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Before the
Federal Communications Commission
Washington, D.C. 20554

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

MAR 27 2009

SECOND REPORT AND ORDER

Adopted: March 17, 2009 **Released: March 24, 2009**

By the Commission: Acting Chairman Copps and Commissioners Adelstein and McDowell issuing separate statements.

I. INTRODUCTION

1. In this Second Report and Order, the Commission adopts a new methodology for calculating regulatory fees from international submarine cable operators.[1] Beginning with Fiscal Year ("FY") 2009, the Commission will calculate these regulatory fees on a per cable landing license basis, with higher fees for larger submarine cable systems and lower fees for smaller systems. In our FY 2008 regulatory fee Report and Order adopted on August 1, 2008 we agreed to evaluate further the issue of regulatory fees paid by submarine cable operators, which are a sub-set of carriers that pay International Bearer Circuit ("IBC") fees, and release a Second Report and Order with a new regulatory fee methodology for submarine cable operators.[2] The new methodology we adopt here is based on a proposal (the "Consensus Proposal") by a large group of submarine cable operators, representing both common carriers and non-common carriers with both large and small submarine cable systems.[3] The new

[1] This regulatory fee methodology only applies to international submarine cable systems that connect the United States with international points, and not to submarine cable systems connecting points within the United States, such as systems connecting the Hawaiian Islands or Alaska to the mainland.

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-182 (rel. Aug. 8, 2008) ("*FY 2008 Report and Order*"). We use the term "IBC" in this proceeding as a general way of referring to this regulatory fee category; however, as we discuss below, our per cable landing license methodology we adopt in this order does not apply to terrestrial and satellite facilities.

Comments cited in this Second Report and Order are comments to our *FY 2008 Notice of Proposed Rulemaking, see Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 7987 (2008) ("*FY 2008 Notice of Proposed Rulemaking*"), and are listed in Appendix C to the *FY 2008 Report and Order*.

[3] *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 23, 2008 (attachment is the "Consensus Proposal"). The parties to the Consensus Proposal are: AT&T, Verizon, Apollo Submarine Cable System, Ltd.; Brasil Telecom of America, Inc.; Columbus Networks USA, Inc.; ARCOS-1 USA, Inc.; A.SUR Net, Inc.; Level 3 Communications, LLC; Hibernia-Atlantic US LLC; Marine Cable Corp.; Pacific Crossing Limited and its subsidiary PC Landing Corp.; Reliance Globalcom Limited and its indirect subsidiary FLAG Network USA Limited; and Tata Communications (US) Inc. Qwest Communications (continued....)

methodology allocates IBC costs among service providers in an equitable and competitively neutral manner, without distinguishing between common carriers and non-common carriers, by assessing a flat per cable landing license fee for all submarine cable systems.[4] In addition to being more equitable, we anticipate that the new methodology will encourage compliance with our regulatory fee requirements.

II. BACKGROUND

2. For several years, submarine cable operators have asked the Commission to revise the historic per circuit regulatory fee methodology for submarine cable systems. We discussed this issue in our FY 2004 regulatory fee proceeding where Tyco Telecommunications (US), Inc. challenged the Commission's regulatory fee methodology, arguing, *inter alia*, that our capacity-based methodology was favoring older lower capacity submarine cable systems and that non-common carrier submarine cable operators should have their own separate category and pay a per-cable landing license fee.[5] We concluded that the complex issues should be resolved after we have a more complete record of the issues.[6] In our FY 2005 regulatory fee proceeding we sought further comment on this issue,[7] but concluded not to change our methodology.[8] More recently, VSNL Telecommunications (US) Inc. ("VSNL"), now Tata Communications, filed a Petition for Rulemaking urging the Commission to revise its regulatory fee methodology for submarine cable operators.[9] Several parties subsequently filed a Revised Joint

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International, Inc. ("Qwest") also supports the Consensus Proposal. *See* Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 29, 2008. GU Holdings, Inc., an indirect wholly-owned subsidiary of Google, Inc. also supports the Consensus Proposal. *See* Letter from Richard S. Whitt, Google, Inc., to Marlene H. Dortch, Office of the Secretary, FCC, Oct. 3, 2008. Pacific Crossing Limited and PC Landing Corp. contend that the Commission should adopt the Consensus Proposal and also further examine the regulatory fee methodology in this docket or in the FY 2009 regulatory fee proceeding to determine if a portion of the regulatory fee burden should be directly allocated to international common carriers. *See* Letter from Martin L. Stern, K&L Gates LLP, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 25, 2008.

