Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Amendment of Parts 1 and 63 of the Commission's Rules	IB Docket No. 04-47

COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

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SUMMARY

The North American Submarine Cable Association ("NASCA") urges the Commission to reject its proposed rule changes relating to the Coastal Zone Management Act ("CZMA"). The legal basis for the Commission's proposals is mistaken, as the CZMA and the implementing regulations issued by the National Oceanic and Atmospheric Administration ("NOAA")—the latter of which the Commission has failed to address in its NPRM—do not require a consistency review unless and until a state with a coastal management program approved by the Secretary of Commerce has identified a required federal license or permit as affecting a land or water use or natural resource in the coastal zone. No state has enumerated a cable landing license as such a license or permit activity so as to trigger a consistency review. Moreover, the issuance of a cable landing license cannot "affect" any land or water use or natural resource of the coastal zone, so as to trigger a consistency review, because a cable landing license does not expressly authorize any construction activities. Instead, a cable landing license is a political and diplomatic permission issued by the president consistent with U.S. foreign policy, national security, telecommunications connectivity, and competition objectives. Its issuance is insufficient for a licensee to commence any construction activities relating to a submarine cable project. Indeed, the Commission explicitly requires all cable landing licensees to obtain prior approval for their construction plans from the Army Corps of Engineers, whose environmental permitting process the states have almost uniformly subjected to CZMA consistency reviews and which ensures full review of every submarine cable project in light of the states' coastal management programs.

Moreover, the Commission's proposals would greatly harm submarine cable operators and infrastructure providers while compromising the Commission's own interests. If adopted, the Commission's proposals would delay cable construction and activation of capacity on U.S.

international routes and hinder financing of submarine cable projects. These proposals would also undermine the Commission's previous efforts to streamline submarine cable licensing, waste governmental resources without providing any tangible benefits in terms of environmental protection, and threaten to draw the Commission into time-consuming disputes with the states over the meaning of "enforceable policies" under the CZMA. Consequently, the Commission should reject on legal and policy grounds its proposals to amend its Part 1 rules, as cable landing license applicants are under no obligation to certify that cable projects comply with the enforceable policies of a state coastal zone management plan approved by the Secretary of Commerce.

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The North American Submarine Cable Association ("NASCA") urges the Commission to reject its proposed rule changes relating to the Coastal Zone Management Act.[1] The legal basis for the Commission's proposals is mistaken, as the CZMA does not require a consistency review unless and until a state with a coastal management program approved by the Secretary of Commerce has identified a required federal license or permit as affecting a land or water use or natural resource in the coastal zone. No state has identified a Commission-issued cable landing license as such a license or permit. And the issuance of a cable landing license cannot "affect" a land or water use or natural resource in the coastal zone, so as to trigger a consistency review, because a cable landing license does not expressly authorize any physical construction activities. Instead, a cable landing license is a political and diplomatic permission issued by the president consistent with U.S. foreign policy, national security, telecommunications connectivity, and

[1] See Amendment of Parts 1 and 63 of the Commission's Rules, Notice of Proposed Rulemaking, FCC 04-40, IB Docket No. 04-47 (rel. Mar. 4, 2004) ("NPRM"); Comment and Reply Comment Dates for Amendment of Parts 1 and 63 of the Commission's Rules Rulemaking, Public Notice, DA 04-763 (rel. Mar. 23, 2004); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 ("CZMA").

competition objectives. Its issuance is insufficient for a licensee to commence landing or operation of a submarine cable. Indeed, the Commission explicitly requires all cable landing licensees to obtain prior approval for their construction plans from the Army Corps of Engineers, whose environmental permitting process the states have almost uniformly subjected to CZMA consistency reviews and which ensures full review of every submarine cable project in light of the states' coastal management programs. By requiring a consistency review for the Commission's cable landing licensing, the Commission would subvert the objectives articulated by the National Oceanic and Atmospheric Administration ("NOAA") in its CZMA implementing regulations, which it crafted to minimize duplicative effort and unnecessary delay.

Moreover, the Commission's proposals would greatly harm submarine cable operators and infrastructure providers while compromising the Commission's own interests. If adopted, the Commission's proposals would delay cable construction and activation of capacity on U.S. international routes and hinder financing of submarine cable projects. These proposals would also undermine the Commission's previous efforts to streamline submarine cable licensing, waste governmental resources without providing any tangible benefits in terms of environmental protection, and threaten to draw the Commission into time-consuming disputes with the states over the meaning of "enforceable policies" under the CZMA.

