Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	
Procedures for Assessment and Collection of Regulatory Fees	MD Docket No. 12-201
Assessment and Collection of Regulatory Fees for Fiscal Year 2013	MD Docket No. 13-140
Assessment and Collection of Regulatory Fees for Fiscal Year 2008	MD Docket No. 08-65

COMMENTS OF THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

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SUMMARY

The North American Submarine Cable Association ("NASCA") supports the Commission's submarine-cable-related findings and proposals in its notice of proposed rulemaking but urges the Commission to adopt lower Submarine Cable System fees consistent with the NPRM's data. The Commission has recognized that its international activities—and the International Bureau's international activities in particular—benefit all Commission licensees or, in many cases, particular licensees of bureaus other than the International Bureau. The Commission has also recognized that the International Bureau functions very differently from the other core licensing bureaus. Consequently, the Commission properly rejected the erroneous assumption in its 2012 NPRM that such activities benefit only or primarily the licensees of the International Bureau, including submarine cable operators.

NASCA urges the Commission to adopt for FY 2013 its proposals to reallocate certain International Bureau FTEs as indirect FTEs, but with a lower Submarine Cable System fee, consistent with the NPRM's conclusions that only two of the Commission's 456 direct FTEs engage in activities directly benefiting submarine cable operators. At present, submarine cable operators account for 0.44 percent of direct FTEs but pay 2.8 percent of all annual regulatory fees.

NASCA also urges the Commission to implement its reclassification of International Bureau FTEs effective for FY 2013, as the Commission has offered no legal or policy reason for delaying the implementation of the reallocation. To allow providers to price their services and recover their costs, and to avoid distorting economic and investment decisions, the Commission to adopt its proposal to limit regulatory-fee increases to 7.5 percent in any given fiscal year.

The Commission should reject its other abstract reallocation proposals as premature, lacking supportive data, and inconsistent with Section 9. The Commission should also reject its proposal of a broad or submarine cable-specific revenue-based fee methodology for FY 2014 or future years, as the Commission has offered no legal or factual justification for such changes.

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COMMENTS OF THE
NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

As the principal non-profit trade association for submarine-cable owners, submarine-cable maintenance authorities, and prime contractors for submarine-cable systems operating in North America, the North American Submarine Cable Association ("NASCA")[1] supports the Commission's submarine-cable-related findings and proposals in its notice of proposed rulemaking but urges the Commission to adopt lower Submarine Cable System fees consistent with the NPRM's data.[2] The Commission has recognized that its international activities—and

[1] NASCA's members are: Alaska Communications System; Alaska United Fiber System Partnership, a subsidiary of General Communication, Inc.; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Limited; AT&T Corp.; Brasil Telecom of America, Inc. / GlobeNet; Columbus Networks; Global Marine Systems Ltd.; Hibernia Atlantic; Level 3 Communications, LLC; PC Landing Corp.; Reliance GlobalCom; Southern Cross Cable Network; Sprint Communications Corporation; Tata Communications (America) Inc.; Tyco Electronics Subsea Communications LLC; and Verizon Business.

[2] *Procedures for Assessment and Collection of Regulatory Fees*, MD Docket No. 12-201, *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, MD Docket No. 13-14, *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08-65, Notice of Proposed Rulemaking ("FY 2013 NPRM") and Further Notice of Proposed Rulemaking, FCC 13-74 (rel. May 23, 2013).

the International Bureau's international activities in particular—benefit all Commission licensees or, in many cases, particular licensees of bureaus other than the International Bureau.[3] The Commission has also recognized that the International Bureau functions very differently from the other core licensing bureaus.[4] Consequently, the Commission properly rejected the erroneous assumption in its earlier NPRM that such activities benefit only or primarily the licensees of the International Bureau, including submarine cable operators.[5] Consistent with this recognition, the Commission should adopt for FY 2013 its proposals to reclassify the full-time employee equivalents ("FTEs") of the International Bureau's Strategic Analysis and Negotiations Division ("SAND"), Policy Division, and front office. It should also adopt lower Submarine Cable System fees consistent with its conclusions that only two of the Commission's 456 direct FTEs engage in activities directly benefiting submarine cable operators. At present, submarine cable operators account for 0.44 percent of direct FTEs but pay 2.8 percent of all annual regulatory fees.

These comments consist of five parts. In part I, NASCA urges the Commission to adopt for FY 2013 its proposals to reallocate certain International Bureau FTEs as indirect FTEs, but with a lower Submarine Cable System fee, consistent with the NPRM's data. In part II, NASCA urges the Commission to implement its reclassification of International Bureau FTEs effective for FY 2013. In part III, NASCA urges the Commission to adopt its proposal to limit regulatory-fee increases to 7.5 percent in any given fiscal year. In part IV, NASCA urges the Commission to reject its other abstract reallocation proposals as premature, lacking supportive data, and

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[3] FY 2013 NPRM ¶¶ 21-22, 24-28.

[4] *Id.* ¶ 19.

[5] *Procedures for Assessment and Collection of Regulatory Fees*, MD Docket No. 12-201, *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Notice of Proposed Rulemaking, MD Docket No. 08-65, 27 FCC Rcd. 8458 (2012) ("2012 Reform NPRM").

inconsistent with Section 9. In part V, NASCA urges the Commission to reject its proposal to adopt a broad or submarine cable-specific revenue-based fee methodology for FY 2014 or future years.

I. The Commission Should Adopt for FY 2013 Its Proposals to Reallocate Certain International Bureau FTEs as Indirect FTEs, Although the Commission's Data Support a Lower Fee for Submarine Cable Operators

A. The Commission Should Continue to Classify SAND FTEs as Indirect FTEs

The Commission should adopt its proposal to exclude SAND FTEs from the regulatory fee allocation for International Bureau licensees and instead allocate them as indirect FTEs.[6] As the FY 2013 NPRM notes, based on the record in the 2012 NPRM proceeding, SAND serves as the organization within the Commission responsible for all intergovernmental and regional leadership, negotiating, and planning functions—activities that benefit all Commission licensees.[7]

Moreover, the FY 2013 NPRM notes, based on the record in the 2012 NPRM proceeding, that SAND provides no specific benefits to submarine cable operators and very specific benefits to licensees of other bureaus.[8] For example, SAND personnel engage in the following activities for the specific benefit of other bureau licensees:

- Managing interference issues involving domestic terrestrial broadcasting near the Canadian and Mexican borders;

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[6] FY 2013 NPRM ¶¶ 21, 28.

[7] *See* FCC International Bureau Strategic Analysis and Negotiation Division, Division Information, http://transition.fcc.gov/ib/sand.

[8] FY 2013 NPRM ¶ 21.

- Managing interference and spectrum scarcity issues for domestic terrestrial wireless services in the U.S.-Canada and U.S.-Mexico border regions, even though the services are mostly licensed by the Wireless Telecommunications Bureau; and
- Managing and allocating spectrum for terrestrial wireless services and devices as part of the International Telecommunication Union and Inter-American Telecommunications Commission ("CITEL") processes, even though the services and devices are mostly licensed or approved by the Wireless Telecommunications Bureau, the Media Bureau, or the Office of Engineering and Technology.

The Commission should therefore continue to treat SAND FTEs as indirect FTEs, to be allocated among all Commission regulatees.

B. The Commission Should Reclassify Other International Bureau Policy Division and Bureau-Level FTEs as Indirect FTEs

The Commission should adopt its proposal to reclassify other International Bureau Policy Division FTEs and all bureau-level FTEs as indirect FTEs, except for the two Policy Division FTEs demonstrated by specific data to benefit submarine cable operators (as discussed in part I.C below).[9] For example, Policy Division personnel engage in the following activities for the specific benefit of other bureau licensees:

- Developing and interpreting the Commission's foreign ownership guidelines for common-carrier and aeronautical radio licenses (which do not apply at all to submarine cable operators);

[9] Regarding the Commission's proposed allocation of Satellite Division FTEs, NASCA takes no position, other than to note that (1) allocation should be based on factual data and input from bureau management and (2) those FTEs should not be allocated to submarine cable operators. *See id.* ¶ 28.

- Adjudicating petitions for declaratory ruling filed by wireless licensees under Section 310 of the Communications Act;
- Conducting international spectrum and broadcasting rulemakings; and
- Acting as the Commission's liaison to the Committee on Foreign Investment in the United States, Team Telecom, and other Executive Branch agencies for Commission transaction and licensing reviews implicating national security, law enforcement, public safety, and foreign policy and trade issues, including transactions with no International Bureau licenses.

Most International Bureau bureau-level (*i.e.*, "front office") personnel are engaged in supervising divisional-level activity, almost none of which specifically benefits submarine cable operators and much of which specifically benefits licensees of other bureaus. In addition to these supervisory activities, the bureau-level personnel engage in a variety of activities benefitting all Commission regulatees, including:

- Advising the Chairwoman or Chairman on matters of international policy and defense;
- Providing advice to trade officials; and
- Advising and coordinating the Chairwoman or Chairman's international travel.

Based on these data regarding the actual activities of International Bureau personnel, NASCA believes that the Commission has a strong legal and factual basis for adopting its reallocation proposals.

C. The Commission Should Adopt Its Proposal to Allocate at Most Two FTEs to Submarine Cable Operators

Consistent with a factual record demonstrating that the International Bureau performs very few assessable regulatory activities (as enumerated in 47 U.S.C. § 159(a)(1)) for the benefit

of submarine cable operators, as detailed in the FY 2013 NPRM,[10] the Commission should adopt its proposal to allocate at most two FTEs to submarine cable operators.[11] NASCA continues to estimate that no more than 6 or 7 IB employees (out of 119) regularly perform submarine-cable-related activities on even a part-time basis, that no IB employees perform submarine-cable-related activities on a fulltime basis, and that only one to two FTEs benefit submarine cable operators.[12]

First, the Commission performs few enforcement activities specifically for the benefit of submarine cable operators. The International Bureau almost never engages in enforcement-related activities against submarine cable operators. To NASCA's knowledge, the FCC has never pursued a case of an unauthorized landing in the United States. In the past 10 years, the FCC has issued a notice of apparent liability ("NAL") or entered into a consent decree for an unauthorized transfer or assignment of cable landing license in only four cases; two of those cases involved mostly licenses other than cable landing licenses.[13]

Second, the Commission performs few policy and rulemaking activities specifically for the benefit of submarine cable operators. The International Bureau has conducted or played a major supporting role in only two submarine cable-specific rulemakings in the last 14 years.[14]

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[10] *Id.* ¶ 27.

[11] *Id.* ¶ 28.

[12] *See* Attachment to NASCA *Ex Parte* Notice, MD Docket Nos. 12-201 and 08-65 (filed Feb. 15, 2013) ("NASCA February 2013 *Ex Parte*"), included as Attachment B to these comments.

[13] *See Hawaiian Telcom, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd. 1585 (Enf. Bur. 2012); *Tricom USA, Inc.*, Order, 26 FCC Rcd. 16,056 (Enf. Bur. 2011); *AST Telecom, LLC*, Order, 26 FCC Rcd. 5762 (Enf. Bur. 2011); *BCE Nexxia Corporation*, Order, 23 FCC Rcd. 18,475 (2008).

[14] *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2008, MD Docket No. 08-65, RM-11312; Review of Commission Consideration of Applications under Cable Landing License Act, IB Docket No. 00-106.

Of those, only one focused on regulatory fees. In fact, the regulatory regime for submarine cables is very limited. The Commission (and, by delegation, the International Bureau) regulates submarine cables pursuant to the Cable Landing License Act,[15] a statute that consists of a mere 437 words, and Commission regulations that span a mere seven-and-a-half pages.[16] Almost all submarine cables operate on a non-common-carrier basis, meaning that they are not subject to and do not benefit from regulation under the Communications Act of 1934.

Third, the Commission performs few user information-services activities specifically for the benefit of submarine cable operators. Submarine-cable-related activity in the International Bureau Filing System ("IBFS") represents a fraction of the records appearing in IBFS. Of the 330,409 records in the International Bureau Filing System as of June 13, 2013, only 572 pertain to submarine cables. Similarly, NASCA estimates that submarine-cable-related queries to the IBFS Help Desk represent a small fraction of the queries received. The International Bureau has long collected capacity data from submarine cable operators. In the past, the effort consisted of simple telephone calls or emails by Commission staff to cable landing licensees. The practice will now be codified in the FCC's rules.[17] Very little of the International Bureau's web site addresses submarine cable issues.[18]

Fourth, the Commission performs few international activities specifically for the benefit of submarine cable operators. The International Bureau does not undertake activities on behalf of submarine cable operators in multilateral or bilateral negotiations or treaty conferences, particularly as submarine cables do not use radio spectrum or raise associated coordination or

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[15] 47 U.S.C. §§ 34-39.

[16] 47 C.F.R. §§ 1.767, 1.768.

[17] *See Reporting Requirements for U.S. Providers of International Telecommunications Services*, Second Report and Order, 28 FCC Rcd. 575, 604-05 ¶¶ 97-101 (2013).

