Preston|Gates|Ellis & Rouvelas|Meeds LLP

MARTIN L. STERN
DIRECT DIAL: (202) 662-8468

September 19, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *CC Docket No. 98-146*

Dear Ms. Dortch:

On September 10, 2002, several telecommunications industry representatives made presentations during a meeting of the Federal Rights-of-Way Working Group (the "Working Group"), a federal interagency working group seeking to develop rational and consistent policies for federal telecommunications rights-of-way management that will promote the deployment of broadband networks. Also attending the meeting were several Commission staff members, including Linda Kinney of the Office of General Counsel, and Jackie Ruff and George Li of the International Bureau.

As reflected in the attached email, we have been asked by one of the attorneys for various local governmental entities to file an *ex parte* notice with the Commission in the captioned proceeding given the presence of Commission staff at the Working Group meeting. While we believe that no *ex parte* notice regarding the meeting is required under the Commission's rules, we would be happy to have this letter and the attachments placed in the Section 706 docket.

At the meeting, representatives of terrestrial wireline providers, the submarine cable industry, and the wireless industry, all of whom have extensive experience involving access to federal lands and rights-of-way for the construction of telecom facilities, made presentations to the Working Group. Elvis Stout of Velocita Corporation, Chris Melcher of Qwest, and Eric Myers of TelROW Coalition addressed the points-of-view of the various domestic wireline segments of the industry; Catherine Creese of Tyco Telecommunications represented the North American Submarine Cable Association (NASCA); and Andrea Williams of CTIA and Laura Altschul of T-Mobile USA, made presentations to the Working Group on behalf of the wireless industry. I made opening remarks to the Working Group and introduced each of the foregoing industry representatives.[1] (Several others representing rural ILECs, who were separately invited to attend the meeting, made presentations as well.)

[1] Among those from the industry also attending the meeting but not making formal presentations included: Tiki

At the meeting, among the issues we addressed were:

- The nature of telecom networks, and the need for numerous permits and authorizations to build a network;
- How only a single jurisdiction or entity can adversely affect network buildout;
- The importance of uniform and standard applications processes, with fixed deadlines for decisions and resolution;
- The need to balance the autonomy of regional and local field offices with a programmatic focus on the importance of telecom deployment -- hence the need for coordination between agencies, and the need for a central "ombudsman" within an agency to keep projects moving and on track;
- An identification of what have been problems based on our collective experience, and what the agencies are doing right, that can form the basis for best practices going forward;
- Issues with fees, and in particular, even where fair market value fees are authorized by federal statute, concerns about fees that are extractive in nature, rather than designed to compensate the government for the reduction in value from the use and other costs, recognizing the importance and benefits to telecom deployment.

Gaugler of ALTS; Frank Simone of AT&T; Scott Thompson of Cole Raywid & Braverman; Chris Day of CTIA; Kent Bressie of Harris, Wiltshire & Grannis (representing Tyco Telecommunications); Rick Cimerman of NCTA; Pete Sywenki of Sprint; Jeffrey Karp, Elise Dieterich, Kevin Minsky of Swidler Berlin Shereff Friedman (representing Velocita Corporation); Scott Randolph of Verizon; and Kevin Gallagher, Karen Johnson, and Frank Salley of WorldCom.

A copy of my prepared remarks are attached, along with those of Mr. Stout of Velocita and Ms. Creese of Tyco Telecommunications.

Respectfully Submitted,

By: /s/

Martin L. Stern
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, N.W., Suite 500
Washington, D.C. 20006
(202) 628-1700 (Tel)
(202) 331-1024 (Fax)

cc: Assistant Secretary Nancy Victory, Jack Zinman, James W. McConnaughey/NTIA
Linda Kinney/Office of General Counsel
Jackie Ruff, George Li/International Bureau

-----Original Message-----
From: Gerry Lederer [mailto:glederer@millervaneaton.com]
Sent: Wednesday, September 11, 2002 5:38 PM
To: Karen Johnson (E-mail); Kevin D. Minsky (E-mail); Kevin Gallagher (E-mail); Maureen Flood (E-mail); Paul Glist; Rick Cimerman (E-mail); Rick Wolfe (E-mail); Scott Thompson; Sharon Liebman (E-mail); David Mielke (E-mail)
Cc: Jim McConnaughey (E-mail)
Subject: Yesterday's NTIA briefing

Hi Guys:

Understand the industry had a briefing yesterday at NTIA on rights of way at which FCC officials were present. I am not sure who all was at the meeting, so I am sending this email to you all as I know you'll make sure that an ex parte is filed that the rest of us might know what was said.

