In 2004, the Commission sought to address confusion among submarine cable operators and their customers by clarifying which operators were obligated to pay.⁷ But the Commission has yet to

⁵ In this respect, the structure of regulatory fees paid by submarine cable operators differs from that applicable to the other primary operators of international bearer circuits—satellite operators. All satellite operators pay one set of fees to account for the costs generated by the regulation of their facilities, while common carrier satellite carriers pay a second set of fees to account for the regulation of their common carrier services. *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2007* (August 2007) (“2007 Fact Sheet”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275938A6.pdf.

⁶ *Id.* at 3.

⁷ See *Compliance With Regulatory Fee Requirements By Cable Landing Licensees Operating On A Non-Common Carrier Basis*, Public Notice, 19 FCC Rcd. 12,318 (2004) (clarifying that regulatory fee payment obligations apply regardless of: (1) the nationality of the licensee or of the licensee’s corporate parent; (2) whether the licensee sells capacity directly or through a U.S. or foreign affiliated sales or marketing subsidiary; (3) whether the licensee operates the licensed system on a common-carrier or non-common-carrier basis; (4) whether the licensee or its affiliated sales or marketing subsidiary sells capacity on a lease or IRU basis; or (5) the nature of the services provided by the operator’s customers using such capacity) (“Clarifying Public Notice”).

define clearly what constitutes “active” circuits or equivalents, although Commission staff has informally interpreted capacity to be “active” (at least with respect to capacity on fiber-optic systems) when both the fiber is lit and the capacity is sold. Thus, facilities-based common carriers must pay IBC fees for all of their active international bearer circuits, while private submarine cable operators and non-common carrier satellite operators need only pay IBC fees for bearer circuits sold to entities other than common carriers.⁸

As with all other regulatory fee categories, the Commission each year determines how much it needs to collect from international bearer circuit operators.⁹ In any event, once it calculates the revenue requirement for the international bearer circuit category, the Commission (following the guidance originally set forth in the statute¹⁰) recovers this revenue by: (1) estimating how much active capacity exists among all international bearer circuit operators; and (2) using this estimate to calculate a fee based on active 64 KB circuits or circuit equivalents.

⁸ See *2007 Fact Sheet*. The Commission exempted capacity sales to carriers holding international Section 214 authorizations in order to avoid double-charging carriers (once for the capacity sale from the submarine cable or satellite operator to the U.S. international carrier, and once for the capacity sale from the U.S. international carrier to its customers). See *Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Memorandum Opinion and Order*, 10 FCC Rcd. 12,759, 12,761 ¶¶ 10-11 (1995). In any event, the Commission expects that IBC fees will be paid once for all active international bearer circuits connecting the United States with foreign points.

⁹ See 47 U.S.C. § 159(b)(1)(A), (i). Although the Act specifies that this “revenue requirement” must correlate with the regulatory benefits actually provided to international bearer circuit operators, the Commission has yet to implement a formal and accurate cost-accounting system. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003, Report and Order*, 18 FCC Rcd. 15,985, 16,040-41 (2003) (concurring statement of Commissioner Adelstein) (discussing cost accounting); *Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Report and Order*, 16 FCC Rcd. 13,525, 13,529 ¶¶ 7-8 (2001) (discussing problems with previous cost accounting system).

¹⁰ See 47 U.S.C. § 159(g); see also *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Final Rule*, 8 FCC Rcd. 5333 (1994) (setting forth initial regulatory fee schedule, including international bearer circuit fees).

Last year, the Commission calculated a revenue requirement for international bearer circuits in the amount of \$7,548,425.¹¹ Estimating that there would be 7,200,000 active 64 KB circuits or circuit equivalents, it established a regulatory fee of \$1.05 per circuit or circuit equivalent.¹² This year, it has calculated a revenue requirement for international bearer circuits in the amount of \$8,149,636.¹³ Estimating that there will be 7,500,000 active 64 KB circuits or circuit equivalents, it proposes a regulatory fee of \$1.09 per circuit or circuit equivalent.¹⁴

C. Proposals Advanced in Past Regulatory Fees Rulemaking Proceedings

Level 3 is not the first submarine cable operator to seek reform of the IBC category. For example, in 2004 and again in 2005, Tyco Telecommunications (US) Inc. (“Tyco Telecom”) explained why the Commission’s existing IBC fee methodology was inconsistent with the Communications Act, distorted the market for submarine cable capacity, and used outdated and inaccurate capacity estimates to establish the IBC fee level each year.¹⁵ In response, the Commission acknowledged the merit of most of Tyco Telecom’s arguments, concluding that “a fee system based on licenses, rather than circuits, would be administratively simpler for both the Commission and carriers,” and finding that “basing the fees on the active circuits may provide disincentives to carriers to initiate new services and to use new facilities efficiently.”¹⁶

¹¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2007, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 15,712, 15,766 (Attachment C) (2007) (“2007 Regulatory Fees Order”).

¹² *Id.*

¹³ See *NPRM* at Attachment C.

¹⁴ See *id.*

¹⁵ Tyco Telecom 2004 Rulemaking Comments at 6-19; Comments of Tyco Telecommunications (US) Inc., MD Docket No. 05-59, at 12-21 (filed Mar. 8, 2005).

¹⁶ *Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Report and Order*, 19 FCC Rcd. 11,662, 11,672 ¶ 29 (2004).

Tyco Telecom's successor-in-interest, VSNL, raised many of the same issues in its Petition, which the Commission granted as part of the *NPRM*.¹⁷ As described in part IV below, the Joint Proposal submitted today differs in several material respects from VSNL's proposal, though not its core proposal of a system-based fee. Level 3 nonetheless agrees with VSNL, Tyco Telecom, and others that the Commission must change the way it assesses non-common carrier submarine cable operators for annual regulatory fees.

