Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2019	MD Docket No. 19-105

COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION AND
THE SEA-US LICENSEES

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SUMMARY

The Commission's proposed FY 2019 submarine cable system fees bear no rational relationship to the Commission's submarine cable regulatory efforts and mistakenly perpetuate the fallacy of capacity-based fees that were to be phased out with retirements of systems grandfathered under the methodology adopted by the Commission in 2009. The North American Submarine Cable Association ("NASCA") and the licensees of the Southeast Asia-US ("SEA-US") cable system[1] therefore urge the Commission to (1) revise its FY 2019 submarine cable system fees by applying its existing full-time equivalent employee ("FTE") methodology properly and (2) initiate a further rulemaking to address systematically both the issues of appropriate revenue requirement and phasing out of fee tiers for systems that were not grandfathered under the 2009 methodology. The Commission should also clarify the source and accuracy of its capacity data and payment unit calculations in the wake of changes in the 43.82 Filing Manual for capacity reporting.

First, the Commission should continue its efforts to bring its submarine cable system fee into compliance with Section 9 of the Communications Act, as amended, which requires that the Commission correlate regulatory fees with FTE data and that such fees be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities." To do this, the Commission should restart the process it began in 2013 and 2014 to reduce the revenue requirement for submarine cable systems in order to align the submarine cable system fee with the Commission's FTE data. The Commission has repeatedly found that Commission activities

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[1] The licensees of the Southeast Asia-US ("SEA-US") submarine cable system include GTI Corporation, Hawaiian Telcom Services Company, Inc., RAM Telecom International, Inc., TeleGuam Holdings, LLC d/b/a GTA, PT Telekomunikasi Indonesia International, and Telin USA Inc. ("SEA-US Licensees").

benefitting submarine cable system licensees are limited, yet it continues to over-collect from submarine cable system licensees. While NASCA and the SEA-US Licensees estimate that submarine cable systems account for 10.42 percent of International Bureau ("IB") FTEs, the Commission proposes to collect FY 2019 regulatory fees as if submarine cable systems accounted for 24.85 percent of IB FTEs.

Because the Commission has not identified any legal basis for continuing to collect manifestly excessive fees from submarine cable system operators, the Commission should realign the revenue requirement with the FTE numbers to recalculate regulatory fees for FY 2019. The Commission should seek $2,645,071 from submarine cable operators. The balance of the FY 2019 IB revenue requirement of $25,394,165 would be allocated to other categories of IB payors based on an assessment of which payors benefit from those FTEs.

Second, the Commission should reject the notion that the submarine cable fee tiers need updating and—consistent with the 2009 methodology—move toward a per-system flat fee as systems grandfathered with partial-unit fees under the 2009 methodology are eventually retired. Capacity bears no relationship whatsoever to Commission regulatory efforts on behalf of a submarine cable system.

Finally, the Commission should clarify the data it uses to calculate submarine cable system fees and assign particular systems to particular fee tiers and should clarify the accuracy of the submarine cable payment units. The Office of Managing Director typically relies on the circuit capacity reports to calculate fees. In December 2018, IB revised the definition of "available capacity" in the 43.82 Filing Manual from lit capacity to design capacity—without notice-and-comment rulemaking—thereby substantially changing the way submarine cable operators report their capacity, and ultimately how their fees will be calculated. In light of this

change, the Commission should clarify the data used to calculate fees. It also must recalculate the payment units for assessing submarine cable regulatory fees to avoid over-recovery of fees, as more licensees will be paying in the highest fee bracket for submarine cables this year.

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The North American Submarine Cable Association ("NASCA") and the licensees of the Southeast Asia-US ("SEA-US") cable system[2] urge the Commission to implement a downward adjustment of the submarine cable system fee[3] to better reflect the full-time equivalent employees ("FTEs") dedicated to submarine cable activities and the benefits submarine cable payors receive from Commission regulatory activities. NASCA and the SEA-US Licensees believe that the Commission's allocation lacks legal justification. The fee allocation means that submarine cable operators are forced to subsidize specific Commission regulatory activities benefitting other payor categories. Absent specific legal justification—and none has been

[2] The licensees of the Southeast Asia-US ("SEA-US") submarine cable system include GTI Corporation, Hawaiian Telcom Services Company, Inc., RAM Telecom International, Inc., TeleGuam Holdings, LLC d/b/a GTA, PT Telekomunikasi Indonesia International, and Telin USA Inc. ("SEA-US Licensees").

