

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of

Universal Service Contribution Methodology

A National Broadband Plan For Our Future

WC Docket No. 06-122

GN Docket No. 09-51

JOINT COMMENTS OF UNDERSEA CABLE OPERATORS

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EXECUTIVE SUMMARY

The FNPRM’s proposals to eliminate the international-only exemption and the limited interstate revenues exemption (“LIRE”) violate the unambiguous language of Section 254(d); are inconsistent with the Fifth Circuit’s holding in *TOPUC v. FCC*, U.S. WTO obligations, and the principles articulated in the Commission’s own *Benchmarks Order*; and would cause severe distortions in the market for international undersea cable capacity. These proposals, if adopted, could drive cable landings and Internet content offshore. For these reasons, the undersigned Undersea Cable Operators urge the Commission to reject the reject the FNPRM’s proposals.

Inconsistency with Section 254(d). Section 254(d) requires the Commission to retain the international-only exemption, as it grants the Commission jurisdiction over interstate providers only. Section 254(d)’s unambiguous language denies the Commission jurisdiction to assess Universal Service Fund (“USF”) contributions on providers of exclusively foreign communications. The FNPRM’s novel, revisionist reading of Section 254(d) is inconsistent with the unambiguous statutory language and the Commission’s longstanding interpretation thereof. Congress—and not the Commission—created the international-only exemption by statute. Although the Commission has long sought the ability to assess USF contributions on all international-services revenues, Congress has consistently declined to grant the Commission such authority. Even if Section 254(d)’s language were unambiguous—which it is not, rendering unnecessary any recourse to the legislative history—it is clear that Congress considered and rejected language that would have permitted assessments on providers of exclusively international services. The Commission’s ancillary jurisdiction and general rulemaking and implementation powers do not permit the Commission to override the express limitations of Section 254(d).

Inconsistency with TOPUC v. FCC and Section 254(d). Section 254(d) and the Fifth Circuit’s decision in *TOPUC v. FCC* require the Commission to retain the LIRE or its functional equivalent. The Fifth Circuit found that the Commission’s interpretation of Section 254(d)’s “equitable and nondiscriminatory” language—whereby the Commission assessed all end-user interstate and foreign communications revenues if a provider had any interstate revenues—allowed the Commission to impose prohibitive costs on a carrier whose USF contributions exceeded its interstate revenues and was therefore arbitrary and capricious and manifestly contrary to the statute. The court further found that the Commission’s interpretation was discriminatory because it harmed certain providers of foreign communications more than others, requiring such providers to incur a loss to participate in interstate service. Finding that the court’s ruling required it to create a new exception, the Commission created the LIRE. This exception ensures that a provider of predominantly foreign communications, such as an international undersea cable operator, does not suffer inequitable or discriminatory treatment simply because it happens to provide—whether advertently or inadvertently—incidental interstate communications in connection with its principal foreign-communications business.

Severe Economic Distortions to the Market for International Undersea Cable Capacity. By eliminating the international-only exemption and/or the LIRE, the FNPRM’s proposals would cause serious economic distortions to the market for international undersea cable capacity. They would also reintroduce the same kinds of economic distortions and practical problems caused by the capacity-based methodology for annual regulatory fees on undersea cable operators (“IBC fees”)—a methodology the Commission replaced in 2009. With respect to existing undersea cable systems, elimination of the international-only exemption and/or the LIRE would:

- Eliminate operating margins for international undersea cable operators, which have, at best, a limited ability to recover their costs by passing USF assessments through to customers, particularly for those located outside the United States;
- Encourage strategic behavior of non-compliant operators, which offer lower pricing to customers and undermine the efforts of compliant operators to establish a regulatorily-compliant capacity price;
- Burden each international undersea cable operator with the task of trying to renegotiate hundreds of IRUs and capacity leases—customized contracts that differ considerably from arrangements for the sale of prepaid calling cards or retail consumer telecommunications services—to permit the operator to pass through the costs of USF contributions;
- Reduce competition in the market for domestic services, in the event the Commission were to retain the international-only exemption; and
- Threaten undersea cable operators, if other countries were to make similar assessments on the same revenue streams for international services, with assessments that could quickly equal the total revenues for an undersea cable system, as many undersea cable systems land in multiple countries and sell capacity on an end-to-end or ring-configuration basis.

By creating unfavorable economic conditions for U.S. landings, each of the FNPRM's proposals could also deter new cable landings in the United States and even encourage operators to land in other countries, particularly Canada. These proposals, if adopted, could also encourage Internet content providers (including online video providers) to shift content creation and storage outside the United States. Such outcomes would harm the telecommunications, Internet, and entertainment sectors of the U.S. economy and pose national security risks.

Weak Jurisdictional Nexus, Subsidization of U.S. Universal Service Programs by Foreign Customers and Carriers, and Inconsistency with Benchmarks Order Principles. By eliminating the international-only exemption and/or the LIRE, the FNPRM would improperly subsidize domestic universal service programs with contributions from international undersea cable operators for activities they conduct predominantly in foreign jurisdictions or beyond the limits of any nation's jurisdiction. The FNPRM assumes—improperly—that all of the revenues

for such end-to-end capacity services are properly assessable simply because the capacity may originate or terminate in the United States (though not necessarily even on the PSTN). In fact, most of those revenues are associated with transport across geographical jurisdictions beyond the 12-nautical-mile limits of U.S. territory, and with origination or termination (whether on the PSTN or not) in one or more foreign countries. Consequently, the FNPRM's proposals are inconsistent with the rationale of the *Benchmarks Order*, in which the Commission articulated the principle that carriers and their customers in one country should not subsidize another country's universal service program.

Inconsistency with U.S. WTO Obligations. The FNPRM's proposals, if adopted, would violate U.S. commitments under the WTO General Agreement on Trade in Services by imposing non-transparent, discriminatory, competition-distorting, and excessively burdensome universal service measures. Neither of the FNPRM's proposals would satisfy the Reference Paper requirements for transparent, non-discriminatory and competitively neutral universal-service obligations that are not more burdensome than necessary—principles originally proposed by the United States.

Overly Broad Remedy that Would Trade One Set of Economic Distortions for Another. The FNPRM's proposed remedies are overly broad and purport to remedy one economic distortion involving pre-paid calling card providers while creating new economic distortions in the market for international undersea cable capacity. The Commission should not over-generalize the problem identified in the FNPRM with respect to pre-paid calling card providers by imposing a remedy affecting all international service providers, much less one creating new economic distortions.