NASCA and its members have a strong interest in protecting the marine and coastal environment without unduly limiting undersea cable infrastructure necessitated by consumer demand for bandwidth capacity. NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.[2]

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[2] NASCA's current members include: Alaska United Fiber System Partnership; Alcatel Submarine Networks; AT&T Corp.; Gemini Submarine Cable System, Inc.; Global Crossing Ltd.; Global Marine Systems Limited; GlobeNet Communications Group, Ltd.; Hibernia

For decades, NASCA's members have worked with federal, state, and local government agencies, as well as other concerned parties—such as commercial fishermen and private environmental organizations—to ensure that submarine cables do not harm the marine or coastal environment or unreasonably constrain the operations of others in that environment.

NASCA's comments are divided into two parts. *First*, NASCA discusses how the Commission's existing submarine cable licensing process comports with the CZMA's consistency review requirements, and explains why the legal basis for the Commission's proposals is mistaken. *Second*, NASCA discusses how the Commission's proposed CZMA-related rule changes would greatly harm submarine cable operators and infrastructure providers while compromising the Commission's own interests.

I. THE COMMISSION'S SUBMARINE CABLE LICENSING PROCESS ALREADY COMPORTS WITH THE CZMA'S CONSISTENCY REVIEW REQUIREMENTS

The Commission's cable landing license rules already comply with the CZMA's consistency review requirements. The legal basis for the Commission's proposals to amend its Part 1 rules is therefore mistaken. The CZMA provides:

> After final approval by the Secretary of a state's management program, any applicant for a *required Federal license or permit* to conduct an activity, in or outside of the coastal zone, *affecting any land or water use or natural resource of the coastal zone* of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program.[3]

Atlantic; Level 3 Communications, LLC; MCI, Inc.; New World Network, USA, Inc.; Southern Cross Cables Limited; Sprint Communications Corp.; Teleglobe Canada ULC; and Tyco Telecommunications (US) Inc.

[3] 16 U.S.C. § 1456(c)(3)(A) (emphasis added).

The CZMA and NOAA's implementing regulations—the latter of which the Commission has failed to address in its NPRM—make clear, however, that a cable landing license does not fall within the category of "required Federal license or permit to conduct an activity . . . affecting any land or water use or natural resource of the coastal zone." *First*, such licenses and permits are limited to those enumerated by the states in their approved coastal zone management programs, and no state has enumerated a cable landing license as such a license or permit so as to trigger a consistency review. *Second*, the issuance of a cable landing license cannot "affect" any land or water use or natural resource of the coastal zone. Consequently, the Commission should reject on legal grounds its proposals to amend its Part 1 rules, as cable landing license applicants are under no obligation to certify that cable projects comply with the enforceable policies of a state coastal zone management plan approved by the Secretary of Commerce.

A. A Cable Landing License Is Not a Required Federal License or Permit Subject to CZMA Consistency Review

A cable landing license is not a required federal license or permit subject to CZMA consistency review because the states with approved coastal zone management programs have not identified it as such. For the CZMA's consistency review requirements to apply, a cable landing license must not only qualify as a "Federal license or permit,"[4] but also as one expressly identified by the states, and approved by NOAA, as subject to CZMA consistency review.[5] Specifically, NOAA's regulations implementing the CZMA—which the Commission neglected to discuss in the NPRM[6]—provide:

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4 *See* 15 C.F.R. § 930.51(a).

5 *See id*. § 930.53(a).

6 *See* NPRM ¶¶ 33-35.

> State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the federal license or permit activities shall be described in terms of the specific licenses or permits involved (*e.g.*, Corps of Engineers 404 permits, Coast Guard bridge permits).[7]

A state must include such a list of federal license and permit activities as part of its procedures for implementing federal consistency requirements, all of which must be approved by the Secretary of Commerce as part of the state's coastal zone management program.[8] A state may amend its list after consultation with the affected federal agency and approval of NOAA's Assistant Administrator.[9] But unless the list includes a specific license or permit activity, that license or permit activity is not subject to CZMA consistency review.[10] Moreover, the CZMA provides that only a state—and not the federal agency issuing a license or permit—may act to include a federal license or permit in the list of those required federal licenses or permits affecting any land or water use or natural resource of the coastal zone.[11]

To NASCA's knowledge, no state with an approved coastal zone management program has identified a cable landing license as a required federal license or permit activity which affects

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7 15 C.F.R. § 930.53(a).

