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BY ELECTRONIC FILING

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM No. 11312

Reporting Requirements for U.S. Providers of International Telecommunications Services, IB Docket No. 04-112

Dear Ms. Dortch:

Yesterday, representatives of the submarine cable industry met with Aaron Goldberger, Legal Advisor to Chairman Martin, to discuss reform of the International Bearer Circuit ("IBC") regulatory fee regime. Present on behalf of the submarine cable operators were: William Hunt, III of Level 3 Communications, LLC, accompanied by Michael Nilsson and (by telephone) Kent Bressie of Harris, Wiltshire & Grannis LLP; Todd Rahimi of Pacific Crossing Limited, accompanied by Martin L. Stern of K&L Gates; Troy Tanner of Bingham McCutchen, on behalf of Brasil Telecom of America, Inc.; Columbus Networks USA, Inc., ARCOS-1 USA, Inc., A SUR Net, Inc., and Hibernia Atlantic US LLC; Joel Winnik of Hogan & Hartson on behalf of Marine Cable Corp.; James Stenger of Thelen Reid Brown Raysman & Steiner LLP on behalf of Apollo Submarine Cable System, Ltd.; and Rogena Harris of Tata Communications.

This letter summarizes those discussions, and also addresses a procedural matter related to the Commission's obligation to notify Congress of permitted amendments. That procedural issue should not prevent the Commission from at long last resolving IBC fee issues this year.

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We discussed the enormous market distortions caused by today's capacity-based IBC fee regime—in which higher-capacity submarine cable operators pay regulatory fees that approach

or even exceed revenues associated with the capacity being sold. We also discussed the Revised Joint Proposal filed in this proceeding on July 11, 2008 by companies representing the overwhelming majority of submarine cable traffic to and from the United States. This Revised Joint Proposal would eliminate these market distortions and significantly reduce the regulatory gamesmanship associated with the existing system, and would comport with the Communications Act's requirement that the schedule of fees be amended when regulatory fees no longer bear a reasonable relationship to regulatory costs. *See* 47 U.S.C. § 159(b)(1)(A); 47 U.S.C. § 159(b)(3). With respect to each of these points, our discussion was consistent with comments and reply comments filed by parties to the Revised Joint Proposal.

We also briefly discussed AT&T's objections to the Revised Joint Proposal:

- **The Revised Joint Proposal does not "discriminate" against common carrier submarine cable systems; to the contrary, the existing IBC fee methodology discriminates against private operators of high-capacity submarine cable systems.** Under the Revised Joint Proposal, common carrier submarine cable operators would pay both new submarine cable system ("New SCS") fees and international bearer circuit ("New IBC") fees because they operate two different lines of business on behalf of which the Commission incurs separate and distinct regulatory costs. When the Commission first started collecting IBC fees in 1993, submarine cables were owned by common carrier consortia for the purpose of providing voice services. There was no distinct market for large increments of wholesale capacity, particularly as the Internet had not yet been commercialized. By 2008, however, it has become abundantly clear that the existing IBC fee regime discriminates against private operators of high-capacity submarine cable systems by wrongly assuming that wholesale providers of large-capacity increments operate in the retail, small-increment, voice-grade circuit business (which they do not do) and generate the same regulatory burdens for the Commission (which, as a review of the Commission's Parts 43 and 63 rules reveals, they could not do). Moreover, the existing methodology actually shifts much of the fee-payment burden to common carriers by exempting from payment of the current IBC fees capacity sale by undersea cable operators to facilities-based international Section 214 holders. Under the Revised Joint Proposal there would be no such exemption, as a private cable operator would pay the New SCS Fee even if it sold 100 percent of its capacity to facilities-based international Section 214 holders. The Revised Joint Proposal would eliminate this exemption and other distortions by finally making facilities-based common carriers and undersea cable operators responsible for fees in relation to the regulatory burdens they impose on the Commission.

- **The Revised Joint Proposal is not "unfair" to smaller common carrier systems**. Smaller systems will pay only half of the New SCS fee applicable to larger systems. Moreover, the IBC fees themselves will be very low. The New IBC fee, for example,

would be less than *half* of that proposed by the Commission ($0.54 per circuit rather than $1.09). Signatories to the Revised Joint Proposal have found that their common-carrier submarine cable affiliates will pay the same or less under the Revised Joint Proposal than they do today—and the same may well be true for AT&T itself. This may seem counterintuitive, but it results because private carriers that have not been paying regulatory fees on certain capacity will do so under the self-enforcing New SCS Fee.