International Services Best Excluded under a Connections-Based Methodology. If the Commission adopts a connections-based methodology for USF contributions, it should exclude international services altogether. There is no meaningful way to fit foreign-originating or foreign-terminating services into a connections-based methodology.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
I. Background	2
A. The Commenters.....	2
1. Level 3 Communications, LLC, GT Landing II Corp., and Global Crossing Americas Solutions, Inc.	2
2. Office des postes et télécommunications de Polynésie française	3
3. PPC-1 Limited and PPC-1 (US), Inc.	3
4. Southern Cross Cables Limited and Pacific Carriage Limited	3
B. Relevant Aspects of the Undersea Cable Business.....	4
II. Section 254(d) Requires the Commission to Retain the International-Only Exemption, as It Grants the Commission Jurisdiction over Interstate Providers Only	5
A. Section 254(d)'s Unambiguous Language Denies the Commission Jurisdiction to Assess USF Contributions on Providers of Exclusively Foreign Communications	6
B. The FNPRM's Novel, Revisionist Reading of Section 254(d) Is Inconsistent with the Unambiguous Statutory Language and the Commission's Longstanding Interpretation Thereof	8
C. Congress Clearly Intended to Exclude Providers of Exclusively Foreign Communications from Contributing	11
D. The Commission's Ancillary Jurisdiction and General Rulemaking and Implementation Powers Do Not Permit the Commission to Override the Express Limitations of Section 254(d)	13
III. Section 254(d) and the Fifth Circuit's Decision in <i>TOPUC v. FCC</i> Require the Commission to Retain the LIRE or Its Functional Equivalent	14
IV. By Eliminating the International-Only Exemption and/or the LIRE, the FNPRM Would Cause Serious Economic Distortions to the Market for International Undersea Cable Capacity	17

A.	Each of the FNPRM’s Proposals Would Cause Grave Economic Harms to Operators of Existing Undersea Cables—Harms Similar to Those Posed by IBC Fees.....	17
B.	Each of the FNPRM’s Proposals Would Deter New U.S. Cable Landings.....	21
V.	By Eliminating the International-Only Exemption and/or the LIRE, the FNPRM Would Improperly Subsidize Domestic Universal Service Programs with Contributions from International Undersea Cable Operators for Activities They Conduct Predominantly in Foreign Jurisdictions or Beyond the Limits of Any Nation’s Jurisdiction	23
VI.	The FNPRM’s Proposals, If Adopted, Would Violate U.S. Commitments Under the WTO General Agreement on Trade in Services by Imposing Non-Transparent, Discriminatory, Competition-Distorting, and Excessively Burdensome Universal Service Measures	25
VII.	The FNPRM’s Proposed Remedies are Overly Broad and Purport To Remedy One Economic Distortion Involving Pre-Paid Calling Card Providers While Creating New Economic Distortions in the Market for International Undersea Cable Capacity	28
VIII.	If the Commission Adopts a Connections-Based Methodology for USF Contributions, It Should Exclude International Services Altogether.....	29
	CONCLUSION.....	30

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JOINT COMMENTS OF UNDERSEA CABLE OPERATORS

The proposals to eliminate the “international-only” exemption and the limited interstate revenues exemption (“LIRE”) are wholly inconsistent with the unambiguous language of the Communications Act of 1934, as amended (“Communications Act”)—both as written and as long interpreted by the Commission and the courts—and would cause severe economic distortions in the market for international undersea cable capacity serving the United States.¹ As a matter of law and policy, the undersigned Undersea Cable Operators urge the Commission to reject these FNPRM proposals.

These comments consist of eight parts. In part I, the Undersea Cable Operators briefly describe their individual undersea cable activities and provide relevant industry background. The Undersea Cable Operators then explain: why the law requires the Commission to retain the international-only exemption (part II); why the law and court interpretation thereof requires the Commission to retain the limited interstate revenues exception (“LIRE”) or its functional

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46, ¶¶ 193-208 (rel. Apr. 30, 2012) (“*FNPRM*”).

equivalent (part III); why the FNPRM's proposals would cause severe economic distortions to the market for international undersea cable capacity serving the United States (part IV); why the Commission lacks a strong jurisdictional nexus for assessing Universal Service Fund ("USF") contributions on end-to-end international undersea cable capacity and would contradict its previous statements opposing subsidization of one country's universal service programs by other countries' consumers and carriers (part V); why the FNPRM's proposals would violate U.S. obligations within the World Trade Organization ("WTO") (part VI); why the FNPRM's proposed remedies are overly broad and would merely trade one set of economic distortions for another (part VII); and why the Commission should exclude international services altogether in the event it were to adopt a connections-based methodology (part VIII).

I. Background

A. The Commenters

1. Level 3 Communications, LLC ("Level 3 LLC"), GT Landing II Corp. ("GT Landing II"), and Global Crossing Americas Solutions, Inc. ("GCAS") (collectively, "Level 3 Licensees")

Level 3 LLC and GT Landing II jointly own and operate a trans-Atlantic undersea cable system, with Level 3 LLC's interest known as the Yellow system and GT Landing II's interest known as Atlantic Crossing-2 ("AC-2"). GT Landing II owns and operates the U.S.-territory portions of the following undersea cable systems, for which it holds cable landing licenses: Atlantic Crossing-1 ("AC-1"); Mid-Atlantic Crossing; Pan-American Crossing; and South American Crossing. The Level 3 Licensees and their affiliates also control capacity on other undersea cable systems serving the United States. All of the Level 3 Licensees are operating subsidiaries of Level 3 Communications, Inc. ("Level 3 Parent"), a global telecommunications and information services company headquartered in Broomfield, Colorado. Through its

operating subsidiaries, Level 3 Parent offers a wide range of communications services over its broadband fiber-optic networks in the Americas, Europe, and Asia.

2. Office des postes et télécommunications de Polynésie française (“OPT French Polynesia”)

OPT French Polynesia owns and operates the Honotua Cable System, the international segment of which connects Tahiti to Hawaii. The Honotua Cable System is designed to ensure high-quality voice, data, high-speed Internet, and video connectivity in French Polynesia. Through its operating divisions and subsidiaries, OPT French Polynesia is the incumbent provider of fixed and mobile telecommunications, Internet access, video programming, and postal services in French Polynesia and is wholly owned by French Polynesia Government.

3. PPC-1 Limited and PPC-1 (US), Inc. (“PPC 1 US”) (together, “PPC-1 Licensees”)

PPC-1 Limited owns and operates the wet segment of PPC-1 beyond the territorial seas of the United States and Australia. (A spur owned separately by Telikom Papua New Guinea Limited connects the PPC-1 trunk to Papua New Guinea.) PPC-1 US owns and operates the U.S.-territory portion of the PPC-1 system connecting Australia and Guam. The PPC-1 Licensees are subsidiaries of PIPE International (Australia) Pty Ltd, which is in turn a direct subsidiary of PIPE Networks Pty Ltd (“PIPE Networks”), a leading Australian operator of metropolitan-area fiber networks, peering exchanges, and the PPC-1 cable system. PIPE Networks is a subsidiary of TPG Telecom Limited, a leading Australian provider of Internet access services, mobile telephony, and software.