8 *Id.* §§ 923.53(a)(2), 930.53(b). A state may in certain circumstances request a consistency review for an unlisted federal license or permit activity affecting any land or water use or natural resource of the coastal zone. *See id.* § 930.54(a)(1). But no state appears to have done so with a cable landing license—nor could it, as explained in part I.B below, because the Commission's issuance of a cable landing license does not satisfying the "affecting" requirement.

9 *Id.* Part 923, § 930.53(c).

10 *See State of New Jersey v. Long Island Power Authority*, 30 F.3d 403, 419-21 (3d Cir. 1994) (finding that the Coast Guard and the Nuclear Regulatory Commission properly issued licenses to two utilities because the State of New Jersey had not included such licenses in its list of federal license or permit activities that affect any New Jersey coastal use or resource).

11 15 C.F.R. § 930.53(b).

any coastal use or resource, either in its original or amended coast zone management plan.[12] Indeed, the states have consistently omitted cable landing licenses, and indeed any licensing or permitting activity by this Commission, from their lists of required federal license or permit activities subject to consistency reviews.[13]

Consequently, the Commission's concern that its rules may not comport with the CZMA is unfounded.[14] As specified in NOAA's CZMA regulations and the approved state coastal

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[12] *See generally* State and Territory Coastal Zone Management Program Summaries, *available at* http://www.ocrm.nos.noaa.gov/czm/czmsitelist.html.

[13] *See, e.g.*, 6 ALASKA ADMIN. CODE § 50.405(b) (2004) (listing as subject to Alaska consistency review required federal licenses and permits issued by the Department of Defense/Army Corps of Engineers (including permits issued pursuant to the Rivers and Harbors Act of 1899, the Clean Water Act, and the Outer Continental Shelf Lands Act), the Environmental Protection Agency, Nuclear Regulatory Commission, and the Departments of Agriculture, Commerce, Energy, and Transportation, but *not* by this Commission); California Coastal Management Program, List of Federal Licenses and Permits Subject to Certification for Consistency, *available at* http://www.coastal.ca.gov/fedcd/listlic.pdf (listing as subject to California consistency review required federal licenses and permits issued by the Department of Defense/Army Corps of Engineers (including permits issued pursuant to the Rivers and Harbors Act of 1899, the Clean Water Act, the National Marine Sanctuaries Act, and the Outer Continental Shelf Lands Act), the Environmental Protection Agency, the Federal Power Commission [sic], the Nuclear Regulatory Commission, and the Departments of the Interior and Transportation, but *not* by this Commission); FLA. STAT. 380.23 (2004) (listing as subject to Florida consistency review required federal licenses and permits issued under, *inter alia*, the Rivers and Harbors Act of 1899, the National Marine Sanctuaries Act, and the Clean Water Act, but *not* the Cable Landing License Act); 301 MASS. REGS. CODE § 21.07 (2004) (listing as subject to Massachusetts consistency review required federal licenses and permits issued by the Army Corps of Engineers (including permits issued pursuant to the Rivers and Harbors Act of 1899, the Clean Water Act, and the Outer Continental Shelf Lands Act), the Environmental Protection Agency, the Nuclear Regulatory Commission, and the Departments of Commerce, the Interior, and Transportation, but *not* by this Commission); OR. ADMIN. R. § 660-035-0050 (2004) (listing as subject to Oregon consistency review required federal licenses and permits issued by U.S. Army Corps of Engineers (including permits issued pursuant to the Rivers and Harbors Act of 1899 and the Clean Water Act), the Environmental Protection Agency, the Department of the Interior/Minerals Management Service, the Department of the Interior, the Department of Transportation/Coast Guard, the Interstate Commerce Commission [sic], the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission, but *not* by this Commission).

