



INTERNATIONAL CABLE  
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Secretary: Mr. Graham Marle

Before the  
Federal Communications Commission  
Washington D.C. 20554

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

### COMMENTS OF THE INTERNATIONAL CABLE PROTECTION COMMITTEE

The International Cable Protection Committee ("ICPC") hereby comments on the Notice of Proposed Rulemaking. ("NPRM")<sup>1</sup> The ICPC comments are limited to Section III E "Modification of Cable Landing Rules." This part of the NPRM raises the issue of whether the present FCC landing license rules ("Rules") should be modified to comply with the Coastal Zone Management Act of 1972 ("CZMA") and, if so, requests comments on two approaches.

The ICPC opposes the NPRM on the grounds that these changes (1) are not required by law; (2) are irreconcilable with earlier FCC rulemaking; and (3) are inconsistent with binding international law unless limited to U.S. territorial seas.<sup>2</sup> The collective FCC experience of the ICPC's membership in landing cables in the United States, can be summed up in the colloquial expression "If it isn't broken, don't fix it".

Formed in 1958, the ICPC is a highly respected international forum with a membership comprised of 76 telecommunication and power companies, government departments, and scientific organizations representing 40 nations.<sup>3</sup> The principal goal of the ICPC is to promote the safeguarding of undersea cables from human and natural hazards, as well as the support of projects and programs beneficial for the protection of submarine cables.<sup>4</sup> As a service to the world's seabed users, the ICPC provides professional recommendations related to submarine cable planning, installation, operation, maintenance, and protection.

<sup>1</sup> See *Amendments of Parts 1 and 63 of the Commission Rules, Notice of Proposed Rulemaking*, FCC 04-40, IB Docket No. 04-47 (rel. Mar. 4, 2004) ("NPRM"), at Section III E. ¶¶ 33-35.

<sup>2</sup> See "US territorial seas" described *infra*. at p. 11.

<sup>3</sup> The members are listed in Appendix A to these comments.

<sup>4</sup> Additional information on the ICPC can be found on its website [www.iscpc.org](http://www.iscpc.org).

Over 70% of the international traffic of the United States is carried by undersea cables, and this percentage is increasing.<sup>5</sup> If these cables were not available, only a tiny fraction of this traffic could be carried by satellite. In other countries even greater dependence on submarine cables exists.<sup>6</sup> By any measure, undersea cables are critical infrastructure not only for the United States, but for the entire world.

Modern international telecommunication by undersea cable is dependent upon a body of international law that allows all nations to lay and maintain cables in the world's oceans. Under international law, no nation can claim greater rights to the world's oceans than any other nation. Without adherence to this body of law, the world's undersea communications network, which indisputably benefits all nations and their citizens, would not be possible. The FCC is urged to carefully weigh any action with respect to the NPRM in this context.

**A. The present Cable License Landing License Rules should not be modified.**

There is no legal requirement that the license issued pursuant to the Cable Landing Act of 1921 (47 USC §§ 34-39) comply with the CZMA.<sup>7</sup> Notwithstanding this fact, the FCC is now considering, 32 years after the CZMA was enacted, whether its rules should now be modified to "assure" compliance with the CZMA.

The FCC's present Rules<sup>8</sup> have served the country and the industry well by providing a neutral forum with telecommunication expertise where the public, other state and federal agencies, and the telecommunications industry have a fair opportunity to raise environmental or other issues associated with a particular cable landing license.<sup>9</sup> A state coastal zone agency or any other entity has a full opportunity under the Rules to file comments about state concerns on any landing license application. The Rules comply with international law and encourage a robust cable network between the United States and the rest of the world.

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<sup>5</sup> Excluding traffic with Canada and Mexico, about 90% of US international telecommunications and Internet traffic is carried by submarine cables.

<sup>6</sup> In 1999, there were 97 countries connected by undersea cables; and by 2003, there will be 134 countries expected to be so connected. "Turner, Companies Take A Briney Plunge With Undersea Cable Networks", Investor's Business Daily, June 9, 1999.

<sup>7</sup> In this regard, the ICPC adopts the arguments set out by the North American Submarine Cable Association ("NASCA") in that organization's NPRM comments.