4. Southern Cross Cables Limited (“Southern Cross”) and Pacific Carriage Limited (“PCL”)

Southern Cross owns and operates the wet segments (beyond the territorial seas of the United States, Australia, and New Zealand) of the Southern Cross Cable Network (“SCCN”),

which connects Australia, New Zealand, Fiji, Hawaii, Oregon, and California with a triple-ring configuration. PCL owns the associated U.S. territory portions of the SCCN, while Verizon Hawaii International owns and operates the Spencer Beach Hawaiian landing facilities. The landing station at Kahe point is leased by PCL, and Hawaiian Telcom, Inc., operates the landing station. MFS GlobeNet, Inc. (a subsidiary of Verizon Business) owns the Oregon and California landing facilities. Southern Cross and PCL are both Bermuda limited companies 50-percent owned by Telecom New Zealand Limited. SingTel Optus owns a 40-percent interest in each entity, while Verizon Business owns a 10-percent interest in each entity.

B. Relevant Aspects of the Undersea Cable Business

Undersea 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, though some cables continue in operation (or have been redeployed on new routes) well past the 25-year mark. Although prices for the design, manufacture, and installation of new systems have fallen considerably over the last 15 years, such systems still require considerable capital investment.

A significant percentage of the international undersea cable capacity serving the United States is sold on an indefeasible right of use (“IRU”) basis for a 15- to 20-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 through 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. For the seller, an IRU represents a way of funding the cost of construction.”² 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 original agreement using an order form, rather than via negotiation of a new agreement. Significant amounts of capacity are sold on a ring-configuration or protected basis, meaning that the actual traffic carried may or may not touch the United States. A significant percentage of the customers purchasing capacity on cable systems landing in the United States are located outside the United States.

As of 2012, most undersea cables landing in the United States are operated on a non-common-carrier basis. Such operators are not even required to register with the Universal Service Administrative Company (“USAC”) if they qualify for the international-only exemption or the LIRE. Even for common-carrier operators, however, they need only file Form 499-A on an annual basis.

II. Section 254(d) Requires the Commission to Retain the International-Only Exemption, as It Grants the Commission Jurisdiction over Interstate Providers Only

Section 254(d) requires the Commission to retain the international-only exemption because the statute’s express and unambiguous language grants the Commission jurisdiction to assess contributions over interstate providers only. Since the adoption of this statutory provision in 1996 and interpretation in the original 1997 order promulgating the Commission’s universal service contribution rules, the Commission has consistently interpreted that statute to mean that Congress did not give the Commission authority to require providers of exclusively foreign

² KPMG International, *IFRS Accounting in the Telecommunications Industry*, § 2.4.1 (2004).

telecommunications to contribute to the USF. Although unnecessary given the unambiguous language of Section 254(d), a review of the relevant legislative history confirms that Congress considered, but decided against, granting the Commission such jurisdiction.

A. Section 254(d)'s Unambiguous Language Denies the Commission Jurisdiction to Assess USF Contributions on Providers of Exclusively Foreign Communications

Consistent with its mistaken view that treatment of foreign-communications revenues is principally a matter of determining an optimal funding policy rather than abiding by the statutory limitations established by Congress,³ the FNPRM claims that the Commission created the international-only exemption.⁴ To the contrary, Congress did so, by limiting Section 254(d) to interstate providers. Section 254(d) provides:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.⁵

³ See, e.g., *FNPRM*, ¶ 202 (stating that “[c]ommenters that oppose the elimination of the ‘international only’ and the ‘limited international revenues’ exemptions should provide specific alternative rules and explain how their proposals will support the proposed goals set forth in this Notice. We ask commenters to provide data to quantify how our proposals or alternatives will impact the Fund and reduce compliance costs and burdens.”).

⁴ *Id.*, ¶ 196 (stating that “[t]he Commission created the current international-revenues exemption even though the Commission recognized that it would result in some providers of international services being treated differently from other such providers and that international-only providers benefited from federal universal service policies.”).

⁵ The text of Section 254(d) goes on to state, “The Commission may exempt a carrier or class of carriers from this requirement if the carrier’s telecommunications activities are limited to such an extent that the level of such carrier’s contribution to the preservation and advancement of universal service would be *de minimis*. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”

The Communications Act defines “interstate communication” or “interstate transmission” to mean a communication or transmission:

- (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia,
- (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or
- (C) between points within the United States but through a foreign country; but shall not ... include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.⁶

By contrast, the Communications Act defines “foreign communication” or “foreign transmission” as a “communication or transmission from or to any place in the United States to or from a foreign country.”⁷

The Communications Act consistently distinguishes between “interstate communication” and “foreign communication,” establishing that the terms are mutually exclusive. Section 152(a), for example, provides, “[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio.”⁸ Similarly, the Communications Act defines “common carrier” as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.”⁹

When considering if it has authority to change the way it assesses contributions, the FCC, like a court, must start with the language of the authorizing statute. Where a statute is

⁶ 47 U.S.C. § 153(28).

⁷ *Id.*, § 153(21). The Commission’s use of the term “international” in the USF context is confusing, as Communications Act uses the term “foreign communication.”

⁸ *Id.*, § 152(a).

⁹ *Id.*, § 153(11).

unambiguous, it will be given its plain meaning.¹⁰ This rule applies to both courts and agencies. Where a “statute is clear and unambiguous ‘that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’”¹¹

Here, Congress has clearly restricted universal service obligations to carriers providing *interstate* telecommunications services. Congress not only consistently distinguished between “interstate” and “foreign” communications, but also defined the terms in the statute itself. Where a statute contains a definition for a word or phrase, as is true for both “interstate” and “foreign” communications, then that definition governs.¹² As such, the FNPRM’s proposal to eliminate the international-only exemption exceeds the Commission’s authority under the plain, and only, meaning of Section 254(d).

B. The FNPRM’s Novel, Revisionist Reading of Section 254(d) Is Inconsistent with the Unambiguous Statutory Language and the Commission’s Longstanding Interpretation Thereof

The FNPRM proposes a revisionist reading of Section 254(d) that is inconsistent with the unambiguous statutory language and the Commission’s longstanding interpretation of that statutory language. The FNPRM advances for the first time a view that Congress intended Section 254(d) to distinguish federal authority from state and territorial authority.¹³ This novel reading lacks any support in the statute.

When Congress made general pronouncements distinguishing federal authority from state and territorial authority in the Communications Act, it did so expressly. Section 152(b) of the

¹⁰ See *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1985) (“*FRS*”) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

¹¹ *Id.*

¹² See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

¹³ *FNPRM*, ¶ 200.

Communications Act states that, except where specifically exempted, “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”¹⁴ The Communications Act further defines “State commission” to mean “the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.”¹⁵ By contrast, Section 254(d) states specifically what implementation actions the Commission must take with respect to interstate communications.

The FNPRM’s novel reading of Section 254(d) is wholly inconsistent with longstanding Commission interpretations of that statutory provision. Since Section 254(d)’s enactment, the Commission has repeatedly stated that Section 254(d) did not permit it to impose USF contribution obligations on providers of exclusively foreign communications. In 1997, the Commission found that “by definition, foreign or international telecommunications are not ‘interstate’ because they are not carried between states, territories, or possessions of the United States.”¹⁶ After quoting the statutory definition of “foreign communication,” the Commission continued:

We find that carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not ‘telecommunications carriers that provide interstate telecommunications services.’¹⁷

¹⁴ 47 U.S.C. § 152(b).