[18] *See, e.g.*, Submarine Cable Landing Licenses, http://transition.fcc.gov/ib/pd/pf/scll.html.

interference issues. Submarine cable operators almost never interact with the Strategic Analysis and Negotiations Division ("SAND"), which focuses on international negotiations mainly involving radio spectrum, broadcasting, and "open Internet" issues.

Almost all of submarine-cable-related activity represented by the one to two associated FTEs arises from sporadic and infrequent licensing and transaction reviews, the costs of which the Commission recovers separately through application processing fees. The Policy Division reviews cable landing license applications under the Cable Landing License Act. There have been only 29 applications in 10 years. The Policy Division grants licenses for a 25-year term, so there is essentially no renewal activity.[19] Most applications qualify for streamlined processing, and the Policy Division grants most licenses pursuant to public notice rather than individually-drafted orders. The International Bureau does not conduct any technical or environmental analysis of cable landing license applications. Most systems are licensed by the Policy Division as non-common-carrier systems and are not subject to regulation under the Communications Act. The Policy Division reviews transactions resulting in assignments and transfers of control of cable landing licenses, although most of such transactions are *pro forma* and require only after-the-fact notifications. Most transactions that do involve substantive transfers of control require other Commission licenses and authorizations and, consequently, reviews by other bureaus.

D. Consistent with Its Data, the Commission Should Lower the Submarine Cable System Fee

Consistent with its conclusions that only two of the Commission's 456 direct FTEs engage in activities directly benefiting submarine cable operators, the Commission should also adopt a lower Submarine Cable System fee. At present, submarine cable operators account for 0.44 percent of direct FTEs, a figure calculated by dividing the FY 2013 NPRM's estimate of

[19] *See* 47 C.F.R. § 1.767(g)(14).

direct FTEs performing activities directly benefiting submarine cable operators (2 FTEs[20]) by the number of Commission direct FTEs that would not be reallocated as indirect FTEs under the FY 2013 NPRM's proposals (548 total core bureau FTEs[21] minus 92 International Bureau FTEs to be reallocated as indirect FTEs = 456 FTEs[22]).

As the FY 2013 NPRM notes, however, submarine cable operators pay 2.8 percent of all annual regulatory fees[23]—a figure more than six times the level of FTEs performing activities that specifically benefit submarine cable operators—even though "the provision of international submarine cable service involves little regulation and oversight from the Commission after the initial licensing process."[24] Consequently, the Commission's own FTE data demonstrate that Submarine Cable System fee is still too high. NASCA therefore urges the Commission to revise the Schedule of Regulatory Fees in Attachment B2 to the FY 2013 NPRM and in future years to reduce the Submarine Cable System fee to reflect two FTEs and a proportionate 0.44 percent of indirect FTEs. Section 9 requires such a realignment to ensure that the fees paid by submarine cable operators are reasonably related to the benefits they receive from Commission activities.

II. For FY 2013, the Commission Should Adopt Its Proposal to Reclassify International Bureau FTEs Effective for FY 2013 and Also Reduce the Submarine Cable System Fee

The Commission should use its updated FTE data to calculate FY 2013 regulatory fees and, consequently, adopt the fee schedule proposed in Attachment B2 to the FY 2013 NPRM,

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[20] *See* FY 2013 NPRM ¶¶ 27, 28.

[21] *See* FY 2013 NPRM ¶ 7 n.12.

[22] *See id.* ¶ 7 n.12 and at Att. A2 n.5.

[23] *See id.* ¶ 27.

[24] *See id.*

with modifications for the Submarine Cable System fee, as noted in part I.D above.[25] There is no legal or policy reason for the Commission to retain the allocation percentages that it currently uses, and the Commission has offered none whatsoever.[26] Section 9 provides that the Commission must "revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with [47 U.S.C. § 159(b)(1)(B)], changes in the amount appropriated for the performance of the activities described in [47 U.S.C. § 159(a)] for such fiscal year,"[27] which the Commission must implement using the FTE calculations and adjustments mandated in 47 U.S.C. § 159(b)(1)(A).[28] Section 9 does not contemplate that the Commission will develop FTE data only to forbear from implementing mandatory fee schedule changes based on that data. To comply with Section 9 and the reasoned decisionmaking requirements of the Administrative Procedure Act, the Commission should act on the data it has developed and examined to adopt a fee schedule supported by that data.

III. The Commission Should Adopt Its Proposal to Limit Regulatory-Fee Increases to 7.5 Percent in Any Given Fiscal Year

NASCA urges the Commission to adopt its proposal to limit regulatory-fee increases to 7.5 percent in any given fiscal year.[29] Such a cap on fee increases is consistent with the requirements of Section 9, which permits the Commission—after making FTE calculations—to make adjustments to account for "other factors that the Commission determines are necessary in the public interest," so long as the resulting fees "will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal

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[25] FY 2013 NPRM ¶ 32 and Att. B2.

[26] *See id*. ¶ 32.

[27] 47 U.S.C. § 159(b)(2).

[28] *Id.* § 159(a), (b).

[29] FY 2013 NPRM ¶¶ 30, 31.

year for the performance of the activities described in [47 U.S.C. § 159(a)].”[30] As the Commission notes in the FY 2013 NPRM, such a limitation would “prevent ‘unexpected, substantial increases which could severely impact the economic wellbeing of these licensees [regulatees].’”[31]

A cap on yearly increases would also serve an objective that NASCA has long urged the Commission to pursue in regulatory-fee matters: avoidance of economic distortions.[32] As NASCA has noted previously, submarine cable operators have few cost-recovery opportunities, and a fee increase could make services uneconomic.[33] The submarine cable business is predicated largely on selling “security of supply at a known price,” with significant amounts of capacity sold via indefeasible right of use (“IRU”) for a term of 10 to 15 years, either with an up-front lump-sum payment or periodic payments plus separate quarterly charges for operations and maintenance. For the seller, an IRU represents a way of funding the cost of construction.

Unlike traditional retail services with monthly invoices, long-term submarine cable capacity sales typically offer few opportunities for cost recovery or pass throughs. Foreign customers often refuse to pay pass-through charges, forcing operators to absorb costs. Significant year-to-year changes in regulatory fees force submarine cable operators either to absorb the fee increases as overhead or undertake to negotiate pass-through charges with customers, who typically object on the grounds that they have already paid for the service.

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[30] 47 U.S.C. § 159(b)(1)(A), (B).

[31] FY 2013 NPRM ¶ 30 (quoting *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, Report and Order, 12 FCC Rcd. 17,161, 17,176 ¶ 37 (1997)).

[32] Comments of the North American Submarine Cable Association, MD Docket Nos. 12-201 and 08-65, at 27 (filed Sept. 17, 2012) (“NASCA 2012 Comments”), included as Attachment A to these comments.

[33] NASCA 2012 Comments at 17-21.

Moreover, as NASCA has previously explained, submarine 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.[34] They routinely factor such costs into their decisions to land in particular countries.

By limiting year-to-year increases in regulatory fees, the Commission would serve U.S. economic and national security interests by limiting interference with economic decisions to invest in new submarine cable infrastructure. A multiplicity of submarine cable connections fosters a more resilient network and makes the United States less vulnerable to terrorism and natural disasters. As NASCA has noted previously, if submarine cable operators were increasingly to choose to land cables in Canada (which is ever-more-attractive given recent relaxation of foreign-ownership restrictions) or Mexico 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.[35] The absence of U.S. landings would deprive the Commission of licensing jurisdiction over such cables and consequently reduce U.S. Government oversight of the supply and operational arrangements for such systems.

IV. The Commission Should Reject Its Other Abstract Reallocation Proposals as Premature, Lacking Supportive Data, and Inconsistent with Section 9

NASCA urges the Commission to reject the FY 2013 NPRM's other reallocation proposals as premature, lacking support from any data, and inconsistent with Section 9. Those include proposals to (1) reallocate other indirect FTEs in support bureaus or offices as direct FTEs to core bureaus and (2) reallocate other core bureau FTEs as indirect FTEs to be reassigned

[34] NASCA February 2013 *Ex Parte* at 2.

[35] NASCA *Ex Parte* Notice, MD Docket Nos. 12-201 and 08-65 (filed Mar. 27, 2013), included as Attachment C to these comments.

proportionally among the bureaus.[36] Section 9 requires the Commission to calculate regulatory fees using specific data by:

> determining the full-time equivalent number of employees performing the activities described in subsection (a) of this section within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest.[37]

Absent such data, the Commission should decline to reallocate FTEs.

NASCA continues to urge the Commission to refrain from speculating or making abstract suppositions about what the licensing Bureaus should do or likely do and instead examine what they actually do, relying on factual input and assessments from Bureau management.[38] Just as the Commission used actual data and bureau management input regarding the activities of its personnel in the various bureaus and offices as a basis for rejecting the FY 2012 NPRM's proposed 230-percent increase in regulatory fees for submarine cable and satellite operators, the Commission should continue to rely on actual FTE data and bureau input for any further changes in fee reallocations and methodology changes.

V. The Commission Should Reject Its Proposal to Adopt a Broad or Submarine Cable-Specific Revenue-Based Fee Methodology for FY 2014 or Future Years

NASCA urges the Commission to reject its proposal to adopt a broad revenue-based fee methodology for all services or a specific one for submarine cable operators for FY 2014 or

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[36] FY 2013 NPRM ¶ 29.

[37] 47 U.S.C. § 159(b)(1)(A).

[38] *See* NASCA 2012 Comments at 28-29.

future years.[39] The Commission has failed to articulate a legal or factual basis for any such changes.

First, the Commission has failed to articulate any statutory basis for undertaking such a wholesale or submarine cable-specific change to regulatory fee methodologies. Such changes would entail "permitted amendments" and congressional notifications for almost all fee categories listed in the Section 9 schedule, and the Commission has laid no legal or factual groundwork for such changes. For "permitted amendments," Section 9 provides that:

> the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of [47 U.S.C. § 159(b)(1)(A)]. In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.[40]

Nowhere in the FY 2013 NPRM has the Commission shown that a revenue-based methodology is necessary to effect the requirements of 47 U.S.C. § 159(b)(1)(A) or that Commission rulemakings or changes in law have changed the Commission's services so as to necessitate changes in the regulatory-fee methodology. Absent such findings, the Commission has no basis for entertaining a revenue-based fee methodology.

Second, rejection of a uniform revenue-based methodology would spare submarine cable operators and other Commission regulatees from a potentially endless cycle of regulatory-fee wrangling that would be even more contentious and resource-draining than the proceedings to date, particularly with respect to the issues of assessable revenues and the nexus between revenues and the Commission benefits provided to Commission regulatees. Submarine cable operators in particular are suffering from regulatory-fee fatigue, having worked from 2003 to

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[39] *See* FY 2013 NPRM ¶ 33.

[40] 47 U.S.C. § 159(b)(2).

2009 to achieve a predictable regulatory-fee methodology that still appears in jeopardy, given the 2012 NPRM's proposal to increase submarine cable system fees by 230 percent and the FY 2013 NPRM's open-ended proposal for revenue-based fees. Regulatory fees should be a minor part of the regulatory compliance activities of a submarine cable operator, as they are in almost every other foreign jurisdiction. Instead, they have become a major regulatory issue that consistently and needlessly interferes with submarine cable operators' commercial activities. Rather than create new regulatory uncertainty that would further inhibit submarine cable operators' ability to price their services and recover their costs and that could deter new services and investment, the Commission should firmly reject any proposal for broad or submarine cable-specific regulatory fees based on revenues.

CONCLUSION

For the reasons set forth above and in NASCA's prior filings incorporated by reference, NASCA urges the Commission to adopt the regulatory-fee proposal reflected in Attachment B2 to the FY 2013 NPRM and to reject its other proposals.

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Attachments

Attachment A

NASCA 2012 Comments

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SUMMARY

The North American Submarine Cable Association ("NASCA") urges the Commission to reject as an extended *non sequitur* the proposed reallocation of regulatory fees to International Bureau licensees, particularly submarine cable operators. This reallocation proposal would increase the regulatory fees paid by International Bureau licensees by ***230 percent***. An operator of a high-capacity submarine cable system that would pay $212,750 in regulatory fees under the existing regime would pay $704,471 under the proposed regime.

The NPRM fails to explain why changes in Commission regulation or workload might justify, as a matter of law or policy, the tripling of regulatory fees paid by submarine cable operators and other International Bureau licensees. The NPRM notes "exponential growth" in the wireless industry and a shift of Commission resources away from the domestic wireline industry and toward the wireless industry. It also notes the growth of intermodal competition, though it does not list submarine cable operators as intermodal competitors. Rather than focusing on the implications of such changes, however, the NPRM proposes to reallocate full-time equivalent employees ("FTEs") in each of its four core licensing bureaus instead—an approach that would perversely shift regulatory fees to International Bureau licensees.