II. THE CAPACITY-BASED FEE REGIME FOR SUBMARINE CABLE OPERATORS DISTORTS THE MARKET FOR INTERNATIONAL CAPACITY

The Commission's existing capacity-based regulatory fee system distorts the market for international capacity in three principal respects, thereby disserving the public interest. *First*, the capacity-based fee regime imposes disproportionate costs on high-capacity submarine cable operators (and on their customers) even though high-capacity operators generate no higher regulatory costs for the Commission than do low-capacity operators. As a result the Commission overcharges high-capacity operators (thus inflating artificially the prices they charge end users). *Second*, the Commission levies the same per-unit charges on common carriers and on private operators, even though private operators impose nominal regulatory costs on the Commission, as they are not regulated under the Act or the Commission's panoply of Part 63 rules governing international common carriers. *Third*, the capacity-based regime imposes significant but unnecessary transaction costs on, and discourages innovative capacity offerings by, private submarine cable operators. Consequently, capacity purchasers—and ultimately U.S. consumers

¹⁷ See *NPRM* at 4 ¶ 8; VSNL Petition at 6. First, VSNL advances the proposal that the Commission reclassify non-common carrier submarine cable service as a new fee category separate from other entities subject to the IBCF, creating at least two separate categories. Second, VSNL proposes that the Commission apportion the revenue requirement between the two categories based on a comparative assessment of the regulatory resources used by entities in each category. Third, VSNL submits its proposal for a system-based rather than capacity-based fee structure. See VSNL Petition at 5-7.

and businesses—pay higher prices for international connectivity without any improvement in service quality or efficiency.

A. The Capacity-Based Regulatory Fee Regime Ignores the Fundamental Changes in Technology that Have Produced Exponential Increases in Capacity and Plunging Capacity Prices

Congress adopted the original capacity-based fees regime in 1993, when the capacity of international systems increased by relatively small increments and was limited by technology that required new construction for significant capacity upgrades. Since then, however, the market for international capacity has changed radically—especially with respect to submarine cable systems. Booming demand for capacity attracted submarine cable operators other than traditional carriers to invest substantial sums in high-capacity systems and to develop new technologies. The industry was able to quickly meet market demand in large part due to the success of the Commission’s policy to streamline regulation on the construction of new cables. These operators can now upgrade system capacity simply by changing the electronics in the cable stations, allowing for a doubling, quadrupling, or more of capacity without putting a new cable in the water.

Submarine operators have increased trans-oceanic capacity more than 2000 percent since 1998, and per-unit prices for high-speed capacity have declined dramatically.¹⁸ IBC fees, however, have decreased at a much slower rate than the per-unit price, meaning that the fees

¹⁸ See Letter from Chad Breckinridge, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, FCC, RM-11312, Attachment at 1 (July 12, 2007) (“Level 3 2007 Letter”). These figures may well understate capacity in the market today, because they do not take into account the most recent system upgrades. Systems originally installed with a fiber pair capability at 16x 10Gbps per fiber pair are now being upgraded to be capable of in excess of 60 wavelengths per fiber pair, and could reach over 80x 10Gbps. Indeed, some of the newest systems may soon reach in excess of 120 wavelengths per fiber pair.

represent an increasingly large component of overall per-unit price.¹⁹ Thus, while capacity has surged and prices have dropped to less than a tenth their 1998 level, corresponding per-unit regulatory fees have declined by 82.5 percent.²⁰

The result is regulatory fees that distort the market for international capacity. Regulatory fees for even low capacity submarine cable offerings take up a significant percentage of the revenue derived from such offerings. Those for high-capacity offerings now approach or even exceed associated revenue. For example:

- An OC3 Protected Private Line is suitable for a small ISP, or mid-sized U.S. corporation. Leasing this capacity costs about \$36,000 per year, exclusive of regulatory fees. With a capacity equivalent of 1,890 voice grade circuits, the FY 2007 IBC fee of \$1.05 per circuit would total roughly \$1,984.5 or nearly 5.5 percent of the annual price.
- A 2.5Gbps Linear Wave is suitable for a voice reseller, a large ISP, or a multinational corporation. Leasing this capacity costs approximately \$102,000 per year, exclusive of regulatory fees. With a capacity equivalent of 30,240 voice grade circuits, the FY 2007 IBC fee would total roughly \$31,752 or more than 31.1 percent of the annual price.
- A 10Gbps Linear Wave is suitable for a major facilities-based telecom carrier, a major ISP, or a major multinational bank. Leasing this capacity costs approximately \$144,000 a year. With a capacity equivalent of 120,960 voice grade circuits, the FY 2007 IBC fee would total roughly \$131,816, or more than 88 percent of the annual price.²¹

With an increased fee of \$1.09 proposed for FY 2008, the percentage of revenue claimed by the IBC will only increase if the fees are not reformed.

¹⁹ See Tyco Telecom 2004 Rulemaking Comments at 9-10.

²⁰ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1998, Report and Order*, 13 FCC Rcd. 19,820 (Attachment F) (1998); *2007 Regulatory Fees Order*, 22 FCC Rcd. at 15,765 (Attachment C).

²¹ See Level 3 2007 Letter (updated with the computed FY 2007 regulatory fee from the *2007 Regulatory Fees Order* at Attachment C).

