Comments of the
North American Submarine Cable Association
on the Draft Report,
"Fair Market Analysis for a Submarine Cable Permit in National Marine Sanctuaries"
66 Fed. Reg. 43135 (Aug. 17, 2001)

These comments are submitted on behalf of the North American Submarine Cable Association ("NASCA"). NASCA is a trade association formed to help those who own, install and maintain submarine cables that land in North America better address issues of common concern.[1] The primary reason that NASCA's members feel strongly about the above report ("the Draft Report") and are filing these comments is not because they expect to lay submarine cable across National Marine Sanctuaries. Rather, we are united by a concern that adoption by NOAA of a seriously flawed methodology may lead other U.S. coastal states and other coastal nations to follow NOAA's bad example, by setting excessive fees for submarine cables crossing their respective territorial seas. That adverse ripple effect would have a serious adverse effect on most or all NASCA members.

In brief, NASCA believes that NOAA should not implement a fee-setting methodology for special use permits unless and until it determines that the issuance of such permits is appropriate. Even if special use permits were appropriate for cables crossing sanctuaries, the fee methodology proposed by the notice would violate the National Marine Sanctuary Act ("the Act"). Specifically, no fair-market value ("FMV") fee should be imposed with such permits because submarine cables do not "use…sanctuary resources" as the Act uses those terms.

Even if they did use such resources, a FMV fee should not be based on the various improper factors considered in the Draft Report, such as monopoly power or similar market power NOAA may have. Instead, such fees should be based on NOAA's related costs, if any, not covered by other fees paid by the permittee. Alternatively, there may be examples of terrestrial easement sales that would be useful as rough comparables, but the prior transactions identified by the Draft Report are not appropriate comparables.

The bases for these conclusions are laid out below.

I. <u>NOAA Should Not Implement a Fee-Setting Methodology for Special Use Permits Before It Determines Whether the Issuance of Such Permits Is Appropriate</u>

[1] NASCA currently has 17 members: 360networks inc.; Alcatel Submarine Networks; Concert Global Networks USA LLC; FLAG Telecom Holdings Limited; Gemini Submarine Cable System, Inc.; Global Crossing Ltd.; Global Marine Systems; Global Photon Systems, Inc.; Level 3 Communications, LLC; New World Network USA, Inc.; Southern Cross Cable Network; Sprint Communications Corporation; Teleglobe Communications Corporation; TyCom Networks (US) Inc.; WCI Cable, Inc.; Williams Communications, LLC; and WorldCom, Inc. Some NASCA members will be submitting their own separate comments on the above draft report.

Bizarrely, the process that NOAA describes in the Aug. 17 Federal Register notice ("the Notice") seems to contemplate selecting a fee-setting methodology and using it to set fees for special use permits already issued to two NASCA members, even though NOAA asserts that it is considering through a separate process whether to require special use permits for such projects at all. That second process is in fact legally required by the National Marine Sanctuary Act ("the Act") before NOAA can properly require special use permits for fiber-optic cables crossing a National Marine Sanctuary ("sanctuary, or "NMS").[2]

The problem is that the Notice clearly makes no commitment to integrate these two processes, or even any prediction as to when the second process will be completed. Therefore, assuming as we must that NOAA has not improperly pre-judged that second issue, the Notice seems to contemplate the possibility that NOAA will first impose fees on the two NASCA members, then subsequently decide through the second, separate process that henceforth special use permits would not be required for such projects crossing a sanctuary. That result would leave those two NASCA members as historical anomalies: the only two ever to pay such fees, unlike fiber optic cable projects crossing sanctuaries before and after those two projects. It is hard to imagine what rationale could justify such a result, which seems to offend basic notions of fairness.[3]

Therefore NOAA should first consider, after public notice and opportunity to comment, whether the issuance of special use permits for such projects is necessary or appropriate. Only if it decides that the answer to that question is yes, should it then proceed to consider the fair market value fee to be assessed for such permits.

II. Even If Special Use Permits Were Appropriate for Cables Crossing Sanctuaries, the Fee Methodology Proposed by the Notice Would Violate the National Marine Sanctuary Act

The most fundamental problem with the Draft Report is that it does not sufficiently respect the governing statute. It quotes the language specifying that one component of a special use permit fee be "an amount which represents the fair market value of the use of the sanctuary resource." Then, without further examination of the Act or other relevant statutes, it proceeds to assume that what is being "valued" here is essentially the sale of an easement to cross the sanctuary. However, as explained below, that is not something NOAA has the authority to sell, and it is not what the Act is telling NOAA to determine the fair market value of in determining a fee.

