

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

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

The comments in this proceeding are striking in their unanimity.¹ Every party agrees that the fees paid by submarine cable operators are far too high—or, to use one commenter’s phrase, “grotesquely disproportionate to the cost of the capacity itself.”² Global Crossing, for example, shows that the Commission’s regulatory fees for international bearer circuits (“IBCs”) can exceed the revenues derived from the sale of this capacity.³ Tata Communications argues likewise, and aptly describes the difficulties these fees cause for negotiations with foreign customers.⁴ (This, in turn, demonstrates the pressures that some submarine cable operators feel to minimize their regulatory fee payments.) And PC-1 estimates that the Commission’s fees are

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*”).

² Comments of Tata Communications (US) Inc. at 1 (“Tata Communications Comments”); see also Comments of Pacific Crossing Limited and PC Landing Corp. at 2 (“PC-1 Comments”); Comments of Global Crossing at 2 (“Global Crossing Comments”); Letter from Patricia Cooper, President, Satellite Industry Association, to Marlene H. Dortch, Secretary, FCC, May 30, 2008 (“SIA Letter”). Unless otherwise noted, all comments were filed in MD Docket No. 08-65 and RM No. 11312 on May 30, 2008.

³ Global Crossing Comments at 3.

⁴ Tata Communications Comments at 4.

based on capacity estimates covering no more than twenty percent of actual capacity—meaning that payments are orders of magnitude too high.⁵

And nearly every commenter urges the Commission to adopt a flat fee for submarine cable operators, such as that proposed by Level 3 Communications, LLC (“Level 3”) and the other signatories to the Joint Proposal.⁶ Under the Joint Proposal, the Commission would create a separate regulatory fee category of “Submarine Cable Systems” (the “SCS Fee”). This fee would be charged on a flat, per-system basis, and would correspond to the costs of Commission regulation of submarine cable facilities—much as the analogous category for satellite facilities does today. Facilities-based common carriers would remain in the IBC fee category (the “New IBC Fee”). The New IBC fee category would correspond to the cost of regulating international common carrier services, regardless of the facilities used to deliver such services.

Only two commenters object to the type of solution contained in the Joint Proposal. AT&T, Inc. (“AT&T”), commenting on an earlier proposal by VSNL Telecommunications (US) Inc. (“VSNL”), argues that any flat per-system fee would “discriminate” against lower capacity systems.⁷ Yet AT&T concedes that, under the *status quo*, cable systems causing the least regulatory costs pay the most regulatory fees by far. AT&T itself thus points to the legal basis for the Joint Proposal, which would align regulatory fees with regulatory costs. As for AT&T’s claim that lower capacity systems would pay more on a “per-circuit” basis under a flat fee, this is as irrelevant as if it had complained that shorter systems would pay more for each mile of cable

⁵ PC-1 Comments at 8.

⁶ See Joint Proposal of Level 3 Communications LLC, Brasil Telecom of America, Inc., Columbus Networks USA, Inc., ARCOS-1 USA, Inc., and A.SUR Net, Inc., Hibernia Atlantic US LLC, Pacific Crossing Limited and PC Landing Corp. (“Joint Proposal”).

⁷ Comments of AT&T Inc. at 2 (“AT&T Comments”).

they deploy. Neither metric has anything to do with the regulatory costs generated by submarine cable systems. Neither should have anything to do with the regulatory fees they pay.

The Satellite Industry Association (“SIA”) resubmits earlier pleadings insisting that the Commission include relief for satellite operators in any IBC reform. Level 3 takes no position on whether the particular legal, regulatory, and economic circumstances of satellite operators warrants reform of IBC fees as applied to them. Instead, Level 3 believes that SIA has failed to elaborate on those satellite-specific circumstances that would provide the Commission with the necessary basis for adopting such reform, and that SIA’s request for relief is therefore unripe.

The Commission should accept neither AT&T’s invitation to paper over the *status quo* nor SIA’s invitation to adopt unsupported proposals. It should instead fix the broken regulatory fee regime for submarine cable operators by adopting the Joint Proposal. And it should do so now.

I. AT&T Has Conceded the Legal Basis of the Joint Proposal.

By conceding that the capacity of a submarine cable has no impact whatsoever on the cost to regulate that cable, AT&T itself points to the legal basis of the Joint Proposal, which would no longer assess fees based on capacity. AT&T argues:

Commission activities benefiting all U.S. cable operators . . . regardless of the capacities of their cables, provide no basis for different treatment of operators under the fee structure according to their regulatory classification or cable size.⁸

Having made this concession, it is difficult to understand how AT&T can defend the *status quo*, under which submarine cables of different capacity pay dramatically different regulatory fees.