[4] Terrestrial and satellite facilities do not have cable landing licenses and will continue to pay regulatory fees on a per circuit basis, under our historic methodology, as clarified herein. We have not received comments or *ex partes* specifically requesting a change in the regulatory fee rules for these entities.

[5] *Assessment and Collection of Regulatory Fees for FY 2004*, MD Docket No. 04-73, Report and Order, 19 FCC Rcd 11662, 11671-73, ¶¶ 26-30 (2004) ("*FY 2004 Report and Order*").

[6] *FY 2004 Report and Order*, 19 FCC Rcd at 11672, ¶ 29.

[7] *Assessment and Collection of Regulatory Fees for FY 2005*, MD Docket No. 05-59, Notice of Proposed Rulemaking, 20 FCC Rcd 3885, 3890-91, ¶¶ 11-17 (2005) ("*FY 2005 NPRM*").

[8] *Assessment and Collection of Regulatory Fees for FY 2005*, MD Docket No. 05-59, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12263-64, ¶¶ 8-9 (2005) ("*FY 2005 Report and Order*").

[9] *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM-11312 (filed Feb. 6, 2006) ("VSNL Petition"). We released a Public Notice designating the proceeding as RM-11312 and seeking comment on the Petition. *See* Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice,* Report No. 2759 (rel. Feb. 15, 2006). In our *FY 2006 Report and Order* we stated that the issues presented in the Petition warranted consideration separately from the Commission's annual regulatory fee proceeding. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Docket No. 06-68, Report and Order, 21 FCC Rcd 8092, 8098-99, ¶ 18 (2006) ("*FY 2006 Report and Order*"). In our *FY 2007 Report and Order* we observed that we had received joint comments filed by seven submarine cable landing licensees and that we would consider the matter separately from the annual regulatory fee proceeding. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, 15715-16, ¶ 10 (2007) ("*FY 2007 Report and Order*").

Proposal.[10] In response, AT&T and Verizon filed a proposal for a flat per cable landing license fee for all submarine cable operators.[11] The Consensus Proposal is similar to the AT&T/Verizon Proposal in that it is based on a flat[12] per cable landing license fee and it does not differentiate between common carriers and non-common carriers. The Consensus Proposal has brought together common carriers and non-common carriers with a proposal that was satisfactory to all interested parties, as no party has opposed it on the record of this proceeding.

3. Congress requires the Commission each year to collect regulatory fees "to recover the costs of ... enforcement activities, policy and rulemaking activities, user information services, and international activities."[13] Section 9 of the Communications Act of 1934, as amended (the "Act") requires the Commission to make certain changes to the regulatory fee schedule "if the Commission determines that the schedule requires amendment to comply with the requirements" of section 9(b)(1)(A). The Commission must add, delete, or reclassify services in the fee schedule to reflect additions, deletions, or changes in the nature of its services "as a consequence of Commission rulemaking proceedings or changes in law."[14] These "permitted amendments" require Congressional notification[15] and resulting changes in fees within the Commission's jurisdiction are not subject to judicial review.[16]

4. Historically, regulatory fees for IBCs have been paid by facilities-based common carriers based on the number of active international bearer circuits they have in a transmission facility used to provide service to specified types of entities. Specifically, our current rules provide that regulatory fees for IBCs are paid by facilities-based common carriers that have active international bearer circuits 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.[17] Non-common carrier submarine cable operators pay fees for

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[10] *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, to Ms. Marlene H. Dortch, Secretary, FCC, July 14, 2008 (attachment is the "Revised Joint Proposal"). The July 14, 2008 Revised Joint Proposal was supported by the following carriers: Brasil Telecom of America, Inc.; Columbus Networks USA, Inc.; ARCOS-1 USA, Inc.; A.SUR Net, Inc.; Global Crossing Ltd.; Level 3 Communications, LLC; Hibernia-Atlantic US LLC; Marine Cable Corp.; Pacific Crossing Limited and its subsidiary PC Landing Corp.; Reliance Globalcom Limited and its indirect subsidiary FLAG Network USA Limited; and Tata Communications (US) Inc. Marine Cable Corp. and Global Crossing Ltd. were new supporters since the filing of the earlier Joint Proposal.

[11] *See* "Proposal of AT&T and Verizon," filed Sept 2, 2008 ("AT&T/Verizon Proposal").