As far as Level 3 is aware, no other Commission regulatee devotes a comparable percentage of revenues to regulatory fees. Interstate Telecommunications Services Providers, for example, pay fees totaling roughly one quarter of one percent of the price of interstate service. Cable television operators pay even less—their regulatory fees equal less than one tenth of one percent of the price of basic cable television service.²²

This regime, moreover, discriminates against high-capacity cable systems, even though higher capacity systems do not cause higher regulatory costs for the Commission. Market forces push prices down when available capacity increases. Yet, the Commission's fee methodology provides for an *increase* in regulatory fee payments that is proportional to increases in capacity. Thus, even as prices drop, U.S.-licensed cable operators pay proportionally higher fees whenever their capacity increases.

By the same token, this fee regime discriminates in favor of low-capacity system operators. All other things being equal, a single high-capacity submarine cable system may pay regulatory fees hundreds of times higher than a low-capacity submarine cable system, even though those systems impose identical regulatory costs on the Commission. Both require only a single landing license and are otherwise subject to identical Commission rules and regulatory obligations.

Each of these distortions—the extraordinarily high percentage of revenues devoted to regulatory fee payments, the discrimination against high-capacity systems, and the discrimination in favor of low-capacity systems—affects the market for international

²² See Level 3 2007 Letter, Attachment at 2. The Commission has attempted to address this problem by increasing the number of payment units for the IBC regulatory fee category in recent years. This, however, is not a satisfactory solution. The increases in payment units have not begun to keep up with increases with capacity and decreases in price. Moreover, mere increases in payment units cannot address the many market distortions caused by the existing fee regime.

telecommunications capacity. This, in turn, discourages investment and innovation in a sector badly in need of both. For these reasons alone, the Commission must amend its IBC regulatory fee regime.

B. The Capacity-Based Regime No Longer Reflects Commission Regulation of IBC Payors

The regulatory fee regime now operates in a manner that no longer has any connection to the manner in which submarine cable operators are regulated. When Congress adopted its original fees regime in 1993, all IBC payors were facilities-based international telecommunications service providers, *i.e.*, common carriers. Submarine cables in particular were owned, ultimately, by common carriers subject to the panoply of Part 63 regulations promulgated pursuant to Title II of the Act.²³ Then and now, common carriers must:

²³ The Commission has proposed to eliminate some of these reporting requirements and, more troublingly, to increase the regulatory burdens on private submarine cable operators by requiring them to comply with some of these common-carrier-like reporting requirements. *See Reporting Requirements for U.S. Providers of International Telecommunications Services, Amendment of Part 43 of the Commission's Rules, Notice of Proposed Rulemaking*, 19 FCC Rcd. 6460, 6482-83 ¶¶ 58-60 (2004) (“*Reporting Requirement NPRM*”). The Commission’s proposal to increase the reporting-related regulatory burden of private submarine cable operators is wholly inconsistent with the Commission’s streamlining and further deregulation of private submarine cable operators, and indeed with the very foundations of non-regulation of private submarine cable operators. *See Review of Commission Consideration of Applications under the Cable Landing License Act, Report and Order*, 16 FCC Rcd. 22,167 (2001) (“*Submarine Cable Streamlining Order*”); *see also Tel-Optik Limited; Application for a license to land and operate in the United States a submarine cable extending between the United States and the United Kingdom, Memorandum Opinion and Order*, 100 F.C.C.2d 1033, 1046-48 ¶¶ 28-31 (1985) (concluding that private submarine cables are subject to the Cable Landing License Act, but not to the panoply of Title II regulation that applies to common carriers). The Commission should reject as illegitimate any attempt to equalize the regulatory costs of common carriers and private submarine cable operators by greatly increasing the regulatory burdens on private submarine cable operators through a “leveling up” process.

- Request global authority from the Commission for provision of telecommunications services—a process that entails an analysis of the operator’s home market, the WTO status of the operator’s home country, and applicable public interest factors;²⁴
- File with the Commission all intercarrier contracts, including any correspondent agreements;²⁵
- File annual traffic reports with the Commission;²⁶
- File annual circuit status reports with the Commission;²⁷
- Comply with the FCC’s international settlements policy, which establishes benchmark rates and deadlines;²⁸ and
- Provide adequate notice to all affected customers before discontinuing, reducing, or impairing service.²⁹

Today, however, many international bearer circuits—and nearly all new submarine cable systems—operate on a non-common carrier basis.³⁰ Such systems are subject to a miniscule subset of Commission rules. The rules governing private submarine cable systems, for example,

²⁴ See 47 U.S.C. § 214; 47 C.F.R. § 63.18.

²⁵ See 47 C.F.R. §§ 43.51(a)(1), 63.21(b).

²⁶ See 47 C.F.R. §§ 43.61(a)(1), 63.21(d).

²⁷ See 47 C.F.R. § 43.82.

²⁸ See 47 C.F.R. § 63.10(e).

²⁹ See 47 C.F.R. § 63.19(a)(1).

³⁰ In streamlining its regulation of submarine cables in 2001, the Commission explained that it intended “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 anti-competitive behavior.” *Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,168 ¶ 1. By issuing a cable landing license for a submarine cable system, the Commission issues a facilities authorization for landing, construction, and operation. By regulating such a system on a non-common-carrier basis, the Commission makes a determination that services sold by the operator do not require the sort of regulatory scrutiny that common-carrier services do.

cover little more than initial licensing.³¹ The non-common carrier regulation of submarine cable facilities thus takes up far less of the Commission's time and resources than does common carrier regulation. The paucity of Commission forms relating specifically to submarine cable operators only underscores this point. Of the 22 forms available for electronic filings on IBFS, only one relates to submarine cable operators.³²

Private submarine cable systems are thus regulated far less than are common carrier submarine cable systems. And neither are regulated based on the capacity of their systems.³³ In such circumstances, there is no longer a meaningful relationship between the regulatory fees imposed on submarine cable operators and the regulation to which they are subject.