<sup>8</sup> "Rules" refers to the present Section 1.767 of the FCC rules for landing license applications.

<sup>9</sup> Within this context, the FCC has already reviewed the environmental impact of international submarine cables in accordance with the regulations of the Council on Environmental Quality ("CEQ") and the requirements of the National Environmental Act of 1969 ("NEPA"). In 1974, the FCC found in the first NEPA Order, 49 FCC 2d at 1321:

Although laying transoceanic cable obviously involves considerable activity over vast distances, the environmental consequences for the ocean, the ocean floor, and the land are negligible. In shallow water, the cable is trenched and immediately covered; in deep water, it is simply laid on the ocean floor. In the landing area, it is trenched for short distance between the water's edge and a modest building housing facilities.

Most countries have reciprocal administrative landing license procedures that are in harmony with the present FCC Rules. If the FCC changes its present Rules, the reciprocity by other nations in considering landing licenses for systems connected to the United States may be impacted. Other nations may alter their landing license rules to reciprocate with U.S. changes. There may be an unintended ripple effect leading to changes in foreign landing license requirements which will impede the ability of U.S. companies to secure landing license overseas. U.S. law recognizes reciprocity has a threshold condition to granting a landing license. *See* 47 U.S.C. § 35<sup>10</sup>. It is not unreasonable to assume that other nations take a similar position when considering their landing licenses.

The delicate international framework which allows submarine cable communications to flourish should be carefully considered. If the cumulative regulatory burden imposed by the FCC for landing a cable in the United States becomes unreasonable in terms of costs, delay, and unpredictability, new cables will be delayed or discouraged in favor of landing cables in countries such as Canada, Mexico or other countries with more practical regulatory regimes. In order to prevent the United States from losing its ability to compete as a communication hub, the FCC should carefully weigh the international impact of any changes in the present cable landing license rules.

The cable landing license is unique in that it is the political permission of the sovereign to allow a cable to enter and operate in its territorial seas and land in its territory.<sup>11</sup> It is distinct from the engineering and construction approval given by the states and the U.S. Army Corps of Engineers ("USACE") which focus instead on the physical construction and resulting impact of a cable landing. The political nature of this special sovereign permission is underscored by the President's authority to enjoin or prosecute the landing or operation of any unlicensed international cable which is about to land or is being operated without a license.<sup>12</sup> 47 USC §§ 36-37. The NPRM would allow a state to effectively veto this federal political permission based on a local CZMA concern.<sup>13</sup>

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<sup>10</sup> Reciprocity was established as a condition for landing a cable in the U.S. by President Grant in 1869 when he declined to allow a French cable to land in Massachusetts until the French company renounced its monopoly, allowing U.S. companies to land cables in France. H.R. Rep. No. 71, 67<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2 (1921)

<sup>11</sup> The underlying unique political quality of the license is illustrated by the 1919 example in the Congressional Record for the Cable Landing Act (47 U.S.C. §§ 34-39) which reports President Grover Cleveland sending a Navy warship to intercept and stop at the 3 NM territorial sea limit an unauthorized cable from Brazil attempting to land in Florida. H.R. Rep. No. 71, 67<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2-3 (1921)

<sup>12</sup> See, *infra* at p. 13.

<sup>13</sup> An example of such a conflict can be easily grasped by reviewing the letter of Department of Defense Representative for Ocean Policy to Director, New Jersey Department of Environmental Protection dated September 20, 2001, attached as Appendix B. DOD objected to New Jersey's exercise of regulations over international cables outside the state 3 NM territorial sea. Subsequently, to satisfy the demands of local clam fishermen, New Jersey enacted rules extending its regulatory jurisdiction over international cables out to 200 NM. N.J.A.C. 7:&E-4.20(c) (35 N.J. Reg. 632(a)) Under the NPRM, New Jersey could withhold CZMA certification, blocking the political permission embodied in the landing license. Such a result could trigger negative reciprocity results,

Expediently obtaining this political permission at the onset of a cable project is essential to financing and planning an international cable system. The underlying assumption in the NPRM that "applicants would have been working in consultation with the states as to such issues well in advance of presenting an application to the Commission" is not accurate.<sup>14</sup> The FCC landing license is normally the first application filed, unless it is filed at the same time as state or USACE applications. This sequence is not coincidental but reflects the importance of obtaining the political permission to land the cable early on. With the political permission secured, a major hurdle is cleared and project financing milestones are met which enable the work required to satisfy permit conditions imposed by USACE and the states to be met.

