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19 March 2013

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 06-122 and GN Docket No. 09-51, Notice of Ex Parte *Presentation*

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b), Southern Cross Cables Limited and Pacific Carriage Limited (together, "Southern Cross") hereby notify the Commission of an *ex parte* presentation in the above-referenced proceedings. On March 15, 2013, Nikki Shone (General Counsel and Corporate Secretary of Southern Cross Cables Limited) and the undersigned counsel met with Chin Yoo and (by telephone) with Carol Pomponio, Claudia Fox, and Erica Myers, all of the Wireline Competition Bureau, to discuss Southern Cross's positions regarding the FNPRM's proposals to eliminate the international-only exemption and the limited interstate revenues exemption ("LIRE").[1]

In our meeting, we reviewed the presentation attached to this notice. The substance of this presentation is consistent with the comments and reply comments that Southern Cross filed jointly with the Undersea Cable Operators in these proceedings.[2] Southern Cross reiterated the Undersea Cable Operators' positions that the FNPRM's proposals to eliminate the international-

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1 *See Universal Service Contribution Methodology & A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357 (2012) ("FNPRM").

2 Comments of the Undersea Cable Operators, WC Docket No. 06-122 and GN Docket No. 09-51 (filed July 9, 2012); Reply Comments of the Undersea Cable Operators, WC Docket No. 06-122 and GN Docket No. 09-51 (filed Aug. 6, 2012). The Undersea Cable Operators include: Global Crossing Americas Solutions, Inc., GT Landing II Corp., Level 3 Communications LLC, Office des postes et télécommunications de Polynésie française, Pacific Carriage Limited, PPC-1 Limited, PPC-1 (US), Inc., and Southern Cross Cables Limited.

only exemption and the LIRE are contrary to federal law, court precedent, and the Commission's own long-standing policy decisions. Southern Cross also explained in greater detail why the FNPRM's proposals would, if adopted, constitute unwise public policy. As undersea cables (not satellites) provide more than 95 percent of U.S.-international connectivity—a percentage that continues to grow—it is critical for the Commission to consider the particular implications of its proposals for undersea cable operators.

Predictability Regarding Regulatory Charges Is Critical, as Most Undersea Cable Capacity Is Sold in Large Increments on a Wholesale, Long-Term Basis; Such Sales Often Plays a Key Role in Financing New Systems. Southern Cross noted that customers often purchase capacity via an indefeasible right of use ("IRU") for a term of 10, 15, or 20 years, or (as in the case of Southern Cross) for the life of the system. In other cases, customers purchase capacity under intermediate or long-term leases. The design life of an undersea cable system (including that of Southern Cross) is 25 years, as is the license term for a Commission-issued cable landing license. Payment can be made as a lump sum at the outset, over the first few years of a system's life, or over the system's entire life, according to the economic terms agreed upon in the initial negotiation. The standard terms and conditions agreed upon at the outset generally govern subsequent sales of additional capacity, and in many cases such capacity is purchased via an order form established in the original agreement. For the customer, the IRU provides the security of long-term supply at a known price. For many system operators, an IRU represents a way of funding the cost of construction of expensive infrastructure through system pre-sales. Operators and their customers have agreed to hundreds of millions of dollars, if not billions, of long-term capacity sales by relying in good faith on the Commission's longstanding and oft-reiterated international-only exemption and LIRE. Regulatory certainty is key for such long-term purchases and investment decisions.

Undersea Cable Operators Lack the Cost-Recovery Options of Retail Service Providers. Southern Cross explained that the FNPRM's proposals could require operators to sell certain services at a loss, as they do not have the cost-recovery options available to other telecommunications providers. Given the razor-thin margins in the undersea cable business, this would be true even if the USF contribution factor were to drop considerably. A provider of retail telecommunications can, in an era of detariffed service offerings, simply give notice to its customers of the pass-through (via line-items in consumer bills and updated web site disclosures), consistent with the FCC's truth-in-billing rules. Similarly, a prepaid calling card provider can easily increase the retail prices of its products to recover the costs of increased USF contributions. By contrast, undersea cable operators would need to attempt to renegotiate hundreds of IRUs and capacity leases to permit the operator to pass through the costs of USF contributions. Such costly efforts usually fail, as the operator would be seeking to alter fundamentally the economic terms of long-term arrangements negotiated in reliance on the longstanding international-only exemption and the LIRE. In fact, since the Commission released the FNPRM and its proposals, potential purchasers of undersea cable capacity have specifically sought commitments from Southern Cross and other operators that they will not pass through the cost of any USF assessments to the purchasers.