¹⁵ *Id.*, § 153(48).

¹⁶ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 9174 ¶ 779 (1997) (“*Universal Service First Report and Order*”).

¹⁷ *Id.*

The Commission expressed dissatisfaction with this outcome and a hope that Congress would eventually amend to law to grant the Commission authority to impose USF contribution obligations on providers of exclusively foreign communications, but it acknowledged that its policy preference was insufficient in light of the current law's limitations:

We would prefer a more competitively neutral outcome, all other things being equal, but the statute precludes us from assessing contributions on the revenues of purely international carriers providing service in the United States, even though we believe that they, too, benefit from our universal service policies. . . . A legislative change allowing us to reach the international revenues of all carriers providing service in the United States who benefit from universal service would, of course, provide another solution for any competitive concerns.¹⁸

Congress has never amended the Communications Act as the Commission then hoped. Consequently, to extend assessments in such a manner, the Commission must wait for Congress to give it the authority to make such assessments. As described in parts IV and V below, there are very good reasons why Congress should reject such a statutory change, though none of these reasons is noted, much less considered, in the FNPRM.

Subsequently, the Commission continued to note that it lacked jurisdiction to assess USF contributions on providers of exclusively foreign communications. As part of its 2002 attempt to reform its USF contribution methodology, the Commission noted with respect to the proposal for a connections-based methodology:

Connections would be defined as facilities that provide end users with access to an interstate public or private network, regardless of whether the connection is circuit-switched, packet-switched, wireline or wireless, or leased line. International-only and intrastate-only connections would be exempt, *because they do not have an interstate component*.¹⁹

¹⁸ *Id.* As noted in part II.C below, Congress expressly rejected such a proposal during its deliberations over the text of the 1996 Act.

¹⁹ *Federal-State Joint Board on Universal Service, Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24,952, 24,987 ¶ 76 (2002) (emphasis added).

The Commission and its bureaus reached the same conclusion in many other decisions.²⁰

C. Congress Clearly Intended to Exclude Providers of Exclusively Foreign Communications from Contributing

Section 254(d) reflects Congress's intent to limit the Commission's universal service authority. Where a statute is unambiguous and clear, there is no need to examine the legislative history to determine Congressional intent.²¹ Even if Section 254(d) were unclear, which it is not, its legislative history demonstrates that Congress deliberately chose to constrain the Commission's USF contribution authority to interstate services only. The legislative history provides additional evidence that Congress did not intend to include international-only carriers in the universal service contribution base.

During its consideration of what became the Telecommunications Act of 1996,²² Congress considered, but ultimately rejected, language that would have affirmatively included

²⁰ See, e.g., *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, 7626 (2006) (noting that “exempt entities, includ[e] ‘international only’ and ‘intrastate only’ providers”); *Federal-State Joint Board on Universal Service*, Order, 19 FCC Rcd. 17,763, 17,764 ¶ 2 (2004) (noting that “carriers that provide only international telecommunications services are not ‘telecommunications carriers that provide interstate telecommunications services,’ and, therefore, are exempt from the mandatory universal service contribution obligation”); *Federal-State Board on Universal Service, Startec Global Communications Corporation Request for Forbearance or Exemption from the Universal Service Contribution Requirement*, Memorandum Opinion and Order, 14 FCC Rcd. 8030, 8034-35 ¶ 7 (1999) (noting that the “statute does not permit us to treat Startec as if it were purely international telecommunications service provider that is not subject to the statutory universal service contribution requirement” because Startec provides interstate service); *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd. 24,094, 24,169 ¶ 174 (1997) (relying on *Universal Service First Report and Order* to draw distinction between those that do not pay USF, international only, and providers offering interstate service and international service must).

²¹ *FRS*, 474 U.S. at 368.

²² Pub. L. 104–104, 110 Stat. 86 (1996) (“1996 Act”).

foreign communications within jurisdiction of Section 254(d). The original text of Senate Bill S.652 contemplated requiring providers of foreign communication services to contribute to universal service support, but that language was rejected after the House and Senate went to Conference. The Senate's original version of the text concerning telecommunications providers' obligation to contribute stated:

ALL TELECOMMUNICATIONS CARRIERS MUST PARTICIPATE.—Every telecommunications carrier engaged in intrastate, interstate, or foreign communication shall participate, on an equitable and nondiscriminatory basis, in the specific and predictable mechanisms established by the Commission and the States to preserve and advance universal service....²³

Nevertheless, the House bill, H.R. 1555, which it passed as an amendment to S.652,²⁴ did not include this language.²⁵ In Conference, the House and Senate agreed that *new section 254(d)* would “require[] that all telecommunications carriers providing interstate telecommunications services shall contribute to the preservation and advancement of universal service.”²⁶ The new language of Section 254(d) was sent back to both the House and Senate for inclusion in the final bill that would become the 1996 Act. Both the House and Senate passed the bill with the language restricting USF contribution obligations to carriers that offer interstate telecommunications services.

In its 1998 report to Congress, the Commission again asked Congress for authority to assess exclusively international providers for USF contributions, renewing its plea from the 1997 *Universal Service First Report and Order*:

²³ Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. (1995) available at <http://www.gpo.gov/fdsys/pkg/BILLS-104s652pp/pdf/BILLS-104s652pp.pdf>.

²⁴ THE TELECOMMUNICATIONS ACT OF 1996: LAW AND LEGISLATIVE HISTORY 5 (Robert Emeritz *et al.* eds., Pike & Fischer, Inc. 1996).

²⁵ See H.R. 1555, 104th Cong. (1995).

²⁶ See H.R. REP. NO. 104-458, at 131 (1996); S. REP. NO. 104-230, at 131 (1996).

In fact, the Commission sought a legislative change that would allow it to reach the international revenues of all carriers providing service in the United States who benefit from universal service. The Commission found that section 254(d) does not permit us to require carriers that provide only international telecommunications services to contribute because these carriers are not providing “interstate telecommunications services.” Providers of purely international telecommunications compete against carriers that provide interstate as well as international telecommunications services, and, thus, benefit competitively by incurring no universal service contribution obligation. We would prefer to include these telecommunications carriers within the class of mandatory contributors in order to treat all providers of international telecommunications similarly and to further broaden the class of contributors.²⁷

Congress, however, again declined to adopt the Commission’s proposal.

D. The Commission’s Ancillary Jurisdiction and General Rulemaking and Implementation Powers Do Not Permit the Commission to Override the Express Limitations of Section 254(d)

The Commission’s ancillary jurisdiction in Title I and its general rulemaking and implementation powers in Sections 201(b) and 251(b)(4) do not authorize it to override the express limitations of Section 254(d). The FNPRM posits that these other statutory provisions could support a novel reinterpretation of Section 254(d),²⁸ but the rules of statutory interpretation do not support such a reading.