1. Legal Infirmities

The proposed reallocation of regulatory fees to submarine cable operators and other International Bureau licensees would violate the Communications Act. *First*, the proposed reallocation would violate Section 9's requirement that regulatory fees be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities." Reallocation of core-bureau indirect FTEs would result in submarine cable operators paying regulatory fees that are mostly unrelated to Commission activities benefitting submarine cable operators. Moreover,

the reallocation would greatly exacerbate the already disproportionate fees that submarine cable operators pay, given the tiny number of FTEs involved (even on a part-time basis) in regulation of submarine cables. By NASCA's estimation, the International Bureau has no more than six or seven employees engaged, even on a part-time basis, on submarine cable regulatory issues.

The International Bureau provides general regulatory benefits to all Commission licensees and specific regulatory benefits to licensees of other Commission bureaus. For example, these activities include the Policy Division's development of the Commission's Foreign Ownership Guidelines and adjudication of petitions for declaratory rulings pursuant to Section 310, which benefit common-carrier wireless and broadcast licensees, not International Bureau licensees. They also include a variety of activities of the Strategic Analysis and Negotiation Division ("SAND"): spectrum management activities within International Telecommunication Union and Inter-American Telecommunications Commission ("CITEL") processes; management of terrestrial broadcast interference issues in border areas; management of spectrum-scarcity issues for terrestrial wireless services in border areas; and management of the Commission's International Visitors Program. As submarine cable operators are neither the sole nor even the primary beneficiaries of such activities, Section 9 requires that the associated regulatory fees be borne by other beneficiaries.

Moreover, the rationales cited in the NPRM—increased Commission regulatory effort due to growth in the wireless sector and in intermodal competition—provide no regulatory benefits whatsoever to submarine cable operators. While wireless carriers purchase capacity on submarine cable systems, their capacity purchases have nothing to do with the Commission's regulation of submarine cable operators. As for intermodal competition, there is little to none involving submarine cable operators—and any such competition that does exist involves

satellites, another category of International Bureau licensee. The NPRM's failure to consider the disconnect between its rationales and outcomes is more than a minor oversight, given the proposed drastic increase in annual regulatory fees to be paid by submarine cable operators and the fact that such fees account for 36 percent of total fees paid by International Bureau licensees.

Second, the proposed reallocation is inconsistent with Section 9's presumption that all Commission licensees benefit from "international activities." In fact, Section 9 presumes that all Commission licensees benefit from "international activities," just as they benefit from the three other illustrative activity categories cited in the statute: "enforcement activities, policy and rulemaking activities, [and] user information services." Section 9 contemplates that the costs of these activities will be borne broadly, and not just by a narrow subset of licensees.

2. Market Distortions

The proposed reallocation would distort the market for submarine cable capacity. *First*, the proposed reallocation would harm existing operators, which have limited opportunities for recovering the costs of extraordinary increases in regulatory fees, such as those proposed in the NPRM. Consequently, high fees could render the offering of particular capacity services unsustainable. The submarine cable business is predicated largely on selling security of supply at a known price. Most capacity is sold on a non-common-carrier basis under customized arrangements, with large increments of capacity sold on an indefeasible right of use ("IRU") basis with ten- or fifteen-year terms or under longer-term leases—arrangements that do not permit the addition of a monthly "Federal Regulatory Fee" or "Regulatory Cost Recovery" charge as one might find on a retail mobile or wireline invoice. Moreover, attempts to recover such costs generate significant transaction costs and even then often fail, as customers of submarine cable systems outside the United States often categorically refuse to pay pass-through

charges of regulatory fees for which they believe operators should account in their overhead. In fact, merely by proposing the reallocation, the NPRM has created significant regulatory uncertainty, with submarine cable operators struggling to account for fees when pricing future services and entering into long-term contractual arrangements.

Taken together with the Commission's separate proposal to eliminate the international-only exemption and the limited interstate revenues exemption ("LIRE") for contributors to the Universal Service Fund ("USF")—which would require providers of exclusively foreign telecommunications to contribute to the Universal Service Fund for the first time—the proposed reallocation could alter the economics of landing international submarine cable systems in the United States, potentially encouraging investment elsewhere. Submarine cable operators using a debt/equity finance model to finance new cables would find it much more difficult to secure investment and financing through pre-sales and proof of future revenue stream.

3. Undermining of 2009 Reforms

In causing such economic distortions, the NPRM would undermine much of the Commission's 2009 reform of the regulatory fees assessed on submarine cable operators, which sought to eliminate significant economic distortions caused by the Commission's prior capacity-based fee methodology. While the 2009 reform did not eliminate all disparities between submarine cable operators and other payors, it at least provided some predictability to a regime under which regulatory fees previously had increased geometrically with capacity upgrades. By adopting the proposed reallocation, the Commission would undo much of that relief, creating new uncertainty and threatening to destabilize commercial arrangements that operators have entered into since that reform, all of which were based on the expectation that the per-system fee would not fluctuate that much from year to year.

4. Failure to Satisfy the NPRM's Own Stated Goals

The NPRM proposes three goals to guide its approach to regulatory fees: "fairness," "administrability," and "sustainability," but the proposed reallocation of regulatory fees to International Bureau licensees would serve none of these goals. It is plainly not "fair" for International Bureau licensees to subsidize fee reductions for domestic wireline providers when the NPRM otherwise concludes that wireless providers are generating the additional regulatory costs. It is also not fair to impose extraordinary fee increases on submarine cable operators shortly after they adjusted to an entirely new regulatory fee methodology in 2009—much of which the NPRM's proposed reallocation would undermine. It is not "administrable" for businesses like submarine cable systems that use long-term contracts to face "unpredictab[le] and rapid shifts" in regulatory fees. And it is not "sustainable" for submarine cable operators to absorb such increases when they cannot be recouped from the customer base in the form of pass-through charges or recalibrated prices, when the economic terms of such customized, long-term arrangements are negotiated far in advance.

5. Recommendations

NASCA urges the Commission to reject the NPRM's proposed reallocation of regulatory fees to submarine cable operators and other International Bureau licensees. As demonstrated above, the proposal neither comports with the law nor constitutes sound public policy. NASCA also urges the Commission to: (1) include "minimization of economic distortions" among its regulatory-fee goals; (2) treat SAND as a support bureau and SAND FTEs as indirect FTEs; and (3) use periodic assessments by bureau management to make both intra-bureau and inter-bureau allocations.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	
Procedures for Assessment and Collection of Regulatory Fees	MD Docket No. 12-201
Assessment and Collection of Regulatory Fees for Fiscal Year 2008	MD Docket No. 08-65

COMMENTS OF THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

The North American Submarine Cable Association ("NASCA") urges the Commission to reject as an extended *non sequitur* the proposed reallocation of regulatory fees to International Bureau licensees, particularly submarine cable operators.[1] This reallocation proposal would increase the regulatory fees paid by International Bureau licensees by ***230 percent***. An operator of a high-capacity submarine cable system that would pay $212,750 in regulatory fees under the existing regime would pay $704,471 under the proposed regime. NASCA believes that this proposal, if adopted, would violate the Communications Act, distort the market for international submarine cable capacity, undermine the Commission's 2009 regulatory-fee reforms for submarine cable operators, and (in conjunction with the Commission's pending proposals to eliminate two international exemptions presently available to Universal Service Fund

[1] *Procedures for Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Notice of Proposed Rulemaking, FCC 12-77, MD Docket Nos. 12-201, 08-65 (rel. July 17, 2012) ("NPRM").

contributors) risk making the United States a less attractive market in which to land and operate submarine cables.

The NPRM fails to explain why changes in Commission regulation or workload might justify, as a matter of law or policy, the tripling of regulatory fees paid by submarine cable operators and other International Bureau licensees. The NPRM notes exponential growth in the wireless industry and a shift of Commission resources away from the domestic wireline industry and toward the wireless industry. It also notes the growth of intermodal competition, though it does not list submarine cable operators as intermodal competitors. Rather than focus on the implications of such changes, however, the NPRM proposes to reallocate full-time equivalent employees ("FTEs") in each of its four core licensing bureaus instead—an approach that would perversely shift regulatory fees to International Bureau licensees.

NASCA's comments consist of six parts. In part I, NASCA provides background on itself, relevant aspects of the market for international submarine cable capacity, and the Commission's extraordinary regulatory fee proposal. In part II, NASCA explains why the NPRM's proposals would violate the law. In part III, NASCA explains how the NPRM's proposed reallocation would distort the market for international submarine cable capacity. In part IV, NASCA explains how the NPRM's proposed reallocation would undermine the Commission's 2009 reforms to regulatory fees paid by submarine cable operators. In part V, NASCA explains why the NPRM's proposed reallocation would disserve the NPRM's stated goals of administrability, fairness, and sustainability. In part VI, NASCA offers specific recommendations on how the Commission should proceed.

I. BACKGROUND

A. NASCA

NASCA is the principal non-profit trade association for submarine-cable owners, submarine-cable maintenance authorities, and prime contractors for submarine-cable systems operating in North America. NASCA's members include:

- Alaska Communications System
- Alaska United Fiber System Partnership, a subsidiary of General Communication, Inc.
- Alcatel-Lucent Submarine Networks
- Apollo Submarine Cable System Limited
- AT&T Corp.
- Brasil Telecom of America, Inc. / Globenet
- Columbus Networks
- Global Marine Systems Ltd.
- Hibernia Atlantic
- Level 3 Communications, LLC
- Reliance GlobalCom
- Southern Cross Cable Network
- Sprint Communications Corporation
- Tata Communications (America) Inc.
- Tyco Electronics Subsea Communications LLC
- Verizon Business

NASCA serves both as a forum and advocacy organization for members' interests. Collectively, NASCA's members pay the vast majority of regulatory fees in the Submarine Cable System category, representing 29 of the 41 active systems landing in the United States.[2]

B. Relevant Aspects of the Submarine Cable Business

Submarine cables are typically owned and operated either by consortia (with capacity allocated according to ownership shares) or by sole owners who finance their systems with debt and equity and sell capacity to third parties, including other carriers, Internet service providers, large enterprises, and governments. They have an intended commercial life of 25 years, and the Commission issues cable landing licenses for a term of 25 years. Many cables are taken out of service earlier due to changes in technology, while others are redeployed on new routes.[3] Some cables continue to operate well past the 25-year mark. Although prices for the design, manufacture, and installation of new systems have fallen over the last 15 years, such systems still require considerable capital investment.

A substantial portion of the international submarine cable capacity serving the United States is sold on a long-term basis. Much of this capacity is sold on an indefeasible right of use ("IRU") basis for a 10- to 15-year term plus separate quarterly charges for operations and maintenance ("O&M"). Some IRU agreements provide for large lump-sum payments up front, while others provide for periodic payments throughout the term of the IRU. "The advantage of an IRU, from the purchaser's perspective, is that it provides security of supply at a known price.

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[2] *See FY 2012 Regulatory Fees, Submarine Cable Systems*, Public Notice (rel. Aug. 20, 2012) http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0820/DOC-315839A1.pdf (listing systems currently in commercial service).

[3] *See, e.g.*, *Actions Taken Under the Cable Landing License Act*, Public Notice, 24 FCC Rcd. 226, 226 (Int'l Bur. 2009) (licensing the American Samoa-Hawaii Cable, which reuses a portion of the former Pac Rim East system).

For the seller, an IRU represents a way of funding the cost of construction."[4] Capacity is also sold on a long-term lease basis. Whether by IRU or lease, the capacity sold consists principally of large increments of capacity, ranging from a STM-4 to a 10-gigabit wavelength; additional capacity is typically ordered under the original agreement using an order form, rather than via negotiation of a new agreement. Many of the customers purchasing capacity on cable systems landing in the United States are located outside the United States; they use most of this capacity to access Internet content produced and stored in the United States.

C. The NPRM's Proposed Reallocation of Regulatory-Fee Payments Would Increase Submarine Cable System Fees by More than 230 Percent

The NPRM would increase submarine cable operators' annual regulatory-fee payments by more than 230 percent. Such an extraordinary increase would make it significantly more difficult for operators to price their services, fund their capital investments, and recover their regulatory costs, as explained in part III below. As presented in the NPRM, however, the proposal appears as a relatively minor administrative change, and nowhere does the NPRM discuss the particular fee increases—whether as a percentage, or as particular fee amounts—that International Bureau licensees would face. Instead, the NPRM expresses the changes merely as reallocations of the total fee burden among bureaus.

