

Remarks by
Catherine Creese, Director of Permitting
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Before the
Federal Rights-of-Way Working Group
Washington, DC
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Good morning. My name is Catherine Creese. I am the Director of Permitting at Tyco Telecommunications, and am a director of the North American Submarine Cable Association, or NASCA. Tyco is an international network owner and the only U.S. supplier of submarine cable systems. NASCA is a non-profit trade association formed by companies that own, install, or maintain submarine telecommunications that land in North America. Thank you for the opportunity to speak to you on their behalf. My remarks focus on three main points:

?? Our Permitting and Right of Way Acquisition Process

?? Specific Agency Issues

?? Recommendations and Suggestions

1. Introduction

Submarine cables are an essential part of the communications infrastructure that allows for nationwide and worldwide broadband connectivity. Submarine cables carry roughly 90 percent of the telecommunications traffic between the United States and points outside of North America. They also play a critical role in connecting the 48 contiguous states with the other states and territories. The U.S. government relies heavily on commercial submarine cables to connect its civilian and military operations around the globe.

I will focus on our marine infrastructure, as my colleagues have addressed the terrestrial issues. Please note, though, that we share those problems as we require terrestrial work for the “last mile” between the beach manholes and the cable stations, and often have terrestrial links that provide ring connectivity in our systems.

2. Our Permitting and Right of Way Acquisition Processes

Marine ROW acquisition is integrally linked to permitting. We require a series of permits, permissions, and easements from the Federal Communications Commission, Army Corps of Engineers, National Oceanographic and Atmospheric Administration (Marine Sanctuary Service and Marine Fisheries Service), state departments of environmental protection and land management, counties, and municipalities. The majority of decisions regarding revenue and environmental protection are made during state lead agency permitting.

The assignment of a marine easement afterwards is a relatively straight forward action by state environmental agencies or land boards. These rights of way extend to the edge of state waters, 3 nautical miles from shore. No state has issued easements beyond that limit, but some have demanded installation conditions including financial mitigation and routing restrictions to the edge of the continental shelf.

Federal involvement is primarily through the Corps, who issues authorizations under the Nationwide Permitting Program (NWP12), or individual permits under Section 10 of the Rivers and Harbors Act and sometimes under Section 404 of the Clean Water Act. The Corps can grant the permit only after state concurrence with the consistency certification and an approval from NMFS. Post-installation compliance documentation traditionally has been limited, which follows logically from qualification for Nationwide permitting. Some recent state permits require regular burial surveys.

NOAA has recently issued special use permits and assessed fees for two of the cables in national marine sanctuaries. The sections of cables covered by these permits extend far beyond US territorial waters. Permit fees include defraying direct costs and a fair market value fee for the use of the land. The “direct costs” for one of these five-year permits included \$850,000 for baseline studies, public outreach and visitor center exhibits, and funding for a ten year, \$4,000,000 research program. The fair market value fee was not determined prior to issuance and is now the subject of rule making.

Since the Corps must receive state concurrence with the applicant’s consistency certification, the volume and content of federal permit application materials depends on the state’s requirements. Application materials include preliminary siting and engineering, marine electronic survey results, and archaeological and environmental studies. They also depend on local District permitting requirements, which vary. Since federal permitting is conditioned by states in this manner, I will also highlight today several problems we face at the state level.

3. Agency Processes and Actions Causing Problems

The FCC recently streamlined the submarine cable license application process. Their new rules reduced the approval time for a landing license to approximately 45 days. This is overwhelmed, however, by federal, state, and local permitting, which is highly unpredictable and can take up to two years. The current governmental permitting procedures have a number of problems that not only delay and unfairly burden the projects, but also threaten to kill such projects through delay.

a. Federal – State Coordination and Oversight

There is inadequate coordination among the multiple approval authorities and no federal regulation or agency that provides oversight of cable permitting. We lack settled clear criteria for approving such projects, and agencies change their approval criteria mid-stream. Some states use their ability to deny consistency concurrence with the Corps permit as a way of requiring conditions and financial mitigation outside of their own waters. Some, but not all Corps Districts issue permits beyond the US waters in violation of international treaties.