[3] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Notice of Proposed Rulemaking, FCC 19-37, MD Docket No. 19-105, Appendix A (rel. May 8, 2019) ("*FY 2019 Reg Fees NPRM*").

proffered—this outcome violates Section 9 of the Communications Act, as amended, which requires that the Commission correlate regulatory fees with FTE data and that such fees be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[4]

The Commission has repeatedly conceded that submarine cable system fees are too high because they bear no relation to the Commission's FTE data or the Commission's minimal regulation of submarine cables.[5] In doing so, the Commission has tacitly admitted that its submarine cable system fees do not comply with Section 9. However, rather than taking steps to align submarine cable system fees with Commission regulatory efforts, as reflected in the FTE data, the Commission continues to over-collect from submarine cable operators, which represent an estimated 10.42 percent of International Bureau ("IB") FTEs, as if they represented 24.85 percent of IB FTEs at present. The Commission should realign the revenue requirement with the FTE numbers to recalculate regulatory fees for submarine cable operators for FY 2019.

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. Some of NASCA's members include:

- Alaska Communications System
- Alaska United Fiber System Partnership
- Alcatel Submarine Networks

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4 47 U.S.C. § 159(d).

5 *See, e.g.*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 10,767, 10,772 ¶ 11 (2014) ("*FY 2014 Reg Fees R&O*"); *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 7790, 7802 ¶ 27 (2013) ("*FY 2013 Reg Fees NPRM*").

- Apollo Submarine Cable System Limited
- C&W Networks
- CenturyLink
- Edge Network Services Ltd.
- Global Cloud Xchange
- Global Marine Systems Ltd.
- GlobeNet
- Hibernia Atlantic
- OPT French Polynesia
- PC Landing Corp.
- Rogers Communications
- Southern Caribbean Fiber
- Southern Cross Cable Network
- Sprint Communications Corporation
- Tata Communications (Americas)
- TE SubCom
- Verizon

NASCA serves both as a forum and advocacy organization for its members' interests. Collectively, NASCA's members pay the great majority of regulatory fees in the submarine cable system category, representing the great majority of the active systems landing in the United States.

The SEA-US cable system totals 15,000 kilometers in length and consists of landing points in Hermosa Beach, California; Makaha, Hawaii; Piti, Guam; Kauditan, Indonesia; and Davao, Philippines. It entered into commercial service on August 8, 2017.

NASCA and the SEA-US Licensees' comments consist of three parts. *First*, NASCA and the SEA-US Licensees explain that because the Commission has not identified a legal basis for continuing to collect manifestly excessive fees from submarine cable operators, the Commission should realign the revenue requirement with the FTE numbers. The Commission should seek $2,645,071 from submarine cable operators and allocate the balance of the FY 2019 IB revenue requirement of $25,394,165 to other categories of IB payors based on an assessment of which payors benefit from those FTEs.

Second, the Commission should reject the notion that the submarine cable fee tiers need updating and—consistent with the 2009 methodology—move toward a per-system flat fee as systems grandfathered with partial-unit fees under the 2009 methodology are eventually retired. Capacity bears no relationship whatsoever to Commission regulatory efforts on behalf of a submarine cable system.

Third, the Commission should clarify the data it uses to calculate submarine cable system fees and assign particular systems to particular fee tiers and the accuracy of the submarine cable payment units. The Office of Managing Director typically relies on the circuit capacity reports to calculate fees. In December 2018, IB revised the definition of "available capacity" in the December 2018 Filing Manual for Section 43.82 Circuit Capacity Reports ("43.82 Filing Manual") from lit capacity to design capacity—without notice-and-comment rulemaking—thereby substantially changing the way submarine cable operators report their capacity, and ultimately how their fees will be calculated. In light of this change, the Commission should

clarify the data used to calculate fees. It also must recalculate the payment units for assessing submarine cable regulatory fees to avoid over-recovery of fees, as more licensees will be paying in the highest fee tier for submarine cables this year.