Gerry

Gerard Lavery Lederer
glederer@millervaneaton.com
Washington Office

Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue. N.W.
Washington, D.C. 20036-4320
phone (202)785-0600
fax (202)785-1234

www.millervaneaton.com
This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law.

If you have received this communication in error, please delete it and destroy any copies, do not distribute it, and notify us immediately by email:
or via telephone: (202) 785 0600.

Prepared Remarks of

Martin L. Stern
Preston Gates Ellis & Rouvelas Meeds LLP

Before the
Federal Rights-of-Way Working Group

September 10, 2002

Thank you Assistant Secretary Victory for providing this opportunity to representatives of the telecommunications industry to address the Federal Rights-of-Way Working Group on issues regarding telecom access to federal rights-of-way and public lands.

We appreciate your strong and continued interest in the importance of rights-of-way access to the deployment of telecommunications facilities, your leadership on these issues, and the formation of this very important Working Group on telecom access to federal rights-of-way. We also appreciate the hard work of your staff in pulling this meeting together.

As we have been discussing for many months, access to rights-of-way is critically important to the deployment of telecommunications facilities -- the backbone and access facilities integral to broadband deployment. The issue is one of leading importance to the entire telecom industry, the high tech industry, and of course, to federal, state, and local governmental entities and policymakers. As the formation of the Working Group recognizes, this is not just a local issue, but one that cuts across federal, state, and local jurisdictions.

Appearing before the Working Group today is a group from the terrestrial wireline sector, the submarine cable industry, and the wireless industry, all of whom have extensive experience and their own issues involving access to federal lands and rights-of-way for the construction of their facilities. This morning you will be hearing from representatives of: Velocita Corporation, Qwest, and the TelROW Coalition, addressing the points-of-view of the various domestic wireline segments of the industry; Tycom Telecommunications speaking on behalf of the submarine cable industry and representing the North American Submarine Cable Association (NASCA); and the Cellular Telecommunications and Internet Association (CTIA) and T-Mobile USA on behalf of the wireless industry. Among those also present for the industry this morning are representatives of: ALTS, AT&T, NCTA, Sprint, Verizon, and WorldCom, as well as attorneys from several law firms that represent companies in the industry, including: Cole Raywid & Braverman; Harris, Wiltshire & Grannis; and Swidler Berlin Shereff Friedman.

The speakers this morning will be addressing several themes, including:

- The nature of telecom networks, and the need for numerous permits and authorizations to get a network built;

- How only a single jurisdiction or entity can adversely affect network buildout;

- The importance of uniform and standard applications processes, with fixed deadlines for decisions and resolution;

- The need to balance the autonomy of regional and local field offices with a programmatic focus on the importance of telecom deployment -- hence the need for coordination between agencies, and the need for a central "ombudsman" within an agency to keep projects moving and on track;

- An identification of what have been problems based on our collective experience, and what the agencies are doing right, that can form the basis for best practices going forward;

- Issues with fees, and in particular, even where FMV fees are authorized by federal statute, concerns about fees that are extractive in nature, rather than designed to compensate the government for the reduction in value from the use and other costs, recognizing the importance and benefits to telecom deployment.

Thank you again, Assistant Secretary Victory, and let me introduce Elvis Stout of Velocita Corporation, who will begin our presentations.

Comments of
Velocita Corporation

National Telecommunications
and Information Administration's
Forum on Federal Rights-of-Way
Access Impediments

Presented by

Elvis Stout
National Franchise and License Manager

September 10, 2002

My name is Elvis Stout, and I am the National Franchise and License Manager for Velocita Corporation. Velocita is a start-up competitive broadband company that is seeking to construct a nationwide long distance facilities-based fiber optic cable network. During the past three years, the company has overcome a number of obstacles and has been in the process of installing over sixty-two hundred miles of telecommunication facilities in thirty-five states. But the network is not completed. Gaps exist in those areas in which we have not been able to negotiate rights-of-way access with governmental entities. If completed, this national network would enable Velocita to engage in the type of competition envisioned by the federal Telecommunications Act of 1996, that of offering service to traditional local service customers, traditional and emerging interexchange carriers, local and regional exchange carriers, wireless carriers, internet service providers, data-intensive corporate entities, as well as local, state and federal government customers. Nonetheless, despite diligent effort and the expenditure of $500 million, Velocita is currently struggling to financially survive. One of the principal causes of the difficulty has been the inability to obtain the necessary governmental permissions to access certain critical public rights-of-way needed to complete the network and derive a revenue stream. Unreasonable delay and excessive fees and costs imposed by government entities is, and has been, the number one impediment to deployment of Velocita's nationwide broadband network.