⁸ *Id.* at 4.

The regulatory fees paid by an FCC-regulated entity must correlate with the regulatory costs imposed on the Commission by that entity. Indeed, this is the basis of Section 9 of the Communications Act—regulatory fees must be related to regulatory costs, and must be adjusted when they are no longer related to regulatory costs.⁹ As AT&T acknowledges, the cost of regulating submarine cable facilities is roughly uniform. And (contrary to AT&T’s implication) facilities-based common carriers generate an entirely separate set of regulatory costs regardless of the facilities over which their services are offered.¹⁰ Thus a lower-capacity common carrier submarine cable system generates higher aggregate regulatory costs than a higher-capacity private submarine cable system. Yet today, the operator of the latter system pays regulatory fees hundreds of times higher than does the operator of the former. AT&T does not argue that this comports with the Communications Act. Nor could it. It is impossible to argue that today’s system is in any cognizable way related to regulatory costs or “the benefits provided to the payor of the fee by the Commission’s activities.”¹¹

⁹ See 47 U.S.C. § 159(a)(1) (requiring the Commission to recover through annual regulatory fees the costs that it incurs in carrying out enforcement actions, policymaking and rulemaking activities, user information services, and international services); 47 U.S.C. § 159(b)(1)(A) (requiring 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”); 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)” and in doing so “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”).

¹⁰ See Comments of Level 3 Communications, LLC at 12 (setting forth common carrier regulatory requirements) (“Level 3 Comments”).

¹¹ 47 U.S.C. §§ 159(b)(1)(A).

Level 3 and other signatories to the Joint Proposal, by contrast, have proposed a regime that aligns fees with costs. The Joint Proposal would create a New SCS fee and a New IBC fee, and would allocate the revenue requirement between these categories more equitably than had earlier proposals.¹² The New SCS fee would correspond with the Commission’s costs of regulating submarine cable facilities. And the New IBC fee would correspond with the very different costs of regulating international common carriers—costs that do not depend on the facilities they happen to use.

As with other proposals over the years, the New SCS Fee would be assessed on a flat basis. Every submarine cable system would thus pay exactly the same fee under the Joint Proposal. AT&T argues that asking each submarine cable system to pay the same fee is discriminatory.¹³ It argues, in particular, that “smaller capacity cables (including most common carrier cables) [would pay] much higher fees *on a per-circuit basis* than larger capacity cables (including most non-common carrier cables).”¹⁴ Again, however, AT&T concedes that the number of active circuits a particular submarine cable system has is of no more relevance to the amount of regulatory costs it generates than is the length of the cable. AT&T’s claim that flat, per-system fees would “discriminate” against lower capacity systems is thus irrelevant—just as would be a claim that shorter systems would pay more for each mile of cable they deploy. In

¹² VSNL had proposed that only ten percent of the current IBC revenue requirement be allocated to private submarine cable operators. *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM-11312 at 5-7 (filed Feb. 3, 2006). The Joint Proposal, by contrast, suggests that the Commission use as a starting point a 50-50 split of the existing IBC revenue requirement and revise downward the percentage allocated to the SCS Fee category, based on the Commission’s internal calculations of regulatory effort expended to regulate undersea cables. Joint Proposal at 1.

¹³ AT&T Comments at 2.

¹⁴ *Id.* at 2-3 (emphasis added).

terms of compliance with the Communications Act’s requirement that fees correlate with costs, only a flat, per-system fee is “competitively neutral.”¹⁵

Without a legal basis on which to base its support of the *status quo*, AT&T instead claims that reform is not urgently needed. Thus, it argues, “[t]here is . . . no apparent adverse impact on industry growth from the existing fees.”¹⁶ Yet AT&T has presumably seen, and certainly does not dispute, evidence that regulatory fees on high-capacity systems approach or even exceed the revenues associated with such offerings.¹⁷ Nor does AT&T dispute evidence that such fees dwarf those paid by other Commission regulatees.¹⁸ This evidence is impossible to reconcile with AT&T’s apparent position that high IBC regulatory fees are of no concern to the submarine cable industry. Nor does AT&T’s facile citation to recent submarine cable capacity increases support AT&T’s position.¹⁹ The addition of new capacity only makes current situation worse—and increases the incentives for regulatory evasion. *AT&T* may not see the need for immediate reform, because the amount of capacity on its licensed systems is relatively small (and thus the regulatory fees it pays are relatively low). For non-consortium owners of higher-capacity systems, however, reform is long past due.

AT&T is thus wrong on all counts. Today’s capacity-based IBC fee regime has a massive and increasing “adverse impact” on the submarine cable industry. And the regime has a

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 2.