[12] By "flat" we mean that the regulatory fee is no longer based on the number of active circuits, but is assessed on a per cable system basis. As we explain below, we are permitting carriers to pay a lower fee for smaller submarine cable systems.

[13] 47 U.S.C. § 159(a)(1).

[14] 47 U.S.C. § 159(b)(3).

[15] 47 U.S.C. § 159(b)(4)(B).

[16] 47 U.S.C. § 159(b)(3). *But see Comsat Corp. v FCC*, 114 F.3d 223, 227 (D.C .Cir. 1997) ("Where, as here, we find that the Commission has acted outside the scope of its statutory mandate, we also find that we have jurisdiction to review the Commission's action.").

[17] *See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, Report and Order, 21 FCC Rcd 8092, 8107, n.62 (2006) ("*FY 2006 Report and Order*"); *Regulatory Fees Fact Sheet: What You Owe – International and Satellite Services Licensees for FY 2008* at 3 (rel. Aug. 2008) (the fact sheet is available on the FCC website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284863A4.pdf).

The Commission's current guidance on its website provides the following information regarding international and satellite license fees, *see* http://www.fcc.gov/fees/regfees.html:

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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.[18] Section 43.82 of the Commission's rules requires that each facilities-based common carrier engaged in providing international telecommunications services file a report by March 31 or each year showing the status of its circuits as of December 31 of the preceding calendar year.[19]

5. For several years, submarine cable operators have asked the Commission to revise the regulatory fee methodology. Submarine cable revenue and capacity have grown significantly in recent years and are expected to expand dramatically in the near future, so we agree that revisions to the old regulatory fee rule are overdue.[20] In 2006, VSNL proposed[21] a flat annual fee per cable system for submarine cable operators,[22] and later, several other parties filed a Revised Joint Proposal.[23] The Revised Joint Proposal would assess a flat fee, per cable landing license, for both common carrier and non-common carrier submarine cable systems and in addition, there would be a new fee based on active circuits, for common carriers only. Thus, under the Revised Joint Proposal, common carriers would pay the flat per cable landing license fee and a per circuit fee and non-common carriers would pay only the flat per cable landing license fee. In response to that Revised Joint Proposal, AT&T and Verizon filed a proposal assessing a flat per cable landing license fee for all submarine cable systems, with a lower fee for smaller systems.[24] The AT&T/Verizon Proposal treated common carrier and non-common carrier systems alike.

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> 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, 2007 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, 2007.

[18] *FY 2006 Report and Order*, 21 FCC Rcd at 8107, n.62.

[19] 47 C.F.R. § 43.82. The information included in the circuit status report is described in the Circuit Status Manual. All facilities-based carriers (including facilities-based resellers) are required to file the report regardless of whether or not they have activated circuits at the year-end. *See* http://www.fcc.gov/ib/pd/pf/csmanual.html.

[20] For example, since January 1, 2007, the Commission received applications for 14 new submarine cables, of which eight are for submarine cables in the Pacific Ocean representing a combined capacity of 19.84 Tbps (terabits per second). *See also* Communications Daily, Oct. 31, 2008, p. 16 ("International submarine cable is a growth market after seeming 'dead in the water' five or six years ago. ... International Internet capacity grew 60 percent this year, and growth is expected to continue.")

[21] *See* VSNL Petition.

[22] VSNL Petition at 6. Subsequently, Tata and other carriers filed two joint proposals, similar to the VSNL Proposal. For additional discussion of the proposal, see *FY 2008 Report and Order* at ¶¶ 14-15.

[23] *See* Revised Joint Proposal. *See also FY 2008 Report and Order* at ¶ 16 for a discussion of the Revised Joint Proposal.

[24] *See* AT&T/Verizon Proposal.

6. A broad coalition of common carriers and non-common carriers submitted the Consensus Proposal,[25] on September 23, 2008. The Consensus Proposal is similar to the AT&T/Verizon Proposal in that it proposes to assess a flat fee on submarine cable systems, graduating the fee so that smaller systems pay less, and making no distinction between common carriers and non-common carriers.[26] Specifically, the Consensus Proposal divides the existing IBC category into two separate categories: one for terrestrial and satellite facilities, and a second for submarine cable operators. Using FY 2008 regulatory fees owed, for illustrative purposes, the Consensus Proposal would allocate 12.4 percent of the FY 2008 revenue requirement to terrestrial and satellite facilities and 87.6 percent of the FY 2008 revenue requirement to submarine cable operators.[27] Submarine cable operators would pay their share through a flat, per cable landing license fee. The Consensus Proposal would assess a flat fee per cable landing license for the 31 existing large submarine cable systems, with a reduced flat fee[28] for the small cable systems. A submarine cable system owned by multiple service providers or licensees would be considered one submarine cable system and each cable landing license holder would be jointly and severally liable for the fee.[29] As noted, in early 2009, we will propose FY 2009 regulatory fees and will address additional reporting requirements and the specific procedures for paying regulatory fees.