This leads to absurd results. An operator such as Level 3 can triple capacity on a submarine cable system simply by changing the electronics on either end of the system. It can do so without filing a notice or application with the Commission, and no regulatory action whatsoever is required. Because the IBC fees are based on capacity, however, the operator's regulatory fees would triple—even though the cost of regulating the system has not changed.

³¹ 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”); Executive Order No. 10,530, *codified at* 3 C.F.R. 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988); 47 C.F.R. § 1.767. Private submarine cable operators typically have limited interaction with the Commission following initial licensing, absent actions such as: (1) the acquisition of a new foreign carrier affiliation in a destination market for the system; (2) a transaction involving a substantial assignment or transfer of control; (3) other ownership changes requiring additional licenses beyond the existing ones (*e.g.*, ownership of the cable station or surpassing of the 5-percent-or-greater threshold for licensees); or (4) physical modification of the licensed facilities.

³² See *International Bureau Filing System, Order*, 19 FCC Rcd. 4575 (OMD 2004); MyIBFS, <http://svartifoss2.fcc.gov/myibfs/web/userHome.do> (log in using FCC Registration Number and password to access drop-down menu containing list of license types).

³³ In 1992, submarine cable operators were required to seek the Commission's permission to upgrade capacity. See *Regulation of International Accounting Rates, First Report and Order*, 7 FCC Rcd. 559, 562 ¶ 24 (1992). There thus existed at least a colorable argument that capacity-based fees were reasonably related to the Commission's efforts to regulate submarine cables.

By the same token, it costs the Commission far more to regulate a common carrier submarine cable system than to regulate a private system. Yet, if its system is of greater capacity, the private system operator must pay higher regulatory fees than the operator that generates more regulatory costs.³⁴ A regime that permits such an outcome is demonstrably no longer one in which fees reflect costs generated for “enforcement activities, policy and rulemaking activities, user information services, and international activities.”³⁵

C. The Capacity-Based Regime Discourages Submarine Cable Operators from Offering New, More Innovative, and More Efficient Services

As the Commission has noted, the existing capacity-based fee regime discourages submarine cable operators from offering new, more innovative, and more efficient services.³⁶ The capacity-based system requires submarine cable operators to expend significant regulatory resources trying to determine whether and when fees apply. Operators often reach different conclusions for similar services and hesitate to offer particular services given the difficulty in

³⁴ Moreover, non-common carrier services are nearly always priced lower than value-added, common carrier services. Cable operators that are not traditional common carriers sell huge capacity increments on a wholesale basis with razor-thin profit margins. They have no possibility of recovering IBC fees from their customers through higher-margin common-carrier services, as they do not offer them. Yet they remain subject to the same IBC fees.

³⁵ 47 U.S.C. § 159(a)(1).

³⁶ *See Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Report and Order*, 19 FCC Rcd. 11,662, 11,672 ¶ 29 (2004); *Assessment and Collection of Regulatory Fees for Fiscal Year 2005, Notice of Proposed Rulemaking*, 20 FCC Rcd. 3885, ¶ 15 (2005) (“2005 NPRM”) (noting that “a fee system based on cable landing licenses and international section 214 authorizations, rather than international bearer circuits, would be administratively simpler for both the Commission and carriers . . . [and] could provide an incentive for carriers to initiate new services and to use new facilities more efficiently”).

making sense of the Commission’s fee regime in light of particularly innovative offerings. This regulatory uncertainty hampers operators’ cost recovery efforts.³⁷

First, operators often sell what might be called “risk-management” or “insurance-like” offerings, which de-couple customer payments from the lighting, allocation, or use of capacity. For example, submarine cable operators (including Level 3) offer a “restoration” service, whereby the customer pays up front for the ability to use back-up capacity at a later date in the event of a primary circuit failure. The operators price the service on the probability that the customers will actually use the capacity, with the presumption that they will not do so except in extreme circumstances, such as cable damage resulting from commercial fishing operations or underwater seismic activity. Similarly, submarine cable operators (including Level 3) offer usage-based services, whereby a customer pays a set amount for capacity that may fluctuate or ramp up over time. In each of these cases, it is difficult to apply the Commission’s “lit and sold” rule of thumb with respect to regulatory fees, as the payment is generally made up front for capacity that may never be activated or allocated for a particular customer.³⁸ Moreover, this ambiguity causes extraordinary difficulty in commercial negotiations with customers who often do not understand the vagaries of the Commission’s regulatory fee system. Given the substantial

³⁷ The Commission’s 2004 public notice clarifying who must pay addressed some of this uncertainty. *Clarifying Public Notice*, 19 FCC Rcd. at 12,318. But it did not remedy any of the confusion or uncertainty regarding the meaning of “active” capacity, which Commission staff have interpreted informally to mean lit and sold. This “lit and sold” standard may have been adequate when applied to a traditional capacity sale or lease. But it works less well when applied to the panoply of newer capacity offerings that today’s customers now demand from submarine cable operators.

³⁸ Under the current regulatory fee regime, submarine cable operators find themselves forced to make distinctions of degree with respect to the applicability of regulatory fees to these kind of services—for example, between the “restoration” service (which is presumably subject to regulatory fees) and a “reservation” service, where customers make a very small payment to reserve unlit capacity (and which is therefore presumably not subject to regulatory fees). Parsing through these kinds of distinctions consumes significant regulatory resources.

nature of the fees, many customers refuse to pay them or in the alternative, can find another carrier with an aggressive interpretation of the rules that minimizes the need for payment.