[2] 16 U.S.C. 1441(b) provides that "The Secretary shall provide appropriate public notice before identifying any category of activity subject to a special use permit…."

[3] That result would also mean that time and other resources of NOAA, NASCA members and others poured into the current proceeding would have been an unnecessary waste of effort.

A. Submarine Cables Do Not Use Sanctuary Resources

The first necessary step that the Draft Report skips is consideration of what the phrase “use of the sanctuary resource” means in the case of a fiber optic cable. “Sanctuary resource” is a defined term in the Act:

> “sanctuary resource” means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational cultural, archaeological, scientific, or aesthetic value of the sanctuary.”[4]

Submarine cables do not make use of any of the special values of a sanctuary listed above. They use the sanctuary only in the same way that they use non-sanctuary seabed: as a way to get where they are going. They do not rely on or benefit from the fact that the area has been designated an NMS[5]. They are, so to speak, blind as whether they are crossing an NMS or not.

Note how different are the relevant examples given in the legislative history of commercial activities that Congress saw triggering the FMV fee, such as commercial tourism activities including “glass bottom boats and diving trips.”[6] These activities make use of and depend upon the (conservation, recreational, ecological, educational, aesthetic, etc.) qualities that make the sanctuary special (qualities which furthermore may have been enhanced or at least preserved by the designation and protection of the area as an NMS). As noted above, submarine cables do not. They are more like a freight vessel that merely needs to cross the NMS to get where it is going; presumably even NOAA would not suggest that Congress meant to authorize it to require special use permits and fair market fees for commercial shipping.

The above conclusion is buttressed by the fact that NOAA, unlike the easement-sellers in every one of its supposed comparables, has no property interest in an NMS. Obviously it could not, in those sanctuaries or portions of them that lie within the area (usually extending three nautical miles from shore) ceded to the relevant coastal state, nor on the “high seas” beyond the U.S. territorial sea (which extends three nautical miles from shore). This illustrates that as a general matter, NOAA’s relationship to a sanctuary is only as a regulator, not as a property owner (unlike, for example, a state with regard to the seabed out to three nautical miles). Therefore the Draft Report errs in assuming that sales of easements provide comparables for what NOAA is supposed to value here -- NOAA does not have the power to sell an easement. NOAA is charged with identifying

[4] 16 U.S.C. §1432 (8).
[5] Note that NMSs, far from being the untrammeled undersea wilderness that some imagine them to be, generally are open to all traditional forms of commercial fishing, including bottom-trawling. Therefore they provide no safe harbor to cables from the threats presented by bottom-tending fishing gear, and undersea cables must be buried to protect them from such gear just as they must outside of NMSs.
[6] *See* S. Rep. No. 100-595, at 4390 (1988).

and protecting the special qualities of a sanctuary through regulatory programs, not holding title to the seabed in a sanctuary.

Therefore, because a submarine cable does not "use … the sanctuary resource", as that term is defined in the Act, the Act does not authorize NOAA to impose any fair market value fee.

B. Even If a Submarine Cable Was Determined to Use Sanctuary Resources, the Fair Market Value Fee Should Be Based on NOAA's Costs, Not What It Might Be Able to Extract Though Monopoly or Similar Market Power

If the "fair market value" of something is to be calculated, despite the conclusion in II. A above, how should it be calculated? Although the Act does not define "fair market value", under the common use of that term it would mean the value (price) that would be set if there was a competitive market.

1. There are no true comparables in the sale of seabed rights-of-way

Of course, there is no competitive market in the sale of rights to cross seabed. The seabed generally is either entirely un-owned and free for any to cross with cables, or within the control of a governmental authority. In either case, there is no competitive market in the sale of rights to cross the seabed. Therefore easement charges by coastal U.S. states (including the California example featured prominently in the Draft Report) and by other nations are not comparables that show what price would be produced by a competitive market in the sale of rights to cross seabed, if such a market existed.[7]

2. The predictions of economic theory

Therefore one must look elsewhere for guidance. First, one could look to the world of economic theory, which says that in a perfect (i.e., competitive) market, the market price for a commodity will become the seller's cost to produce plus a reasonable rate of return. That is because in a perfect market one assumes no monopoly power, and if sellers temporarily manage to charge more than their cost plus a reasonable rate of return, such as due to a shortage of supply relative to demand, more sellers will be drawn into the market, and the law of supply and demand will operate so as to again drive the market price down to seller's cost plus a reasonable rate of return.