[14] *See* NPRM ¶ 33.

management plans, an applicant for a cable landing license has no legal obligation to certify to the Commission that its cable project complies with the enforceable policies of the state's approved coastal zone management plan and that it will conduct the project in a manner consistent with that plan. Moreover, any attempt by the Commission to identify cable landing licenses as federal licenses or permits affecting any land or water use or natural resource of any state's coastal zone is legally improper, usurping a right which the CZMA reserves exclusively for the states.[15]

As explained further in parts I.B. and II.D below, the fact that the states have not enumerated Commission-issued cable landing licenses as licenses or permits subject to CZMA consistency review does not evidence some failure to act by the states. To the contrary, all cable projects—including those connecting points within the continental United States, which do not even require cable landing licenses[16]—are subject to a mandatory and comprehensive permitting process administered by the Secretary of the Army pursuant to the Rivers and Harbors Act of 1899 and, in some cases, the Clean Water Act. By requiring a consistency review for the Commission's cable landing licensing, the Commission would cause "duplicative effort and unnecessary delay" in contravention of the objectives of NOAA's implementing regulations.[17]

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[15] *See id.* ¶¶ 34-35 (improperly suggesting that the Commission, rather than the states, determines whether a Commission-issued license or permit affects any land or water use or natural resource of the states' coastal zones).

[16] A cable landing license is not required for a submarine cable that lands only in the continental United States. 47 U.S.C. § 34.

[17] 15 C.F.R. § 930.1(c).

B. A Cable Landing License Cannot "Affect" Any Land or Water Use or Natural Resource of a State's Coastal Zone Because It Is a Political and Diplomatic Permission, Not Construction Authority

A cable landing license cannot "affect" any land or water use or natural resource of a state's coastal zone because it is a political and diplomatic permission, not construction authority. The Cable Landing License Act[18] provides that:

> No person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States.[19]

The Cable Landing License Act makes plain that a cable landing license is a political and diplomatic permission issued by the president consistent with U.S. foreign policy, national security, telecommunications connectivity, and competition objectives:

> The President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights and interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed: Provided, the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States.[20]

The Commission—acting on delegated authority of the president[21]—has adopted rules to further these policies, seeking detailed information of cable landing license applicants with respect to

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[18] *See* "An act relating to the Landing and Operation of Submarine Cables in the United States," *codified at* 47 U.S.C. §§ 34-39 ("Cable Landing License Act").

[19] 47 U.S.C. § 34.

[20] *Id.* § 35.

[21] *See* Executive Order No. 10,530 § 5(a), *codified at* 3 C.F.R. 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988) (delegating to the Commission the authority to license submarine cables and receive applications therefor, but requiring State Department consent by a

nationality, ownership, markets to be served, affiliations with foreign carriers, and system capacity.[22] Both the Cable Landing License Act and the Commission's implementing rules therefore clarify that although a cable landing license is necessary for a submarine cable project to proceed, the license itself provides no authority to engage in physical construction activities.

In fact, the Commission explicitly requires all cable landing licensees to obtain prior approval for their construction plans from the Secretary of the Army. "The location of the cable system within the territorial waters of the United States of America, its territories and possessions, and upon its shores shall be in conformity with plans approved by the Secretary of the Army."[23] The Army Corps of Engineers—acting on delegated authority from the Secretary of the Army—administers a mandatory and comprehensive permitting program under the Rivers and Harbors Act of 1899 and, in some case, the Clean Water Act.[24] Thus, the issuance of a cable landing license, while a necessary condition for cable construction, is an insufficient condition for construction absent the requisite permit from the Army Corps of Engineers, meaning that no submarine cable construction can take place unless and until the Army Corps of Engineers approves plans for the cable.

Consequently—as noted in part I.A above—the states have not included cable landing licenses in their list of required federal license or permit activities affecting any land or water use or natural resource of their respective coastal zones—nor could they under NOAA's

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presidential appointee (who has been confirmed with the advice and consent of the Senate) following consultations with the Departments of Commerce and Defense—a consultation process that typically focuses on national security and law enforcement concerns).

22 47 C.F.R. § 1.767(a).

23 *Id.* § 1.767(g)(2).

24 *See* Rivers and Harbors Act of 1899 § 10, 33 U.S.C. § 403 (requiring a permit for any construction "in or through the navigable waters of the United States"); Clean Water Act § 404, 33 U.S.C. § 1344 (requiring a permit for any activities involving the discharge of dredged or fill material).

implementing regulations.[25] As a legal matter, cable landing license issuance does not "affect" any land or water use or natural resource of a state's coastal zone. And as a practical matter, the states already review all construction-related activities of submarine cable projects by subjecting the Army Corps' permits to CZMA consistency review, thereby ensuring full review of every submarine cable project in light of the states' coastal management programs. Additional review of the Commission's licensing process would, at most, duplicate the existing consistency reviews of Army Corps permits, disserving NOAA's objectives in implementing the CZMA.