The NPRM suggestion that an applicant provide certification "that the proposed cable complies with NOAA approved programs of any relevant states" is impractical.<sup>15</sup> The collective permitting experience of ICPC members in the various states reveals these state procedures to be politically dynamic with changes occurring in state demands up until the permit is issued. Certification cannot be safely made until the state and USACE permitting processes have been completed which can take from one to two years. Only then does the applicant know whether the proposed cable is in compliance

The regulatory concerns articulated by the FCC in its *Review of Commission Consideration of Applications under the Cable Landing License Act, Report and Order*, 16 FCC Rcd. 22,167 (2001) continue to be relevant and would be ill served by the NPRM:

The streamlining and bright-line procedures we adopt in this Report and Order are less complex than the procedures proposed in the Notice of Proposed Rulemaking (NPRM) in this proceeding. At the same time, the new rules will meet the objectives set out in the NPRM. In adopting the NPRM, the Commission sought to achieve three key objectives: (1) institute an expedited licensing process to speed the deployment of cable capacity to the market; (2) ensure careful Commission review of certain applications to guard against anti-competitive behavior; and (3) adopt a pro-competitive model that could be used around the world. We recognize the importance of reducing regulatory costs, providing regulatory certainty, and facilitating the planning of financial transactions. Today's adopted procedures should allow participants in the submarine cable market to make business decisions more readily. We note that the rules we adopt here, like all of our rules, are subject to biennial review. In this regard, we are open to revising these rules should experience suggest further improvements that it would be in the public interest to adopt.<sup>16</sup>

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not only for US companies trying to secure landing licenses overseas, but also for the Department of Defense. ("If the State of New Jersey is permitted to regulate the laying of cables beyond its territorial sea, foreign nations could attempt to impose similar restrictions on the United States that could have a negative effect on U.S. national security interests worldwide.")

<sup>14</sup> NPRM at ¶ 35.

<sup>15</sup> *Ibid.*

<sup>16</sup> FCC 01-332 at 2-3

The NPRM squarely conflicts with the above FCC objectives. In particular, the NPRM would delay deployment of cable capacity, discourage a universal pro-competitive model, increase regulatory costs, introduce regulatory uncertainty, and hinder financial transactions for cables landing in the United States.

**B. Any modification of the Cable Landing License Rules should comply with customary international law and treaties to which the United States is a party or adheres.**

Placing an international cable in service is necessarily an international undertaking involving two or more countries. The impact of any rules that the FCC may issue on cables will be felt directly and indirectly in international communication frameworks between the United States and its economic partners and political allies. Any change, should be in rigorous compliance with international law regarding regulation of cables outside of U.S. territorial seas. The term "coastal zone" used in the NPRM is critical to understanding the proposed changes but the term is undefined.<sup>17</sup> In considering the definition of "coastal zone", it is respectfully submitted that there is value in a brief review of these international law requirements.

**(1) International law**

Protection of international submarine cables in international waters or on the "High Seas" dates back over 100 years. On March 14, 1884, the United States became a signatory to the International Convention for the Protection of Submarine Cables (14 Mar 1884), 24 Stat 989 (1 Dec 1886), 25 Stat 1424, 25 Stat 1425 (7 Jul 1887) TS 380. The Cable Convention has been adopted in 40 nations and is considered to be customary international law. It sets forth rights and protections of all signatory parties to place submarine cables in international waters or the High Seas.

The Cable Convention's protection of submarine cables was reaffirmed in the Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 ("Geneva Convention"), to which the United States is a party. Articles 1, 2, and 26 of the Geneva Convention provide as follows:

Article 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.<sup>18</sup>

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal states:

1. Freedom of navigation;

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<sup>17</sup> FCC 04-40 at ¶34.

<sup>18</sup> For purposes of these treaties, a "State" means a sovereign nation like the USA, and not individual states.