First, the specific provisions of Section 254(d) trump the general ones in Title I and Sections 201(b) and 251(b)(4). According to generally accepted rules of statutory interpretation, where a specific provision may conflict with a general one, the specific provision governs.²⁹ Here, Section 254(d) specifically predicates the application of a USF contribution obligation on the provisioning of interstate service. Thus, Section 254(d)’s more specific provisions must

²⁷ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, 11,563 ¶ 128 (1998) (“*Stevens Report*”).

²⁸ See FNPRM, ¶ 200 n.340.

²⁹ See *Edmond v. United States*, 520 U.S. 651, 657 (1997).

control. Consequently, the Commission is barred from effecting an end-run around the statutorily-defined terms of “interstate communication” and “foreign communication” in reliance on its general powers in Title I and Sections 201(b) and 251(b)(4).³⁰

Second, Section 254(d) trumps the earlier-adopted provisions of Title I and Section 201(b). Under generally accepted rules of statutory interpretation, where statutory provisions would otherwise conflict, the earlier enacted provision must yield to the more recently enacted provision to the extent necessary to prevent conflict.³¹ Consequently, Title I and Section 201(b) must yield to Section 254(d) as the more recently enacted statutory provision.

III. Section 254(d) and the Fifth Circuit’s Decision in *TOPUC v. FCC* Require the Commission to Retain the LIRE or Its Functional Equivalent

Section 254(d) and the Fifth Circuit’s decision in *TOPUC v. FCC* require the Commission to retain the LIRE or its functional equivalent. As far back as 1997, the Commission recognized that a “contamination” theory of jurisdiction—where incidental interstate traffic would expose a provider to USF contributions for all of its end-user revenues for interstate and foreign communications—failed to satisfy the “equitable and nondiscriminatory” requirements of Section 254(d).³² The Fifth Circuit expanded on this intuition, finding that the

³⁰ The Fifth Circuit found that even with respect to more general provisions, such as the “equitable and nondiscriminatory” provision in Section 254(d), that “[w]hile the statute allows the FCC a considerable amount of discretion . . . that discretion is not absolute.” *Texas Office of Pub. Utils. Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999) (“*TOPUC v. FCC*”).

³¹ See *Smith v. Robinson*, 468 U.S. 992, 1024 (1984).

³² *Universal Service First Report and Order*, 12 FCC Rcd. at 9174 ¶ 779 (agreeing that “incidental interstate traffic created during the transmission of an international communication should not qualify as ‘interstate communications’ because the limited interstate traffic is unintended by the end user customer. We conclude, however, that carriers that provide both interstate and foreign telecommunications services must contribute to the extent they provide interstate and foreign telecommunications.”).

Commission’s interpretation of “equitable and nondiscriminatory”—to assess all end-user interstate and foreign communications revenues if a provider had any interstate revenues—“allow[ed] it to impose prohibitive costs” on a carrier whose USF contributions exceeded its interstate revenues and “is ‘arbitrary and capricious and manifestly contrary to the statute.’”³³ The court further found that the Commission’s interpretation was discriminatory because it harmed certain providers of foreign communications more than others, requiring such providers “to incur a loss to participate in interstate service.”³⁴

The Commission responded to *TOPUC v. FCC* by creating the LIRE, finding:

This modification is consistent with the court’s ruling because it will exclude from the contribution base the international end-user telecommunications revenues of any telecommunications provider whose annual contribution to the federal universal service support mechanisms, based on the provider's interstate and international end-user telecommunications revenues, would exceed the amount of the provider's interstate end-user telecommunications revenues.³⁵

The Commission stated its belief that the LIRE satisfied the requirements of *TOPUC v. FCC* by “permit[ting] a contributor that derives the substantial majority of its revenues from the provision of international services to calculate its contribution to universal service based solely on its

³³ *TOPUC v. FCC*, 183 F.3d at 434-435 (citation omitted).

³⁴ *Id.* at 435.

³⁵ *Federal-State Joint Board on Universal Service*, Eighth Report and Order, 15 FCC Rcd. 1679, 1687 ¶ 19 (1999) (“*Universal Service Eighth Report and Order*”). *See also* 47 C.F.R. § 54.706(c) (1999) (codifying the LIRE). Optimistically, the Commission predicted that it did “not anticipate that the universal service contribution factor will exceed 8 percent in the near future.” *Universal Service Eighth Report and Order*, 15 FCC Rcd. at 1687 ¶ 19. Alas, the contribution factor did exceed 8 percent, and the Commission later increased the LIRE to 12 percent. *See Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd. 3752, 3806 ¶ 125 (2002); 47 C.F.R. § 54.706(c) (2012).

domestic interstate revenues” and by “ensuring that a provider is not assessed a contribution in an amount exceeding that provider's annual interstate end-user telecommunications revenues.”³⁶

Given the Fifth Circuit’s holding in *TOPUC v. FCC*, the Commission cannot simply eliminate the LIRE. Granted, the LIRE has certain defects, most notably the disparity between the LIRE’s 12-percent threshold and the actual contribution factor, meaning that a provider of predominantly foreign communications could still provide interstate communications at a loss after factoring in USF contributions. Such defects can be remedied, however, without elimination of the LIRE.

Ultimately, the LIRE ensures that a provider of predominantly foreign communications, such as an international undersea cable operator, does not suffer inequitable or discriminatory treatment simply because it happens to provide—whether advertently or inadvertently—incidental interstate communications in connection with its principal foreign-communications business. Contrary to the Commission’s finding in 1997,³⁷ there are now many providers that earn most of their foreign-communications revenues without providing any (other than ancillary) interstate communications. In 1997, most of the world’s undersea telecommunications cables were owned and operated by carrier consortia. Trade in basic telecommunications services had

³⁶ *Universal Service Eighth Report and Order*, 15 FCC Rcd. at 1688 ¶ 21 (further noting that “[b]ecause providers will receive a financial benefit, overall, from providing interstate service, we conclude that our revised rule is equitable.”)

³⁷ *See Universal Service First Report and Order*, 12 FCC Rcd. at 9174 ¶ 779 (stating, “We believe that it is nonetheless equitable and nondiscriminatory ... to assess contributions, where the statute permits it, on the international revenues of carriers providing service in the United States that benefit from universal service. We note that any disparity among providers should be minimal, since most international revenues are today earned by carriers that also provide interstate services”).

not yet been liberalized within the World Trade Organization framework,³⁸ and the United States still required a showing of “effective competitive opportunities” for cable landings, making end-to-end ownership of undersea cables challenging absent a consortium with a U.S. member or a U.S. landing party.³⁹ Moreover, in 1997, much of the world’s undersea cable connectivity was still intended for voice and data transmission connections, as opposed to Internet content.