II. IF ADOPTED, THE COMMISSION'S PROPOSALS WOULD GREATLY HARM SUBMARINE CABLE OPERATORS AND INFRASTRUCTURE PROVIDERS WHILE COMPROMISING THE COMMISSION'S INTERESTS

While based on a mistaken reading of the CZMA and NOAA's implementing regulations, the Commission's proposals, if adopted, would also greatly harm submarine cable operators and infrastructure providers while compromising the Commission's own interests. *First*, the Commission's proposals would delay cable construction and activation of capacity on U.S. international routes. *Second*, the proposals would impede efforts to secure financing for submarine cable projects. *Third*, they would undermine the Commission's previous efforts to streamline submarine cable licensing. *Fourth*, they would waste governmental resources without providing any tangible benefits in terms of environmental protection. *Fifth*, they would threaten to draw the Commission into time-consuming disputes with the states over the meaning of "enforceable policies" under the CZMA.

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[25] *See* 15 C.F.R. §§ 923.53(a)(2), 930.53(b).

A. The Commission's Proposals Would Delay Cable Construction and Activation of New Capacity on U.S. International Routes

The Commission's CZMA-related proposals would delay cable construction and activation of new capacity on U.S. international routes. At present, submarine cable operators typically apply for cable landing licenses toward the beginning of a cable project timeline, as a cable landing license is a legal prerequisite for any construction activities in U.S. territory. With a cable landing license in hand, a cable operator and its contractors may then commence construction on particular segments and cable stations as soon as they receive the necessary state, local, and Army Corps permits.[26] If a particular state or local government agency or the Army Corps delays issuance of a necessary permit with respect to one particular segment or cable station, the cable operator and its contractors may still commence construction with respect to the other segments or cable stations for which they have received all necessary permits. Thus, the current process provides cable operators and their contractors with the flexibility to move forward with construction and activation of particular segments and cable stations. Moreover, it allows infrastructure providers to deploy their manufacturing, construction personnel, and cable ship resources more efficiently to complete particular segments and cable stations as they receive governmental approvals, rather than attempt to construct all segments and cable stations simultaneously—a practical impossibility, in any event.

The Commission's CZMA-related proposals, however, would deny cable operators and infrastructure providers this scheduling flexibility by precluding them from moving forward with construction on any particular segment or cable station in U.S. territory by declining to issue a cable landing license unless and until *all* states with approved coastal management programs had

[26] *See* 47 U.S.C. § 34.

approved a cable project as consistent with the enforceable policies of the state.[27] Under the Commission's first proposal, the Commission would require an applicant to certify to the Commission regarding consistency with state coastal management programs, and the Commission would decline to act on a cable landing license application unless and until all of the states had concurred with the applicant's certification.[28] The Commission's second proposal would impose even greater delays by precluding a cable landing license applicant even from filing an application unless and until it could furnish the Commission with consistency certifications and concurrences for each state.[29] The Commission's proposals would therefore contravene NOAA's implementing regulations by imposing inflexible procedures and delaying unnecessarily the construction and the ultimate activation of capacity for U.S. consumers and businesses.[30]

B. The Commission's Proposals Would Interfere with the Financing of Submarine Cable Projects

The Commission's proposals would interfere with the financing of submarine cable projects. While a Commission-issued cable landing license does not authorize specific construction activities, it assists submarine cable operators in addressing investment risk, signaling to investors and lenders that a submarine cable project is consistent with U.S. foreign policy, national security, telecommunications connectivity, and competition objectives. For this reason, the Commission has long sought to expedite the cable landing licensing process to avoid

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27 *See* NPRM ¶ 35.

28 *Id.*

29 *Id.*

30 *See* 15 C.F.R. § 930.1(c).

interfering with the investment and financing decisions of submarine cable operators.[31] In particular, the Commission has acknowledged industry concerns that an onerous and lengthy cable landing licensing process deters investors in submarine cable projects until they are licensed.[32]

By proposing to delay the issuance of a cable landing license—or even to accept a cable landing license application—unless and until the applicant could provide CZMA consistency certifications and evidence of state concurrences thereto, the Commission would undermine its previous efforts to expedite cable landing licensing and to avoid interfering in the financing decisions of operators.[33] Moreover, it would only exacerbate potential delays of construction and activation of capacity on U.S. international routes.

