Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF INCOMPAS

INCOMPAS, the Internet and competitive networks association, files these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") seeking input on its proposed regulatory fees for fiscal year ("FY") 2019.[1] INCOMPAS's comments are limited to the Commission's regulatory fee proposal for submarine cable licensees.

The NPRM proposes to increase FY2019 regulatory fees for submarine cable licensees by approximately 28 percent across each of the five existing capacity tiers. This increase is far greater than the approximately five percent increase in the Commission's overall budget.[2] Because the NPRM is devoid of any justification for this substantial increase in submarine cable regulatory fees, and because it is inconsistent with the Commission's statutory duty in Section 9 of the Communications Act to set fees that are "reasonably related to the benefits provided to the payor of the fee by the Commission's activities,"[3] the increase is unlawful and must be adjusted. Indeed, the Commission's entire approach to apportioning its regulatory fees for submarine cable landing licensees on the basis of capacity should change, as that approach—which is based on a

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[1] *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Notice of Proposed Rulemaking, FCC 19-37, MD Dkt. No. 19-105 (rel. May 8, 2019) (hereinafter "NPRM").

[2] *Compare* NPRM ¶ 1 ($339 million), *with Assessment and Collection of Regulatory for Fiscal Year 2018*, Report and Order and Notice of Proposed Rulemaking, FCC 18-65, MD Dkt. No. 18-175 at ¶ 1 (rel. May 22, 2018) ($322 million).

[3] 47 U.S.C. § 159(d).

decade-old agreement by a small number of industry participants—is not reasonably related to either the Commission's costs of administering its licensing regime or to the value of any benefits provided to licensees.

To correct these inconsistencies and ensure that the Commission's proposed fees for FY 2019 adhere to the agency's statutory duty, the Commission should first confirm that its allocation of full-time equivalents ("FTE") and indirect costs to the International Bureau ("IB") are accurate. Even if that is the case, the Commission should increase regulatory fees for submarine cable licensees only insofar as necessary to align with the additional costs it has incurred or will incur in FY 2019 as a result of its administration of submarine cable licenses; and it should recover its costs in FY 2019 from submarine cable licenses on a *pro rata* basis per license rather than on a capacity basis. To the extent the Commission confirms that additional costs should still be recovered from IB, those costs would more rationally be recovered from other IB licensees for which the cost of Commission regulation, or benefits received thereby, have increased. This approach will help ensure both that the Commission's regulatory fees are "reasonably related to the benefits provided to the payor" and that licensees that happen to own or control submarine cables with higher capacities (which impose no added cost or burden on the Commission) are not unfairly saddled with having to finance a disproportionate share of the Commission's operating costs.

I. THE PROPOSED FEE INCREASE IS UNSUPPORTED AND INCONSISTENT WITH SECTION 9 OF THE COMMUNICATIONS ACT.

The NPRM proposes to increase the regulatory fees applicable to submarine cable licensees by approximately 28 percent in FY 2019 across each of the five capacity tiers used in

prior fee orders over the last decade.[4] Section 9 of the Communications Act, however, requires the Commission to amend its regulatory fee schedule each year to ensure that "such fees 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."[5]

This means that to effectuate its proposed 28 percent fee increase—which is far in excess of the increase in the Commission's overall budget—the Commission must demonstrate a concomitant increase in "the benefits provided" to submarine cable licensees, as compared to other types of licensees, "by the Commission's activities." The NPRM fails to do that. The Commission's own articulation of the relevant "Commission's activities" vis-à-vis submarine cable licensees has not substantively changed since at least 2015.[6] No portion of the NPRM identifies *any* change to the nature or extent of the Commission's activities, the benefits provided thereby, or to the cost of the Commission's actions that could justify the proposed increase for submarine cable licensees, which is disproportionately high relative to other IB licensees. Nor are any changes in the Commission's conduct or the benefits provided to submarine cable licensees otherwise apparent. Since last year, there has been no change in submarine cable

[4] *Compare* NPRM App. B, *with* NPRM App. G.

[5] 47 U.S.C. § 159(d).

[6] *Compare* NPRM App. F at n. 20, *with Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd 10268, 10273, ¶ 12 (2015).

reporting requirements, only one new submarine cable license was granted, and only five new submarine cables were put into service.[7]

While a number of submarine cable license applications may be pending before the agency, the Commission's costs in reviewing those applications already is (or should be) covered by the $19,855 application fee.[8] If this fee is insufficient to cover the cost of evaluating license applications, then the most equitable and appropriate solution would be to increase the one-time *application* fee paid by the applicant (the cost-causer) rather than to impose a substantial increase on all submarine cable licensees through the annual *regulatory* fee, which bears no relation to the number or quality of pending applications that rise or fall in any given year.