The US Commission on Ocean Policy been asked to assess permitting and land management responsibilities that govern telecommunications cables. NASCA has recommended to them that a nationally consistent federal permitting regime should be created to set the conditions for installing submarine cables. This federal regime would operate in lieu of state and local permitting processes.¹ In addition, the Department of Defense is aware of these inconsistencies and is working to address those that reside within the Corps. These initiatives could eliminate the disparities of application processes and provide federal oversight of permitting these important systems.

b. Specific Agency Actions that Cause Problems

There are currently several specific of agency actions that hinder cable permitting.

i. NOAA Initiatives

NOAA has published a series of rulemaking notices regarding submarine cables. We are concerned that NOAA has not substantiated its proposals as a matter of law or policy. NOAA's most recent public notice regarding the fair market value basis for special use fees for submarine cables² reinforces our concerns regarding their process for determining the applicability of special use permits and the associated fees.³ We are also concerned that their focus appears to have shifted from streamlining their approach, and better coordinating it with other agencies, to one that could prohibit any submarine cable activity in sanctuaries. In addition, we share the concern expressed by the US Navy that NOAA is considering applying some of these principles outside of national marine sanctuaries to the marine and coastal environment as a whole.⁴ These proposals do not alleviate any delays or uncertainty, but do increase the cost of the cables significantly. Many of these sanctuaries support other activities – namely commercial fishing - without permits.

This rulemaking addresses only commercial cables and specifically excludes research and military cables. Since there is no difference in installation or physical properties between them, this is clearly for generating revenue and not an environmental issue. NOAA itself questions whether special use permits are proper for this activity. I request that you refer to the comments submitted by, Tyco, other NASCA members and the Navy in response to these notices.

ii. Agencies Determining System Configuration

¹ Testimony by Paul Shorb, Vice President, North American Submarine Cable Association, before the US Commission on Ocean Policy, Boston, MA, July 24, 2002

² See Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System, 67 Fed. Reg. 35,501 (May 20, 2002).

³ See Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries, Advanced Notice of Proposed Rulemaking, Docket No. 000526157-0157-01, 65 Fed. Reg. 51,264 (Aug. 23, 2000).; and

Fair Market Value Analysis for a Submarine Cable Permit in National Marine Sanctuaries, Notice of Availability, 66 Fed. Reg. 43,135 (Aug. 17, 2001), Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries, Notice of Availability, 66 Fed. Reg. 1092 (Jan. 5, 2001), Draft Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries (Aug. 2001), available at <<http://www.sanctuaries.nos.noaa.gov/news/newsbboard/fairmarket.pdf>>

⁴ Department of Defense, Representative for Ocean Policy Affairs letter to Ms. Malek, National Marine Sanctuary Program, 23 October, 2000

Some agency decisions conflict with decisions made by the FCC. Three years ago the FCC licensed several systems to provide connectivity between specific markets in the Pacific. California determined that they would not qualify for permitting under the California Coastal Act because they included coastal marine links. One system had already been installed outside of California in accordance with the FCC license when the state decided to deny the permit. California did reevaluate, and most were installed as originally configured.

Likewise, New Jersey has a proposed rule that leads to a virtual prohibition of these wet links.⁵ The FCC might approve a license with a link between sites in New Jersey, or from New Jersey to New York. But New Jersey intends to prohibit the installation by exerting routing controls outside of its territorial waters.

The NOAA rulemaking could have a similar impact. The Sanctuaries along the California coast effectively prohibit landings near the Bay Area. Cables must instead backhaul terrestrially, shifting any impacts from the marine environment, to the terrestrial one, where they can be much greater. Sanctuaries also block many of the landings established on Hawaiian Islands, and Seattle.

Agencies are also considering “cable corridors” where a single catastrophic event could significantly impair the US network. NOAA is evaluating implementation of corridors within sanctuaries. Florida has proposed corridors to specific landing points, but is not willing to control them, which can lead to an artificial inflation of land prices on the shore end of the cable. Neither agency has shown any real environmental benefit from implementing such a regime.

iii. Agencies Conditioning Permits With Private Contracts.

