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

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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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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

[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

[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.

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