C. The Commission's Proposals Would Gut the Commission's Previous Efforts to Streamline Submarine Cable Licensing

The Commission's CZMA-related proposals also would gut the Commission's previous efforts to streamline submarine cable licensing in the United States. Following a lengthy rulemaking, the Commission in 2002 implemented streamlined cable landing licensing rules and

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[31] *See, e.g., Review of Commission Consideration of Applications under the Cable Landing License Act, Report and Order*, 16 FCC Rcd. 22,167, 22,234, app. C at ¶ 19 (2001) ("*Submarine Cable Streamlining Order*") (noting that "[t]he procedures adopted in the Report and Order are designed to provide more certainty and flexibility for applicants, encourage investment and infrastructure development by multiple providers, expand available submarine cable capacity, and decrease application processing time.").

[32] *See 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations, Report and Order*, 14 FCC Rcd. 4909, 4936 ¶ 65 (1999), *On Reconsideration*, 14 FCC Rcd. 7963 (1999). *See also Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,174-75, ¶¶ 11-12 and n.30, 22,177 ¶ 16 (noting that the Commission seeks to remain neutral as to the investment decisions of cable operators).

[33] *See* NPRM ¶ 35.

reached an agreement with the State Department for expedited Executive Branch review of cable landing license applications.[34] The Commission noted that its new streamlined rules:

> are designed to enable submarine cable applicants and licensees to respond to the demands of the market with minimal regulatory oversight and delay, saving time and resources for both industry and government, while preserving the Commission's ability to guard against anticompetitive behavior. As a result, the costs of deploying submarine cables should decrease to the ultimate benefit of U.S. consumers.[35]

The Commission's streamlined rules received strong support from submarine cable operators, infrastructure providers, and capacity customers, as they drastically reduced the duration of the Commission's licensing process, from a range of 137 to 451 days under the old rules to 45 days from the issuance of the initial public notice under the new rules.[36]

The Commission's CZMA-related proposals in the NPRM would undermine the Commission's stated objectives in adopting its submarine cable streamlining rules. Specifically, if adopted, the proposals would impose substantial new regulation and delays and create additional regulatory uncertainty. The proposals are wholly inconsistent with the letter and the spirit of the Commission's streamlining rules.

D. The Commission's Proposals Would Waste Governmental Resources without Providing Any Tangible Benefits in Terms of Environmental Protection

By requiring cable landing license applicants to provide CZMA consistency certifications, the Commission would waste governmental resources without providing any tangible benefits in terms of environmental protection. To the contrary, the Commission's proposals would, at most, duplicate consistency reviews inherent in the existing, and

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[34] *See Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,167.

[35] *Id.* at 22,168 ¶ 1.

[36] *See id.* at 22,189-91 ¶ 45 & n.98.

comprehensive, regulatory process administered by the Army Corps, in contravention of the objectives of NOAA's implementing regulations.[37]

All submarine cable projects—including some not even subject to licensing by the Commission under the Cable Landing License Act—are subject to CZMA consistency reviews as part of the Army Corps' permitting under the Rivers and Harbors Act of 1899, and in some cases, under the Clean Water Act as well.[38] And unlike a cable landing license application, an application for an Army Corps permit under the Rivers and Harbors Act of 1899 and the Clean Water Act contains the relevant details necessary for evaluating a cable project under the enforceable policies of a state coastal management program, as the Army Corps permits expressly authorize construction activities.[39] For this reason, as noted in part I.A above, the states have enumerated Army Corps permits—but not Commission-issued cable landing licenses—as required federal licenses or permits subject to CZMA consistency review. A CZMA consistency review process linked to the Commission's cable landing license process would therefore be redundant of the Army Corps permitting process, presenting the state with the exact same project to be considered as part of the consistency review for the Army Corps permitting process.

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[37] *See* 15 C.F.R. § 930.1(c).

[38] *See* Rivers and Harbors Act of 1899 § 10, 33 U.S.C. § 403; Clean Water Act § 404, 33 U.S.C. § 1344.

[39] *See* 33 C.F.R. Part 322 (governing permits for structures or work in or affecting navigable waters of the United States), Part 323 (governing permits for discharges of dredged or fill material into waters of the United States), Part 324 (governing permits for ocean dumping of dredged material), Part 325 (establishing extensive permit application procedures), and Part 330 (establishing Nationwide Permit Program).