A recent Oregon rule requires a cable permit applicant to reach a written agreement with local fishermen.⁶ There is no state requirement for the fishers to sign. New Jersey proposed a similar requirement but would not force the cash subsidy demanded by the fishers and dropped the proposal. The State of California does not have such a regulation, but the applicant must reach an agreement. Since in each case state concurrence is required before the Corps can grant a permit, these agreements are therefore prerequisites to the federal permit as well.

iv. Lead Agencies with no Formal Permitting Process

Most of the transpacific cables land in California, yet it has no specific rules for permit issuance or easement granting. This has resulted in increasingly burdensome

⁵ New Jersey Proposed Coastal Zone Management Rule Update stating that “Submerged cables, or portions thereof, which are sited in the Atlantic Ocean shall meet the following conditions:

1. Siting a cable in the Atlantic Ocean is discouraged unless the cable complies with the following:

i. If the cable is either sited within Surf clam areas, N.J.A.C. 7:7E-3.3, or sited within areas where Marine fish, as defined at N.J.A.C. 7:7E-8.2, are commercially harvested using mobile bottom-tending gear, no prudent and feasible land-based alternate route exists and the cable follows the shortest route to waters beyond the Surf clam areas and areas where Marine fish are commercially harvested using mobile bottom-tending gear;” available at

<http://www.state.nj.us/dep/landuse/proposal/122701b.doc>

⁶ Oregon Administrative Rule 660.036(b) stating that (b) Communication and coordination. Written agreements between the applicant and fishers or other users shall be required by the easement-granting agency as evidence of communication and coordination;” available at

http://arcweb.sos.state.or.us/rules/OARS_600/OAR_660/660_036.html

requirements, many with dubious environmental benefits, ad hoc and variable conditions, and the unwritten, but very real requirement to reach an agreement with fishers, which make cables in this state cost more and take longer than in other states.

v. Discrimination Against Submarine Telecommunications Cables

Commercial fiberoptic cables are discriminated from other utilities. For example, in Oregon application fees for cable easements in territorial seas are seven times higher than other utilities. The actual easement fee is set only by reference to the state constitution which requires the State Land Board to obtain the “greatest benefit” for the people of the state⁷. In contrast, terrestrial utility easements are exempt of fees.⁸ In Washington, fiber easements are based on commercial land values, other utilities’ on light industrial. In Florida fiber cables get a private easement with a negotiated rate; other utilities get the use of free public easements.

4. Suggestions/Conclusions

Submarine cables are an integral part of our nation’s broadband infrastructure. States currently control the cost and time for permitting, attempt to control system configurations, and leverage coastal zone management rules to condition federal permits. The net effect unfairly burdens submarine cables. No federal agency keeps track of state and federal permit applications for this important part of the telecommunications infrastructure. NASCA believes there is a legal basis for the federal government to exert greater control in submarine cable permitting. NASCA encourages this Working Group to support our recommendation to the Ocean Commission for a federalized permitting system. In the interim we request a mechanism to ensure coordination within the federal government and with state governments, and to ensure prompt and non-discriminatory processes and cost-based fees for submarine cable permitting.

We believe that NOAA should suspend implementation of the fair market value analysis unless and until it completes a rulemaking to determine whether special use permits are permissible as a legal and policy matter for submarine cables, as the permits are the only legal basis for fee assessments. In this regard, we ask that NTIA consult further regarding the consistency of NOAA’s proposed actions with the Administration’s communications and information policies, particularly with respect to proposed fees, which discriminate against the telecommunications industry and are seen, in some respects, as a NOAA funding mechanism.

Thank you for your attention. I would be pleased to provide you with additional information and copies of any of the documents that I have referenced today.

Catherine Creese

7 Oregon Administrative Rule 141-083 stating that the State Land Board, through the Division, has a constitutional responsibility to manage "the lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management" pursuant to Article VIII, Section 5(2) of the Oregon Constitution. available at http://arcweb.sos.state.or.us/rules/OARS_100/OAR_141/141_083.html

8 Oregon Administrative Rule 141-122 stating that the following types of easements located on Non-Trust Land are exempt from the mandatory compensatory payment to the Division specified in OAR 141-122-0060(1): (b) Gas, electric and communications service line easements not within designated city limits up to a maximum width of twenty-five (25) feet on each side of the center line. available at http://arcweb.sos.state.or.us/rules/OARS_100/OAR_141/141_122.html

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Other specific problems we routinely encounter in include

- ?? requirements to reach written agreements with local fishermen which can force us into cash subsidies in addition to our standard outreach procedures
- ?? lead agencies with no written application process
- ?? and discriminatory state easement fees where other utilities get free use of public easements