The Commission's proposed reallocation is best understood in the context of its prior implementation of Congress' regulatory fee mandate. In Section 9 of the Communications Act of 1934, as amended ("Section 9"), Congress mandated that the Commission collect annual regulatory fees in order to distribute and recover the costs of particular activities—enforcement,

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[4] KPMG International, *IFRS Accounting in the Telecommunications Industry*, § 2.4.1 (2004), *available at* http://www.kpmg.co.il/Events/IFRS/IFRS%20for%20telcos.pdf ("*KPMG IFRS Accounting*").

policy and rulemaking, user information services, and international activities.[5] Section 9 also requires that the Commission derive these fees by determining the number of FTEs performing a series of enumerated activities (enforcement activities, policy and rulemaking activities, user information services, and international activities), taking into account factors that are reasonably related to the benefits provided by the Commission's activities to the payor of the fee.[6]

Since at least 1995,[7] the Commission has treated employees in its four core licensing bureaus (International, Media, Wireless Telecommunications, and Wireline Competition) differently depending on whether an employee is "directly" involved in an enumerated activity or "indirectly" involved in a supporting capacity.[8] Direct FTEs are allocated to the relevant core bureau, while indirect FTEs are allocated proportionally across the core bureaus[9] (along with FTEs for the Commission's support bureaus and offices) on the grounds that the activities of indirect FTEs benefit all bureaus (and thus all regulatees).[10]

The NPRM, however, proposes an entirely different approach. It begins by describing changes in regulation since Congress promulgated Section 9, observing that "the mobile wireless

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[5] 47 U.S.C. § 159(a).

[6] 47 U.S.C. §§ 159(a)(1), (b)(1)(A); NPRM, ¶ 5.

[7] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995; Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Act*, Report and Order, 10 FCC Rcd. 13,512, 13,523 ¶ 22 (1995) (first describing distinction between direct and indirect FTEs) ("*FY 1995 Fees Report and Order*").

[8] NPRM, ¶¶ 6-7. *See also FY 1995 Fees Report and Order*, 10 FCC Rcd. at 13,523 ¶ 22.

[9] NPRM, ¶¶ 7, 19.

[10] *See FY 1995 Fees Report and Order*, 10 FCC Rcd. at 13,523 ¶¶ 22-23 (noting that "we add to our direct FTEs, i.e., those represented by staff directly assigned to our operating Bureaus, any support FTEs representing staff assigned to overhead functions such as our field and laboratory staff and certain staff assigned to the Office of Managing Director" and that "[s]upport FTEs, and ultimately costs, are allocated to each regulatory fee category (e.g., cable television) based upon the number of direct FTEs assigned to each fee category").

industry has grown exponentially, shifting Commission resources to, among other things, the wireless industry, while the costs of implementing the Telecommunications Act of 1996 decreased."[11] The NPRM also notes increased intermodal competition among "wired and wireless companies, satellite companies, broadcasters, and cable television companies."[12] After seeking input on a series of proposed goals to guide its overall approach on regulatory fees,[13] however, the NPRM then proposes a remedy that has nothing whatsoever to do with increased regulation for wireless carriers or intermodal competition: eliminating the distinction between direct and indirect FTEs for employees within the four core bureaus, which would result in extraordinary increases in regulatory fees for International Bureau licensees.[14] The NPRM posits that the work of indirect FTEs within a bureau "contributes to the cost of regulating licensees of that bureau" alone, and not all licensees generally.[15] The NPRM concludes that "the work of the FTEs in the core bureaus would remain focused on the industry segment regulated by each of those bureaus."[16]

If adopted without modification, this change would increase the total share of annual regulatory fees borne by International Bureau licensees from 6.7 percent to 22.0 percent.[17] The NPRM does not actually explain what this would mean for the five categories of fee payors

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[11] NPRM, ¶ 1.

[12] *Id.*

[13] *See id*. ¶¶ 14-16 (proposing "fairness," "administrability," and "sustainability" as goals to guide its approach to regulatory fees).

[14] For indirect FTEs outside the four core bureaus (such as, for example, employees of the Office of Managing Director), the Commission proposes no change. *Id.* ¶ 20.

[15] *Id.* ¶ 19

[16] *Id.*

[17] *Id.* ¶ 25.

regulated by the International Bureau, but NASCA calculates that the NPRM would increase the annual regulatory fees paid by International Bureau licensees such as submarine cable operators ***by more than 230 percent***, as shown in Table 1 below:

Table 1:

		FY 2012 Fees*	Fees Using FCC NPRM Proposals
Line 1	FY 2012 Budget	$339,844,000[18]	$339,844,000
Line 2	Allocation to International Bureau	$22,621,361[19] (representing approximately 6.7% of Line 1[20])	$74,765,680 (22.0% of Line 1[21])
Line 3	Allocation to Submarine Cable Systems (in each case, representing 36.1% of Line 2[22])	$8,150,984[23]	$26,990,410
Line 4	Number of payment units for Submarine Cables[24]	38.313	38.313
Line 5	Regulatory fee for each Submarine Cable System of >20 Gbps Capacity	$212,750[25]	$704,471[26]

* *Smaller-capacity Submarine Cable Systems pay fees based on a fraction of the payment unit.*

Alternatively, the NPRM proposes a "[r]eallocation of 50% of the FTEs in the International

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[18] *Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, Report and Order, FCC 12-76, MD Docket No. 12-116, Attachment B (rel. July 19, 2012) ("*FY 2012 Fees Report and Order*") (stating the total pro-rated FY 2012 revenue requirement).

[19] *Id.* (stating the total expected FY 2012 revenue for the combined IB fee categories).

[20] NPRM, ¶ 25 (describing current allocation of FTEs to International Bureau). Please note that the percentage cited in the NPRM is rounded.

[21] *Id.* ¶ 24 (describing proposed allocation of FTEs to International Bureau).

[22] *Id.* ¶ 33 (estimating current allocation of regulatory fees within International Bureau).

[23] *FY 2012 Fees Report and Order*, Attachment C (expected revenue from submarine cable operators).

[24] *FY 2012 Fees Report and Order*, Attachment C (submarine cable FY 2012 payment units).

[25] *Id.* (submarine cable rounded FY 2012 regulatory fee).

[26] This amount is derived by dividing Line 3 (total expected allocation for submarine cable fee category) by Line 4 (submarine cable FY 2012 payment units).

Bureau," based on the fact that "the International Bureau has estimated that as many as one half of the FTEs in the Bureau work on matters covering services other than international services."[27] Under this proposal, the percentage of total regulatory fees allocated to the International Bureau would fall to 10.97 percent, resulting in a regulatory fee of $351,275 per >20 Gbps Submarine Cable System—still an increase of 65 percent over FY 2012 fees.

Such extraordinary increases under the principal and alternative proposals would result principally from the NPRM's proposed reallocation of FTEs of the International Bureau's Strategic Analysis and Negotiations Division ("SAND")—which undertakes a variety of intergovernmental negotiations and research activities that benefit the Commission bureaus and Commission-regulated entities as a whole—exclusively to payors licensed by the International Bureau.[28]

II. THE PROPOSED REALLOCATION WOULD VIOLATE THE COMMUNICATIONS ACT

The NPRM's proposed reallocation of regulatory fees to submarine cable operators and other International Bureau licensees would violate the Communications Act. The trebling of fees due from these payors would violate Section 9's requirement that regulatory fees be "reasonably related" to the regulatory benefits provided to the licensees and would allocate exclusively to those licensees the FTEs for a category of activity that Section 9 presumes to benefit all Commission licensees. Neither of these outcomes seems to have anything to do with an increase in wireless regulation or intermodal competition—the NPRM's purported bases for the allocation change.[29]

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[27] NPRM, ¶ 27.

[28] *Id*. ¶¶ 26-28.

[29] *See, e.g.*, *id.* ¶ 1.

A. The Proposed Reallocation Would Violate Section 9's Requirement that the Fees Be Reasonably Related to the Benefits Provided to the Payor

Regulatory fees must be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[30] The NPRM's proposed reallocation of core-bureau indirect FTEs, however, would result in submarine cable operators paying regulatory fees that are mostly unrelated to Commission activities benefitting submarine cable operators. Moreover, the reallocation would greatly exacerbate the already disproportionate fees that submarine cable operators pay, given the tiny number of FTEs involved (even on a part-time basis) in regulation of submarine cables. By NASCA's estimation, the International Bureau has no more than six or seven employees engaged, even on a part-time basis, on submarine cable regulatory issues.

1. The International Bureau Provides General Regulatory Benefits to All Commission Licensees and Specific Regulatory Benefits to Licensees of Other Commission Bureaus

Contrary to the NPRM's assumption that SAND provides benefits only to International Bureau licensees, SAND FTEs provide significant benefits to all Commission licensees and, in some cases, particular benefits to the licensees of other bureaus. Among other activities, SAND is responsible for:

[30] 47 U.S.C. § 159(b)(1)(A).

- Management of interference issues involving domestic terrestrial broadcasting near the Canadian and Mexican borders;[31]
- Management of interference and spectrum scarcity issues for domestic terrestrial wireless services in U.S.-Canada and U.S.-Mexico border regions (even though the services may be licensed by Wireless Telecommunications Bureau);[32]
- Spectrum management and allocation activities for terrestrial wireless services and devices as part of the International Telecommunication Union and Inter-American Telecommunications Commission ("CITEL") processes, even though the services and devices may be licensed or approved by the Wireless Telecommunications Bureau, the Media Bureau, or the Office of Engineering and Technology;[33] and

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[31] The allotment and assignment of television and radio channels in the border areas with Canada and Mexico are subject to agreements with each of those countries. *See, e.g.*, *Letter of Understanding Between the Federal Communications Commission of the United States of America and Industry Canada Related to the Use of the 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border*, *available at* http://transition.fcc.gov/ib/sand/agree/files/can-bc/can-dtv.pdf. A comprehensive list of these agreements is available at International Agreements: Broadcast Agreements with Mexico, http://transition.fcc.gov/ib/sand/agree/mex_broad_agree.html and at International Agreements: Broadcast Agreements with Canada, http://transition.fcc.gov/ib/sand/agree/can_broad_agree.html.

[32] Domestic wireless services in areas that are near the Canadian or Mexican borders are subject to international agreements with Canada and Mexico. Pursuant to these agreements, the U.S. must protect the signals of Canadian and Mexican television broadcast stations located in the border area. *See, e.g.*, 47 C.F.R. § 27.57(b). A comprehensive list of these agreements is available at International Agreements: Non-Broadcast Agreements with Mexico, http://transition.fcc.gov/ib/sand/agree/mex_nonbroad_agree.html and at International Agreements: Non-Broadcast Agreements with Canada, http://transition.fcc.gov/ib/sand/agree/can_nonbroad_agree.html.

[33] *See, e.g., FCC Seeks Comment on Recommendations Approved by the Advisory Committee for the 2012 World Radiocommunication Conference,* Public Notice, 26 FCC Rcd. 3499 (2011) (containing items related to Maritime Aeronautical and Radar Services, terrestrial mobile broadband and telephony services, and emergency and disaster relief).

- Management of the Commission's International Visitors Program, which promotes exchanges between U.S. and foreign regulators, focusing significantly on domestic regulatory activities.[34]

Contrary to the NPRM's assumption, none of these activities provides specific regulatory benefits to submarine cable operators or other International Bureau licensees. The NPRM itself suggests that nearly 50 percent of SAND's FTEs benefit licensees of other core bureaus.[35] Were the Commission to allow International Bureau management to make such estimations, as it proposes, the figure would very likely be higher.[36]

More generally, the International Bureau is tasked with advising the Chairman on matters of international policy and defense,[37] developing rules regarding international broadcasting,[38] providing advice to trade officials,[39] collecting data on market developments in other countries,[40] ensuring that the Commission complies with international agreements and treaties,[41] advising and coordinating the Chairman's international travel,[42] and coordinating with other bureaus and

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[34] *See* International Bureau: International Visitors Program, http://transition.fcc.gov/ib/ivp/ (describing the International Visitors Program as "enabl[ing] foreign delegations to interact in informal discussions with FCC personnel who provide legal, technical, and economic perspectives on a wide range of communications issues involving broadcasting, cablecasting, and telecommunications").

[35] NPRM, ¶ 27.

[36] *Id.* ¶ 33.

[37] 47 C.F.R. § 0.51(b).

[38] *Id.* § 0.51(c).

[39] *Id.* § 0.51(h).

[40] *Id.* § 0.51(j).

[41] *Id.* § 0.51(n).

[42] *Id.* § 0.51(p).

agencies on matters of homeland security and emergency response.[43] Contrary to the NPRM's assumption, none of these activities provides specific regulatory benefits to submarine cable operators or other International Bureau licensees. As the Government Accountability Office noted in its recent report about the Commission's collection of regulatory fees, "staff we spoke with in the International and Enforcement Bureaus stated that their work was so cross cutting that they did not think it would make sense to track it according to industry sector—much less according to fee category."[44]

Even the International Bureau's Policy Division, which manages many of the International Bureau's core licensing and rulemaking functions, includes many FTEs devoted to issues involving wireless, domestic wireline, and broadcast issues. In particular, the Policy Division provides significant benefits to the licensees of other bureaus with respect to implementation of the foreign ownership restrictions on common-carrier wireless, broadcast, and aeronautical licensees contained in Section 310 of the Communications Act, as amended.[45] The Policy Division has developed the Commission's *Foreign Ownership Guidelines*,[46] and it adjudicates petitions for declaratory ruling under Section 310 to permit foreign ownership in those licensees—petitions arising both during the initial licensing phase and in subsequent transactions involving assignments and transfers of control. Contrary to the NPRM's

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[43] *Id.* § 0.51(s).