Second, operators often sell capacity under long-term arrangements—sometimes as long as 15 years—with a single payment up front. Regulatory fees on this capacity, however, are assessed every year. Thus, there is often a disconnect between operators’ receipt of revenues for given capacity and their obligation to pay regulatory fees for such capacity.

This uncertainty creates economic distortions that favor certain services and capacity offerings over others (and, perhaps, favor submarine cable operators that stretch the boundaries of the law over those that do not). Moreover, the current regime can prevent submarine cable operators from adequately recovering their costs. This, in turn, hinders the offering of innovative services and capacity arrangements more generally.

III. EVEN THE MOST INTRUSIVE REPORTING REQUIREMENTS WOULD NOT REMEDY THE STRUCTURAL PROBLEMS WITH THE EXISTING FEE REGIME

The Commission has no means of monitoring active submarine cable capacity, and thus no real way of enforcing submarine cable operator’s payment of regulatory fees.³⁹ The International Bureau calculates its payment units each year based on the previous year’s payment records, meaning that the accuracy of the Commission’s estimates is only as good as operators’ compliance with the Commission’s regulatory fee obligations. As the Commission’s issuance of the *Clarifying Public Notice* suggests, operators—whether intentionally or not—have not necessarily complied with these obligations.⁴⁰ Tyco Telecom described in 2004 how this system may lead the Commission to systematically underestimate the amount of active capacity subject

³⁹ The Commission has not moved to adopt its original proposal to require private submarine cable operators to file circuit status reports. *See Reporting Requirement NPRM*, 19 FCC Rcd. at 6482-83 ¶¶ 58-60.

⁴⁰ *See Clarifying Public Notice*, 19 FCC Rcd. at 12,318.

to regulatory fees.⁴¹ Level 3 agrees with this assessment, and does not believe that the *Clarifying Public Notice* has solved the problem entirely.

The current capacity-based fee regime, moreover, gives operators an incentive to game the Commission's practice of assessing fees based on a "snapshot" of capacity on December 31st of each year.⁴² Operators have an incentive to ask customers to pay for capacity purchases on the first of January, so as to minimize the amount of active capacity for regulatory fee purposes. Operators also have an incentive to work with their customers to take capacity off line on December 31st, so as to avoid having such capacity considered lit, and therefore active, for regulatory fee purposes. Such gamesmanship makes the Commission's monitoring and enforcement job more difficult, and it places a greater payment burden on those operators who do comply with the letter and spirit of the Commission's requirements.

Some have suggested that more stringent reporting requirements could address these issues. Yet even the most onerous and unwarranted reporting requirements – requirements inappropriate for private submarine cable operators generally not subject to pervasive Commission regulation⁴³ – would not address the structural deficiencies. More stringent reporting could, for example, increase the number of estimated payments in a given fiscal year, thereby lowering the regulatory fee itself. Yet this would do nothing to address the distortions that disfavor high-capacity systems under the current regime. And it would do nothing to address the disconnect between regulatory fees and the manner in which different classes of payors are actually regulated.

⁴¹ See Tyco Telecom 2004 Rulemaking Comments at 16.

⁴² See Tyco Telecom 2004 Rulemaking Comments at 17.

⁴³ See n.30 above.

IV. THE COMMISSION SHOULD ADOPT THE PROPOSAL TO RECLASSIFY SUBMARINE CABLE OPERATORS IN A SEPARATE CATEGORY

The Joint Proposal would address each of the problems described above with the existing capacity-based system. It would eliminate the market distortions caused by tying regulatory fees to capacity. It would better link regulatory fees with the regulation imposed on both submarine cable operators and facilities-based common carriers. It would eliminate disincentives for innovative submarine cable services. And it would be far easier to administer.

A. The Joint Proposal Would Create a New Regulatory Fee for Submarine Cable Systems

The Joint Proposal makes a number of changes to the existing category, under which all operators of active international bearer circuits must pay capacity-based regulatory fees. *First*, the Commission would create a separate regulatory fee category of “Submarine Cable Systems” (the “SCS Fee”). Facilities-based common carriers would remain in the IBC fee category (the “New IBC Fee”). The SCS Fee is designed to recover the costs of Commission regulation of submarine cable facilities—much as the analogous category for satellite facilities does today. The New IBC category is designed to reflect the Commission’s regulation of international common carrier services, regardless of the facilities used to deliver such services. Common-carrier submarine cable operators would pay both fees—one reflecting regulation of their facilities, the other reflecting common-carrier regulation of their service. In this regard, the regulatory fee regime would work for common-carrier submarine cable operators just as it does for common carrier satellite operators today.⁴⁴

⁴⁴ The Commission collects regulatory fees from satellite operators on either a per-satellite basis (for geostationary satellite operators) or per-system basis (for non-geostationary satellite operators). *See NPRM*, Attachments D (proposed FY 2008 schedule of regulatory fees) & F (FY 2007 schedule of regulatory fees).

Second, the Commission would create a revenue requirement for the new category. The Commission could begin the process simply by splitting the existing IBC category (“Old IBC Fee”) revenue requirement of \$8,149,636 for FY 2008 equally between the SCS and the New IBC fee categories—meaning that the revenue requirement for each would total \$4,074,818. The Commission should, however, revise downward the percentage allocated to the SCS Fee category based on its own internal calculations of the regulatory effort to regulate submarine cable facilities. (Again, regulation of common carrier services offered over submarine cables would continue to be accounted for under the New IBC Fee category.)