- **Increased regulation is not the answer.** AT&T has suggested that the inequities associated with the existing IBC fee system can be remedied through more onerous reporting requirements on private submarine cable operators. *See* Letter from James J. R. Talbot to Marlene H. Dortch, MD Docket No. 08-65, RM No. 11312, IB Docket No. 04-112 (filed July 16, 2008). This is not so.

  First, AT&T's position is an apparent reversal of its prior position in the international reporting proceeding. Then, AT&T argued that "[u]nder no circumstances should international reporting requirements be made more burdensome." Letter from Douglas Schoenberger to Marlene H. Dortch, IB Docket No. 04-112 (filed Dec. 1, 2005) (attachment). Indeed, AT&T argued that reporting should be simplified and streamlined. *Id.*; *see also* Letter from Douglas Schoenberger to Marlene H. Dortch, IB Docket No. 04-112 (filed Jan. 24, 2006). AT&T nowhere explains why it is taking a diametrically opposing position today.

  Increasing regulatory burdens to justify regulatory fees, moreover, is not sound public policy. More onerous reporting requirements would do nothing to address the inequities of charging higher-capacity systems hundreds of times the fees of lower-capacity systems—when it is often the lower-capacity systems that are more pervasively regulated. Companies that "under-pay" under the current system are unlikely to reveal materially higher circuit counts because a reporting requirement is put into effect. Nor would reporting address the real disconnect between regulatory fees and the manner in which different classes of payors are actually regulated.

- **The Revised Joint Proposal is simple and straight-forward.** AT&T criticizes the Revised Joint Proposal for failing to specify how fee payments should be allocated among consortium members. Yet consortium members are in a far better position to allocate such payments among themselves than either the Commission or the signatories to the Revised Joint Proposal. This is why the Revised Joint Proposal leaves such allocation to private commercial arrangements. Moreover, it is not the case that sharing or allocation of such payments would be difficult to arrange. Indeed, in many cases, such matters are already arranged, as the construction and maintenance agreements that govern operational and financial matters for consortium submarine cable systems already govern allocation of many joint costs.

Last, we discussed the need for immediate action, noting both the urgent nature of the problem and the unusually complete record, submitted over the course of five years, now before the Commission. We urged the Commission to adopt the Revised Joint Proposal this year. To the extent that holders of Section 214 authorizations believe that their fee category also needs adjustment in the coming years, the Commission should address any such proposals when and if such proposals are made.

In this regard, we note that any permitted amendment becomes effective 90 days after the Commission notifies Congress. 47 U.S.C. § 159(b)(4)(B). Because the Commission has not yet acted on its regulatory fee proceeding, it would appear that there is no longer time for a permitted amendment to become effective during this fiscal year. Where, as here, Commission delay has caused it to miss its statutory deadline, it would be appropriate to adopt the Revised Joint Proposal as an interim measure. The Commission could do so, for example, pursuant to its authority to "waive [or] reduce . . . payment of a fee in any specific instance for good cause shown." 47 U.S.C. § 159(d). Nothing in the Communications Act would prevent the Commission from "waiving" or "reducing" fees under its existing fee structure on a one-time basis to levels that would be paid under the Revised Joint Proposal. And Commission delay in commencing and resolving the regulatory fees proceeding surely constitutes "good cause shown" for such a reduction or waiver.

Should the Commission determine otherwise, it should at the very least adopt a permitted amendment in this proceeding to become effective for the next fiscal year. The Commission proceeded in this manner with interconnected VoIP services last year. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, 22 FCC Rcd. 15,712, 15,720 ¶ 20 (2007) (adopting permitted amendment assessing regulatory fees on interconnected VoIP providers); *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, FCC 08-126, MD Docket No. 08-65, att. C n.3 (rel. May 8, 2008) ("Beginning in FY 2008, regulatory fees for IVoIP will be included as part of the Interstate Telecommunications Service Provider (ITSP) fee, and these fees will be collected at the same time as ITSP fees are collected.").

What the Commission should *not* do is use the late date as an excuse for further delay in resolving IBC regulatory fee issues. These matters have been before the Commission for five years. The legal and economic case has been made repeatedly, and further input would not aid the Commission in decision-making. The time for IBC fee reform is now.

If you have any questions, please do not hesitate to contact us.

Respectfully submitted,

Kent Bressie
Michael Nilsson
Counsel for Level 3 Communications, LLC

Cc: Aaron Goldberger