E. Any Attempt to Subject Cable Landing License Applications to CZMA Consistency Certifications Would Draw the Commission into Repeated Conflicts with State Environmental Agencies Over the Meaning of "Enforceable Policies" under the CZMA

Any attempt to subject cable landing license applications to CZMA consistency certifications would draw the Commission into repeated conflicts with state environmental agencies over the meaning of "enforceable policies" under the CZMA. The CZMA provides the applicant for a required federal license or permit identified by the state as affecting any land or water use or natural resource of the coastal zone "shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the *enforceable policies* of the state's approved program and that such activity will be conducted in a manner consistent with the program."[40] As detailed below, however, the states and their environmental agencies have long asserted jurisdiction in contravention of federal law and U.S. treaty obligations, and have used the CZMA consistency certification process to impose illegal conditions on submarine cable projects. Thus the Commission's CZMA-related proposals threaten to draw the Commission into jurisdictional disputes with the states, wasting valuable staff resources while further delaying the issuance of cable landing licenses to applicants.

The CZMA permits states to establish coastal zone management programs, but only within state boundaries established by the Submerged Lands Act of 1953, *i.e.*, three miles from the coast line.[41] Although the CZMA confers certain rights on the states—including the right to identify federal licenses and permits as affecting any land or water use or natural resource of the coastal zone—the CZMA makes clear that "[n]othing in this title shall be construed . . . to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning,

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[40] 16 U.S.C. § 1456(c)(3)(A) (emphasis added).

[41] *Id.* § 1453(a)(1) (defining "coastal zone").

development, or control of water resources, submerged lands, or navigable waters."[42] While the states may require that certain federal actions either within the coastal zones—*i.e.*, the state territorial seas—or affecting land or water use or natural resources of the coastal zone, the CZMA does not alter the limitations on state jurisdiction established in the Submerged Lands Act of 1953 and various decisions of the U.S. Supreme Court.[43]

Notwithstanding the attempts of Congress and the U.S. Supreme Court to settle the limits of state jurisdiction, the states have consistently tried to extend the limits of their jurisdiction beyond the three-nautical-mile limit. The states have also consistently denied consistency certifications unless and until the Army Corps has agreed to include in its own permits—for areas beyond the three-nautical-mile limit of their territorial seas—conditions identical to those conditions imposed by the states with respect to their territorial seas. They have done so without making the necessary showing under the CZMA that the actions in federal waters *affect* a land or water use or natural resources in state waters.[44] And they have done so without regard to U.S. treaty obligations, which preserve the freedom to lay and maintain submarine cables and limit U.S. offshore jurisdiction.[45] For example:

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[42] *Id.* § 1456(e).

[43] *See* 43 U.S.C. § 1312 (providing that "[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary."); *United States v. Maine*, 420 U.S. 515, 519-22 (1975); *United States v. California*, 381 U.S. 139, 153-55, 164-67 (1965).

[44] *See* 16 U.S.C. § 1456(c)(3)(A).

[45] *See* International Convention for the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, 25 Stat. 1424, T.S. 380 (entered into force definitively for the United States on May 1, 1888) (providing freedom to lay submarine cables on the bed of high seas); Geneva Convention on the High Seas, arts. 2, 26.1, 26.3, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force definitively for the United States on Sept. 30, 1962) ("Geneva Convention") (providing freedoms to lay submarine cables on the bed of high seas and to repair existing cables without prejudice); United Nations Law of the Sea Convention, art. 79.2, 79.5, 112, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on

- The Oregon Land Conservation and Development Commission has adopted ocean planning rules imposing new permitting conditions on submarine cables located on the continental shelf off the coast of Oregon.[46] These conditions apply regardless of whether the cables enter Oregon's territorial sea or land on the Oregon coast. Oregon's rules impose burial conditions out to the 2000-meter depth contour—roughly 65 nautical miles off the Oregon coast.[47] Oregon therefore presumes that its jurisdiction extends beyond the three-nautical-mile limit of its territorial sea, and that it may require the federal government to impose the state's conditions between the limits of Oregon's territorial sea and the edge of the outer continental shelf. Oregon's rules also recommend that a cable corridor or preferred routing approach be imposed on submarine cables off the Oregon coast.[48]
- The California Coastal Commission ("CCC") has used the consistency review process to impose conditions far beyond the limits of the California territorial sea. The CCC has adopted a practice by which a submarine cable project will receive a consistency certification only if the conditions to which the applicant agrees are mostly identical to the last consistency certification issued by the CCC. Unfortunately, in the past, some submarine cable operators have agreed to burial conditions out to a depth of 1,000 fathoms—roughly 60 nautical miles off shore—meaning that subsequent