III. DISCUSSION

7. As described above, we adopt the general methodology of the Consensus Proposal. We find that the Consensus Proposal is an improvement over our current submarine cable fee methodology, is responsive to the concerns expressed by the submarine cable operators, and is in the public interest. The methodology we adopt today will increase compliance with our regulatory fee requirements, is competitively neutral, is easy to administer, and is supported by a majority of the submarine cable community.

8. We find that the Consensus Proposal is in the public interest because it will increase compliance with our regulatory fee requirements. Under the existing framework, the Commission relies on carrier self-reporting of regulatory fee obligations, based on section 43.82 reports of active circuits. Non-common carriers do not file these reports, but are required to pay regulatory fees. Thus, the Commission does not have an independent check on whether non-common carriers are paying their share of regulatory fees. Parties have stated to the Commission that there are non-common carriers who should pay, but do not.[30] If our rules permit certain entities to avoid complying with our regulatory fee requirements because we do not have sufficient reporting requirements for part of the industry, the remaining carriers must pay a higher amount to compensate for those who avoid payment.[31] Today's

[25] *See* note 3 for a list of signatories to the Consensus Proposal.

[26] Consensus Proposal at 1. The Consensus Proposal uses current regulatory fees in its description of the proposed methodology. Fees and allocations for FY 2009 and years thereafter will probably differ.

[27] *Id.*

[28] *Id.* at 3. The fee for the "small" submarine cable systems would vary depending on the size.

[29] *Id.* at 2.

[30] *See, e.g.*, Level 3 Communications, LLC Comments at 16 ("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"); Pacific Crossing Limited and PC Landing Corp. Comments at 3 ("the current methodology has been plagued by rampant undercounting of total activated capacity that has been institutionalized into the methodology over its fourteen year history"); Tata Communications (US) Inc. Comments at 2 ("one way to interpret the ... fee calculation ... based on 64 Kb circuits or equivalent (the size of a voice circuit) [is] that this fee only applies to voice circuits."

[31] *See* AT&T/Verizon Proposal at 4-5.

action addresses this concern because the Commission has a record of the cable landing licenses issued to licensees (including those licensees who have avoided paying their share of regulatory fees) and will now assess the fee for each license.[32]

9. Further, we find that the Consensus Proposal is competitively neutral. Unlike several previous proposals submitted by submarine cable operators, the approach we adopt today treats common carriers and non-common carriers identically. Both common carrier and non-common carrier submarine cable operators support the Consensus Proposal.

10. In addition, the new methodology will be easier for the Commission to administer and submarine cable operators to comply with. Under the existing methodology, submarine cable operators must calculate their fee obligations based on the number of 64 kilobits per second ("kbps") "active" circuits at the end of the year. Some entities chose to underreport the number of active circuits and thus underpay regulatory fees. Under the rule we adopt today, submarine cable operators will no longer pay regulatory fees based on how many active circuits they had on the previous December 31. Under our new rule they will pay a flat fee per cable landing license. Submarine cable operators will still need to advise the Commission of the number of circuits to identify whether they qualify as a small system for fee payment purposes, or certify to the category that they fit into, but this should be a relatively small burden, and is supported by the members of the consensus group who themselves would qualify as small system service providers.

11. Finally, we note that the Consensus Proposal is the product of broad agreement among the submarine cable operators. The 15 parties to the Consensus Proposal represent 35 of the 42 international submarine cable systems currently in operation, as well as three planned submarine cable systems. In 2008, these submarine cable systems accounted for over 95 percent of the international circuits carried on submarine cables. These represent both common carriers and non-common carriers that provide service through both large and small submarine cable systems. There is no opposition to the Consensus Proposal on the record. We recognize as well that parties have submitted a number of proposals prior to the Consensus Proposal, and that the methodology we adopt today is the product of considered discussions within the industry and with the Commission.