Applying this simple theory to the case at hand, one would have to look at NOAA's cost of providing the sanctuary resource being used, and then determine how to fairly allocate that cost across all users of the sanctuary resources. For example, one could take NOAA's total cost of running the sanctuary program, break that down across the thirteen current sanctuaries, then further allocate NOAA's "costs" for that sanctuary across that sanctuary's users. The fee then, on an annual basis, would be no more than some small fraction of a fraction of NOAA's cost of running the sanctuary program.

Another reduction would have to be considered. Aside from the FMV fee, the Act authorizes two other types of fees for special use permits: one for "costs incurred… by [NOAA] in issuing the permit," and another for "costs incurred…by [NOAA] as a direct result of the conduct for which the permit is issued, including the costs of monitoring the activity". To the extent such fees are paid by the permittee, those types of NOAA costs should not be counted again towards NOAA's total costs of providing the sanctuary. To the extent such fees overcompensate[8], no additional FMV fee may be justified.

What if there were a shortage of potential undersea cable routes, wouldn't that drive the price of seabed easements up, above sellers' cost plus reasonable return, even if there were competing sellers? This concern can be countered with two points. First, to the extent there is a shortage relative to demand, with no opportunity for additional sellers to enter the market, you have deviated from the assumptions that should underlie the concept of "fair market value". Of course such shortages relative to demand can exist, such as in the case of where all sellers form a cartel to control supply and raise prices; or where a monopolist has the power to deter competitors from entering; or even temporarily in a competitive market, before new sellers have been able to enter the market. In the real world, particular sellers sometimes have some degree of market power even if less than full monopoly power, such as based on patent or copyright or brand. But the concept of fair market value by definition should be based on a competitive market, not one where the seller has market power.

Second, putting aside the fact that NOAA or state coastal agencies may have monopoly-like power over large expanses of seabed, in the real world there is no shortage of seabed for submarine cables. NASCA's August 3, 2000 comments to NOAA in response to its Advance Notice of Proposed Rulemaking, "Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries", predicted that "on average over the next five years, only a relatively small number of new systems will be landed in North America per year", and explained why. Subsequently, in comments submitted in a state rulemaking in Florida, NASCA predicted that Florida (a major international hub for cables linking the U.S. with Central America, South America, and Europe) would probably see only about four more cable systems (a total of eight separate cables) landed by 2009. Both predictions relied in part in the foreseeable continuing technological improvements that allow ever-greater carrying capacity to be built into a single undersea cable, thus keeping pace even with the continued future growth in demand that was then optimistically expected.

---

[8] For example, Global Crossing states that its special use permit from NOAA for the PC-1 cable required it to fund, among other things, $500,000 worth of visitor center exhibits. It is unclear why the PC-1 crossing of the sanctuary would have required NOAA to incur such costs.

Since those reports were prepared, the telecommunications sector has seen dramatic reductions in financial status and in the pace of planning new submarine cable projects. The NASCA estimates in those two reports, intended to be conservative, now appear even more so. Therefore, with

(1) the low expected rate of cable-laying,

(2) the fact that each cable is only a few inches wide, and

(3) the fact that international cable systems generally have at the early planning stage a wide range of places where they could land,

there is no relative scarcity of seabed that would drive up easement prices if there were a competitive, or even semi-competitive, market for such easements. Seller's cost (plus a reasonable rate of return) therefore is an appropriate predictor of the fair market value – i.e., the price the market would set, if a competitive market existed.

3. The Telecommunications Act of 1996 Shows Congressional Support for a Cost-Based Approach

Section 253(c) of the Telecommunications Act of 1996[9] (the "1996 Act") mandates that local government rights-of-way fees imposed on the installation and maintenance of telecommunications must be "fair and reasonable." Federal and state courts interpreting this "fair and reasonable" fee language have routinely struck down various right-of-way fees that exceed the actual and direct cost to local government of allowing access to such rights-of-way. In other words, these courts faced a question analogous to that faced by NOAA in interpreting "fair market value" – they also had to decide what fee was "fair" when set by a government agency that has something like monopoly power and there is no market.