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Nov. 16, 1994) ("UNCLOS") (providing freedoms to lay submarine cables on the bed of high seas and to lay submarine cables and repair existing cables without prejudice on continental shelves notwithstanding claims of 200-nautical-mile Exclusive Economic Zones). Although UNCLOS has not been ratified by the Senate, the United States has taken the position that UNCLOS reflects customary international law to which the United States adheres. *See* 19 Weekly Comp. Pres. Doc. 383 (March 10, 1983).

[46] OREGON ADMIN. RULES 660-036-0000 through -0010.

[47] *See id.* 660-036-0001(3)(B).

[48] *See id.* 660-036-0001(c).

applicants must generally agree to the same conditions, regardless of whether or not they are proper, in order to obtain the CCC's consistency certification.[49] Moreover, the CCC places the burden on the applicants, requiring that they ask the Army Corps (so as not to suggest that the State of California is explicitly regulating beyond the three-nautical-mile limit on its territorial sea) to include the requisite burial conditions in *Army Corps* permits. The CCC has also threatened to reopen or revoke the consistency certification for a submarine cable project with an Army Corps permit should the cable operator fail to adopt voluntary mitigation activities for areas of incomplete cable burial at a depth of 600 fathoms (roughly 20 nautical miles off shore).[50]

- The New Jersey Department of Environmental Protection has suggested that it will issue a consistency certification under the CZMA only for those submarine cables for which the Army Corps has imposed the conditions desired by New Jersey—which extend beyond the limits of the New Jersey territorial sea. New Jersey prohibits

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[49] *See* California Coastal Commission, Status Report on Installation of Offshore Fiber Optic Cables, at 1 (Jan. 7, 2002) (noting "heavily conditioned" submarine cable projects, including (a) where feasible, cable burial to a 1-meter depth out to the 1,000-fathom depth contour; (b) implementation of a horizontal directional drilling monitoring and contingency plan; (c) marine mammal monitoring during cable installation; (d) post-installation cable corridor surveying to document impacts to rocky substrate; and (e) payment of a rocky substrate mitigation fee (for the purpose of constructing an artificial reef) if unavoidable impacts to hard substrate occur).

[50] California Coastal Commission, Fiber Optic Cables Offshore California, Hearing Transcript, at 8 (Los Angeles, Jan. 9, 2002) (with the CCC's Coastal Program Manager stating, "Since the suspended cable segments are located in federal waters, and not within the [CCC's] permit jurisdiction, we are waiting to hear if the Army Corps of Engineers will require a permit amendment, and such an amendment would require federal consistency review by [the CCC]. If the Army Corps does not require an amendment to its permit, or if [the permittee] does not voluntarily propose to relay these suspended areas, we may consider reopening—under Section 930.65 of the Federal Consistency Regulations—the [CCC's] review of the consistency certification.").

> festoon-type submarine cables in expansively defined surf clam areas—coastal waters extending 60 to 80 nautical miles from the shore, unless there is no other alternative (without regard to the reasonability of that alternative).[51] New Jersey also regulates "marine fish" with regard only to the need to preserve the resource, and without reference to New Jersey's territorial sea, effectively asserting jurisdiction roughly 90 to 100 nautical miles from the shore, given the location of the fisheries fished by commercial fisherman off the New Jersey coast.[52] Finally, New Jersey imposes onerous burial requirements in these expansively-defined surf clam and marine fish areas, including fees/fines and inspection and removal requirements.[53]

By improperly injecting CZMA consistency reviews into the Commission's cable landing licensing process, the Commission would likely be drawn into time-consuming disputes with the states over the states' "enforceable policies," specifically, the extent of state offshore jurisdiction. For this reason as well, the Commission should decline to adopt its CZMA-related proposals.

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[51] N.J. ADMIN. CODE 7:7E-3.3(a).

[52] *Id.* 7:7E-8.2.

[53] *Id.* 7:7E-4.20.

CONCLUSION

For the reasons stated above, the North American Submarine Cable Association urges the Commission to reject its proposals to modify its cable landing license rules, as those rules already comport with the CZMA.

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