[44] Government Accountability Office, *Federal Communications Commission – Regulatory Fee Process Needs to Be Updated*, GAO-12-686, at 22 (Aug. 2012).

[45] 47 U.S.C. § 310 ("Section 310").

[46] *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd. 22,612, 22,617-18, 22631 (Int'l Bur., 2004), *Erratum*, 21 FCC Rcd. 6484 (Int'l Bur., 2006); *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Report and Order, FCC 12-93, IB Docket No. 11-133 (rel. Aug. 17, 2012).

assumption, none of these activities provides *any* regulatory benefits to submarine cable operators or other International Bureau licensees. By its terms, Section 310 does not apply to cable landing licenses or international Section 214 authorizations, the two most common authorizations granted by the Policy Division.

2. The Rationales Cited in the NPRM—Increased Commission Regulatory Effort Due to Growth in the Wireless Sector and in Intermodal Competition—Provide No Regulatory Benefit to Submarine Cable Operators

The NPRM's purported rationales for the proposed reallocation—increased Commission regulatory effort due to growth in the wireless sector growth and in intermodal competition—provide no regulatory benefit to international submarine cable operators. The NPRM's failure to consider such matters is more than a minor oversight, given the proposed drastic increase in annual regulatory fees to be paid by submarine cable operators and the fact that such fees account for 36 percent of total fees paid by International Bureau licensees. The Commission therefore lacks a legal basis for adopting the proposed reallocation.[47]

As noted above, the NPRM states that wireless carriers consume more regulatory resources than they used to while terrestrial wireline carriers consume fewer resources.[48] Yet, while wireline carriers would indeed pay less under the reallocation proposal, wireless carriers

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[47] *See* 5 U.S.C. § 706(2)(A) (directing a reviewing court to overturn agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("*Fox*") (holding that, while an "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," it must do so "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy," and continuing that, in such cases "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

[48] NPRM, ¶ 1.

would not pay more; instead, International Bureau licensees would pay more.[49] While wireless carriers purchase capacity on submarine cable systems, their capacity purchases have nothing to do with the Commission's regulation of submarine cable operators. Consequently, the Commission cannot rely on the benefits of regulating the growing wireless sector as a basis for raising the regulatory fees of submarine cable operators.

As for the intermodal competition cited by the NPRM as a basis for its proposal,[50] there is little involving submarine cables, which continue to displace satellites (particularly to meet real-time, high-capacity connectivity needs) and now account for the transport of about 95 percent of U.S. international traffic.[51] At most, satellites continue to serve destination markets unserved by submarine cables and to provide last-resort restoration arrangements in the event that all submarine-cable connections to a particular destination market are disrupted.[52] Tellingly, the NPRM makes no mention of submarine cables in its list of intermodal competitors.[53] The

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[49] *Id.* ¶ 17 (stating that "[t]he percentage of regulatory fees currently collected from regulatees in the Wireless Telecommunications Bureau would remain unchanged at 17.4 percent. The allocation percentage would increase only slightly for fee payors in Media Bureau service categories, from 31.9 percent to 32.9 percent. However, use of the updated FTE figures would reduce the percentage of regulatory fees allocated to regulatees in the Wireline Competition Bureau from 44.0 percent to 27.7 percent and increase the percentage of fees allocated to payors in the International Bureau from 6.7 percent to 22.0 percent.").

[50] *Id.* ¶¶ 1, 12.

[51] *Submarine Cables and the Oceans – Connecting the World*, UNEP-WCMC Biodiversity Series No. 31 at 28 (UNEP-WCMC and ICPC, 2009), *available at* http://www.iscpc.org/publications/ICPC-UNEP_Report.pdf ("UNEP Report").

[52] *See id.* at 16; *Connect America Fund; A Nat'l Broadband Plan for Our Future; Establishing Just & Reasonable Rates for Local Exch. Carriers; High-Cost Universal Serv. Support; Developing a Unified Intercarrier Comp. Regime; Fed.-State Joint Bd. on Universal Serv.; Lifeline & Link-Up; Universal Serv. Reform—Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17,663, 17,699 ¶ 101 (2011) (noting that "satellite backhaul may limit the performance of broadband networks as compared to terrestrial backhaul").

[53] NPRM, ¶ 1.

NPRM also fails to consider that any intermodal competition between submarine cables and satellites would involve two categories of International Bureau licensees—a fact that could not, by definition, justify an *inter*-bureau reallocation of fees. Consequently, the Commission cannot rely on the benefits of regulating emerging intermodal competition—involving other Commission licensees—as a basis for raising the regulatory fees of submarine cable operators.

B. The Proposed Reallocation Is Inconsistent with Section 9's Presumption that All Commission Licensees Benefit from "International Activities"

The NPRM's proposed reallocation would also violate Section 9 by concluding, in effect, that only International Bureau licensees benefit from "international activities." In fact, Section 9 presumes that all Commission licensees benefit from "international activities," just as they benefit from the three other illustrative activity categories cited in the statute: "enforcement activities, policy and rulemaking activities, [and] user information services."[54] Section 9 contemplates that the costs of these activities will be borne broadly, and not just by a narrow subset of licensees.

To begin with, the statutory language itself precludes the new formulation, as two of the four enumerated activities—namely, "policy and rulemaking," and "user information services"—cannot be associated with any one bureau. Given this language, Congress could not have meant to conflate activities with bureaus, even where a particular activity and a particular bureau share similar names. The International Bureau does not even appear in Section 9's enumerated bureaus[55]—the Bureau was created after Congress added Section 9 to the Act[56]—further

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[54] 47 U.S.C. § 159(a).

[55] *Id.* (referencing the "Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission").

confirming that Congress intended "international activities" to be borne by all licensees who benefit from such activities.

Since 1994, the Commission has followed this commonsense interpretation of the statute.[57] Yet nowhere does the NPRM present record evidence to depart from this settled understanding or "display awareness" that the Commission would be "changing position," or attempt to "show that there are good reasons for the new policy."[58]

III. THE PROPOSED REALLOCATION WOULD DISTORT THE MARKET FOR SUBMARINE CABLE CAPACITY

The NPRM proposes to triple the annual regulatory fees paid by submarine cable operators and other International Bureau licensees. A >20 Gbps submarine cable system that pays roughly $200,000 in regulatory fees would pay more than $700,000 in fees under the NPRM's proposal. The proposed reallocation would distort the market for submarine cable capacity. This, in turn, could both harm existing operators and discourage investment in new systems and U.S. cable landings.

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[56] *Amendment of Parts 0, 1, 25, 43, 64, and 73 of the Commission's Rules to Reflect a Reorganization Establishing the International Bureau*, Report and Order, 9 FCC Rcd. 7050, 7074 ¶ 45 (1994) (establishing International Bureau and regulatory fees for International Bureau licensees).

[57] *See, e.g.*, *Assessment & Collection of Regulatory Fees for Fiscal Year 2003*, Notice of Proposed Rulemaking, 18 FCC Rcd. 6085, 6086 ¶ 2 n.2 (2003) (noting that "[t]he costs assigned to each service category are based upon the regulatory activities (enforcement, policy and rulemaking, user information, and international activities) undertaken by the Commission on behalf of units in each service category").

[58] *Fox*, 556 U.S. at 515 (also providing that "[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books") (*citing United States v. Nixon*, 418 U.S. 683, 696 (1974)).

A. Operators of Existing Submarine Cables Would Have Limited Opportunities for Recovering the Costs of the Extraordinary Regulatory-Fee Increase Proposed in the NPRM

Operators of existing submarine cable systems have limited opportunities for recovering the costs of extraordinary increases in regulatory fees, such as those proposed in the NPRM. Consequently, high fees could render the offering of particular capacity services unsustainable.

First, as discussed in part I.B above, the submarine cable business is predicated largely on selling "security of supply at a known price."[59] *Post-hoc* changes alter fundamentally the economic terms of these long-term arrangements, and are rarely successful. Most submarine cable capacity is sold on a non-common-carrier basis pursuant to customized arrangements—ones that do not permit the addition of a monthly "Federal Regulatory Fee" or "Regulatory Cost Recovery" charge as one might find on a retail mobile or wireline invoice.

Second, while customers of all businesses object to price increases, the customers of submarine cable systems outside the United States often categorically refuse to pay pass-through charges of regulatory fees for which they believe operators should account in their overhead. As the Commission has acknowledged, foreign customers often object to "domestic assessments"

[59] *KPMG IFRS Accounting* § 2.4.1.

such as regulatory fees and maintain that they should not be passed through to them.[60] Yet a 230-percent increase in regulatory fees is far from a typical element of overhead.

Third, the mere attempt to pass through to customers the increased cost of regulatory fees entails substantial transaction costs, requiring the expenditure of significant personnel resources to persuade customers to accept and pay such charges and negotiate contract modifications to permit such pass-through charges.[61]

Fourth, the difficulty in passing through regulatory fee increases is not limited to existing contracts. Merely by making the reallocation proposal, the NPRM creates regulatory uncertainty, with the threat of extraordinary and sudden changes in regulatory fees. This uncertainty makes it harder for submarine cable operators to account for fees when pricing future services and entering into long-term contractual arrangements.

B. Taken Together with Other Proposed Commission Actions, the Proposed Reallocation Could Deter New U.S. Cable Landings

For submarine cable operators, the NPRM's proposed reallocation of regulatory fees follows immediately after its release of a separate proposal to eliminate the international-only

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[60] *See, e.g.*, Comments of Level 3 Communications, LLC, MD Docket No. 08-65, RM-11312, at 15-16 (filed May 30, 2008) ("Level 3 Submarine Cable Reform Comments") (noting that IBC fees caused "extraordinary difficulty in commercial negotiations with customers who often do not understand the vagaries of the Commission's regulatory fee system. Given the substantial nature of the fees, many customers refuse to pay them or in the alternative, can find another carrier with an aggressive interpretation of the rules that minimizes the need for payment."). Indeed, even some domestic entities have objected to pass-throughs of regulatory charges. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, 24 FCC Rcd. 4208, 4215-16 ¶ 19 (2009) ("*Submarine Cable Regulatory Fees Order*") (noting Internet2's objection to the pass-through by submarine cable operators of the cost of annual regulatory fees).

[61] *See, e.g.*, Level 3 Communications, LLC, Comments in Support of Petition for Rulemaking, RM-11312, at 4 (filed Mar. 17, 2006) (noting that "[t]o the extent that suppliers cannot pass the costs through to customers, suppliers are forced to apply the IBC fees as a cost of doing business. In many cases, this makes the transaction demanded by customers uneconomical for the supplier, potentially suppressing supply.").

exemption and the limited interstate revenues exemption ("LIRE") for contributors to the Universal Service Fund ("USF"), requiring providers of exclusively foreign telecommunications to contribute to the Universal Service Fund for the first time.[62] Taken together, these two proposals could significantly alter the economics of landing international submarine cable systems in the United States, potentially encouraging investment elsewhere.[63] Submarine cable operators using a debt/equity finance model to finance new cables would find it much more difficult to secure investment and financing through pre-sales and proof of future revenue stream.

The Commission has long recognized the importance of encouraging investment and new services and adopting market-entry, licensing, and fee rules that promote such investment and services.[64] Indeed, Chairman Genachowski recently observed that the United States must do

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[62] *Universal Service Contribution Methodology*, WC Docket No. 06-122, *A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, 5428-5433 ¶¶ 193-208 (2012).

[63] *See*, *e.g.*, Joint Comments of Undersea Cable Operators, GN Docket No. 09-51 (filed July 9, 2012) (objecting to the Commission's proposal to eliminate the LIRE exemption). Depending on the economics for individual submarine cable systems, these proposals could also hasten the retirement of those systems. While creating disincentives for new cable construction, these proposals could further harm network diversity and resilience.

[64] *See, e.g.*, *Submarine Cable Regulatory Fees Order*, 24 FCC Rcd. at 4215 ¶ 17 (stating that "[t]he 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."); *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, Report and Order, 19 FCC Rcd. 11,662, 11,672 ¶ 29 (2004) (noting that "[w]e are also concerned that basing the fees on the active circuits may provide disincentives to carriers to initiate new services and to use new facilities efficiently"); *Review of Commission Consideration of Applications Under the Cable Landing License Act*, Report and Order, 16 FCC Rcd. 22,167, 22,234 ¶ 19 (2001) (stating that the Commission's submarine cable streamlining procedures are designed to "encourage investment and infrastructure development by multiple providers" and "expand available submarine cable capacity"); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, 23,893 ¶ 1 (1997) ("*Foreign Participation Order*") (noting Commission efforts to promote "procompetitive, transparent regulatory policies in order to foster the growth of a global information infrastructure").

more to keep up with changes in the global broadband market "to foster economic growth, job creation, and our global competitiveness."[65] Commissioner Pai has also described how regulatory uncertainty can deter such investment.[66] More generally, the United States has long taken for granted that submarine cables will continue to land in the United States, providing abundant connectivity for U.S. consumers, businesses, and government agencies, while permitting the rest of the world to continue to access the large percentage of Internet content located in the United States. NASCA's members urge the Commission to consider the potential effects of its proposals—both individually and cumulatively—on the continued availability of this connectivity in a world where consumers of bandwidth increasingly have choices other than the United States.