2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

#### Article 26

1. All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. When laying such cables or pipelines the State in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

The protection of international submarine cables is seen again in Articles 58, 79, 87, and 112-115 of the United Nations Law of the Sea Convention (1982) ("UNCLOS")<sup>19</sup>, which incorporates almost verbatim the submarine cable protection language of the earlier Geneva Convention.

Under UNCLOS, a nation's territorial sea may not exceed 12 nautical miles, measured from the baseline determined in accordance with this convention (UNCLOS, Art. 3). While UNCLOS allows a nation to claim a 200 nautical mile Exclusive Economic Zone ("EEZ"), it guarantees to other nations the freedom to lay submarine cables and other internationally lawful uses of the sea related to this freedom, such as the operation of submarine cables (UNCLOS, Art. 58.1). "Consistent with international law and traditional high-seas freedoms, the United States does not generally assert control over . . . the laying or cables . . . on the ocean floor [in the EEZ]."<sup>20</sup> On the continental shelf, UNCLOS requires that coastal nations not impede the laying and maintenance of such cables (UNCLOS, Art. 79.2). Furthermore, coastal nations when laying submarine cables shall ensure that the possibilities of repairing cables shall not be prejudiced (UNCLOS, Art. 79.5). While a coastal nation may control the delineation of pipelines, no similar right exists in the case of submarine cables (UNCLOS, Art. 79.3).<sup>21</sup> In fact,

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<sup>19</sup> On February 25, 2004, the Senate Foreign Relations Committee, by unanimous vote, sent UNCLOS to the full Senate for its consideration. UNCLOS, while not yet ratified, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc 383 (Mar. 10, 1983) is recognized by the United States to reflect customary international law to which the United States adheres.

<sup>20</sup> Preliminary Report of the U.S. Commission on Ocean Policy, April 2004, [www.oceancommission.gov](http://www.oceancommission.gov) at p.43.

<sup>21</sup> In contrast, Articles 60 and 80 of UNCLOS give a coastal State the authority to regulate the construction, operation, and use of artificial islands and structures on its continental shelf for most purposes. Similar competence is not found for cables in UNCLOS that expressly limits a coastal State's ability to regulate them outside of territorial seas.

proposals to treat cables like pipelines were rejected during the negotiations for UNCLOS.<sup>22</sup> The 118-year-old universal freedom to lay cables on the High Seas continues under UNCLOS (UNCLOS, Art. 112).

These treaties (Cable Convention, Geneva Convention and UNCLOS) provide the unequivocal right to lay and maintain submarine cables outside of territorial seas, free from a coastal nation oversight or regulation. Only in the "Territorial Seas" of the United States may the United States impose reasonable conditions on the laying of a submarine cable. And then, any regulation by the United States must be consistent with the treaties, since the courts of the United States are bound to give effect to international agreements of the United States and to international law. The provisions of a binding international agreement derive their status as law in the United States from their character as international legal obligations of the nation. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §III, cmt. b; Westmar Marine Services v. Heerema Marine Contractors, S.A., 621 F.Supp. 1135, 1137 (N.D. Cal. 1985) ("once a treaty is ratified it is the law of the United States and is as binding as a federal statute.")

## (2) The Territorial Seas of the United States

On December 27, 1988, Presidential Proclamation 5928, signed by President Reagan ("Proclamation 5928"), extended the territorial sea of the United States from three to twelve nautical miles. See 54 F.R. 77, reprinted in 43 U.S.C. 1331. However, the extension of the United States territorial seas from three to twelve nautical miles ("NM") did not change the right to lay and maintain cables on the High Seas as set forth in the international treaties.

Proclamation 5928 explicitly states:

Nothing in this Proclamation:

- (a) extends or otherwise alters existing Federal<sup>23</sup> or State<sup>24</sup> law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or
- (b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction. Id.

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<sup>22</sup> Nordquist, United Nations Convention On the Law of the Sea 1982 A Commentary, Vol. II, at 915 notes:

**79.8(c)** Paragraph 3 deals with the course of pipelines, and covers both new and existing pipelines. It places a limitation on the freedom of all states to lay pipelines (but not cables) on the continental shelf by making the delineation of the course for those pipelines subject to the consent of the coastal State. This is consistent with paragraph 2, which allows a coastal State to take reasonable measures for the prevention, reduction, and control of pollution from pipelines. (emphasis added)

<sup>23</sup> The ICPC is unaware of any determination by the FCC as to whether its territorial jurisdiction was extended from 3NM to 12 NM with this Proclamation or since.