12. While today we adopt a new methodology for calculating regulatory fees for international submarine cable systems, this Second Report and Order does not amend our licensing rules with respect to submarine cable systems.[33] Nor does this Second Report and Order determine the amount of regulatory fees that should be assessed on submarine cable operators; we are not assessing the FY 2009 revenue requirement or the regulatory fees for submarine cable systems, terrestrial, or satellite facilities in this proceeding. The revenue requirement for this category will vary each year, as it has in the past. The Commission has an ongoing proceeding seeking comment on whether regulatory fee categories bear their fair share of the total cost to the Commission.[34] After the Commission has reviewed the record in that proceeding, it may find that submarine cable systems, along with other categories, may have been allocated too small a revenue requirement in the past or that submarine cable systems have been allocated

[32] Section 1 of the Cable Landing License Act prohibits any person from landing or operating in the United States "any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States." 47 U.S.C. § 34. This function was delegated to the Commission in Executive Order No. 10530, May 11, 1954.

[33] *See* 47 C.F.R. §§ 1.767, 1.768.

[34] *See FY 2008 Report and Order* at ¶¶ 25-58; "*Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008*," MD Docket No. 08-65, Public Notice, DA 08-2033, rel. Sept. 3, 2008.

too a large revenue requirement and that other categories should pay more. In a separate docket, we will continue our usual practice of releasing a Notice of Proposed Rulemaking seeking comment on proposed FY 2009 regulatory fees. At that time, we will seek comment on regulatory fee rates calculated using the methodology adopted herein to recoup the amount set by Congress for FY 2009.

A. New Methodology for Calculating Submarine Cable Regulatory Fees

13. The per cable landing license fee methodology we adopt herein assesses a flat, per cable landing license fee on international submarine cable systems, with a reduced amount for the smaller systems. Specifically, we will first apportion the revenue requirement between (1) terrestrial and satellite facilities and (2) submarine cable.[35] The terrestrial and satellite facilities will be assessed regulatory fees on a per circuit basis, as discussed below.[36] The remaining portion of the revenue requirement will be allocated among the submarine cable systems.

14. Our methodology differs from the Consensus Proposal in one respect. Instead of using kbps,[37] we use gigabits per second ("Gbps"). We find that using Gbps rather than 64 kbps is preferable because 64 kbps is the unit of measurement for voice grade circuits; whereas submarine cables are now largely used for data. In addition, carriers file their applications using Gbps or terabits per second ("Tbps") and the industry standard is to use Gbps or Tbps. For these reasons, it is administratively easier to use Gbps instead of 64 kbps. Converting from 64 kbps to Gbps does not change the particular fee allocations for FY 2009 that would apply with respect to each individual cable system, as set forth in the Consensus Proposal.

15. The operational submarine cable systems will first be defined as "large" submarine cable systems and "small" submarine cable systems based on the capacity of each system used for the Commission's annual Circuit Status report.[38] The "small" systems will be further subdivided into subcategories, as discussed below. A "small" system may, however, move into a different category as it gets larger.[39] Carriers will be required to advise the Commission of a change in category or subcategory for regulatory fee purposes. Based on the number and size of operational submarine cable systems today, there are currently 31 "large" cable systems, defined as systems with capacity of 20 Gbps or greater. These large systems will pay one "payment unit" each. We emphasize that this calculation is not the regulatory fee assessment for FY 2009, but is an example based on the regulatory fees for FY 2008.

16. There are 11 small submarine cable systems (*i.e.*, smaller than 20 Gbps) operational today using this methodology proposed in the Consensus Proposal. The methodology we adopt assesses different percentages of a "payment unit" depending on the size of the submarine cable system. The submarine cable systems with a capacity equal to or greater than 10 Gbps but less than 20 Gbps will pay

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[35] This apportionment will be determined on an annual basis and proposed in our annual regulatory fee Notice of Proposed Rulemaking.

[36] We are not changing the methodology for assessing regulatory fees for terrestrial and satellite facilities, although we are clarifying our rule to some degree, as we discuss below.

[37] *See* Consensus Proposal.

[38] The Commission annually prepares and releases a report on Section 43.82 Circuit Status Data ("Circuit Status Report"). The Circuit Status Report includes a table which lists all of the operational and planned trans-oceanic fiber optic cables, both common carrier and non-common carrier cables, and their capacity. The capacity figures are derived from the cable landing license applications, updated capacity information from the cable operators and other sources.

[39] We anticipate that the subcategories of small systems and the definitions of large and small systems may change as the submarine cable industry changes.