We deeply appreciate the attention being given to this issue by Assistant Secretary Nancy Victory and her able staff at the National Telecommunications and Information Administration, and are very pleased that the Administration has brought together decision-makers from the several federal agencies involved in management of utility rights-of-way on federal lands in an effort to understand the problems faced by broadband network providers, to identify "best practices" that facilitate timely and cost-feasible broadband deployment, and to develop meaningful near-term solutions to the rights-of-way access problem. As Velocita's situation dramatically illustrates, time is of the essence in solving this critical problem, if competitive broadband deployment is to occur at the pace that both the Administration and the public desire.

I would like to share with you Velocita's experience in two circumstances where federal policies and procedures have worked against, rather than for, deployment of our broadband network. The first involves access in the State of Maryland to rights-of-way along federally-funded interstate highways administered by the Maryland Department of Transportation pursuant to federal regulations. The second involves access to existing utility rights-of-way on lands in the Southwest -- New Mexico, Arizona, and California -- under the jurisdiction of the U.S. Bureau of Land Management. In both of these examples, a gap exists in our network because we have been unable, despite months of negotiations and the expenditure of vast sums, to obtain the requisite permission to install our fiber optic cable and associated conduit on a timely basis or on cost-feasible terms. As a result of this delay, these two critical segments of Velocita's nationwide network remain unbuilt. As a consequence of gaps in our network, Velocita has been unable to generate the revenue stream necessary to sustain further deployment of its network. And, absent the necessary revenue stream, Velocita ultimately has had no choice but to seek the protection of the bankruptcy courts. Numerous other start-up broadband providers, as you know, have suffered the same fate in recent months. Yet, as I will explain, we believe that the problems we have encountered could be remedied through relatively minor changes in federal policy.

In Maryland, the State Department of Transportation has formulated policy which provides that longitudinal placement of utilities along controlled access rights-of-way can only be accomplished by participation in the State of Maryland Resource Sharing Plan, which demands of applicants hugely excessive annual fees and in-kind contributions. Despite some fifteen months of negotiation with the State, Velocita was unable to negotiate access under the Resource Sharing Plan on any kind of cost-feasible basis. As you may be aware, Section 253 of the Telecommunications Act of 1996 preempts state and local requirements that prohibit, or have the effect of prohibiting, the provision of telecommunications services, and here was a clear instance in which the State's demands prevented the deployment of Velocita's telecommunications facilities. The State took the position, however, that Section 253 did not apply to the State or its excessive demands because Velocita's request involved a request to access Maryland's federally-funded highways. Although we disagree with the State's analysis, the question is one that has never been addressed by the courts, and Velocita had neither the time nor the resources to litigate the question with the State. We believe that the Federal Highway Administration ("FHWA") can easily remedy this problem for the future, simply by clarifying in its rules that states cannot use their delegated authority over federally-funded highways to extract usurious fees and in-kind contributions from telecommunications providers, but may charge only fair and reasonable fees for rights-of-way use, based upon the states' actual costs in administering the rights-of-way, consistent with the clear Congressional intent expressed in Section 253 of the federal Telecommunications Act.

Furthermore, to the extent that the appropriate fee must be calculated or negotiated based on the scope of a particular provider's rights-of-way use, states should be directed to permit construction while the amount of the fee is being worked out. Just as importantly, the FHWA should adopt a national standard requiring that all states grant providers a permit to access the federal highway rights-of-way within sixty (60) days after a provider has applied for such access, unless there is a deficiency in the application that is not timely cured. Otherwise, as was Velocita's experience in Maryland, that State may withhold permission to construct as a means of leveraging the provider to acquiesce to unreasonable fee or in-kind demands. While Maryland's desire to enrich the State's budget is understandable, the State should not be allowed to use its delegated authority over federal highway rights-of-way -- a pathway for which telecommunications providers have few substitutes -- to extract from telecommunications providers excessive fees to fund unrelated State projects or to require providers to construct unrelated fiber optic lines for the State's use at no cost to the State.