<sup>24</sup> State territorial seas in the Atlantic and Pacific oceans are limited to 3 NM. *U.S. v. California*, 332 U.S. 19 (1947); *U.S. v. Maine*, 420 U.S. 515 (1975)

**(3) The 200 Mile Exclusive Economic Zone of the United States does not extend to oversight of placement of submarine cables**

On March 10, 1983, President Reagan signed Presidential Proclamation 5030 ("Proclamation 5030"), which established an Exclusive Economic Zone of the United States of America ("EEZ") 48 F.R. 10601, reported at 16 U.S.C. § 1453. The EEZ, based on UNCLOS, recognizes that the United States may assert certain sovereign rights over natural resources and related jurisdiction to a distance of 200 nautical miles from its coastal baseline. The Proclamation, however, observed that the assertion of these restricted rights over natural resources may only be exercised without prejudice to "the laying of submarine cables." The Proclamation 5030 states in relevant part:

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea. *Id.*

On September 2, 1999, President Clinton signed Presidential Proclamation 7219 ("Proclamation 7219"), which established a 24 nautical mile contiguous zone. 64 F.R. 48701. The freedom to lay and maintain undersea cables in this zone was expressly upheld and expanded to cover cable operations:

In accordance with international law, reflected in the applicable provisions of the 1982 Convention of the Law of the Sea, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law reflected in the 1982 Convention on the Law of the Sea. *Id.*

Thus, this right of the United States to assert jurisdiction over its natural resources (oil, gas, and fisheries –key CZMA concerns) out to 200 miles from the coast does not in any way dictate placement or permitting of submarine cables outside of territorial seas.

**(4) The Federal Communications Commission Jurisdiction**

Within the Territorial Seas of the United States, the landing of a submarine cable onto the shores of the United States must be authorized by the President or other delegated official delegated by him. 47 U.S.C. §§34 to 39. This authority has been delegated to the FCC pursuant to §5(a) of Executive Order No. 10530 (May 11, 1954). See 19 Fed. Reg. 2709; 3 U.S.C. §301; 47 C.F.R. §1.766.

33 C.F.R. 322.5 (h)(1)(3) states in relevant part.

- (h) Facilities at the borders of the United States. (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

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- (3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39 and, 47 C.F.R. 1.766).

The FCC's landing license jurisdiction is limited to the United States. 47 U.S.C. §§ 34 and 38. Even assuming the FCC's historical territorial jurisdiction has been extended from 3 NM, this limits the FCC jurisdiction in any event to the US 12 NM territorial sea. As such, any changes in Rules as a result of the NPRM should explicitly be limited to the FCC's United States territory jurisdiction and be so stated in any final rule. In no event should the NPRM regulate or recognize state claims over international cables outside the 12 NM U.S. territorial sea limit.

**C. Adding additional CZMA requirements to the existing cable landing license Rules conflicts with prior FCC rulemaking decisions to streamline this process.**

Adding additional requirements to the present Rules under the CZMA will be redundant and wasteful. Any cable landing in the United States already requires, in addition to the FCC landing license, a separate permit issued by the USACE, whose permitting process is subject to the CZMA. Thus, any public policy concerns of the CZMA and cables are already being addressed. Having the FCC duplicate the work of USACE makes no sense.

Setting up a duplicative CZMA regulatory regime will allow states two opportunities to impose conditions on international cables. If unsuccessful in imposing state CZMA requirements with USACE, there will be a second opportunity with the FCC landing license for a state to impose its conditions. This result is manifestly unpredictable, costly, and fraught with delay.