For example, in *City of Auburn v. Qwest Corp*,[10] the Ninth Circuit recently said that "fair and reasonable compensation" under Section 253(c) means a fee based on the local government's costs.[11] The court in *Qwest Communications Corporation v. The City of Berkeley*[12] also said that such fees must be related to actual use of the right-of-way, and cannot exceed cost-based factors.[13] Many other courts have held similarly.[14]

---

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 et seq.).
[10] *City of Auburn v. Qwest Corp*., 247 F.3d 966 (9th Cir. 2001) ("*City of Auburn")*.
[11] *Id*., 247 F.3d at 982.
[12] *Qwest Communications Corp. v. The City of Berkeley*, No. C 01-0663 (N.D. Cal. filed May 23, 2001).
[13] *Id*., slip op. at 20.
[14] See *e.g.*, *New Jersey Payphone Association Inc. v. Town of West New York*, 130 F. Supp. 2d at 631 (interpreting "fair and reasonable compensation" to limit local government entities to recoupment of costs directly incurred through the use of the public right-of-way), *Bell Atlantic MD v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (2000) (rejecting 3% franchise fee as not directly related to use of rights-of-way)[14]; *City of Dallas v. Metropolitan Fiber Sys.*, 2000 WL

These cases of course do not interpret the Act at issue here, and the specific types of local government costs may not apply to the NMS context. But they show that the cost-based approach outlined above is not a merely theoretical point. To the contrary, it may be the only way to determine a fair price when a fee-setting government agency possesses monopolistic control over rights of way, and there is no free market to produce true comparables as reference points.

4. The Draft Report does not use the closest comparables

As an alternative to looking at seller's cost to predict free-market outcome, one could try to find real-world comparables in a competitive market that was at least analogous to what a competitive market in undersea easements would look like. One could make estimated adjustments, if necessary to make the quasi-comparables better approximate the ideal.

To be close to a true comparable to the seabed situation, you would need to check or adjust for the following factors:

?? multiple competing sellers available, none with significant market power (not necessarily true in the NMS context, but must be assumed for "fair market value");

?? comparable in terms of width of easement and length of term;

?? undeveloped rural area (see bullets below);

?? no exclusion of other uses (a cable plowed in across sanctuary's seabed generally does not preclude any other foreseeable uses of the seabed, including fishing, either practically or legally through the form of the permission granted);

198104 (N.D. Tex. 2000) (while upholding 4% franchise fee as it was agreed to *prior* to passage of Section 253, concluding that a percent of revenue fee would now be unlawful for post-1996 Act franchises); *BellSouth Telecommunications, Inc.. v. City of Mobile*, 2001 U.S. Dist LEXIS 4244 (S.D. Ala. 2001). (*affirming* a city ordinance under Section 253(c) that imposed a fee that enabled the city to recover the costs of administration and enforcement, and which was *not* for the purpose of raising revenue.)' *AT&T v. City of Dallas*, 1999 WL 324668 (N.D. Tex. 1999) (rejecting 4% franchise fee as unrelated to use of rights-of-way) *reversed as* moot, *AT&T v. City of Dallas*, 2001 U.S. App. LEXIS 3890 (5th Cir. 2001) (following passage of an intervening Texas statute); *PECO Energy Co. v. Haverford Township*, No. 1999 U.S. Dist. Lexis 19409 (E.D. Pa. 1999)) (rejecting ordinance imposing four types of franchise fees with no way of determining proper amount of fees, nor how fees relate to use of rights-of-way); *City of Hawarden v. U. S. West Communications, Inc.*, 590 N.W.2d 504 (Iowa 1999) (rejecting 3% franchise fee as illegal revenue generating measure); *City of Gary v. Indiana Bell Tel. Co. d/b/a Ameritech Indiana*, No. 45A03-9808-CV-333 (In. Ct. App. 1999) (rejecting percentage of gross revenue fee as illegal revenue generating measure or tax, and unrelated to use of rights-of-way).

?? no costs of disruption to the seller (urban installations often have significant costs in terms of traffic disruption and street repair; submarine cables in contrast impose no such costs on NOAA, save those directly compensated for through separate NOAA fees for permit processing, monitoring, etc.);

?? no significant environmental harm or other reduction in property value (NOAA concedes cables generally create no significant adverse environmental impacts, and in any case could not properly receive a special use permit to cross a sanctuary unless such potential impacts had been mitigated); and

?? no "corridor enhancement", a price increment recognizing the value of a single long corridor when the alternative would be for buyer to negotiate with a large number of separate contiguous property holders (the seabed does not suffer from such fractionated ownership).