50 percent of a payment unit; the systems with a capacity equal to or greater than 5 Gbps but less than 10 Gbps will pay 25 percent of a payment unit; the systems with a capacity equal to or greater than 2.5 Gbps but less 5 Gbps will pay 12.5 percent of a payment unit; and submarine cable systems with a capacity below 2.5 Gbps will pay 6.25 percent of a payment unit. This allocation may change from year to year, depending on the revenue requirement, the submarine cable industry, and other factors. The per system fee for FY 2009 will be determined, if this allocation is not changed, by dividing the revenue requirement for submarine cable systems among the large and small operators in these proportions. We anticipate, however, that each year we will have a different revenue requirement and there will be changes in the submarine cable industry, requiring revision of these allocations in our annual regulatory fee Notice of Proposed Rulemaking.

17. In addition to the benefits discussed above, the new methodology will allow carriers to add incremental capacity to already existing submarine cable systems without paying a higher regulatory fee for each additional "active" circuit.[40] The new regulatory fee methodology will effectively eliminate concerns that the regulatory fees discouraged submarine cable operators from increasing capacity on their systems. On the contrary, the regulatory fee would become smaller on a per circuit basis as a cable's capacity is increased. We also anticipate a lower administrative burden on the industry and the Commission. Our rules already require one cable landing license for each submarine cable system. A company seeking to build a submarine cable system is required to obtain a cable landing license; under the rule we adopt today the regulatory fee would not be assessed until the system is operational.[41] A consortium would be considered to have one cable landing license for regulatory fee purposes. The regulatory fee would apply to submarine cable systems in service as of December 31 of each year.

18. We also agree that a lower fee for the smaller cable landing licensees would mitigate concerns that a flat fee may create a barrier to entry for new entrants.[42] We anticipate that over time the categories of small and large systems will change as the smaller systems grow in capacity and new larger systems are built and licensed. The growth of smaller systems may move them into a higher category. The addition of new larger submarine cable systems may require us to move the smaller of the large systems into the small category.

19. Next we address a concern raised by several nonprofit educational end users.[43] Internet2, a National Research and Education Network ("NREN"), that has now settled its differences with the supporters of the Consensus Proposal,[44] contends that IBCs used for the purpose of interconnecting NRENs, which are critical components of the infrastructure that supports scientific research throughout

[40] A "large" submarine cable system will continue to be assessed one payment unit even as it gets larger. A "small" system may, however, move into a different category as it gets larger. Carriers will be required to advise the Commission of a change in category or subcategory for regulatory fee purposes.

[41] *See* 47 C.F.R. § 1.767(g)(14).

[42] *See* Telsra Incorporated Reply Comments at 2 (requesting a two-year ramp up period for new systems, with reduced regulatory fees).

[43] *See* Letter from Alan G. Fishel, Arent Fox, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 23, 2008 ("NREN Letter"). *See also* Letter from Harvey B. Newman, Professor of Physics, California Institute of Technology, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 24, 2008.

[44] Internet2 and the supporters of the Consensus Proposal reached an agreement that (1) they do not object to the Commission seeking further comment on this issue and (2) Internet2 supports the Consensus Proposal. *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, *et al.* to Marlene H. Dortch, Office of the Secretary, FCC, Oct. 17, 2008.

the world, should be exempt from regulatory fees in order to remain competitive.[45] Internet 2 argues that carriers should not be permitted to pass-through regulatory fees to NREN end users in order to permit the United States to remain competitive in physics, medicine, computer science, bioinformatics, biodiversity and ecological research, geoscience, astronomy, and space exploration.[46] While we agree that advancement in these scientific fields is an admirable goal, our rules currently exempt certain entities, such as educational institutions, from regulatory fees when the entity itself is the licensee. There is no exemption when the entity is the end-user.[47] Carriers are, of course, not required to pass regulatory fees onto these special end-users. We strongly urge the IBC industry to make competitive rates available to NRENs, in order to support the furtherance of science and education in general.

B. Per Circuit Regulatory Fees

20. We are retaining, with some clarification, our current per circuit regulatory fee for terrestrial and satellite facilities, which do not have cable landing licenses.[48] We clarify the ruleas follows:

> *International Terrestrial and Satellite.* Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, of the prior year in any terrestrial or satellite 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. "Active circuits" for these purposes include backup and redundant circuits. In addition, for these purposes, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

21. In this Second Report and Order we are not addressing or deciding the appropriate amount of regulatory fees that should be assessed on submarine cable operators; we are adopting the framework for assessing fees on IBC providers. The revenue requirement for this category will vary each year, as it has in the past. The Commission has an ongoing proceeding seeking comment on whether regulatory fee categories bear their fair share of the total cost to the Commission.[49] After the Commission has reviewed the record in that proceeding, it may find that submarine cable systems, along with other categories, may have been allocated too small a revenue requirement in the past or that submarine cable

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[45] NREN Letter at 1.