IV. By Eliminating the International-Only Exemption and/or the LIRE, the Commission Would Cause Serious Economic Distortions to the Market for International Undersea Cable Capacity

A. Each of the FNPRM’s Proposals Would Cause Grave Economic Harms to Operators of Existing Undersea Cables—Harms Similar to Those Posed by IBC Fees

The FNPRM’s proposals would cause grave economic harm to operators of existing undersea cables. Each of the FNPRM’s proposals would reintroduce the same kinds of economic distortions and practical problems caused by the capacity-based methodology for annual regulatory fees on undersea cable operators (“IBC fees”). The Commission replaced that methodology with a per-system fee in 2009, recognizing both that an operator should be able to recover its regulatory costs and that an operator should not pay a charge that exceeds total revenue for a service.⁴⁰

First, elimination of the international-only exemption and/or the LIRE would eliminate operating margins for international undersea cable operators, which have, at best, a limited

³⁸ The Fourth Protocol to the WTO General Agreement on Trade in Services, which encompassed commitments in basic telecommunications made by the initial group of sixty-nine countries, entered into force on February 5, 1998.

³⁹ *See Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd. 3873, 3877 ¶ 6 (1995).

⁴⁰ *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, 24 FCC Rcd. 4208 ¶ 1 (2009) (“*Submarine Cable Regulatory Fees Order*”).

ability to recover their costs by passing USF assessments through to customers, particularly for those located outside the United States. Operating margins on many routes are already razor-thin, and unsuccessful recovery of USF contribution costs from even a minority of customers could turn certain international undersea cables into loss-making enterprises. As operators explained to the Commission in seeking to replace the Commission's IBC fees methodology, customers outside the United States consistently object that "domestic assessments" such as regulatory fees and USF contributions cannot and should not be passed through to such customers, but instead absorbed into the operator's administrative overhead.⁴¹ This is particularly true when such charges come due long after the economic basis of the long-term capacity purchase is negotiated. Attempts to pass through such charges create tensions in the operator-customer relationship, and operators must expend significant personnel resources to persuade customers to accept and pay such charges, typically with little success.⁴²

Second, operator attempts to pass through such charges often fail due to strategic behavior of non-compliant operators, which offer lower pricing to customers and undermine the efforts of compliant operators to establish a regulatorily-compliant price. This was the case with

⁴¹ *See, e.g.*, Comments of Level 3 Communications, LLC, MD Docket No. 08-65, RM-11312, at 15-16 (filed May 30, 2008) (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 Submarine Cable Regulatory Fees Order*, 24 FCC Rcd. at 4215-16 ¶ 19 (noting Internet2's objection to the pass-through by undersea cable operators of the cost of annual regulatory fees).

⁴² *See, e.g.*, Level 3 Communications, LLC, Comments in Support of Petition for Rulemaking, RM-11312, at 4 (filed March 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.").

attempted pass-throughs of IBC fees by international undersea cable operators.⁴³ Despite the best efforts of the Commission to ensure compliance, non-compliant operators created a “race to the bottom” in international capacity markets and made it economically infeasible for compliant operators to cover their costs, much less earn a profit.⁴⁴ With USF contributions, such strategic behavior would also likely outpace enforcement efforts. The Undersea Cable Operators therefore urge the Commission to account realistically for these market dynamics in considering changes to the international-only exemption and the LIRE.

Third, these proposals would greatly burden each international undersea cable operator with the task of trying to renegotiate hundreds of IRUs and capacity leases to permit the operator to pass through the costs of USF contributions. As noted in part I.B above, many of these customized agreements do not provide for the pass-through of USF contributions to customers. This is unsurprising, given the Commission’s categorical statements about the international-only exemption over the last 15 years and the Fifth Circuit’s findings in *TOPUC v. FCC* in 1999 with respect to a statutory provision that remains unchanged by Congress. Renegotiation of these agreements would be a major undertaking, as the operator would be seeking to alter fundamentally the economic terms of long-term arrangements that were intended to secure the

⁴³ See, e.g., *id.* (stating that “the failure of any companies to pay applicable IBC fees raises the costs for those that comply by decreasing the number of units on which payment is based. This distortion provides a competitive advantage to those that fail to pay. These providers are trying to lower their costs basis and generate any type of rot at the expense of those who abide by the rules. Alternatively, they win more business against those that do pay, because they avoid IBC fees. Finally, by allowing companies to avoid their IBC fee payment requirements, the Commission will encourage (indeed force) companies to emulate the practices of the noncompliant few, resulting in a ‘race to the bottom’”).

⁴⁴ See *Submarine Cable Regulatory Fees Order*, 24 FCC Rcd. at 4212 ¶ 8 (noting that “[i]f our rules permit certain entities to avoid complying with our regulatory fee requirements because we do not have sufficient reporting requirements for part of the industry, the remaining carriers must pay a higher amount to compensate for those who avoid payment.”).

supply of capacity at a known price—arrangements negotiated in reliance upon the Commission’s longstanding international-only exemption and LIRE. A prepaid calling card provider can easily adjust the retail prices of its products to recover the costs of increased USF contributions. Similarly, a provider of retail telecommunications services can, in an era of detariffed service offerings, simply give notice to its customers of the pass-through (via inserts in consumer bills and updated web site disclosures), consistent with the Commission’s truth-in-billing rules.

Fourth, even if the Commission were to retain the international-only exemption, its elimination of the LIRE, without any functional equivalent, could still lead international undersea cable operators to cease provision of ancillary domestic interstate services. Such an outcome would reduce competition in the market for such services.

Fifth, if other countries were to make similar assessments on the same revenue streams for international services, such assessments could quickly equal the total revenues for an undersea cable system. For example, Level 3’s South American Crossing system lands in five countries (Brazil, Argentina, Chile, Panama, and Peru) in addition to the United States. Southern Cross lands in three countries (Australia, Fiji, and New Zealand) in addition to the United States. As capacity is often sold on an end-to-end or ring-configuration basis, such services would arguably fall within the regulatory jurisdictions of each of these countries. There is simply no way for international undersea cable operators to support multiple universal service assessments for services provided far beyond any one country’s territory. This potential outcome only underscores the extraterritorial nature of the FNPRM’s proposals, as explained in part V below.

B. Each of the FNPRM’s Proposals Would Deter New U.S. Cable Landings

By creating unfavorable economic conditions for U.S. landings, each of the FNPRM’s proposals could deter new cable landings in the United States and even encourage operators to land in other countries, particularly Canada. These proposals, if adopted, could also encourage Internet content providers (including online video providers) to shift content creation and storage outside the United States (particularly as they are typically treated as end-users for USF assessment purposes), perhaps abetted by the spectacular growth of content delivery networks (“CDNs”).⁴⁵ Such outcomes would harm the telecommunications, Internet, and entertainment sectors of the U.S. economy, not to mention national security. 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.⁴⁶ The FNPRM proposals, however, would undermine these efforts.

⁴⁵ See, e.g., Frost & Sullivan, *World Video Content Delivery Networks Market* (Feb. 7, 2011) (describing growth of CDNs).