IV. THE PROPOSED REALLOCATION WOULD UNDERMINE MUCH OF THE COMMISSION'S 2009 REFORM OF REGULATORY FEES PAID BY SUBMARINE CABLE OPERATORS

In causing the economic distortions described in part III above, the NPRM would undermine much of the Commission's 2009 reform of the regulatory fees assessed on submarine cable operators, which sought to eliminate significant economic distortions caused by the Commission's prior capacity-based fee methodology.[67] While the 2009 reform did not eliminate

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[65] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report to Congress, FCC 12-90, GN Docket No. 11-121 (rel. Aug. 21, 2012) (Statement of J. Genachowski).

[66] *See* Opening Remarks of Commissioner Ajit Pai at the Telecommunications and E-Commerce Committee Roundtable of the U.S. Chamber of Commerce (Sept. 14, 2012), *available at* http://www.fcc.gov/document/commissioner-pai-remarks-us-chamber-commerce?fontsize (citing "regulatory uncertainty" as a principal reason why telecommunications companies have not invested "the billions of dollars sitting on their balance sheets").

[67] *Submarine Cable Regulatory Fees Order*, 24 FCC Rcd. at 4208, 4209 ¶ 1.

all disparities between submarine cable operators and other payors, it at least provided some predictability to a regime under which regulatory fees previously had increased geometrically with capacity upgrades.[68] Yet the NPRM mentions fails to even mention this reform. By adopting the proposed reallocation, the Commission would undo much of that relief, creating new uncertainty and threatening to destabilize commercial arrangements that operators have entered into since that reform, all of which were based on the expectation that the per-system fee would not fluctuate that much from year to year.[69]

Under the Fee Schedule originally adopted by Congress in 1993 and implemented by the Commission in 1994, submarine cable operators paid annual regulatory fees based on the number of active 64 kilobit international bearer circuits or circuit equivalents ("IBC fees").[70] With exponential increases in capacity and simultaneous precipitous declines in capacity prices due to changes in technology, the commercialization of the Internet, and liberalization (under the auspices of the World Trade Organization) of market access for submarine cables, in many cases the annual regulatory fee associated with a particular submarine cable service, such as a 10

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[68] *See* Level 3 Submarine Cable Reform Comments at i (noting that "the regulatory fees on a 10 Gbps Linear Wave now account for more than 88 percent of the annual revenue that a submarine cable operator generates by leasing this capacity").

[69] This year, each submarine cable system of greater than 20 Gbps capacity owes $211,925 in regulatory fees. *FY 2012 Fees Report and Order*, Attachment C. For FY 2011, the figure was $205,225. *Assessment and Collection of Regulatory Fees for Fiscal Year 2011*, Report and Order, 26 FCC Rcd. 10,812, 10,877 Attachment G (2011). For FY 2010, it was $233,950. *Assessment and Collection of Regulatory Fees for Fiscal Year 2010*, Report and Order, 25 FCC Rcd. 9278, 9349 Appendix G (2010); For FY 2009, the figure was $241,025. *Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, Report and Order, 24 FCC Rcd. 10,301, 10,321 Appendix C (2009).

[70] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002(a), 107 Stat. 397 (Aug. 10, 1993), *codified at* 47 U.S.C. § 159; *Implementation of Section 9 of the Communications Act—Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Final Rule, 8 FCC Rcd. 5333 (1994) (setting forth initial regulatory fee schedule, including international bearer circuit fees).

gigabit wavelength, exceeded the entire gross annual revenue for the service.[71] Moreover, although the per-circuit fee had been declining since 1998, the percentage decline in the fee did not begin to keep pace with declines in prevailing capacity prices.[72] The absence of clear, easily enforceable Commission rules with respect to fees on active submarine cable capacity (the Commission relied on self-reporting of active capacity and capacity sales to resellers certificated under Section 214 of the Act) made it difficult for compliant operators to price their services to cover their regulatory costs, and created significant tensions between operators and customers (particularly those located outside the United States) as to who should bear the cost of such fees.[73] Attempts by the Commission to clarify payment obligations did not alleviate this strategic behavior and were, in any event, not designed to address the underlying economic distortions.[74]

In 2009, the Commission adopted a "permitted amendment" to the Fee Schedule, including a new system-based methodology for regulatory fees paid by submarine cable

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[71] Comments of Level 3 Communications, LLC, MD Docket No. 08-65, RM No. 11312 at 9 (filed May 30, 2008) ("Level 3 Reform Comments").

[72] *Id*.

[73] *See, e.g.,* Comments of Pacific Crossing Limited and PC Landing Corp., MD Docket No. 08-65, RM No. 11312 at 10 (filed May 30, 2008) (noting that submarine cable customers "have significant concerns in not being able to define the annual regulatory costs" and that the fact that operators "tell the customer what the fee will be with any certainty has lead to significant delay and contractual difficulties in reaching agreement").

[74] *See Compliance With Regulatory Fee Requirements By Cable Landing Licensees Operating On A Non-Common Carrier Basis*, Public Notice, 19 FCC Rcd. 12,318 (2004) (clarifying that regulatory fee payment obligations apply regardless of: (1) the nationality of the licensee or of the licensee's corporate parent; (2) whether the licensee sells capacity directly or through a U.S. or foreign affiliated sales or marketing subsidiary; (3) whether the licensee operates the licensed system on a common-carrier or non-common-carrier basis; (4) whether the licensee or its affiliated sales or marketing subsidiary sells capacity on a lease or IRU basis; or (5) the nature of the services provided by the operator's customers using such capacity).

operators.[75] It bifurcated the revenue requirement in the International Bearer Circuit category, creating a new Submarine Cable System fee with a substantial 87 percent of the previous revenue requirement and leaving satellite and international terrestrial wireless facility operators in the legacy IBC fee category.[76] Holders of facilities-based international Section 214 authorizations were relieved of any obligation to pay IBC fees for services provided using submarine cable capacity.[77] Under the new Submarine Cable System fee, each submarine cable operator pays a flat, per-system fee: the full fee for a >20 Gbps Submarine Cable System, and fractional fees (under a grandfathering provision) for older, lower-capacity systems. The Commission determines the fee by dividing the total allocation to submarine cables (the numerator) by the number of international systems in commercial service as of December 31st of the prior calendar year (the denominator).

The post-2009 reform fees are substantial and require fees from submarine cable operators that had never before paid regulatory fees, as those operators' entire customer bases consist of 214-certificated customers who themselves previously paid IBC fees. Some operators thought the Commission had failed to justify the bifurcation of the old IBC fee category's revenue requirement—with submarine cable operators taking 87 percent of the liability—based

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[75] *Submarine Cable Regulatory Fees Order*; 47 U.S.C. § 159(b)(3) (setting forth requirements for permitted amendments).

[76] *Submarine Cable Regulatory Fees Order*, 24 FCC Rcd. at 4212 ¶ 5.

[77] *See id.* at 4211-12 ¶¶ 5-6 (describing a prior proposal that would have required separate payments for Section 214 authorizations). International Section 214 holders thus no longer pay for the regulation of such licenses by the International Bureau's policy division.

on the small number of FTEs associated with regulating submarine cables.[78] Nevertheless, most submarine cable operators participating in that proceeding agreed with the consensus approach adopted by the Commission, viewing it as a vast improvement over the prior regime.

Under the Commission's new formulation, the fees for a particular service no longer exceed gross annual revenues for such services. As the fees have also varied comparatively little over the last four years—from $241,025 to $205,225[79]—submarine cable operators have also gained confidence that they can price long-term capacity offerings to recover their costs. With bright-line rules about who owes what, the 2009 reform also eliminated the strategic behavior that set prices below the cost of complying with the Commission's regulatory-fee rules.

By adopting the proposed reallocation, the Commission would undo much of that relief, creating new uncertainty and threatening to destabilize commercial arrangements that operators have entered into since that reform, all of which were based on the expectation that the per-system fee would not fluctuate that much from year to year.

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[78] *See* Joint Comments of ARCOS-1 USA, Inc. *et al.*, MD Docket No. 07-81 at 7-8 (filed May 3, 2007) (arguing that "[n]o additional manpower or oversight is required to regulate a current generation multi-gigabit cable system relative to an older less efficient cable" and that "basing the entire international regulatory fee contribution mechanism on a cable's capacity to accommodate narrowband voice channels that no longer generate appreciable amounts of revenue cannot be rationalized as a scheme that offers the underlying regulated party a reasonably related benefit for the Commission's regulatory activity").

[79] For FY 2012, each submarine cable system of greater than 20 Gbps capacity owes $211,925 in regulatory fees. *FY 2012 Fees Report and Order*, Attachment C. For FY 2011, the figure was $205,225. *Assessment and Collection of Regulatory Fees for Fiscal Year 2011*, Report and Order, 26 FCC Rcd. 10,812, 10,877 Attachment G (2011). For FY 2010, it was $233,950. *Assessment and Collection of Regulatory Fees for Fiscal Year 2010*, Report and Order, 25 FCC Rcd. 9278, 9349 Appendix G (2010). For FY 2009, the figure was $241,025. *Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, Report and Order, 24 FCC Rcd. 10,301, 10,321 Appendix C (2009).

V. THE PROPOSED REALLOCATION WOULD DISSERVE THE NPRM'S STATED GOALS OF ADMINISTRABILITY, FAIRNESS, AND SUSTAINABILITY

The NPRM proposes three goals to guide its approach to regulatory fees: "fairness," "administrability," and "sustainability," but the proposed reallocation of regulatory fees to International Bureau licensees would serve none of these goals.[80] As explained in part II.A.2 above, it is plainly not "fair" for International Bureau licensees to subsidize fee reductions for domestic wireline providers when the NPRM otherwise concludes that wireless providers are generating the additional regulatory costs. As explained in part IV above, it is also not fair to impose extraordinary fee increases on submarine cable operators shortly after they adjusted to an entirely new regulatory fee methodology in 2009—much of which the NPRM's proposed reallocation would undermine. As explained in part III.A above, it is not "administrable" for businesses like submarine cable systems that use long-term contracts to face "unpredictab[le] and rapid shifts" in regulatory fees.[81] And as also explained in part III.A above, it is not "sustainable" for submarine cable operators to absorb such increases when they cannot be recouped from the customer base in the form of pass-through charges or recalibrated prices, when the economic terms of such customized, long-term arrangements are negotiated far in advance.

VI. RECOMMENDATIONS

NASCA urges the Commission to reject the NPRM's proposed reallocation of regulatory fees to submarine cable operators and other International Bureau licensees. As demonstrated

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[80] NPRM, ¶¶ 14-16, 26.

[81] *See id*. ¶ 15 (noting that "[a] fee system that strictly aligned FTEs with these activities and Bureaus on an ongoing basis would require a complex time and accounting system like the one the Commission tried in 1997 and 1998 and abandoned in 1999 due in part to the unpredictability and rapid shifts in fee rates that it created for fee payors").

above, the proposal neither comports with the law nor constitutes sound public policy. NASCA also urges the Commission to take the following specific actions.

A. The Commission Should Include "Minimization of Economic Distortions" Among Its Regulatory-Fee Goals

In addition to "fairness,"[82] "administrability,"[83] and "sustainability,"[84] the Commission should add a fourth regulatory goal: minimization of economic distortions caused by regulatory fees and regulatory fee reallocations. Although all regulatory fees and reallocations thereof increase licensee costs, the Commission can and should nevertheless ensure that the costs of such fees do not distort service offerings or investment, or impair the ability of licensees to recover their costs. Regulatory fees should not penalize one class of licensee.

NASCA believes that many of the infirmities in the NPRM's proposals result from a failure to consider the potential for such distortions and to heed the lessons of the 2009 reform of fees paid by submarine cable operators.[85] As for any category of Commission licensee, submarine cable operators should be able to recover the costs of regulatory fees by pricing their services accordingly. To do so, they must have some predictability, without wild year-to-year fluctuations in such fees, as they lack the ability to pass through such costs the same way that providers of retail mobile or wireline service through line-item "regulatory fee" charges on customer bills.

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[82] *Id.* ¶ 14.

[83] *Id.* ¶ 15.

[84] *Id.* ¶ 16.

[85] *See* parts III.A, B, and C above (describing the difficulties faced by submarine cable operators in recovering fees, and economic distortions caused thereby).

B. The Commission Should Treat SAND as a Support Bureau and SAND FTEs as Indirect FTEs

If the Commission proceeds with the NPRM's reallocation proposal, it should at a minimum treat SAND as a support bureau and SAND FTEs as indirect FTEs for regulatory fee allocation purposes.[86] The NPRM itself concedes that "much of the work within the Strategic Analysis and Negotiations Division of the International Bureau covers services outside of the Bureau's direct regulatory activities."[87] The Commission therefore lacks a factual or policy basis for concluding, as the NPRM does, that SAND is "focused on the industry segment regulated by [the International Bureau]."[88] Whatever justification might exist with respect to a more general reallocation (and NASCA believes there is none) simply does not exist with respect to SAND.