Third, the Commission would calculate payment units for the SCS Fee category. Under the Joint Proposal, each submarine cable for which the Commission has issued a landing license would constitute a single payment unit.⁴⁵ The Joint Proposal excludes purely domestic submarine cables from this fee category, as much of the Commission’s submarine cable regulation is inapplicable to domestic submarine cables.

Fourth, the Commission would calculate the SCS and New IBC fees. The SCS Fee would thus be determined by dividing the new revenue requirement by the number of landing licenses. With a 50-50 split of the current IBC fee category’s revenue requirement, the new SCS fee would be approximately \$100,000 for each of the licensed international submarine cable systems.⁴⁶ The actual fee, however, should almost certainly be lower, based on a downward

⁴⁵ The Joint Proposal does not address whether active international bearer circuits shall remain the payment unit for the New IBC fee.

⁴⁶ The New IBC fee would be calculated by dividing that category’s revenue requirement by the number of active circuits reported in the aggregate in the latest Circuit Status reports. The latest such report lists 7,558,072 “active” circuits and 7,196,340 “idle” circuits. *See* FCC International Bureau Report: 2006 Section 43.82 Circuit Status Data 31 (rel. Feb. 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280335A1.pdf. Assuming a 50-50 split of the current IBC fee category’s revenue requirement, the New IBC fee would be \$0.54 per active circuit.

adjustment of the percentage of revenue requirement for the Old IBC fee based on the Commission's calculations of its regulatory efforts.

B. The Joint Proposal Would Eliminate the Market Distortions Created by the Existing System and Would Be Far Easier for the Commission to Administer

The Joint Proposal would apportion fees for both submarine cable systems and facilities-based common carriers in a far more rational manner than does the existing IBC system. The Joint Proposal would eliminate each of the three market distortions that afflict operators and end users, and would be far easier to administer.

First, the Joint Proposal would remove the distortions among submarine cable operators resulting from dramatic increases in submarine cable capacity over the last 10 years. As explained above, the existing system penalizes high-capacity submarine cable operators because the operators' higher capacities increase their fee obligations. The Joint Proposal rectifies this distortion by eliminating the link between regulatory fees and capacity.

Second, by adopting the Joint Proposal, the Commission would better align the fees paid by providers within the current IBC category with the efforts expended to regulate such entities. Today, Commission regulation of international common-carrier services is separate from its regulation of the facilities used to provide such services. The Joint Proposal would likewise separate the regulatory fees that correspond with these two sets of regulation. In this sense the Joint Proposal treats the regulatory fees paid by submarine cable operators exactly as satellite operators are treated today. By charging a flat, per-system fee, moreover, the Joint Proposal also better aligns the fees paid *within* the new SCS category with the regulatory costs generated by the payor. Submarine cable systems in the new category will typically generate facilities-related regulatory costs on a per-system basis; the new SCS fee would reflect this.

Third, the Joint Proposal would eliminate distortions related to innovative capacity offerings. A system-based fee regime would simplify and strengthen the Commission's calculation of fees and monitoring of fee payors while enhancing payor compliance and the fairness of the regulatory fee regime. Under the Joint Proposal, monitoring fee payors and the amounts they each must pay would be simple. The universe of fee payors would consist of all submarine cable operators with a cable landing license. The amounts to be paid would be derived by dividing the revenue requirement for submarine cable operators by the number of licensed international cable systems. These figures are publicly available and easily verifiable. The Commission's enforcement and monitoring burden would be nominal.

Thus, under a system-based regime, a submarine cable operator would no longer have to spend time and money determining, for example, whether (and when) a risk-management service triggers regulatory fees, or convincing skeptical customers that its interpretation of the Commission's fee guidance is correct. Moreover, it could simply offer capacity on whatever basis its customers wanted, rather than on a basis that it thought would avoid regulatory fees. A system-based fee for submarine cable operators would make commercial negotiations easier, level the playing field, and, most importantly, allow new products and services to rise and fall on their own merits rather than as a result of regulatory-fee distortions.

V. THE COMMISSION HAS AMPLE LEGAL JUSTIFICATION TO CLASSIFY SUBMARINE CABLE OPERATORS IN A SEPARATE FEE CATEGORY

A. Regulatory Fees Paid by Submarine Cable Operators Are No Longer Reasonably Related to the Benefits Provided

The regulatory fees paid by submarine cable operators are no longer “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁴⁷ By contrast, the Joint Proposal’s system-based fee regime complies with this statutory requirement.

Section 9 of the Communications Act of 1934 (“Communications Act”) requires the Commission to recover through annual regulatory fees the costs that it incurs in carrying out enforcement actions, policymaking and rulemaking activities, international services, and user information services.⁴⁸ Section 9(b)(1)(A) requires the Commission to derive its regulatory fees “by determining the full-time equivalent number of employees performing the [regulatory activities for the service in question] . . . 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.”⁴⁹ Section 9(i) of the Act requires the Commission to develop “accounting systems necessary to making the adjustments” that would ensure that an operator’s regulatory fees reflect the regulatory costs it generates.⁵⁰ If the Commission determines that fees do not reflect the public interest or the regulatory costs generated by a particular entity, the Commission must amend its fee schedule.⁵¹

⁴⁷ 47 U.S.C. § 159(b)(1)(A).

⁴⁸ *See* 47 U.S.C. § 159.

⁴⁹ 47 U.S.C. § 159(b)(1)(A).

⁵⁰ 47 U.S.C. § 159(i).