The Draft Report at least mentions the general principle that one must evaluate "the degree of comparability", and mentions some of the particular distinctions noted above (e.g., exclusivity, low environmental impacts, rural versus urban, corridor enhancement). However, the Draft Report neither identifies any near-comparables as defined above nor attempts to make the necessary adjustments to the supposed comparables that it does use. The Draft Report does not expressly say how comparable it thinks its supposed comparables are (the bottom-line recommendation in the prior published draft, that cables be charged a "fair market fee" of $120,000 per mile to cross a sanctuary, has been deleted from this draft). However, the Draft Report still gives the impression, when discussing prior transactions, that it considers them to be relevant.

Unfortunately, the prior transactions identified in the Draft Report are so far from being appropriate comparables that they seem more misleading than helpful. That is particularly true of the four described in detail. The Nevada Bell example seems presented not so much for the moderate fee imposed as for the state agency's finding that in the private sector, prices have been going up. The Massachusetts Turnpike Authority example presumably involved not only a major "corridor enhancement" (135 miles along Interstate 90), but also some relatively high-value urban and suburban property. The AT&T class action example does not even involve a sale, but rather a settlement of a lawsuit brought after the cables were installed; it does not make clear what considerations drove the settlement, but to the extent plaintiffs might have had the legal right to require the defendant to remove cable already installed and in use, that obviously is a different situation from negotiating a price for a prospective installation. The California State Lands example also does not involve a sale, but rather a fee imposed by a government agency with close to absolute monopoly power in the context of those cable-permitting processes.

Similarly, the two graphs presented earlier in the paper, extrapolating changes in average price over time from about twenty data points, each suggest a current "value" of about $100,000 per mile. But the Draft Report admits that these data points were selected simply because they were among the few with publicly-available documentation; the Draft Report does not suggest that they hew close to the comparability criteria listed above, nor does it even attempt to adjust the data points to compensate for their non-comparability. So again, the misleading impression of precision given by the mathematical analysis makes the graphs more misleading than helpful.

5. The Draft Report contains many other improper considerations.

In numerous places, the Draft Report mentions with approval or at least interest considerations that are clearly improper, and which NOAA should not consider going forward. For the sake of brevity, they are briefly listed here.

?? The report mentions in several places how much money large cable projects can make. (See, e.g., p. 5, "the enormous revenues generated by the fiber optic industry"; p. 12, "highly profitable, unregulated firms;" see also the income allocation approach at pp. 16 - 18). This seems calculated to justify at least politically extracting large fees. First of all, the profitability picture has changed dramatically since such language was drafted, with more than one NASCA member now in bankruptcy. Secondly, as shown above, profitability is not a proper basis for NOAA's fee, only NOAA's related costs are. Profitability could properly drive up NOAA's fee if it was a financial investor sharing in the risks of the project, but it is not.

?? The report in several places seems to consider NOAA market power as an appropriate basis for extracting large fees. (See, e.g., p. 15; "free-market bargaining scenario" actually involves one in which NOAA is taking advantage of its market power from controlling a large area; see also reliance on prior transactions that involved such market power, e.g. page 20.) In doing so, NOAA seems to confuse free-market bargaining with a monopolist, which could be what Congress intended as "fair market value", with bargaining in a competitive market.

?? The report concedes (pages 9, 10) that submarine cables have minimal impacts on sanctuaries. But then it goes on to suggest that submarine cables still "may represent a retreat from established environmental protections", may somehow reduce their "amenity value" (pages 4, 9, 10). First, by definition a project properly permitted by the U.S. Army Corps of Engineers and/or NOAA will not retreat from "established environmental objections". Second, NOAA's concept of amenity value is undefined and unclear, but in any event clearly is not based on a cost to NOAA and should not be part of the FMV concept.

?? In related statements, the Draft Report suggests that FMV fees should be set to create "appropriate economic incentives" (p. 9). However, NOAA should not go down the road of trying to quantify the net social harm done by a cable project, if any, even after all project mitigation is considered; if it wanted to create "appropriate economic incentives". Even if NOAA could do so, by the same logic it would also have to estimate the net social benefits from the project, and might find itself owing financial incentives to worthwhile projects.