⁴⁶ 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 “procompetitive, transparent regulatory policies in order to foster the growth of a global information infrastructure.”).

The United States has long taken for granted that undersea 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 a large percentage of Internet content located in the United States. Nevertheless, the share of Internet bandwidth connecting the United States to the Asia-Pacific region, Latin America, and Africa has declined considerably over the last decade; the share of Internet bandwidth connecting the United States to Europe has never been particularly high.⁴⁷ There has long been speculation that U.S. surveillance following implementation of the USA PATRIOT Act could push Internet content and information storage outside the United States—to the detriment of the United States.⁴⁸ The FNPRM’s proposals would likely accelerate these trends by providing an additional economic incentive to avoid the United States.

Historically, Canada has appealed less than the United States as a landing country due to a variety of factors, including: comparatively small Canadian demand for capacity; comparatively small Internet content residing in Canada; and foreign ownership restrictions that barred ownership of telecommunications facilities (including backhaul facilities) beyond the cable station.⁴⁹ That calculus is starting to change, however, and could change radically if the

⁴⁷ See John Markoff, *Internet Traffic Begins to Bypass the U.S.*, N.Y. TIMES, Aug. 30, 2008, at C1.

⁴⁸ See, e.g., *id.* (quoting Michael V. Hayden, Director of the Central Intelligence Agency, testifying before the Senate Judiciary Committee, “‘Because of the nature of global telecommunications, we are playing with a tremendous home-field advantage, and we need to exploit that edge. . . . We also need to protect that edge, and we need to protect those who provide it to us.’”).

⁴⁹ See Canada, Telecommunications Act (1993), § 16 (providing that a telecommunications common carrier must be a “Canadian-owned and controlled corporation, incorporated or continued under the laws of Canada”); Canadian Telecommunications Common Carrier Ownership and Control Regulations (1994).

Commission were to subject revenues from sales of international undersea cable capacity to USF assessments. Canada is in the final stages of repealing most of its foreign ownership restrictions on telecommunications facilities, meaning that foreign undersea cable operators and global network operators may now own domestic facilities in Canada.⁵⁰ Moreover, the financial burden of Canadian universal service programs pales in comparison to that of the United States. While Canada does assess “contribution” on all Canadian Telecommunications Service Revenues (“CTSR”), the contribution rate is 0.66 percent of CTSR.⁵¹ By contrast, the Commission’s current proposed contribution rate for the third quarter of 2012 is 15.7 percent of interstate end-user revenues—nearly 24 times higher than the Canadian contribution rate.⁵²

V. By Eliminating the International-Only Exemption and/or the LIRE, the FNPRM Would Improperly Subsidize Domestic Universal Service Programs with Contributions from International Undersea Cable Operators for Activities They Conduct Predominantly in Foreign Jurisdictions or Beyond the Limits of Any Nation’s Jurisdiction

By eliminating the international-only exemption and/or the LIRE, the Commission would improperly subsidize its domestic universal service programs with contributions from international undersea cable operators for activities they conduct predominantly in foreign

⁵⁰ See Amendments to the Income Tax Act, a Related Act and the Income Tax Regulations, Bill C-38, §§ 595 *et seq.*, www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5524772.

⁵¹ See Canadian Radio-television and Telecommunications Commission, Decision 2000-745, Changes to the Contribution Regime (Nov. 30, 2000), www.crtc.gc.ca/eng/archive/2000/dt2000-745.htm; Canadian Radio-television and Telecommunications Commission, Decision CRTC 96-2 (Feb. 2, 1996) (declining to forbear from regulating Teleglobe’s services between Canada and international points), <http://crtc.gc.ca/eng/archive/1996/DT96-2.htm>.

⁵² See *Proposed Third Quarter 2012 Universal Service Contribution Factor*, Public Notice, CC Docket No. 96-45, DA 12-917 (rel. June 11, 2012).

jurisdictions or beyond the limits of any nation’s jurisdiction. The jurisdictional nexus for assessing USF contributions on revenues from capacity services on international undersea cables is weak at best, and likely impermissibly extraterritorial.

The FNPRM’s proposals differ considerably from settlement-rate benchmarks. With benchmarks, the Commission sought to regulate the rates paid by domestic carriers for the termination of U.S.-originated traffic in foreign markets, relying on its regulatory powers to regulate rates and contracts pursuant to Sections 205(a) and 211(a) of the Communications Act, respectively.⁵³ Here, the FNPRM would have the Commission collect a regulatory assessment on revenues for end-to-end services between the United States and a foreign country, where the customer is—as often as not—located in a foreign country. The FNPRM assumes—improperly—that all of the revenues for such end-to-end capacity services are properly assessable simply because the capacity may originate or terminate in the United States (though not necessarily even on the PSTN). In fact, most of those revenues are associated with transport across geographical jurisdictions beyond the 12-nautical-mile limits of U.S. territory, and with origination or termination (whether on the PSTN or not) in one or more foreign countries.

Consequently, the Commission could not justify adoption of the FNPRM proposals by asserting (as it did with settlement-rate benchmarks) that it does not exceed its authority “simply because a regulatory action has extraterritorial consequences.”⁵⁴ The FNPRM would have the Commission expressly assess all of the value for all of the services, wherever provided.

⁵³ See *Regulation of International Settlement Rates*, Report and Order, 12 FCC Rcd. 19,806 (1997) (“*Benchmarks Order*”), *aff’d. Cable & Wireless P.L.C. v. FCC et al.*, 166 F.3d 1224 (D.C. Cir. 1999).

⁵⁴ *Id.* at 1230.

In fact, the FNPRM’s proposals are wholly inconsistent with the rationale of the *Benchmarks Order*, in which the Commission articulated the principle that carriers and their customers in one country should not subsidize another country’s universal service program:

[W]e disagree that foreign termination services from certain countries should be required to finance a disproportionate share of network costs, or that foreign carriers should have the ability to impose hidden, discriminatory universal service obligations on termination services for foreign-originated calls.⁵⁵

The Commission continued, noting that “[d]iscriminatory local interconnection charges and universal service obligations that are levied disproportionately on foreign-originated calls clearly violate the[] principles” of “transparent, nondiscriminatory and competitively neutral” universal service obligations.⁵⁶ “Foreign governments are free to choose their own policies, but international law does not require U.S. consumers to subsidize those [universal service] policies.”⁵⁷ In adopting the FNPRM proposals to eliminate the international-only exemption and the LIRE, the Commission would promulgate the very sort of measure it fought in the *Benchmarks Order*.

VI. The FNPRM’s Proposals, If Adopted, Would Violate U.S. Commitments Under the WTO General Agreement on Trade in Services by Imposing Non-Transparent, Discriminatory, Competition-Distorting, and Excessively Burdensome Universal Service Measures

If the Commission adopted either or both of the FNPRM proposals to eliminate the international-only exemption or the LIRE, it would violate U.S. commitments under the WTO General Agreement on Trade in Services (“GATS”) by imposing non-transparent,

⁵⁵ *Benchmarks Order*, 12 FCC Rcd. at 19,848 ¶ 86.