[46] *Id.* at 1-2. Further, Internet2 has noted that its submarine cable carrier only recently began assessing regulatory fees on the NREN end-users, as a result of this carrier's failure to pay regulatory fees in the past.

[47] The rule change adopted here is a result of a long process, including a Petition for Rulemaking, to change the methodology for assessing regulatory fees for international submarine cable systems. We have not sought comment on the issue of exempting certain end users from regulatory fees; this issue is outside of the scope of this proceeding.

[48] This decision does not change the methodology for calculating IBC regulatory fees for satellite and terrestrial IBCs. The Notice of Proposed Rulemaking in this proceeding was limited to submarine cable IBCs. Further, no satellite or terrestrial international service provider has responded to the Joint Proposal, the Revised Joint Proposal, or the Consensus Proposal. Finally, because satellite and terrestrial IBCs are not licensed in the same manner as submarine cable IBCs, this decision cannot be applied to satellite and terrestrial IBCs. The Commission encourages satellite and terrestrial IBC providers to propose any changes to the regulatory fee methodology that would better serve their interests and the public interest.

[49] *See FY 2008 Report and Order* at ¶¶ 25-58; "*Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008,*" MD Docket No. 08-65, Public Notice, DA 08-2033, rel. Sept. 3, 2008.

systems have been allocated a too large revenue requirement and that other categories should pay more.

22. Today we divide the existing IBC regulatory fee category into two new categories, one for terrestrial and satellite facilities and a second for submarine cable operators. This represents a permitted amendment to the regulatory fee schedule under section 9(b)(3) of the Act. Section 9(b)(4)(B) of the Act requires us to notify Congress 90 days before the change may take effect. We will provide Congress notification upon release of this Second Report and Order.

IV. PROCEDURAL MATTERS

A. Final Paperwork Reduction Act of 1995 Analysis

23. This Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. It will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA.[50] OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

B. Congressional Review Act Analysis

24. The Commission will send a copy of this Second Report and Order in a report to be sent to Congress and the General Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 159, and 303(r) that this Second Report and Order IS ADOPTED.

26. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules ARE AMENDED as set forth herein, and these rules shall become effective 90 days after Congressional notification.

27. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis in Appendix B, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

[50] 44 U.S.C. § 3507(d).

APPENDIX A

Final Regulatory Flexibility Analysis

28. As required by the Regulatory Flexibility Act ("RFA"),[51] the Commission prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking.[52] Written public comments were requested on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[53]

I. Need for, and Objectives of, the Proposed Rules:

29. We agreed to revise our methodology for calculating regulatory fees for international bearer circuits ("IBCs") within 60 days of adoption of our FY 2008 Report and Order.[54]

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

30. No parties have raised significant issues in response to the IRFA.

III. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply:

31. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[55] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[56] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[57] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[58]

32. **Small Businesses.** Nationwide, there are a total of 22.4 million small businesses,

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[51] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[52] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 7987 (2008) ("*FY 2008 NPRM*").

[53] 5 U.S.C. § 604.

[54] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, RM-11312, Report and Order and Further Notice of Proposed Rulemaking, __ FCC Rcd ___, ¶ 24 (2008) ("*FY 2008 Report and Order*").

[55] 5 U.S.C. § 603(b)(3).

[56] 5 U.S.C. § 601(6).

[57] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[58] 15 U.S.C. § 632.

according to SBA data.[59]

33. **Small Organizations**. Nationwide, there are approximately 1.6 million small organizations.[60]

34. **Small Governmental Jurisdictions**. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[61] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[62] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[63] Thus, we estimate that most governmental jurisdictions are small.

35. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[64] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[65] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

36. **International Service Providers**. There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of "Satellite Telecommunications" and "Other Telecommunications." Under both categories, such a business is small if it has $13.5 million or less in average annual receipts.[66]

37. The first category of Satellite Telecommunications "comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[67] For this category, Census Bureau data

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[59] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[60] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[61] 5 U.S.C. § 601(5).