I. To Comply with Section 9, the Commission Should Reallocate a Greater Proportion of the IB Revenue Requirement from Submarine Cable Systems to IB Payors That Receive Greater Benefits from Commission Regulatory Activities.

To comply with Section 9, the Commission should reallocate a greater proportion of the IB revenue requirement from submarine cable systems to other IB payors. In this year's rulemaking, the Commission has proposed allocating to submarine cable systems 24.85 percent of the revenue requirement for IB services.[6] This allocation is disproportionate to the benefits that submarine cable system payors receive from the Commission's activities, meaning that submarine cable operators continue to pay excessive fees. The Commission has not identified any legal basis for continuing to collect manifestly excessive fees from submarine cable operators. The Commission should realign the revenue requirement with the FTE numbers to recalculate regulatory fees for submarine cable operators for FY 2019.

A. The Commission Has Repeatedly Acknowledged that It Performs Very Few Assessable Regulatory Activities for the Benefit of Submarine Cable Operators.

The Commission has repeatedly acknowledged that it performs very few regulatory activities for the benefit of submarine cable operators. In 2015, the Commission adopted a 7.5 percent decrease, noting that regulatory oversight includes licensing, reviewing the circuit capacity reports, and reviewing the filed quarterly reports.[7] The Commission also noted that the

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6 *FY 2019 Reg Fees NPRM* ¶ 14.

7 *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd. 10,268, 10,273 ¶ 12 (2015) ("*FY 2015 Reg Fees R&O*").

covered services include services provided to common carriers using the submarine cable circuits.[8] But allocation of these services to submarine cable payors goes beyond the mandates of Section 9 of the Communications Act, as amended, which requires the Commission to "reflect the full-time equivalent number of employees within the bureaus and 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."[9] The vast majority of submarine cable system licensees do not receive the benefits of the Commission's activities for services provided to common carriers using the submarine cable circuits. Accordingly, contrary to the Commission's suggestion in 2015 that two FTEs may not be an accurate allocation, NASCA and the SEA-US Licensees believe an allocation close to this number (*e.g.*, 2.5 FTEs) appropriate for the limited Commission activities that benefit submarine cable payors.

Historically, the Commission has recognized the limited activities associated with submarine cable licensees. In 2014, the Commission reduced the revenue requirement by five percent because "the current regulatory fee assessment for the submarine cable category does not fairly take into account the Commission's minimal oversight and regulation of the industry, as demonstrated by NASCA."[10] In 2013, the Commission stated that "fees submarine cable service providers now pay is the sixth highest regulatory fee percentage among all fee categories, notwithstanding the fact that the provision of international submarine cable service involves little regulation and oversight from the Commission after the initial licensing process."[11] The

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8 *Id.*

9 47 U.S.C. § 159(d) (emphasis added).

10 *FY 2014 Reg Fees R&O* ¶ 11.

11 *FY 2013 Reg Fees NPRM* ¶ 27.

Commission concluded that "[t]he Policy Division employees whose work involves the regulation of submarine cable systems and bearer circuits, equates to only two FTEs."[12]

The factual basis for these conclusions remains unchanged. 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. IB has conducted or played a major supporting role in only two submarine cable-specific rulemakings in the last 13 years. 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 rarely interact with the Strategic Analysis and Negotiations Division ("SAND"), which focuses on international negotiations mainly involving radio spectrum (and the staff of which the Commission reallocated as indirect FTEs in 2013).[13]

Almost all of IB's activities involving submarine cables arise from sporadic and infrequent licensing and transaction-reviews, the costs of which the Commission recovers separately through application processing fees. The additional activities related to submarine cable payors include the annual circuit capacity reports and the quarterly reports. All of these activities are minimal:

- Licensing
    - IB reviews cable landing license applications under the Cable Landing License Act. There have been only 37 new-system applications in the last 10 years.
    - IB grants licenses for a 25-year term, so there is essentially no renewal activity.