The NPRM does not provide sufficient justification for its proposed 28 percent fee increase beyond describing changes to the number of FTE allocations and presumably some increase in indirect or common costs across the Commission. But this, too, ignores Section 9's statutory mandate to adjust the resulting calculation to account for factors that are reasonably related to the benefits provided to submarine cable licensees.[9] The NPRM even acknowledges that "under both old and new versions of the [Communications Act], regulatory fees are initially apportioned across fee categories based on the number of FTEs and adjusted 'to take into

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[7] *See* Public Notice, Actions Taken Under Cable Landing License Act, Report No. SCL-00226 (IB Oct. 5, 2018) (granting a cable landing license to Crosslake Fiber USA LP); *see also* IBFS Licensing Database.

[8] This is the application fee for a cable landing license application filed by a non-common carrier. *See* FCC, International and Satellite Services Fee Filing Guide at 11, *available at* https://docs.fcc.gov/public/attachments/DOC-353914A1.pdf; *see also* 47 C.F.R. § 1.767(e).

[9] 47 U.S.C. § 159(d); *see also* NPRM ¶ 13 ("We propose to allocate the total amount to be collected among the regulatory fee categories within each of the core bureaus and base the FY 2019 FTE allocations on a percentage that proportionally reflects the changes in FTEs in the core bureaus over the course of FY 2019."). Unlike FY 2018, the NPRM does not disclose the number of FTEs for each core bureau. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order and Notice of Proposed Rulemaking, FCC 18-65, MD Dkt. No. 18-175 at ¶ 3 n.10 (rel. May 22, 2018).

account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities.'"[10] The NPRM fails to do this. In short, the Commission's proposed regulatory fee for submarine cable licensees in FY 2019 is flawed and, absent new supporting evidence, must be adjusted downward to ensure that it complies with Section 9 of the Communications Act.

II. THE CAPACITY-BASED FEE METHODOLOGY FOR SUBMARINE CABLES IS OUTDATED AND INEQUITABLE.

Given the RAY BAUM'S Act of 2018's mandate for the Commission to engage in a rulemaking to evaluate its regulatory fees, the FCC this year has a unique mandate to assess its methodology for setting those fees.[11] The NPRM accordingly seeks comment "on whether our fee setting methodologies could be improved or updated to ensure that our regulatory fees are more equitable or otherwise streamlined to make the fee schedule simpler."[12] The NPRM acknowledges that "[t]he Commission has stated that three overarching goals for assessing regulatory fees are fairness, administrability, and sustainability."[13] Here, the lack of justification for the 28 percent fee increase is compounded by the fact that the underlying methodology the Commission uses to allocate its proposed fee among submarine cable licensees is inequitable and unreasonable because the brunt of the fee burden falls on larger capacity cables even though there is little or no connection between the capacity of a submarine cable and either the

[10] NPRM ¶ 8 (quoting 47 U.S.C. § 159(d)).

[11] *See* Consolidated Appropriations Act, 2018, Division P - RAY BAUM'S Act of 2018, Title I, FCC Reauthorization, Public Law N. 115-141, § 102(e), 132 Stat. 348 (2018).

[12] NPRM ¶ 31.

[13] *Id.* ¶ 9 n.33.

associated administrative costs to the Commission or the benefits provided to the licensee in exchange for its fee.

The current methodology for calculating regulatory fees from international submarine cable operators dates back to 2008. It is based on an unopposed "Consensus Proposal" submitted by a group of submarine cable operators around that time.[14] Prior to FY 2008, submarine cable regulatory fees varied, depending upon whether the operator was a common carrier.[15] Under the Consensus Proposal, which was "supported by a majority of the submarine cable community" as it then existed, the distinction between common carriers and non-common carriers was removed and the capacity-based allocation of costs in use today was adopted.[16] In addition to the overall shifts in the submarine cable industry detailed below, the majority of current submarine cable license applicants were not signatories to the 2008 Consensus Proposal, further undercutting the extent to which the methodology in that 2008 proposal represents an industry consensus today. The Commission also did not meaningfully address the rationale for this capacity-based approach at the time, beyond noting that it was based on an unopposed proposal from submarine cable operators, was "more equitable" than the prior distinction based on common carrier status, and would encourage compliance with regulatory fee requirements.[17]

While this capacity-based approach might have made sense to some a decade ago as an expedient compromise during a transitional period, that period has passed. The market for submarine cable services and the nature and identity of submarine cable licensees have changed

[14] *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, FCC 09-21, MD Dkt. No. 08-65 et al. at ¶¶ 1, 2 (rel. Mar. 24, 2009) (hereinafter "FY 2008 NPRM"); *see also* NPRM App. F at ¶ 22 ("The submarine cable regulatory fee methodology is based on an industry proposal adopted in 2009.").

[15] FY 2008 NPRM ¶ 4.

[16] *Id.* ¶¶ 7, 15.