Velocita's situation in Texas, New Mexico, Arizona, and California with the Bureau of Land Management involves a similar disconnect between the intent of Congress and the Administration to encourage broadband deployment, and the agency's desire to fund unrelated public policy goals. Velocita proposed to install additional fiber optic lines in existing utility rights-of-way on federal lands in New Mexico and Arizona already being used for that purpose. The annual fees for use of such linear rights-of-way on federal lands were not inordinate, and the process to obtain a permit from BLM is well established. For this we are grateful, since this removes two of the problems -- delay, and excessive fees -- that broadband providers often face when seeking to access public rights-of-way. Unfortunately however, federal requirements pertaining to the identification and protection of cultural resources on federal lands proved to be the obstacle to Velocita's plans in this case. As a condition of receiving the necessary permits to

construct its network in existing, already disturbed utility rights-of-way on certain federal lands, BLM announced in March 2000 that the various links (route segments) of Velocita's project, known as the NexGen Project, that had been proposed as separate projects in Texas and California would be considered together with the New Mexico and Arizona links as a single national project. This meant that BLM asserted jurisdiction over Texas and the link between San Diego and Los Angeles, where there were no federal land rights-of-way routing needs. This also meant that the area within which environmental and cultural resource investigations would be required increased from 200 miles of route to 1600 miles. Ultimately, this would involve the funding of massive archaeological studies on public and adjacent private lands throughout the four-state route that extended far beyond the narrow strip of land in which Velocita proposed to place its facilities. The funding of these investigations cost Velocita as much $1.2 million per month and totaled more than $30 million to complete. Moreover, Velocita's network construction in the already-disturbed rights-of-way was held up from March, 2000, to June, 2001, while areas far afield, which Velocita had no intent to disturb, were sifted for cultural artifacts that then were cataloged, studied, and archived. We appreciate that it may be appropriate public policy to identify and preserve sites of archaeological significance on federal lands. Nonetheless, Velocita believes it is not appropriate to require telecommunications providers -- in particular, a provider that is using existing disturbed utility rights-of-way -- to bear the full brunt of that expense, an expense which is almost wholly unrelated to the deployment of broadband networks in federal rights-of-way.

Two straightforward changes in the BLM's policies would address the concerns I have just described. First, telecommunications providers' obligations with respect to cultural or other resources should be limited to those portions of federal lands that the telecommunications provider actually will use, *i.e.*, to the rights-of-way, and not to broad sections of public and adjacent private lands extending for long distances in either direction. While we support the notion that a rights-of-way user should be responsible for protecting cultural or other resources in the path of its construction, the rights-of-way user's responsibility should not extend beyond the rights-of-way being used. Second, once cultural or other resources in the path of the proposed broadband network have been taken out of harm's way, either by removal of the artifacts or by re-routing of the network, construction should be allowed to proceed in a timely manner. Velocita was delayed for fifteen months while the archaeologists sorted, cataloged, studied, and archived artifacts, many of which were never in the path of construction, notwithstanding that the rights-of-way themselves -- which already had been disturbed by prior construction -- had long since been cleared.

We hope this brief overview of just two of the impediments to rights-of-way access that Velocita has experienced have provided some insight into the manner in which federal policies can impact the speed and cost-efficiency of broadband deployment. As a member of the Telecommunications Industry Rights-of-Way Working Group ("I-ROW"), Velocita wholeheartedly endorses I-ROW's rights-of-way access principles, which we understand I-ROW has communicated to you. Moreover, Velocita agrees with I-ROW that delay and excessive fees and costs associated with access to rights-of-way on public lands are the two greatest impediments to broadband deployment currently, and must be remedied if the national goal of timely increasing broadband deployment is to be achieved. Again, we thank you for your efforts

to understand and address the problems I have raised here today. I will be very happy to answer any questions you may have.

409795v1

360networks inc.

Alcatel Submarine Networks

AT&T Corp.

Gemini Submarine Cable System, Inc.

Global Crossing Ltd.

Global Marine Systems Limited

GlobeNet Communications Group Ltd.

Level 3 Communications, LLC

New World Network USA, Inc.

Southern Cross Cable Network

Sprint Communications Corporation

Teleglobe Communications Corp.

Tyco Networks (US) Inc.

Williams Communications, LLC

WorldCom, Inc.

Remarks by

Catherine Creese

On Behalf of the

North American Submarine Cable Association

Before the

Federal Rights-of-Way Working Group

Washington, DC

September 10, 2002

North American Submarine Cable Association
c/o David Ross Group 127 Main Street Chatham, New Jersey 07928

Remarks by
Catherine Creese, Director of Permitting
Tyco Telecommunications
Before the
Federal Rights-of-Way Working Group
Washington, DC
September 10, 2002

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 cables[2] 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 state[7]. 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.

---

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

8Oregon 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

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
Director, Permitting
Tyco Telecommunications (US), Inc.
60 Columbia Rd,
Morristown, NJ 07960