⁵⁶ *Id.*, ¶ 87.

⁵⁷ *Regulation of International Settlement Rates*, Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd. 9256, 9260 ¶ 14 (1999).

discriminatory, and competition-distorting measures regarding universal service. The WTO Reference Paper, which the United States adopted as part of its schedule of commitments in basic telecommunications,⁵⁸ provides in Section 3 that universal service obligations:

will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.⁵⁹

Neither of the FNPRM's proposals—to eliminate the international-only exemption or the LIRE—would satisfy these Reference Paper requirements regarding universal service obligations.

First, each of the FNPRM's proposals would create a universal service obligation that is not transparent. Transparency in universal service obligations means, among other things, that “the operators should know of any universal service obligation that they would be required to perform before entering the market.”⁶⁰ Indeed, it was the United States that first proposed this principle as part of a broader set of pro-competitive regulatory principles that ultimately became the WTO Reference Paper.⁶¹ Undersea cable operators, however, did not know, and could not

⁵⁸ See United States of America, *Schedule of Specific Commitments, Suppl. 2*, General Agreement on Trade in Services, GATS/SC/90/Suppl.2 (Apr. 11, 1997).

⁵⁹ Reference Paper, World Trade Organization, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), at 3, S/GBT/W/1/Add.2/Rev.1 (Feb. 12, 1997).

⁶⁰ Boutheina Guerhazi, *Exploring the Reference Paper on Regulatory Principles*, Centre for the Study of Regulated Industries Working Paper, McGill University (2000) at 12, www.wto.org/English/tratop_e/serv_e/telecom_e/workshop_dec04_e/guerhazi_referencepaper.doc.

⁶¹ WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Pro-competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services*, S/NGBT/W/5 (Feb. 9, 1995) (stating that “[a]ll market participants must have transparent access to the development of universal service policies that affect the economic terms of their market access.”).

have known, of such obligations at the time they entered into long-term IRUs and capacity leases. As noted in parts I.B and IV above, those contractual arrangements are not easily modified, and there is little assurance that any attempt to pass through or collect such charges from the end-user customer would be successful. The fact that the Commission has initiated a rulemaking to consider elimination of the international-only exemption and the LIRE does not cure the transparency problem, as operators have entered into long-term capacity sales arrangements in reliance on the Commission's longstanding interpretations of Section 254(d). Similarly, the use of waivers to address adverse impacts on undersea cable operators would also not satisfy the transparency requirements of U.S. GATS commitments, as the decision criteria and likely outcome for waiver requests were not known at the time of market entry.⁶²

Second, elimination of the LIRE without a functional equivalent would create a USF contribution requirement that is discriminatory. As the Fifth Circuit found in *TOPUC v. FCC*, “the FCC’s interpretation is ‘discriminatory’ because the agency concedes that its rule damages some international carriers . . . more than it harms others,” requiring such providers “to incur a loss to participate in interstate service.”⁶³

Third, each of the FNPRM’s proposals would create a USF contribution requirement that is competitively distorting and excessively burdensome. As described at length in part IV above, each of these proposals would create significant economic distortions for both existing and future undersea cables, making it uneconomic to offer certain services or to land new cable systems in the United States. The proposals would also impose excessive burdens, as they sweep far

⁶² See *TOPUC v. FCC*, 183 F.3d at 434 (noting the Commission’s position that a provider of predominantly foreign communications should seek a waiver to allow the Commission to consider its individual circumstances in relation to the LIRE).

⁶³ *Id.* at 435.

beyond the problems identified by the FNPRM (namely, concerns about competitive distortions arising in the retail market involving prepaid calling cards—see part VII below) to alter radically the USF contribution obligations with respect to international undersea cable capacity.

VII. The FNPRM’s Proposed Remedies are Overly Broad and Purport To Remedy One Economic Distortion Involving Pre-Paid Calling Card Providers While Creating New Economic Distortions in the Market for International Undersea Cable Capacity

The FNPRM’s proposed remedies are overly broad and purport to remedy one economic distortion involving pre-paid calling card providers even as they would create new economic distortions in the market for international undersea cable capacity. Even if it had had the authority to eliminate the international-only exemption and the LIRE—and the Undersea Cable operators believe it has no such authority, as described in parts II and III above—the Commission should nevertheless reject the FNPRM’s proposed remedies as insufficiently tailored to address the asserted competitive neutrality problem.

The FNPRM expresses concern about competitive distortions caused by prepaid calling card providers offering exclusively or predominantly international services.⁶⁴ Providers of those services currently do not contribute to the USF because they qualify for the international-only exemption or the LIRE. Concerned that certain prepaid calling card providers have “incentives or opportunities . . . to avoid their USF contribution obligations,”⁶⁵ the FNPRM describes the international-only exemption and the LIRE as facilitating the pre-paid calling card offerings’ competitive distortions.⁶⁶ Nowhere does the FNPRM demonstrate that the international-only

⁶⁴ FNPRM, ¶¶ 181, 197-98.

⁶⁵ *Id.*, ¶ 181.

⁶⁶ *Id.*, ¶ 198.

exemption and the LIRE distort international services markets. To the contrary, the Commission does not even consider other international services markets or their similarities to or differences from the market for pre-paid calling card providers.

In overgeneralizing the problem with pre-paid calling cards and adopting an overbroad remedy, the FNPRM would trade one set of economic distortions for another. Instead of creating significant new distortions (as detailed in parts IV and V above) the Commission should work within the limitations of Section 254(d) (as described in parts II and III above) to address any with a tailored remedy competitive neutrality concerns about pre-paid calling card providers. To do otherwise would violate the “equitable and nondiscriminatory” requirements of Section 254(d).

VIII. If the Commission Adopts a Connections-Based Methodology for USF Contributions, It Should Exclude International Services Altogether

The FNPRM seeks comment on shifting from a revenue-based methodology to a connections-based approach for determining USF contribution obligations.⁶⁷ Contributors would be assessed based on the number of connections they provided to a communications network for customers.⁶⁸ As described in the FNPRM,⁶⁹ such a radical change would impose significant economic and operational burdens, including costs for new or additional data collection and reporting, changes in billing and reporting systems, and the myriad operational issues involved in devising and transitioning to a new system. For international services, a connections-based approach poses even greater difficulties as there is no meaningful way to fit foreign-originating

⁶⁷ *Id.*, ¶ 219.

⁶⁸ *Id.*, ¶ 220.

⁶⁹ *Id.*

or foreign-terminating services into a connections-based methodology. The FCC should decline to adopt a new, connections-based methodology. If, however, it decides to shift to a connections-based approach, it should exempt international-only services altogether.

CONCLUSION

For the reasons stated above, the Undersea Cable Operators urge the Commission to retain the “international-only” exemption as well as the LIRE or its functional equivalent.

Respectfully submitted,



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