¹⁷ See Letter from Chad Breckinridge, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, FCC, RM-11312, Attachment at 1 (July 12, 2007); see also Level 3 Comments at 9; Global Crossing Comments at 4.

¹⁸ See Level 3 Comments at 10; Global Crossing Comments at 4-5.

¹⁹ AT&T Comments at 3.

small (and decreasing) relationship with the regulatory costs generated by IBC fee payors. This situation demands immediate Commission action—not the inaction suggested by AT&T.

II. SIA Has Yet to Provide a Legal Justification for Its Proposal.

SIA has yet to provide the Commission with a legal analysis of changes in law and regulation pertaining to satellite operators, as required by Section 9 of the Communications Act. Nor has it provided information about the economic impact of IBC fees on the market for satellite capacity, which is almost entirely separate and distinct from that for submarine cable capacity. As such, the Commission has no basis on which it could adopt SIA’s proposals.

SIA has not submitted new substantive comments in this proceeding. Instead, it has simply refiled earlier submissions.²⁰ These submissions, in turn, seek two alternate forms of relief: absolving satellite operators of any regulatory fee payments by collecting IBC fees only from non-satellite-operator payors under a per-authorization methodology, or treating satellite operators in the same manner as private submarine cable operators (in the event that the Commission were to adopt a per-system fee for private submarine cable operators).²¹ The submarine cable industry already responded to SIA’s earlier submissions.²² As SIA has submitted no new information in this proceeding, there is little need to add to that record. Level 3 nonetheless makes two brief observations here.

²⁰ See Comments of the Satellite Industry Association, RM No. 11312 (filed March 17, 2006) (“SIA Comments on VSNL Petition”); Comments of the Satellite Industry Association, MD Docket No. 05-59 (filed March 8, 2005) (“SIA 2005 Comments”); Reply Comments of the Satellite Industry Association, MD Docket No. 04-73 (filed Apr. 30, 2004).

²¹ See SIA 2005 Comments at 5-10 (first proposal); SIA Comments on VSNL Petition at 4 (latter proposal).

²² See Reply Comments of Tyco Telecommunications (US) Inc., MD Docket No. 05-59 at 3-6 (filed Mar. 18, 2005).

First, SIA has yet to support its proposals with an analysis of rulemakings or changes in law that may have altered the Commission’s services for satellite operators or the market for transponder capacity, as Section 9 requires.²³ Level 3 and other submarine cable operators addressed the legal and regulatory regime for submarine cable operators—a regime that by definition does not apply to satellite operators.²⁴ SIA also fails to provide any economic data demonstrating the impact of changes in law or regulation on supply or pricing for transponder capacity, or distortion of the market for transponder capacity under the current IBC fee regime. Level 3 and others, by contrast, have submitted data regarding the dramatic effect these changes have made on the market for submarine cable capacity.²⁵ Because the market for satellite capacity is almost entirely separate from the market for submarine cable capacity, SIA cannot rely on this data to support the relief it seeks. Unless and until SIA can demonstrate the legal and economic justification for such relief, the Commission has no record on which it can adopt SIA’s proposal.

Second, the Joint Proposal differs in material respects from earlier submissions on which SIA has commented, and these differences may be relevant to SIA’s position. As Level 3 understands it, SIA objected to prior submarine cable industry proposals to create a new *private* submarine cable system fee because private satellite operators (unlike private submarine cable operators) would continue to pay IBC fees.²⁶ Because private satellite operators are not subject to common carrier regulation, argued SIA, they too should have been included in the then-

²³ 47 U.S.C. § 159(b)(3) (empowering the Commission to amend its fee schedule to “reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in the law”).

²⁴ *See, e.g.*, Level 3 Comments at 22-35.

²⁵ *See, e.g.*, Level 3 Comments at 8-11.

²⁶ *See* SIA Comments on VSNL Petition at 3.

proposed private submarine cable category. The Joint Proposal, however, would not create a “private submarine cable” category. Rather, all submarine cable operators—private and common carrier alike—would fall into the New SCS category, while all facilities-based common carriers would fall into the New IBC category. Private satellite operators would not be placed in this latter category—they would pay regulatory fees on their facilities, just as they do now and just as submarine cable operators would do.²⁷

There may well be merit in examining the regulatory fees paid by satellite operators. Level 3, for its part, would not object to such an examination. The Commission, however, cannot allow such an examination to delay much needed relief for submarine cable operators.

²⁷ See *NPRM*, Attachments D (proposed FY 2008 schedule of regulatory fees) & F (FY 2007 schedule of regulatory fees).

CONCLUSION

For the foregoing reasons and those identified in its initial comments, 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,



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