C. The Commission Should Use Periodic Assessments by Bureau Management to Make Both Intra-Bureau and Inter-Bureau Allocations

Regardless of how the Commission chooses to proceed with respect to inter-bureau reallocation, it should adopt its proposal with respect to *intra*-bureau allocations.[89] NASCA agrees with the NPRM's proposal to allow management in each of the core bureaus to revise internal FTE percentages every three years based on the current distribution of work within the bureau.[90] As noted in part II.A above, Section 9 requires the Commission to derive regulatory

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[86] *See* NPRM, ¶ 27 (seeking comment on SAND in particular).

[87] *Id.* ¶ 26; *see also id.* (noting that "this Division has primary responsibility for leading the Commission's international representation in bilateral meetings, multilateral meetings, and cross-border spectrum negotiations with Canada and Mexico on spectrum sharing arrangements, and notifications to the International Telecommunications Union (ITU), as well as participation in ITU Study Groups" and concluding that, "[t]hough focused on the international community, this international work covers the entire gamut of the Commission's regulatory responsibilities").

[88] *Id.* ¶ 19.

[89] *Id.* ¶ 34.

[90] *Id.*

fees in the first instance by determining the number of FTEs performing specified activities in specified bureaus and make adjustments to ensure that fees are reasonably related to the regulatory benefits provided by the Commission to fee payors.[91] The Commission's current approach—reliance on decade-old survey data—simply does not satisfy these statutory requirements.[92] Input from bureau management—who have direct knowledge data of how Commission resources and FTEs are deployed within their respective bureaus—would best allow the Commission to satisfy Section 9's requirement regarding FTE allocations.

NASCA also believes that the Commission should use such management assessments in each of the core bureaus to identify indirect FTEs and benefits provided to licensees of other core bureaus. Such input would help to ensure that the Commission would satisfy Section 9's "reasonably related" requirement with respect to regulatory benefits. It would also help to avoid uninformed reallocations, as, unfortunately, the NPRM proposes to do with respect to SAND.

NASCA also supports the NPRM's proposal to conduct such assessments by bureau management every three years.[93] Annual assessments would be wasteful and unnecessary and are not expressly required by Section 9. Triennial assessments would keep regulatory fees aligned with FTEs and Commission regulatory benefits while ensuring that the resulting reallocations of regulatory fees would be gradual. This approach would satisfy "administrability" concerns outlined in the NPRM and better ensure the ability of licensees to recover their regulatory costs and price their services accordingly.[94]

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[91] 47 U.S.C. §159(b)(1)(A).

[92] NPRM, ¶ 12.

[93] *Id.* ¶ 15.

[94] *See id.* ¶ 34.

CONCLUSION

For the foregoing reasons, NASCA urges the Commission to reject the NPRM's proposed reallocation of regulatory fees to submarine cable operators and other International Bureau licensees.

Respectfully submitted,

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17 September 2012

Attachment B

NASCA February 2013 *Ex Parte*

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15 February 2013

BY ELECTRONIC FILING

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

Re: MD Docket Nos. 12-201 and 08-65, Notice of Ex Parte *Presentation*

Dear Ms. Dortch:

Pursuant to 47 C.F.R § 1.1206(b), the North American Submarine Cable Association ("NASCA") notifies the Commission of an *ex parte* presentation in the above-referenced proceeding. On February 13, 2013, Robert Wargo (of NASCA member AT&T Corp., as President of NASCA), Rogena Harris (of NASCA member Tata Communications (America), Inc.), and I met with Thomas Buckley and Roland Helvajian of the Office of Managing Director, David Krech of the International Bureau, and Mika Savir of the Enforcement Bureau to discuss NASCA's positions regarding the Commission's regulatory-fee reallocation proposals.

In our meeting, we reviewed the points summarized in the talking points attached to this notice. (This attachment differs slightly from the one distributed at our meeting, as we have amended it to clarify and correct the points noted in italics on pages 1 and 2 of the handout. No text has been deleted.) These talking points are consistent with NASCA's arguments in its comments on the record in this proceeding.[1] NASCA made a number of additional points in the meeting.

First, NASCA restated its view that Section 9 of the Communications Act, as amended ("Section 9") requires the Commission to engage in a fact-based examination of the activities in which its personnel actually engage. The Commission should refrain from speculating or making abstract suppositions about what the licensing Bureaus should do or likely do and instead examine what they actually do, relying on input and assessments from Bureau management as a

[1] Comments of the North American Submarine Cable Association, MD Docket Nos. 12-201 and 08-65 (filed Sept. 17, 2012).

workable means of gathering such data (and one consistent with the Commission's stated goals of administrability and fairness). Not all Bureaus function in a similar manner, and the International Bureau (including not just the Strategic Analysis and Negotiations Division, but also the Policy Division and the Bureau Front Office) in particular continues to perform activities for the specific benefit of licensees in other Bureaus, as well as for the general benefit of all Commission licensees. NASCA continues to believe that such an examination would result in a lower Submarine Cable System fee, given the minimal Commission activity conducted for the benefit of submarine cable operators.

Second, NASCA explained in greater detail that submarine 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 and routinely factor such costs into their decisions to land in particular countries. As evidence of this sensitivity, NASCA noted that cables have increasingly landed in Oregon rather than California due to fees and other regulatory costs imposed by the State of California. NASCA 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 and recent relaxation of Canadian foreign ownership limitations. The annual international submarine cable licensing fees due to the Canadian Government are negligible.

Third, NASCA noted that, should submarine cable operators increasingly choose to land cables in Canada or Mexico 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 U.S. Government oversight of the supply and operational arrangements for such systems.

Fourth, NASCA reiterated that the Commission should adopt an additional objective in this proceeding—namely, avoidance of economic distortions.[2] NASCA believes that imposition of regulatory fees that deprive licensees of the ability to recover their regulatory costs and consequently discourage the offering of particular services or discourage investment infrastructure serving the United States would both disserve the public interest and violate Section 9.

Fifth, NASCA noted with respect to the report issued by the U.S. Government Accountability Office ("GAO") that GAO has made some well-founded observations about Commission regulatory fees—particularly the cross-cutting nature of the International Bureau's work.[3] Nevertheless, some of GAO's recommended actions would likely require Congressional action before the Commission itself could act.

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[2] *See id.* at 27.

[3] U.S. Government Accountability Office, *Federal Communications Commission – Regulatory Fee Process Needs to Be Updated*, GAO-12-686, at 22 (Aug. 2012).

Finally, we noted that the Commission should not be starting with the question "How much more could a licensee pay without causing economic harm?" but should instead ask: "What enumerated activities in Section 9 ("enforcement," "policy and rulemaking," "user information services," and "international activities") does the Commission undertake on behalf of licensees in each fee category?"; "How should the Commission gather data on such activities?"; and "What changes, if any, should the Commission make in its existing methodologies and allocations to account for such data?"

* * * * *

Should you have any questions, please contact me by telephone at +1 202 730 1337 or by e-mail at kbressie@wiltshiregrannis.com.

Respectfully submitted,

Kent Bressie

Counsel for
the North American Submarine Cable Association

Attachment

cc: Thomas Buckley
Roland Helvajian
David Krech
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NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

VIEWS RE REGULATORY FEE REFORM IN MD DOCKET NOS. 12-201 AND 08-65

13 FEBRUARY 2013

1. **The International Bureau ("IB") performs very few assessable regulatory activities (as enumerated in 47 U.S.C. § 159(a)(1)) for the benefit of submarine cable operators.**

- "Enforcement"
  - IB almost never engages in enforcement-related activities against submarine cable operators. To NASCA's knowledge, the FCC has never pursued a case of an unauthorized landing in the United States.
  - In the past 10 years, the FCC has issued a mere 3 notices of apparent liability ("NAL") for unauthorized transfers and assignments of cable landing licenses, and two of those NALs involved mostly licenses other than cable landing licenses.

- "Policy and rulemaking"
  - IB has conducted or played a major supporting role in only 2 submarine cable-specific rulemakings in the last 13 years; only 1 of those focused on regulatory fees.
  - The regulatory regime for submarine cables is very limited. The Commission (and, by delegation, IB) regulates submarine cables pursuant to the Cable Landing License Act (47 U.S.C. §§ 34-39), a statute that consists of a mere 437 words and Commission regulations that span a mere 7 ½ pages.
  - Almost all submarine cables operate on a non-common-carrier basis, meaning that they are not subject to and do not benefit from regulation under the Communications Act of 1934.

- "User information services"
  - Submarine-cable-related activity in the International Bureau Filing System ("IBFS") represents a fraction of the records appearing in IBFS. Of the 327,329 records in IBFS as of February 12, 2013, only 569 pertain to submarine cables.
  - Similarly, NASCA estimates that submarine cable-related queries to the IBFS Help Desk represent a small fraction of the queries received.
  - IB has long collected capacity data from submarine cable operators. The effort has consisted of simple telephone calls or emails to system owners. Starting later in 2013, the practice will now be codified in the FCC's rules.
  - Very little of IB's web site addresses submarine cable issues.

- "International activities"
  - IB does not undertake activities on behalf of submarine cable operators in multilateral or bilateral negotiations or treaty conferences, particularly as submarine cables do not use radio spectrum or raise associated coordination or interference issues.
  - Submarine cable operators almost never interact with the Strategic Analysis and Negotiations Division ("SAND"), which focuses on international negotiations mainly involving radio spectrum.

- Personnel
  - NASCA estimates that no more than 6 or 7 IB employees (out of 116) regularly perform submarine cable-related activities on even a part-time basis, and that no IB employees perform submarine cable-related activities on a full-time basis.

2. Almost all of IB's activities involving submarine cables arises from sporadic and infrequent licensing and transaction-reviews, the costs of which the Commission recovers separately through application processing fees.

- Licensing
  - IB reviews cable landing license applications under the Cable Landing License Act. There have been only 29 applications in 10 years.
  - IB grants licenses for a 25-year term, so there is essentially no renewal activity.
  - Most applications qualify for streamlined processing, and IB grants most licenses pursuant to public notice rather than individually-drafted orders.
  - IB does not conduct any technical or environmental analysis of cable landing license applications.
  - Most systems are licensed as non-common-carrier systems and are not subject to regulation under the Communications Act.

- Transaction reviews
  - IB reviews transactions resulting in assignments and transfers of control.

3. The NPRM's proposed reallocation would violate Section 9's requirement that the fees be reasonably related to the benefits provided to the payor.

- The assessable activities described above do not support existing fee levels, much less a 230-percent increase in regulatory fees for the Submarine Cable System category

- IB provides general regulatory benefits to all Commission licensees and specific regulatory benefits to licensees of other Commission bureaus. IB:
    - Advises the Chairman on matters of international policy and defense
    - Develops rules regarding international broadcasting
    - Provides advice to trade officials
    - Collects data on market developments in other countries
    - Ensures Commission compliance with international agreements and treaties
    - Advises and coordinates the Chairman's international travel
    - Coordinates with other bureaus and agencies on matters of homeland security and emergency response

- SAND activities provide few if any benefits to submarine cable operators and very specific benefits to licensees of other bureaus. SAND:
    - Manages interference issues involving domestic terrestrial broadcasting near the Canadian and Mexican borders
    - Manages interference and spectrum scarcity issues for domestic terrestrial wireless services in the U.S.-Canada and U.S.-Mexico border regions (even though the services are mostly licensed by the Wireless Telecommunications Bureau)
    - Manages and allocates spectrum for terrestrial wireless services and devices as part of the International Telecommunication Union and Inter-American Telecommunications Commission ("CITEL") processes, even though the services and devices are mostly licensed or approved by the Wireless Telecommunications Bureau, the Media Bureau, or the Office of Engineering and Technology

- The rationales cited in the NPRM—increased Commission regulatory effort due to growth in the wireless sector and in intermodal competition—provide no regulatory benefit to submarine cable operators.
    - Regulatory efforts made with respect to the wireless sector do not implicate submarine cables.
    - Submarine cables are not economic substitutes for wireless services (or satellite services).

4. The NPRM's proposed reallocation is inconsistent with Section 9, which presumes that all Commission licensees—and not just IB licensees—benefit from "international activities" just as they benefit from the three other illustrative activity categories cited in Section 9.

- IB did not even exist at the time Section 9 became law.

5. The NPRM's proposed reallocation would distort the market for submarine cable capacity.

- Operators have few cost-recovery opportunities, and a fee increase could make services uneconomic.
  - The submarine cable business is predicated largely on selling "security of supply at a known price," with most capacity sold via indefeasible right of use ("IRU") for a term of 10 to 15 years, either with an up-front lump-sum payment or periodic payments plus separate quarterly charges for operations and maintenance. For the seller, an IRU represents a way of funding the cost of construction.
  - Unlike traditional retail services with monthly invoices, long-term submarine cable capacity sales offer few opportunities for cost recovery or pass throughs.
  - Foreign customers often refuse to pay pass-through charges, forcing operators to absorb costs.
  - To pass through costs, operators must incur substantial transaction costs, requiring the expenditure of significant personnel resources to persuade customers to accept and pay such charges and negotiate contract modifications to permit such pass-through charges.
  - When combined with FCC's USF contribution proposal, the NRPM's regulatory fee proposal has created significant uncertainty in the market and made it harder for operators to price their services.