⁵¹ *See* 47 U.S.C. § 159(b)(3) (stating that “the Commission shall . . . amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A).”).

The existing capacity-based fee regime no longer satisfies the requirements of Section 9 because it overcharges high-capacity submarine cable operators in relation to the Commission’s regulatory activities, resulting in market distortions that disserve the public interest.⁵² The capacity-based regime relies on the Commission’s tally of “active capacity” in apportioning fees, even though an operator’s active capacity does not reflect the regulatory costs it generates.⁵³ The existing capacity-based system also imposes the same fees on all international bearer circuits even though the Commission spends significantly less money regulating submarine cable systems than it does regulating facilities-based common carriers.⁵⁴

By contrast, the Joint Proposal’s system-based regime for submarine cable operators comports with the Act. This proposal advances the public interest, as required by Section 9(b)(1)(A) of the Act, by eliminating these overcharges and distortions. Moreover, this system-based proposal would better align payors’ regulatory fees with the regulatory costs they create, thereby ensuring the proportionate cost recovery required by the Act.⁵⁵ Most importantly, by implementing the proposed system-based fee regime, the Commission would fulfill its statutory obligation to amend regulatory fees when (as now) the existing system disservices the public or fails to reflect fee payors’ regulatory costs in a proportional manner.⁵⁶

⁵² Regarding market distortions, *see* part II.A, B above.

⁵³ *See* part II.B above.

⁵⁴ *See* Tyco Telecom 2004 Rulemaking Comments at 11-13; part II.B above.

⁵⁵ *See* 47 U.S.C. § 159(b)(1)(A) (authorizing “adjust[ments] to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities”).

⁵⁶ *See* 47 U.S.C. § 159(b)(3).

B. The Commission Should Reclassify Submarine Cable Operators in a Separate Fee Category to Reflect Reduced Regulation Resulting from Changes in Law and the Commission’s Own Regulations

Level 3 believes that the Commission should and must use its “permitted amendment” authority to reclassify submarine cable operators in a new and separate fee category using a methodology—such as that set forth in the Joint Proposal—that reasonably relates payor benefits to Commission regulatory activities. 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.⁵⁷

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 pursuant to Section 9(b)(3) of the Communications Act, as amended to remedy previously identified problems with the regime as applied to private submarine cable operators.

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

⁵⁷ See 47 U.S.C. § 159(b)(1)(A), (3).

Commission’s submarine cable streamlining rulemaking. Viewed individually or collectively, these 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 changes and related initiatives, the Commission reoriented its regulatory direction 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, submarine cable operators’ capacity (almost all of it non-common-carrier in nature) has skyrocketed, prices have plummeted, and the cost of regulating them has dropped. Thus, the Commission should amend the regulatory fee regime for submarine cable operators.

1. 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.”⁵⁸ Section 9 provides that regulatory fees:

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.⁵⁹

⁵⁸ 47 U.S.C. § 159(a)(1).

⁵⁹ 47 U.S.C. § 159(b)(1)(A).

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.⁶⁰ 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.”⁶¹

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.⁶²

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.

The Commission must premise a permitted amendment upon changes in its services resulting from a Commission rulemaking or a change in law because, as the D.C. Circuit held in *COMSAT Corp. v. FCC*, Section 9(b)(3) authorizes an amendment to the fee regime only “in

⁶⁰ See 47 U.S.C. § 159(b)(1)(C).

⁶¹ 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. 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.

⁶² 47 U.S.C. § 159(b)(3).

response to [a] ‘rulemaking proceeding[] or change[] in law.’”⁶³ 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*.

2. 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 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.”⁶⁴ By contrast, three separate changes support amendment of the regulatory fees schedule as applied to submarine cable operators.

First, the U.S. GATS commitments in basic telecommunications and the Commission’s implementation in its *Foreign Participation Order* changed the Commission services provided to submarine cable operators. The implementation of these changes in law and regulations 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.⁶⁵ In February 1997, the United States and 68 other nations made specific commitments (of varying degrees) to

⁶³ *COMSAT Corp. v. FCC*, 114 F.3d 223, 225 (D.C. Cir. 1997) (quoting 47 U.S.C. § 159(b)(3)).

⁶⁴ *Id.* at 227-28.

⁶⁵ *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”).

liberalize trade in basic telecommunications services.⁶⁶ These commitments aimed “to replace the traditional regulatory regime of monopoly telephone service providers with pro-competitive and deregulatory policies.”⁶⁷ 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.”⁶⁸

In particular, the United States committed to eliminate its long-standing reciprocity-based approach to the licensing of submarine cables.⁶⁹ Under this approach—epitomized by the effective competitive opportunities (“ECO”) test—the Commission required, *inter alia*, that there

⁶⁶ 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 Organization, 33 I.L.M. 1125, 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.

⁶⁷ *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*”).

⁶⁸ *Id.* at 23,894 ¶ 4.

⁶⁹ 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).

be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market.⁷⁰ 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."⁷¹ Among other 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 the GATS commitments in basic telecommunications of WTO-member countries would result in "a shift away from monopoly provision of telecommunications services and toward competition, open markets and transparent regulation."⁷² 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

⁷⁰ See *Market Entry and Regulation of Foreign-affiliated Entities, Report and Order*, 11 FCC Rcd. 3873, 3890 ¶¶ 42-44 (1995).

⁷¹ *Foreign Participation Order*, 12 FCC Rcd. at 23,893 ¶ 2.

⁷² *Id.* at 23,896 ¶ 9.

oversight of private submarine cable operators and others.⁷³ As noted in part II.A above, since 1998, bandwidth capacity increased exponentially while prices plunged. 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).

