

Before the
Federal Communications Commission
Washington, D.C. 20054

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Office of the Secretary

In the Matter of)
)
Assessment and Collection of Regulatory) MD Docket No. 08-65
Fees for Fiscal Year 2008) RM-11312

REPLY COMMENTS OF PACIFIC CROSSING LIMITED AND PC LANDING CORP.

Pacific Crossing Limited (“PCL”) and PC Landing Corp. (collectively, the “PCL Commenters”) hereby submit these reply comments to the comments filed in response to the Notice of Proposed Rulemaking of the Federal Communications Commission (“FCC” or “Commission”) in the captioned proceeding.¹

In its comments, AT&T, while supporting a reduction in regulatory fees payable by submarine cables, favors retention of the status quo, per circuit international bearer circuit (“IBC”) methodology so long as any fee methodology is non-discriminatory and is applied on a competitively neutral basis.² Like AT&T, the PCL Commenters also believe that it is critical that the submarine cable regulatory fee apply to all licensees on a non-discriminatory and competitively neutral basis without competitively advantaging or disadvantaging any type of cable system.³ While the existing IBC fee may work for companies that have a significant voice-based and smaller-circuit retail business, it is clear that the per circuit IBC fee does not work for the remainder of the submarine cable industry.

¹ See Notice of Proposed Rulemaking, *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, FCC 08-126 (rel. May 8, 2008)(the “2008 Fee Notice”).

² Comments of AT&T Inc., *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, at 2 (filed May 30, 2008) (“AT&T Comments”).

³ *Id.*

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As Tata points out in its comments, the IBC fee is “grotesquely disproportionate to the cost of capacity itself.”⁴ For example, according to the current data cited by Tata, regulatory fees can be approximately 71% of the selling price of large circuit capacity sold on the Atlantic route.

This is in stark contrast to the percentage that regulatory fees in other categories are of the revenue of the regulated entities in those industries. For example, the proposed 2008 regulatory fee for interstate carriers is just \$.00266 per dollar of revenue for interstate carriers.⁵ For wireless carriers, the proposed fee of \$.18 per handset has been estimated at less than one tenth of one percent of wireless revenue per customer.⁶ For cable television, the proposed regulatory fee of \$.75 per subscriber is likewise just 1/10 of one percent of cable television revenue.⁷

Ironically, as Global Crossing notes in its comments, the Commission has emphasized that in general, it is its intent to collect regulatory fees “in the most efficient manner possible and without undue public burden.”⁸ And while it continues to saddle the submarine cable industry with regulatory fees that are “breathtakingly disproportionate,”⁹ “vague,”¹⁰ and administratively impossible to implement, the Commission proposes policies with respect to the regulatory fees

⁴ Comments of Tata Communications (US) Inc., *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, at 1 (filed May 30, 2008) (“*Tata Comments*”).

⁵ *2008 Fee Notice* at Attachment F.

⁶ Joint Comments, *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, at 6 (filed May 3, 2007) (“*Joint Comments*”).

⁷ Based on annualized video revenue per basic subscriber of \$760 in Q1 2008 reported by Comcast. See <http://library.corporate-ir.net/library/11/118/118591/items/291109/1Q08slides.pdf>.

⁸ Comments of Global Crossing North America, *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, at 3-4 (filed May 30, 2008) (“*Global Crossing Comments*”).

⁹ *Tata Comments* at 6.

¹⁰ *Id.* at 4.

applicable to other providers to “lessen the administrative burden” of their fees.¹¹ We agree with Global Crossing that the current fee and this grossly inequitable treatment of the submarine cable industry, particularly given the overwhelming deficiencies of the current methodology that have been raised in the record of this and previous proceedings, is “arbitrary and capricious, and no longer sustainable.”¹² In addition, as we noted in our initial comments, the administration of the regulatory fee system raises significant equal protection issues.¹³

AT&T also observes that the amount of the fee has come down in recent years as payment units have increased, and posits that “usage of this expanded capacity will automatically reduce IBC fees under the current fee methodology.”¹⁴ As the PCL Commenters noted in their initial comments, however, total number of circuits in use is more than five times the number of payment units counted by the Commission, and the per unit fee should actually be less than 20% of the 2008 proposed fee.¹⁵ Clearly, there has been a growing divergence between the payment units counted and what the payment units should be, and it cannot be reasonably suggested that at some point, payment units will ever catch up to actual active circuits or circuits in use. As the PCL Commenters note in their comments, the current methodology has been plagued by rampant undercounting of total activated capacity that has been institutionalized into the methodology

¹¹ See 2008 Notice, ¶¶ 28-29. (proposing to allow cable television operators to continue to base regulatory fee on aggregate year-end subscriber count, rather than requiring them to sub-report subscriber counts on a per community basis which “has eased administrative burdens for the cable television industry”); *Id.* ¶ 30 (proposing to allow CMRS providers to continue to make regulatory fee payments at the aggregate subscriber level, and proposing other changes “to lessen the administrative burden on licensees”).

¹² See Global Crossing Comments at 5 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002)).