[17] *Id.* ¶¶ 1–2, 7–8.

dramatically since 2009 when the Commission adopted the capacity-based fee approach. Allocating submarine cable regulatory fees on the basis of capacity—and based on a proposal by a group that did not even include many of today's submarine cable licensees—is no longer equitable. A new approach is necessary.

When the Commission adopted its capacity-based fee structure, there were 31 "large" submarine cable systems (20 Gbps or greater) and 11 "small" submarine cable systems (smaller than 20 Gbps).[18] Due to advances in technology and exponential increases in data usage and thus capacity requirements, newer submarine cables fall overwhelmingly in the largest capacity tier of 4,000 Gbps as of FY 2018. Indeed, of the 13 currently pending applications for new submarine cable licenses, 12 are for proposed cables with greater than 4,000 Gbps capacity, and the remaining cable is in the second highest capacity tier (between 1,000 and 4,000 Gbps).[19] Given this substantial shift in the submarine cable industry and the capacity of the cables, average fees per cable system have increased dramatically and the overall regulatory fee burden for submarine cables is now borne almost exclusively by operators of large capacity cables. This outcome is highly inequitable, as these higher capacities have very little (if any) effect on the activities the Commission must undertake to regulate submarine cables and they have no direct correlation with the benefits conferred on submarine cable licensees from the Commission's regulatory activities.

The NPRM describes the Commission's activities with respect to submarine cables as including the review and grant of licenses (and transfers, assignments, and modifications

[18] *Id.* ¶¶ 15, 16.

[19] *See* IBFS Licensing Database.

thereof),[20] benchmarks enforcement, protection from anticompetitive actions by foreign carriers, foreign ownership rulings, section 214 authorizations, and negotiations and representation of U.S. interests before international organizations.[21] None of these activities bears any relationship to the size or capacity of a submarine cable, and licensees of higher capacity cables do not receive any special benefits or impose any additional costs on the Commission as compared to their smaller capacity counterparts. The Commission undertakes these activities regardless of the capacity of the submarine cable, and the effort required to undertake them does not vary based on capacity. Licensees of submarine cables also do not receive additional commercial benefits in proportion to the capacity of their facilities, because alternative factors such as the route and utilization of the cable also are relevant from a commercial perspective. To nevertheless tie the annual regulatory fee to the capacity of the submarine cable is inappropriate and inequitable.

The inequities of this problematic fee structure are only increasing as time passes. Given that all but one of the pending applications for submarine cables is designed to be in the highest capacity tier, the current fee structure is likely to produce significant increases in Commission fee revenue with no corresponding burden on the Commission or benefits to licensees. For instance, if just four of the 12 pending applications for 4,000 Gbps cables are granted with the cables put into service next year, then based on the NPRM's proposal the Commission will collect more than $800,000 in additional regulatory fees from those cables alone. There is no indication in the NPRM or elsewhere that the Commission's costs vis-à-vis submarine cable regulation will increase by this amount or even by a small fraction of this amount, and it stands

[20] As indicated above, review of license applications should already be covered by the substantial application fees for those licenses.

[21] NPRM App. F at n.20.

to reason that they will not. The current approach to submarine cable regulatory fees needs to be corrected before it becomes even more inequitable.

III. THE COMMISSION SHOULD RECOVER APPROPRIATELY-REDUCED SUBMARINE CABLE REGULATORY FEES ON A *PRO RATA* BASIS PER LICENSE.

Given the inequities in the current capacity-based regulatory fee regime for submarine cable licensees, the Commission should change its approach and instead collect its costs for regulating submarine cables among submarine cable licensees on a *pro rata* basis per license. This would lead to a more equitable distribution of fees and comport with the Commission's statutory duty to tie fee modifications to corresponding shifts in the Commission's services and the benefits of those services to licensees.

A *pro rata* apportionment of regulatory fees is already known and employed by the Commission in related contexts. For instance, the annual regulatory fees for earth and space stations are fixed and licensees do not pay different annual fees based on capacity or some other factor that may differ among them.[22] INCOMPAS does not believe that the proposed change to a *pro rata* fee structure per license would result in significant additional fees for any current licensee such that a transition period would be necessary. If, however, the Commission determines otherwise, then it could consider a reasonably short transition period prior to implementation of the *pro rata* fee structure.

[22] *See* NPRM App. B (flat fee proposal for earth stations and space stations).

CONCLUSION

INCOMPAS supports the Commission's stated objective of assessing regulatory fees in a manner that is fair, administrable, and sustainable. The regulatory fees proposed for submarine cables for FY 2019 do not meet this objective. They are inconsistent with the Commission's statutory duty to set fees that are reasonably related to the benefits provided by the Commission's activities to licensees, and they are inequitable. The Commission therefore should reduce its proposed increase to these regulatory fees so they align with statutory requirements, and it should change its approach to collecting those fees from capacity-based to *pro rata* per license.

Respectfully submitted,

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