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[12] *Id. See also FY 2014 Reg Fees R&O* at 10,772 ¶ 11 (stating that "only two FTEs in the International Bureau work on submarine cable issues").

[13] *FY 2013 Reg Fees NPRM* at 7799-7800 ¶ 21.

- 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 of 1934.

- Transaction review
  - IB reviews transactions resulting in assignments and transfers of control.
  - In the past 10 years, IB has received 116 transfer-of-control filings related to submarine cables. In that time, IB received a total of 2,943 transfer-of-control filings. Similarly, in the past 10 years, IB has received 60 assignment filings related to submarine cables out of a total of 2,024 assignment filings. Most of these transfer-of-control and assignment-related filings are simply *pro forma* notices.

- Reporting
  - In 2018, IB updated its Circuit Capacity Reporting Manual with a new Section 43.82 Filing Manual to implement 2017 rule changes for submarine cable circuit capacity reporting. Filers report capacity annually.
  - IB also collects (but generally takes no further action on) quarterly reports from cable landing licensees regulated as dominant, although these licensees represent a small fraction of the providers regulated by IB as dominant.

As the Commission has properly noted in its prior regulatory-fee rulemakings addressing submarine cables, these activities are minimal, particularly when compared with the effort of regulating other consumer-oriented services.

B. Nevertheless, the Commission Has Continued to Over-Recover Regulatory Fees from Submarine Cable Operators for IB FTEs.

Notwithstanding the fact that the Commission's regulatory effort for submarine cable operators equates to a little over two FTEs (an estimated 2.5 direct FTEs), the Commission has continued to over-recover regulatory fees from submarine cable operators for IB FTEs.

- In FY 2013, submarine cable operators were expected to pay $8,530,139, representing 36.3 percent of IB-related regulatory fees and 2.5 percent of all Commission regulatory fees ($339,844,000), even though they accounted for only 7.14 percent of IB direct FTEs

(two out of 28) and 0.44 percent of total Commission-wide direct FTEs (two out of 458).[14]

- In FY 2014, even with the Commission's five-percent decrease in the revenue requirement, submarine cable operators were expected to pay $6,586,731, representing 31.6 percent of IB-related regulatory fees and 1.9 percent of all Commission regulatory fees ($339,847,246), even though they continued to account for only 7.14 percent of IB direct FTEs (two of 28) and approximately 0.44 percent of the total Commission-wide FTEs.[15]
- In FY 2015, the Commission adopted a 7.5-percent decrease in the revenue requirement and has maintained the same percentage allocation since then.
- Based on this allocation, for FY 2019, the Commission proposes that submarine cable payors should pay $6,364,050, or 24.85 percent of the fees allocated to IB.[16] Under this

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[14] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd. 12,351, 12,374, Attachment B (2013) ("*FY 2013 Reg Fees R&O*"). Total IB-related regulatory fees include those expected from: (1) submarine cable operators ($8,530,139); (2) 64 KB terrestrial and satellite circuits ($1,032,277); (3) earth stations ($935,000); (4) GSO space stations ($12,101,700); and (5) NGSO space stations ($899,250) totaling $23,498,366 across the five categories. $8,530,139 / $23,498,366 = 36.3%.

[15] *FY 2014 Reg Fees R&O* at 10,793, Appendix B; *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, Second Further Notice of Proposed Rulemaking, and Order, 29 FCC Rcd. 6417, 6427 ¶ 27 (2014) ("*FY 2014 Reg Fees NPRM*"). The Commission did not provide final direct FTE data in the *FY 2014 Reg Fees R&O*, but the *FY 2014 Reg Fees NPRM* stated that there were 456 direct FTEs. Total IB-related regulatory fees include those expected from: (1) submarine cable operators ($6,586,731); (2) 64 KB terrestrial and satellite circuits ($941,640); (3) earth stations ($1,003,000); (4) GSO space stations ($11,505,600); and (5) NGSO space stations ($797,100) totaling $20,834,071 across the five categories. $6,586,731 / $20,834,071 = 31.6%.