If Adopted, the FNPRM's Proposals Would Likely Discourage Investment in U.S. Infrastructure. Southern Cross explained in greater detail that undersea cable operators—whether they are entirely new entrants on a particular route or seeking to replace an existing cable that has outlived its commercial or technical usefulness—are acutely sensitive to fees associated with various landing options. Given the razor-thin margins in the undersea cable capacity business, these operators routinely factor such costs into their decisions to land in particular states and countries. Southern Cross noted that it effectively abandoned a brand-new cable station in Monterey Bay, California, due to regulatory costs imposed by the State of California; instead, Southern Cross landed in Oregon. Southern Cross also noted significant discussion in the marketplace regarding the increasing attractiveness of landing in Canada instead of the United States due to the impact of U.S. federal regulatory charges (both USF contributions and regulatory fees) and recent relaxation of Canadian foreign ownership limitations. The annual "contribution"—the Canadian equivalent of USF contributions—due to the Canadian Government is 1/24th of those imposed by the Commission. (In fact, many other countries, including Australia and New Zealand, exempt undersea cable systems from universal service contributions entirely, recognizing that the systems do not, except incidentally, touch, much less derive benefits from, domestic networks.) This potential benefit of a Canada landing is already being touted as a competitive advantage by the owners of at least one proposed new undersea cable system.

If Adopted, the FNPRM's Proposals Could Encourage Other U.S. Economic Activity to Move Offshore. Southern Cross explained that much of the undersea cable infrastructure landing in the United States is used to deliver U.S.-stored Internet content to foreign consumers. Not only does such activity involve very limited interaction with the U.S. domestic network—the very "benefit" rationale asserted by the Commission as the basis for USF contributions—it simply does not require a continuing U.S. presence. With content delivery networks, caching, and other emerging technologies, such content storage can be moved offshore for repeated access at significantly lower transport costs than those for U.S. international transport if the Commission were to adopt its proposals to eliminate the international-only exemption and the LIRE. As content storage moved offshore, content creation could follow, with negative consequences for the U.S. Internet and entertainment industries.

If Adopted, the FNPRM's Proposals Would Harm National Security. Southern Cross noted that, should undersea cable operators increasingly choose to land cables outside the United States in order to avoid increased U.S. regulatory costs, the result would adversely impact national-security interests as articulated by various U.S. Government agencies. In particular, the absence of U.S. landings would deprive the Commission of licensing jurisdiction over such cables and consequently reduce oversight by other U.S. Government agencies that leverage the Commission's jurisdiction to influence the supply and operational arrangements for such systems. With fewer cables and connections, U.S.-international networks would become less resilient and more vulnerable to outages, natural disasters, and terrorism.

The FNPRM's Proposals Contradict the Commission's Prior Pronouncements that Consumers in One Country Should Not Subsidize Another Country's Universal Service Program. Southern Cross noted that the FNPRM's proposals would contradict the Commission's statements in the settlement-rate benchmarks proceeding. In the *Benchmarks Order*,[3] the FCC sought to regulate the rates paid by domestic carriers and consumers for the termination of U.S.-originated traffic in foreign markets. The Commission found that discriminatory universal service obligations in those markets violated "transparent, nondiscriminatory and competitively neutral" universal service obligations—principles later enshrined in the WTO Reference Paper, by which the United States has agreed to be bound. The FNPRM proposals would, however, effect the very same sort of discrimination, except that the United States would be the country imposing discriminatory universal service obligations. The FNPRM's proposals assume—improperly—that all of the revenues for such end-to-end capacity services are properly assessable simply because the capacity may originate or terminate in the United States (though not necessarily even on the PSTN). In fact, most of those revenues are associated with transport across geographical jurisdictions beyond the 12-nautical-mile limits of U.S. territory, and with origination or termination (whether on the PSTN or not) in one or more foreign countries.

Undersea Cable Operators Benefit Comparatively Little, if at All, from the U.S. Network. The Commission's 1997 insight that most providers of international telecommunications still principally provide domestic services and therefore benefit from the domestic network—long a basis for the LIRE and now a basis for the FNPRM's proposals (whether with respect to the PSTN or broadband networks)—no longer holds true. In 1997, the majority of undersea cables landing in the United States were owned by carrier consortia with the incumbent or another domestic carrier serving as landing party in each landing country. Consequently, the U.S. landing party always had a predominantly domestic business. By 2013, however, many U.S.-international undersea cable systems have long been owned on an end-to-end basis by a single (often foreign) company, following improved market access resulting from U.S. commitments in basic telecommunications under the General Agreement on Trade in Services of the World Trade Organization ("WTO") and the Commission's consequent elimination of the "effective competitive opportunities" test for cable landings from WTO-member countries. Moreover, most international undersea cable capacity is used to transport Internet content, barely touching U.S. networks (whether PSTN or broadband). Most of their physical networks are located outside the United States, as are many of their customers.

Allowing the LIRE Threshold to Float Might Alleviate Certain Market Distortion Concerns. Southern Cross noted that it would not oppose a reform (but not elimination) of the

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[3] *Regulation of International Settlement Rates*, Report and Order, 12 FCC Rcd. 19,806, 19,846-47, ¶¶ 86, 87 (1997) ("*Benchmarks Order*"), *aff'd. Cable & Wireless P.L.C. v. FCC et al.*, 166 F.3d 1224 (D.C. Cir. 1999).

LIRE to correct the disparity between the LIRE's 12-percent threshold and the actual contribution factor.

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Should you have any questions, please contact Kent Bressie by telephone at +1 202 730 1337 or by e-mail at kbressie@wiltshiregrannis.com or Madeleine Findley by telephone at +1 202 730 1304 or by e-mail at mfindley@wiltshiregrannis.com.

Respectfully submitted,

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