- Taken together with the Commission's new USF contribution proposal, the NPRM's proposed fee increase could deter new U.S. cable landings.

6. The NPRM's proposed reallocation would disserve the NPRM's stated goals of administrability, fairness, and sustainability.

7. Recommendations

- The Commission should reject the reallocation of regulatory fees to submarine cable operators, as the regulatory activities benefitting those operators do not justify the reallocation.

- The Commission should include "minimization of economic distortions" among its regulatory-fee goals.

- The Commission should treat SAND as a support bureau and SAND FTEs as indirect FTEs.

- The Commission should use periodic assessments by Bureau management to make both intra-bureau and inter-bureau allocations.

Attachment C

NASCA March 2013 *Ex Parte*

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ATTORNEYS AT LAW

27 March 2013

BY ELECTRONIC FILING

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

Re: MD Docket Nos. 12-201 and 08-65, Notice of Ex Parte *Presentation*

Dear Ms. Dortch:

Pursuant to 47 C.F.R § 1.1206(b), the North American Submarine Cable Association ("NASCA") submits this *ex parte* presentation in the above-referenced proceeding, following up on NASCA's February 13, 2013, meeting with Commission staff and a March 21, 2013 request from Commission staff to provide additional information about submarine-cable regulatory fees imposed by foreign jurisdictions.

1. Influence of Regulatory Fees and Charges on Landing and Investment Decisions

In the February 13, 2013, meeting, NASCA had noted that submarine 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 and routinely factor such costs into their decisions to land in particular states and countries. In this letter, NASCA provides some specific examples of such sensitivity:

- Cable operators increasingly avoid California due to significant regulatory and permitting costs and permitting delays.[1] Those that have recently landed in California—such as the Unity system—have used previously-built and –permitted infrastructure to reduce such

[1] *See, e.g.*, Joint Comments of AT&T Corp., Level 3 Communications LLC, Southern Cross Cable Network, Tyco Networks (US) Inc., and WorldCom, Inc., Recommended Changes to Hawaii Guidelines for Submarine Fiber Optic Cables, at 2 (Oct. 11, 2002) (stating that "in California, regulatory costs and permitting time requirements have risen to the point that cable owners predictably will land cables elsewhere"), available at http://www.n-a-s-c-a.org/library/u-s-state-issues/hawaii/.

costs and delays.[2] Such previously-built and -permitted facilities are scarce, if any remain at all.

- Cable operators now generally avoid Puget Sound in Washington State, as landing there requires the cable system to traverse the Olympic Coast National Marine Sanctuary, for which the National Oceanic and Atmospheric Administration imposes very high per-mile right-of-way fees as a condition of its special use permit regime.[3] The State of Washington also imposes very high permitting fees.[4] No new system has been installed into Washington State since 2000.
- Cable operators increasingly choose Oregon for its regulatory cost and timing advantages, even if the choice requires reconfiguring a system already under construction. The Southern Cross Cable Network—which connects the United States to Australia, Fiji, and New Zealand—effectively abandoned a newly-constructed cable station in Monterey Bay due to high regulatory costs and delays, choosing instead to secure new permits (and an amended cable landing license from the Commission) to land at Nedonna Beach, Oregon.[5]

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[2] *See* Bharti Airtel Limited, Global Transit Limited, GU Holdings Inc., KDDI Corporation, Pacnet Services (USA) Inc., and Singapore Telecommunications Limited, Application for a Cable Landing License, FCC File No. SCL-LIC-20080516-00010, at 5 n.1 (filed Dec. 16, 2008) (noting that "the California landing would use, in part, existing cable facilities owned by Tyco and authorized by the Commission pursuant to File No. SCL-LIC-20050304-00011. Construction of the cable authorized by that license was never completed with the exception of certain terrestrial facilities and a 6.2 kilometer stub extending seaward from Hermosa Beach.").

[3] *See* National Oceanic and Atmospheric Administration, Office of National Marine Sanctuaries, Final Policy and Permit Guidance for Submarine Cable Projects (Sept. 2011), *available at* http://sanctuaries.noaa.gov/library/national/cable_guidelines.pdf; Comments of Global Crossing Ltd., CC Docket No. 98-146, at 8 (filed Sept. 24, 2001) (describing regulatory costs imposed for the PC-1 submarine cable system by NOAA, which "proposed to charge $120,000 per-mile for existing and future installations, which would impose an additional 'fair market value fee' of $7.2 million on the Pacific Crossing cable. In light of these proposed fees and other actions by NOAA, Global Crossing understands that two cable operators have already abandoned their proposed sanctuary routes.").

[4] *Id.* at 7.

[5] Reuters, *Two-part Trans-Pacific route soon to be complete: Southern Cross cable sidesteps US landing problem* (Mar. 29, 2000) (noting that "Southern Cross took an initiative last year to seek authorisation to land in Oregon, having originally intended to make two landings in California—at San Luis Obispo north of Los Angeles and nearby Monterey Bay, closer to San Francisco. After hitting permit difficulties, Monterey Bay will no longer happen and the landing in Oregon in mid-April will mark the start of cable-laying between there and

- In Asia, Hong Kong, Singapore, and Malaysia compete fiercely for submarine cable landings to maintain and improve their connectivity and support their services industries and recognize that regulatory costs could drive cable landings elsewhere. As the Hong Kong Government has noted:

> Southeast Asian economies such as Malaysia and Singapore have been aggressively developing their telecommunications infrastructure to support the growth of their service industries. In view of the developments in the industry and in the region, there is a pressing need for Hong Kong to uplift its competitiveness in attracting the landing of new submarine cables. To maintain Hong Kong as the telecommunications hub in the Asia-Pacific region, the Administration has been striving to create a regulatory environment that is conducive to further investments.[6]

In fact, the Hong Kong Government has expressly recognized that the regulatory costs of landings greatly influence where cables land and can support or undermine national economic and security interests. In the wake of the Hengchun earthquake in the Luzon Strait on December 26, 2006, which damaged most East Asia's submarine cable systems (including six of the seven systems landing in Hong Kong)[7] and greatly affected connectivity and, indirectly, financial markets and other economic activity,[8] the Hong Kong Government undertook reviews and policy

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Hawaii."), *available at* www.siliconinvestor.com/readmsg.aspx?msgid=13310717; *Southern Cross Cables, Our Company* www.southerncrosscables.com/home/company/company (last visited March 22, 2013), (noting among project milestones that for March 2000, "Southern Cross takes decisive action to keep the project on track and decides to land at Nedonna Beach, Oregon, rather than Monterey, California."); *MFS Globenet, Inc. and Pacific Carriage Limited*, Modification of Cable Landing License, FCC File No. SCL-MOD-20000201-00002, 15 FCC Rcd. 10,145 (Int'l Bur. Apr. 3, 2000).

[6] Legislative Council, Panel on Information Technology and Broadcasting, Meeting on 8 March 2010, Background brief on issues relating to the landing of submarine cables, at 2 ¶ 7, LC Paper No. CB(1)1289/09-10(05), *available at* www.legco.gov.hk/yr09-10/english/.../itb0308cb1-1289-5-e.pdf.

[7] Legislative Council, Panel on Information Technology and Broadcasting Meeting on 14 April 2008 Background brief on issues relating to Internet disruptions caused by earthquake damage to undersea cables, LC Paper No. CB(1)1200/07-08(04), at 1 ¶ 2, *available at* www.legco.gov.hk/yr07-08/english/panels/itb/papers/itb0414cb1-1200-4-e.pdf.

[8] Karl Frederick Rauscher, *Reliability of Global Undersea Cable Communications Infrastructure (ROGUCCI), The Report*, at 155 (2010) (finding that "the affected services include substantially reduced international connectivity for telephone voice traffic, Internet access including email and search capabilities, financial sector and other commerce traffic, and other critical services."), *available at* www.ieee-rogucci.org/files/The%20ROGUCCI%20Report.pdf.

changes to ensure speedier restoration of communications, speedier repair of damaged systems, and the greater network resilience resulting from new cables on diverse routes. Consultants to the Hong Kong regulator, now known as the Office of the Communications Authority ("OFCA"), later concluded that that when choosing where to land a cable submarine cable owners' key considerations include government policies, ease of administrative processes, and investment environment.[9]

By contrast, the U.S. Government has generally taken for granted that new cables will land in the United States and that the United States will remain a hub even for traffic that does not require a landing for origination or termination of traffic in the United States. State and local governments—which conduct environmental and land-use reviews for each and every submarine cable system—have generally paid even less attention to the investment- or innovation-related impacts that their regulatory costs and delays they impose on submarine cable operators, much less the broader economic or national security implications of their regulations.

In reforming its regulatory fees for submarine cable operators in 2009, the Commission did recognize that the old capacity-based fee methodology was rendering certain services uneconomic.[10] Unfortunately, the current proposal to increase by 233 percent the regulatory fees paid by submarine cable operators would undermine much of that prior reform—even more so if the fee-shifting were accompanied by elimination of long-standing universal service contribution exemptions on which many submarine cable operators rely.[11]

NASCA continues to believe that the Commission's straightforward compliance with Section 9 of the Communications Act, as amended, would lead the Commission to abandon the NPRM's fee-shifting proposal. Section 9 requires the Commission to conduct a fact-based

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[9] Frost & Sullivan, *Report on Consultancy Study on Issues Relating to the Landing of Submarine Cables in Hong Kong*, at 6 (April 2010), *available at tel_archives.ofca.gov.hk/en/report-paper-guide/rp20100526.pdf*

[10] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, 24 FCC Rcd. 4208, 4215 ¶ 17 (2009) (stating that "[t]he 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."); Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Report and Order, 19 FCC Rcd. 11,662, 11,672 ¶ 29 (2004) (noting that "[w]e are also concerned that basing the fees on the active circuits may provide disincentives to carriers to initiate new services and to use new facilities efficiently");

[11] See *Universal Service Contribution Methodology & A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, 5428-33 ¶¶ 193-208 (2012).

examination of the work its personnel actually perform.[12] NASCA believes that such an examination would result in a lower Submarine Cable System fee, given the minimal Commission activity conducted for the benefit of submarine cable operators, given the minimal submarine cable-related regulatory activity, as outlined in great detail in the attachment to NASCA's February 15, 2013, *ex parte* notice in these proceedings.[13]

2. Submarine-Cable Regulatory Fees in Foreign Jurisdictions

In response to the Commission staff's question about the extent to which foreign government assess regulatory fees specifically on submarine cables, NASCA confirms that to the knowledge of its members, no governments—other than those of the United States and Canada—assess regulatory fees specifically on submarine cable infrastructure. In Canada, that annual fee is *de minimis*, currently C$100, or US$97 at current exchange rates.[14]

NASCA understands that fees cited in the comments of the International Carrier Coalition ("ICC") with respect to Argentina, Australia, the Netherlands, Spain, and the United Kingdom refer to regulatory fees assessed on "eligible," relevant," or otherwise subject telecommunications revenues.[15] None of those fees is specific to submarine cables or submarine cable operators, though they may apply to revenues of certain services provided over submarine cable systems, whether by the cable operators or their third-party customers. As the ICC rightly notes, even these revenue-based fees on services are "modest."[16] Moreover, some of them are actually declining.[17]

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[12] *See* Comments of the North American Submarine Cable Association, MD Docket Nos. 12-201 and 08-65, at 10-14 (filed Sept. 17, 2012).

[13] *See* Letter from Kent D. Bressie, Counsel for the North American Submarine Cable Association, to FCC Secretary Marlene H. Dortch, MD Docket Nos. 12-201 and 08-65 (filed Feb. 15, 2013).

[14] International Submarine Cable Licences Regulations (Canada), SOR/98-488, http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-488/page-1.html.

[15] Comments of the International Carrier Coalition, MD Docket Nos. 12-201 and 08-65, at 14 (filed Sept. 17, 2012).

[16] *Id.*

[17] The current rate assessed by the Dutch regulator OPTA dropped to 0.059 percent in December 2012. *See Regeling vergoedingen Telecommunicatiewet en Postwet 2013* (in English, "The 2013 Fee Regulations Telecommunication and Post"), https://www.opta.nl/nl/actueel/alle-publicaties/publicatie/?id=3693. That rate also applies only to public electronic communications networks with annual turnover from the Netherlands greater than €20 million. Networks with annual turnover from the Netherlands less that €20 million but greater than €2 million pay a fixed fee of €6,540. *Id.*

* * * * *

Should you have any questions, please contact me by telephone at +1 202 730 1337 or by e-mail at kbressie@wiltshiregrannis.com.

Respectfully submitted,

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