[16] *See FY 2019 Reg Fees NPRM* ¶ 14, Appendix A.

allocation, however, submarine cable operators would continue to pay 1.87 percent ($6,364,050) of all Commission regulatory fees ($340,866,270), though they continue to account for only 0.65 percent of total Commission-wide direct FTEs (2.5 out of 384, as of 2018).[17]

By contrast, in FY 2019, the Commission has proposed that GSO and NGSO satellite operators and earth stations pay aggregated regulatory fees of approximately $18.1 million, representing 71.39 percent of IB-related regulatory fees.[18] As revenue allocations across services are supposed to reflect direct FTE allocations under the Commission's FTE methodology, one would expect to find, based on the FY 2018 numbers, that satellite operators would account for 17.13 direct FTEs and that submarine cable operators would account for 5.96 direct FTEs, out of a total of 24 direct FTEs in IB's Satellite and Policy Divisions. Yet following an extensive examination of FTE data in its *FY 2013 Reg Fees NPRM* and *FY 2013 Reg Fees R&O*, when there were 28 direct FTEs allocated to IB, the Commission allocated 25 direct FTEs from the Satellite Division to satellite space station and earth station regulatees, two direct FTEs from the Policy Division to submarine cable regulatees, and one direct FTE from the IB front office (without allocation to specific regulatees).[19] There has not been any meaningful change in Commission activities for submarine cables since that time to warrant more FTEs dedicated to

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[17] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order and Order, 33 FCC Rcd. 8497, 8497 ¶ 4 n.12 (2018) ("*FY 2018 Reg Fees R&O*") (showing direct FTEs for the four core bureaus). While NASCA recognizes that the direct FTE allocations have since changed because of the creation of the Office of Economics and Analytics, NASCA provides its best estimate because the *FY 2019 Reg Fees NPRM* does not provide total direct FTEs, direct FTE allocations per bureau, or direct FTE allocations per payor.

[18] *FY 2019 Reg Fees NPRM*, Appendix A. Proposed GSO and NGSO and earth station regulatory fees total $18,130,075. $18,130,075 / $25,394,365 = 71.39%.

[19] *FY 2013 Reg Fees R&O* at 12,355-56 ¶ 13, 14; *FY 2013 Reg Fees NPRM* at 7802 ¶ 27.

submarine cable system activities. While the Commission indicated in 2015 that its FTE allocation of two direct FTEs to submarine cable regulatees may not have accounted for all of the activities when it included activities for common carriers that use submarine cable circuits, as explained above, these are not activities that benefit submarine cable payors. Estimating that 2.5 direct FTEs are allocated to submarine cable regulatees, the regulatory fee percentages between these categories still do not reflect an equitable balance based on the benefits received by each payor category. Clearly, the revenue allocation between submarine cable operators and satellite-related services is erroneous and requires further correction.

C. The Over-Recovery of Regulatory Fees from Submarine Cable Operators Results from the Commission's Failure to Adjust Downward the Revenue Requirement Previously Assigned for International Bearer Circuits.

The Commission has continued to over-recover regulatory fees from submarine cable operators due to an insufficient downward adjustment of the revenue requirement previously assigned for international bearer circuits and now split between submarine cable operators and terrestrial and satellite circuits—two of the five categories of IB regulatees. NASCA and the SEA-US Licensees believe that the over-recovery does not result from the split between submarine cable operators (87.6 percent) and terrestrial and satellite circuits (12.4 percent), which the Commission made in 2009 when it adopted a new system-based methodology for submarine cable operators and abandoned the capacity-based fee methodology that had greatly distorted the market for submarine cable capacity connecting the United States.[20] In fact, the Commission has never clearly identified any direct FTEs associated with these circuits.