¹³ See Comments of Pacific Crossing Limited and PC Landing Corp., *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, at 12, n.24 (filed May 30, 2008) (“PCL Joint Comments”).

¹⁴ AT&T Comments at 2.

¹⁵ PCL Joint Comments at 3.

over its fourteen year history.¹⁶ The inherent ambiguities in how circuits should be counted and how others should be excluded create perverse incentives for cable operators because each is left to its own interpretation of these ambiguous rules. Because providers are largely left to their own devices, certain providers are clearly overpaying while others are underpaying.

As Global Crossing correctly points out, regulatory fees must be “reasonably related to the benefits provided by the payor of the fee by the Commission’s activities.”¹⁷ Thus, according to AT&T, Commission activities provide substantial benefits to all U.S. submarine cable operators, and are properly taken into account in the establishment and adjustment of regulatory fees under Section 9. That may be true, but as Global Crossing notes, the level of IBC fees are still not commensurate with the relatively low level of Commission regulatory activity in this area or the full time equivalent Commission employees handling submarine cable matters as compared with the activities of regulated carriers.¹⁸

Indeed, AT&T goes on to argue that “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 . . . cable size.”¹⁹ That is precisely the point and illustrates what is wrong with a per circuit fee system. At bottom, there is simply no basis for correlating the level of Commission regulatory oversight on a one-to-one basis with the amount of capacity on a cable. Moreover, because price per unit of capacity decreases as capacity increases, the average revenue per unit of capacity on larger cables, which are selling relatively larger circuits, will be less than on smaller cables, such as legacy common carrier

¹⁶ *Id.* at 3.

¹⁷ Global Crossing Comments at 5 (citing Section 9 of the Communications Act of 1934, as amended, 47 U.S.C. § 159).

¹⁸ *Id.* at 5.

¹⁹ AT&T Comments at 4.

cables, which likely have a greater proportion of smaller circuits, including circuits dedicated to retail services.²⁰

In contrast, the regulatory fee per unit of capacity remains constant, such that under the IBC methodology, larger cables are paying far more on a per revenue basis than either smaller cables or international common carriers. Moreover, since the regulatory burden is relatively constant regardless of cable size, larger cables are unfairly impacted in two ways: first, they are paying more on an absolute basis by virtue of their size, when there is absolutely no correlation between size and regulatory effort; and second, they are paying more on a per revenue basis because of the decreasing price per unit of capacity versus the constant price of the regulatory fee per unit of capacity.

For this reason, the Joint SCS Fee Proposal endorsed by the PCL Commenters would impose a flat regulatory fee per licensed cable system on submarine cable operators, and charge remaining international common carriers a regulatory fee based on active 64 Kbps circuits that they maintain in international transmission facilities.²¹ The proposal recognizes that a fee based on 64 Kbps circuits may continue to work for a more voice focused, retail business such as

²⁰ The same point holds equally true for facilities-based international common carriers, who are selling smaller circuits, on average, than submarine cables, including retail voice and relatively low bandwidth retail broadband circuits.

²¹ AT&T complains that a flat, per-system fee is flawed, and would result in smaller capacity cables paying much higher fees on a per-circuit basis than larger capacity cables. It adds that a flat fee proposal would be "distinctly less rational and equitable" than the current fee structure, which applies the same per-circuit fees to all cables regardless of cable size or regulatory classification. AT&T Comments at 3. As noted above, however, there is absolutely no basis for correlating regulatory effort and benefit with cable size, and indeed, as AT&T notes in its comments, and discussed above, Commission activities benefit all cable operators regardless of cable capacity, and cable capacity "provide[s] no basis for different treatment of operators under the fee structure according to their . . . cable size." AT&T Comments at 4.

international common carriage, versus the IP-based, multigigabit business of submarine cable operators,²² where a 64 Kbps fee clearly does not work.

That being said, there are only 95 facilities-based international common carriers reporting active circuits according to the Commission's most recent Circuit Status Report.²³ The PCL Commenters would have no objection if as to these, as suggested by the Satellite Industry Association, a flat per license fee were adopted as well.²⁴

There may be other adjustments to the Joint SCS Fee Proposal that are worth considering. Like Global Crossing, the PCL Commenters "look[] forward to working with the Commission to develop a new methodology that fairly accounts for advancements in cable capacity."²⁵ What is clear, however, is that the per circuit IBC fee, as applied to the submarine cable industry must be replaced.

Respectfully submitted,

**PACIFIC CROSSING LIMITED AND
PC LANDING CORP.**

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²² Tata notes in its comments, for example, that 63% of traffic on transAtlantic cables are sold in increments of 10 Gbps waves. Tata Comments at 4.

²³ International Bureau Report, 2006 Section 43.82 Circuit Status Data (Feb. 2008).

²⁴ See Comments of SIA, *Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, at 1 (filed May 30, 2008) ("*SIA Comments*").

²⁵ Global Crossing Comments at 1.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2008, a copy of the foregoing Reply Comments was served by hand, on each of the persons listed on the attached service list.

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