[62] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[63] We assume that the villages, school districts, and special districts are small and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[64] 15 U.S.C. § 632.

[65] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[66] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910.

[67] U.S. Census Bureau, 2002 NAICS Definitions, "517410 Satellite Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

for 2002 show that there were a total of 371 firms that operated for the entire year.[68] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[69] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

38. The second category of Other Telecommunications "comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems."[70] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[71] Of this total, 259 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[72] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

39. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. IBC fees apply to circuits: (1) used by a facilities-based common carrier to provide service to an end user or resale carrier; (2) used by a non-common carrier submarine cable operator; and (3) sold or leased by a non-common carrier satellite operator, other than an international common carrier.

40. In this Second Report and Order we adopt a flat annual per cable landing license fee for IBCs. We keep a per circuit regulatory fee for terrestrial and satellite facilities. The reporting requirements for terrestrial and satellite facilities would not be changed. We anticipate that the reporting requirements for carriers with IBCs may decrease as a result of the rule adopted herein.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

41. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[73] In the rule we adopt for IBCs, we are creating a separate category for smaller submarine cable systems, with a lower regulatory fee.

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[68] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 517410.

[69] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[70] U.S. Census Bureau, 2002 NAICS Definitions, "517910 Other Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[71] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 517910.

[72] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[73] 5 U.S.C. § 603.

42. *Report to Small Business Administration*: The Commission will send a copy of this Second Report and Order, including a copy of the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. The Second Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.

43. *Report to Congress*: The Commission will send a copy of this FRFA, along with this Second Report and Order, in a report to Congress pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A).

APPENDIX B

Final Rule

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303, 309.

2. Section 1.1156 is amended to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services

a. The following schedule applies for the listed services:

	Fee amount	Address
Radio facilities 1. International HF Broadcast 2. International Public Fixed		FCC, International, [fill in address]
Space Stations (Geostationary Orbit)		FCC, Space Stations,
Space Stations (Non-Geostationary Orbit)		FCC, Space Stations,
Earth Stations: Transmit/Receive & Transmit only (per authorization or registration)		FCC, Earth Station,

b. *International Terrestrial and Satellite*. Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, of the prior year in any terrestrial or satellite 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. "Active circuits" for these purposes include backup and redundant circuits. In addition, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

The fee amount, per active 64 KB circuit or equivalent will be determined for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, [fill in address].

c. *Submarine cable:* Regulatory fees for submarine cable systems will be paid annually, per cable landing license, for all submarine cable systems operating as of December 31 of the prior year. The fee amount will be determined according to following table by the Commission for each fiscal year. Payment, if mailed, shall be sent to: FCC, [fill in address].

Submarine Cable Systems (capacity as of December 31)	Fee amount	Address
< 2.5 Gbps	6.25 % of a payment unit	
2.5 Gbps or greater, but less than 5 Gbps	12.5 % of a payment unit	
5 Gbps or greater, but less than 10 Gbps	25% of a payment unit	
10 Gbps or greater, but less than 20 Gbps	50 % of a payment unit	
20 Gbps or greater	One payment unit	

STATEMENT OF
ACTING CHAIRMAN MICHAEL J. COPPS

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

I am pleased that the Commission is finally taking action to adopt a new methodology for assessing regulatory fees applicable to submarine cable systems, one that better reflects today's marketplace. Such a revision is well past due. I have long emphasized the importance and desirability of bringing our regulatory fee systems into the modern era.

Great thanks are owed to the many affected stakeholders who joined together, and worked assiduously, to develop an equitable consensus proposal that has assisted the Commission in its work.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

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

I enthusiastically approve this item which addresses the concerns raised by international submarine cable operators. They have long argued, with good cause, that the current regulatory fee structure does not allocate costs among service providers in an equitable and neutral manner. I have encouraged the Commission to continue to improve its regulatory fee assessment processes so that in the future we are more able to make adjustments as appropriate. I am happy that today we make long overdue adjustments needed to international bearer circuit fees for submarine cable operators. I also commend the operators who worked diligently over the past several months to put forth a consensus proposal which forms the basis of the new methodology we adopt here.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

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

I am pleased to support this order, which the Commission had pledged to complete last fall. In that regard, I thank Acting Chairman Copps for bringing this forward promptly. I also thank the coalition of service providers who worked diligently to develop a thoughtful, equitable proposal. Your efforts have greatly assisted us in crafting a sensible decision that properly reflects and accounts for the incredible expansion of capacity on international submarine cables.