[20] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, 24 FCC Rcd. 4208 (2009) ("*2009 Submarine Cable Order*").

Instead, NASCA and the SEA-US Licensees believe that the over-recovery results from the fact that the combined revenue requirement for submarine cable operators and terrestrial and satellite circuits is still set too high as compared with that for the other three categories of IB regulatees (GSO, NGSO, and earth station) that account for the bulk of IB's regulatory activity and direct FTEs. The current respective revenue requirements for submarine cable operators and terrestrial and satellite circuits on the one hand and GSO space stations/NGSO space stations/earth stations on the other simply bear no relation to the underlying direct FTEs attributable to those services.

D. The Commission Should Allocate 10.42 Percent of the Current IB Revenue Requirement to Submarine Cable Operators, Consistent with the FTE Data.

On its face, the current allocation and collection of regulatory fees for submarine cable operators is inconsistent with Section 9 and will remain inconsistent with Section 9 until the reallocation is complete and submarine cable operators are no longer paying for direct FTEs providing regulatory benefits exclusively to other payors. To resolve the legacy revenue requirement from the old international bearer circuits category, which lacks any factual basis in current FTE allocations,[21] the Commission should allocate 10.42 percent of the IB revenue requirement to submarine cable operators (based on 2.5 direct FTEs out of 24 FTEs, from 2018 data). Applying this allocation percentage to the proposed recoveries in the *FY 2019 Reg Fees*

[21] *See FY 2013 Reg Fees R&O* at 12,355 ¶ 12 (stating that "[w]e find no persuasive argument for perpetuating the use of 14-year-old FTE data as the basis for regulatory fees in FY 2013").

NPRM,[22] the Commission should seek $2,645,071 from submarine cable operators.[23] The balance of the FY 2019 IB revenue requirement of $22,749,094 would be allocated to other categories of IB payors.

While NASCA and the SEA-US Licensees are sympathetic to the potential impact of significant increases for other payors—and NASCA has stated as much in past regulatory-fee rulemakings—the fact remains that submarine cable operators have been paying disproportionately—and therefore unlawfully—high fees for years and subsidizing the very payors who would pay more as a consequence of the reallocation: satellite space station and earth station operators. Notably, the Commission did not impose a specific cap for fee increases in FY 2018 and has not proposed one for FY 2019.

Only by aligning the revenue requirements with the FTE data can the Commission comply with the requirements of Section 9. Regulatory fees must "reflect the full-time equivalent number of employees within the bureaus and 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."[24] They do not, as the current regulatory fees paid by submarine cable operators relate largely to regulatory benefits provided to satellite payors. The

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[22] NASCA and the SEA-US Licensees share this calculation for illustrative purposes only and recognize that it does not take into account further potential reallocations that could affect IB payors, such as the reallocation of indirect FTEs as direct FTEs for non-IB payors, or changes in the payor categories.

[23] *FY 2019 Reg Fees NPRM*, Appendix A. Total proposed IB fees for FY 2019 are $25,394,165. Applying NASCA's proposed allocation, 10.42 percent, equals approximately $2,645,071.

[24] 47 U.S.C. § 159(d).

7.5-percent reduction from FY 2015 was appreciated by submarine cable operators but remains legally insufficient.

II. The Commission Should Reject the Concept that the Submarine Cable System Fee Tiers Require Updating.

In addition to resolving the disproportionate fee allocation discussed above, the Commission should move away from the submarine cable fee tiers, consistent with the original intent behind the industry proposal to modify the submarine cable fee methodology adopted by the Commission in 2009.[25] The 2009 methodology was designed to eliminate the need to assess capacity as a basis for regulatory fees. Prior to 2009, the fee assessment process was rife with unfairness and strategic behavior that punished compliant companies while failing to take action against non-compliant companies. Under the pre-2009 framework, the Commission had relied on carriers self-reporting their regulatory fee obligations based on active international bearer circuits. In 2009, the Commission did away with the capacity-based methodology, adopting a flat, per-system fee: the full fee for a >20 Gbps submarine cable system. The FCC created lower-capacity tiers to grandfather older, low-capacity systems mostly located in the Caribbean, with the idea that the tiers would disappear as those systems were retired.[26] The intention behind the methodology was working: in 2018, all but two cable systems were paying in the top category.[27] But in 2018, the Commission unnecessarily revised the fee categories to update the

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[25] *2009 Submarine Cable Order* at 4213 ¶ 10.