Second, 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 addressed cable landing licenses under the Cable Landing License Act—altered the regulatory requirements landscape for submarine cable operators, particularly non-common-carrier submarine cable operators.⁷⁴

Reflecting Congress’ deregulatory purpose, the 1996 Act obligates the Commission to “review all regulations” issued under the Communications Act, and to “determine whether any

⁷³ *1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, Notice of Proposed Rulemaking*, 13 FCC Rcd. 13,713, 13,716 ¶ 5 (1998).

⁷⁴ *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*”).

such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”⁷⁵ Pursuant to the 1996 Act, the Commission must “repeal or modify” those regulations.⁷⁶

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 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.”⁷⁷ 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.”⁷⁸ (The Commission had previously required Section 214 authorization “to assure compliance with Commission conditions placed on non-common carrier systems.”⁷⁹)

⁷⁵ 47 U.S.C. § 161(a)(2).

⁷⁶ 47 U.S.C. § 161(b).

⁷⁷ *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 Cable Landing License Act.

⁷⁸ *Section 214 Streamlining NPRM*, 10 FCC Rcd. at 13,487 ¶ 26.

⁷⁹ *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.”⁸⁰ 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.”⁸¹

The Commission continued this trend 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.⁸² 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.⁸³

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 justifies a permitted amendment pursuant to Section 9(b)(3).

Third, 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 submarine cable

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Section 214 Further Streamlining Order*, 14 FCC Rcd. at 4933-34 ¶¶ 59-60 (describing, *inter alia*, Tyco Telecom’s arguments that the pre-existing restrictions stunted competition, conflicted with global deregulatory efforts, and distorted carriers’ incentives to increase capacity).

⁸³ *Id.* at 4937-38 ¶ 67.

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.⁸⁴

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.”⁸⁵ After considering its own proposals as well as comments from the industry, in late 2001 the Commission adopted “bright-line” streamlining procedures that simplified the licensing process.⁸⁶ 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.”⁸⁷ 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.”⁸⁸

⁸⁴ 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*”); *Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,167.

⁸⁵ *Submarine Cable Streamlining NPRM*, 15 FCC Rcd. at 20,790 ¶ 1.

⁸⁶ See *Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,168-69 ¶¶ 1-3.

⁸⁷ *Id.* at 22,168 ¶ 1.

⁸⁸ *Id.*

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.⁸⁹ 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.”⁹⁰ 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.”⁹¹

Like the rule changes resulting from the international Section 214 streamlining rulemakings, the rule changes resulting from the submarine cable streamlining rulemaking reduced the Commission services provided to submarine cable operators, while fostering explosive 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).

⁸⁹ See *id.* at 22,168 ¶ 2; see also *id.* at 22,190 ¶ 45 n.98 (referring to data, supplied by Tyco Telecom, 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”).

⁹⁰ *Id.* at 22,168 ¶ 2.

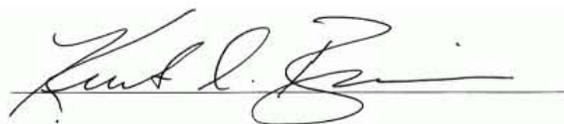
⁹¹ *Id.*

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.

CONCLUSION

For the foregoing reasons and those identified in the NPRM, Level 3 urges the Commission to adopt the Joint Proposal to reclassify submarine cable operators in a fee category separate from IBC fees, allocate the international bearer circuit revenue requirement between the two new categories in accordance with the Act, and apply a flat per-cable-landing-license fee for submarine cable operators.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kent D. Bressie", is written over a light green rectangular background.

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Exhibit A

JOINT PROPOSAL

1. **Create New Regulatory Fee Category for Submarine Cable Systems (“SCS Fee”):** facilities-based 214 holders would remain in the IBC fee category (“New IBC Fee”)
2. **Create “Revenue Requirement” for SCS Fee:** split existing revenue requirement for existing IBC Fee (“Old IBC Fee”)— \$ 8,149,636 for FY 2008—between SCS Fee category and New IBC Fee category
 - Use as a starting point a 50-50 split of the Old IBC Fee category, meaning that the starting point for calculating a revenue requirement for the new SCS Fee for FY 2008 would be \$4,074,818
 - Revise downward the percentage allocated to the SCS Fee category, based on FCC’s internal calculations of regulatory effort expended to regulate undersea cables, which have long suggested that the Commission expends less effort regulating undersea cable operators than international facilities-based common carriers
3. **Define “Payment Unit” of New SCS Fee:** payment unit defined as submarine cable systems connecting international points and for which the FCC has issued a separate cable landing license
4. **Determine SCS Fee By Dividing New Revenue Requirement by Number of Payors in SCS Fee Category:**
 - Resulting per-system fee would be a maximum of \$100,000 per system and potentially lower with a downward adjustment of the percentage of the revenue requirement for the Old IBC Fee based on the Commission’s calculations of its regulatory efforts
 - SCS Fee would apply to submarine cables in commercial service as of December 31st of each year
5. **Calculate New IBC Fee By Dividing New Revenue Requirement by Number of Active Circuits Reported in Aggregate in Circuit-Status Reports:**
 - Common-carrier undersea cable systems would not pay IBC fees based on the international Section 214 authorization granted to the system concurrent with the cable landing license, but instead only to the extent that an individual owner of a common-carrier system reported active common-carrier circuits in its annual circuit-status report
 - Based on the 7,558,072 active circuits reported in the most recent circuit-status report, the per-circuit New IBC Fee would be \$0.54 per 64 KB circuit or circuit-equivalent