[26] While the *2009 Submarine Cable Order* contemplated that it would revise the tiers as cable systems grew larger, *see id.* at 4215 ¶ 18, such revision was not contemplated by the industry proposal which the Commission adopted; instead, the industry contemplated grandfathering only for the existing small systems, with the eventual move to a flat fee for all systems.

[27] *Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order and Notice of Proposed Rulemaking, 33 FCC Rcd. 5091, 5095 ¶ 8 (2018).

tiers.[28] The Commission's updated categories backtrack from the purpose behind the 2009 methodology and instead resurrect incentives for cable operators to underreport capacity.

The Commission should reject a tiered system altogether, as capacity has zero to do with regulatory effort or FTEs, and therefore nothing to do with the quantum of the regulatory fee. A cable's size does not make any difference in regulatory burden or the "benefits provided to" submarine cable licensees "by the Commission's activities."[29]

Further, the concept of capacity tiers is particularly inappropriate for certain submarine cable systems like SEA-US. The SEA-US cable system consists of multiple segments, each of which have different numbers of fiber pairs with variable lit capacity and design capacity (using current technology). Sometimes, capacity for a system varies between the international and domestic segments of a submarine cable system.

To simplify the collection of regulatory fees, the Commission should not base its payment methodology on a system's capacity. The Commission should reject tiers and move back to a per-system fee, without regard to a system's capacity.

III. Until Fee Tiers Are Phased Out, the Commission Should Clarify the Data To Be Used In Assigning Submarine Cable Systems to Particular Fee Tiers and Confirm the Accuracy of the Payment Units.

IB's revisions to its 43.82 Filing Manual for circuit capacity reporting—changing the definition of "available capacity" to design capacity—has led to industry confusion and will potentially lead to over-recovery of submarine cable regulatory fees. NASCA and the SEA-US Licensees therefore urge the Commission to clarify the data used for assessing regulatory fees

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[28] *Id.* at ¶ 9.

[29] *See* 47 U.S.C.§ 159(d).

and to recalculate the payment units for submarine cable payors to account for the systems that will move up to the highest fee tier due to their design capacity.

IB's 2018 revised 43.82 Filing Manual substantially changed how cable operators report capacity, without providing opportunity for notice-and-comment rulemaking. IB's 43.82 Filing Manual now requires cable landing licensees to report design capacity rather than lit capacity because of its revised definition of "available" capacity.[30] While IB made this revision under the guise of "clarif[ying]" its prior definition,[31] this went beyond a mere clarification. The revised definition substantially changed the reporting requirements for submarine cable systems. The prior definition of "available capacity" was "all of the capacity currently available on the cable using equipment currently used on the cable."[32] Because a cable owner must install transmission equipment to light additional capacity, the industry generally understood the previous definition of available capacity to mean lit capacity only.

It makes little sense to report a system's design capacity. Design capacity is not static but based on current technology, which evolves over time, meaning that reliance on design capacity to assess regulatory fees would still require confirmation and updating, with attendant administrative burdens and potential for non-compliance.

The Office of the Managing Director stopped requiring separate reporting of capacity for regulatory fee purposes in 2009 and has since relied on IB circuit capacity data, meaning that

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30 *See International Bureau Releases Revised Filing Manual for Section 43.82 Circuit Capacity Reports*, Public Notice, 33 FCC Rcd. 12,517, Filing Manual for Section 43.82 Circuit Capacity Reports at 12,524 ¶ 26 (2018).

31 *International Bureau Releases Revised Filing Manual for Section 43.82 Circuit Capacity Reports*, Public Notice, 33 FCC Rcd. at 12,517.

32 Filing Manual for Section 43.62 Annual Report ¶ 136 (Feb. 2016), https://www.fcc.gov/document/filing-manual-section-4362-annual-reports-february-2016.

submarine cable operators have historically paid based on active, *i.e.*, lit capacity.[33] IB's revision to the definition of "available capacity" to design capacity means that cable operators will have to pay for large amounts of unlit capacity and will face enormous fluctuations in their fee category from last year, without having made any changes to their systems. Making such a change—which has implications on submarine cable operators' fee obligations—exceeds IB's delegated authority[34] and violates the Administrative Procedures Act.[35] Moreover, in delegating authority to IB to revise the Filing Manual, the Commission expressly directed IB to seek public comment on the revisions.[36] This change in methodology has significant fairness implications. For example, based on the design capacity reported in their cable landing license application, the SEA-US Licensees' fees will double under this proposed methodology.

To the extent the Commission does not make further adjustments to eliminate the fee tiers, as proposed above, the Commission must—at a minimum—clarify the data to be used in assigning submarine cable systems to particular fee tiers. This clarification is necessary to confirm that all operators pay based on the same metrics.

Significantly, the Commission's payment units for submarine cable payors do not appear to account for the shift that will result now that submarine cable operators must report design

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[33] *See, e.g.*, *Section 43.62 Reporting Requirements for U.S. Providers of International Services*, Report and Order, 32 FCC Rcd. 8115, 8118 ¶ 5 (2017) ("*Section 43.62 Report and Order*") (stating that "the Commission also uses . . . the submarine cable capacity data to administer the annual regulatory fees established in Section 9 of the Communications Act of 1934, as amended.").

[34] *Id.* at 8133 ¶ 39 (delegating authority to IB to "revise the Filing Manual to implement the modifications to the circuit capacity reporting requirements discussed" in the Order).

[35] *See* 5 U.S.C. § 553.

[36] *Section 43.62 Report and Order* at 8133 ¶ 39 (directing IB to "issue a public notice *seeking comment* on the revised Filing Manual") (emphasis added).

capacity rather than lit capacity (assuming payors have correctly updated their filings). The fact that the payment schedule does not take these fluctuations into account further demonstrates that there is widespread confusion about what should or is expected to be reported as capacity data. According to a review of the design capacity that submarine cable licensees reported in their submarine cable landing license applications, approximately 27 systems[37] should now be reporting in the highest fee tier (greater than 4,000 Gbps), rather than the 19 systems included in the highest fee tier in FY 2018.[38] This is merely an estimate, however, given that design capacity is not static; many systems' design capacity has likely changed since the license application. In any event, this indicates that there will be large fluctuations in the fee tiers that the *2019 FY Report and Order* does not consider. Because more systems will pay in the top fee tier, this will result in over-recovery of submarine cable regulatory fees unless the Commission addresses the change in capacity reporting. Accordingly, the Commission should recalculate the payment units to account for submarine cable operators reporting design capacity rather than lit capacity.

[37] This includes systems that would presumably move up to the top fee tier as well as the new systems that entered into service.

[38] *FY 2018 Regulatory Fees, Listing of Submarine Cable System Owners*, Public Notice (Sept. 4, 2018), available at https://docs.fcc.gov/public/attachments/DOC-353921A1.pdf.

CONCLUSION

For the foregoing reasons, NASCA and the SEA-US Licensees urge the Commission to reduce the revenue requirement for submarine cable systems and align the submarine cable system fee with the Commission's FTE data. The Commission should also reject the notion that the submarine cable fee tiers need updating and move ultimately to a per-system flat fee as systems paying partial-unit fees under the 2009 methodology are eventually retired. Finally, until the fee tiers are phased out, NASCA and the SEA-US Licensees encourage the Commission to clarify the data used for this year's fee assessment and urge the Commission to confirm the accuracy of the submarine cable payment units, given that IB revised the circuit capacity filing manual to require reporting of design capacity without notice-and-comment rulemaking.

Respectfully submitted,

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