The Ocean Policy Commission in its Draft Report accurately summed up the current problem in off-shore management of federal waters outside of 3 NM:

The array of agency responsibilities and lack of coordination result in confusion that can create roadblocks to public participation, discourage private investment, cause harmful delays, and generate unnecessary costs. This is particularly true for new uses, for which federal agency responsibilities are scattered and ill defined and the decision making process is unclear. Without an understandable, streamlined, and broadly accepted method for reviewing a proposed activity, reactive, ad hoc management approaches will continue, perpetuating uncertainty and raising questions about the comprehensiveness and legitimacy of decisions.<sup>25</sup>

Certainly, the present situation in many states for obtaining permits is confusing at best, and probably legally unsupportable. A review of the CZMA process in three states shows why this is so. In Oregon, the state routinely regulates international cables beyond its 3 NM territorial sea.<sup>26</sup> In California, besides routinely regulating international cables out to 200 NM, the state

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<sup>25</sup> See *supra.*, n. 15. at 64.

<sup>26</sup> The final state demand with the US-CHINA cable system was a March 1999 letter from Governor Kitzhaber that informed AT&T to either bury the cable out to a water depth of 1500 meter and work with the Oregon fishing group to settle all outstanding issues[by paying 20 fishermen \$5M] or a state permit would not be issued. Kroft, "Fiber Optic Cables; The Oregon Experience of Things Look Different Here.", 18<sup>th</sup> Annual Submerged Lands Management Conference, Jersey City, New Jersey, Oct. 16, 1999.

has even suspended cable permitting.<sup>27</sup> In New Jersey, the state proceeded to regulate cables out to 200 NM over the specific objections of the Department of Defense.<sup>28</sup>

The mistaken basis for these state claims to jurisdiction beyond their 3 NM territorial sea is an incorrect reading of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) and (e) ("OCSLA")<sup>29</sup>, which requires permits for "artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf." *Id.* See 33 C.F.R. § 322.3(b) The statute specifies that these "installations and other devices" are those used for purposes of exploration, development, production, or transportations of natural resources. 43 U.S.C. § 1331(a)(1). Significantly, submarine cables are not listed in either the OCSLA or its implementing regulations.<sup>30</sup>

Finally, the FCC, if it decides in favor of the NPRM, should revisit its earlier holding in *Review of Commission consideration of Applications under the Cable Landing License Act. Report and Order*, FCC 01-332, ¶ 52 at 27.

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<sup>27</sup> Revised Findings and Combined Consistency Certification and Coastal Development Permit Application Staff Report Tull12b/13a issued by California Coastal Commission, June 14, 2000. The California Coastal Commission in the same month also declared a one-year moratorium on the issuance of new state landing permits.

<sup>28</sup> See letter from Department of Defense Representative for Ocean Policy Affairs to Director, New Jersey Department of Environmental Protection, dated September 20, 2001, attached as Appendix B to these comments.

<sup>29</sup> Other states such as Florida comply with international law and limit their permitting requirements to the state's 3NM territorial sea.

<sup>30</sup> The state's erroneous position is that a telecommunication cable is a "device" or "structure" subject to USACE jurisdiction. Besides ignoring the clear mandate of international treaties to which the United States is a party or adheres, this argument is unconvincing for several reasons.

Section 10 of the Rivers and Harbors Act grants the Secretary of the Army the authority to prevent obstruction to navigation within the 3 NM territorial sea jurisdiction of USACE. See 33 U.S.C. § 403 and 33 C.F.R. § 329.12. As originally enacted, OCSLA extended that authority to "artificial islands and fixed structures located on the outer Continental Shelf." 43 U.S.C. § 1333(f)(1953). In 1978, OCSLA was amended and the description of the Corps' Section 10 authority on the outer Continental Shelf was expanded. As amended, the act provides that the Corps' authority "is hereby extended to the artificial islands, installations and other devices referred to in subsection (a) of this section." 43 U.S.C. § 1333(e)(1978). The artificial islands, installations and other devices referred to are "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources there from, or any such installation or other device . . . for the purpose of transporting such resources . . ." 43 U.S.C. § 1333(a)(1978). The plain meaning of the words, giving effect to everything Congress wrote, is that the USACE's OCSLA authority over installations and devices on the Continental Shelf extends only to such devices used "for the purpose of exploring for, developing, or producing [natural] resources." Since international telecommunication cables which require FCC landing licenses are not involved in natural resources, international law controls and USACE has no jurisdiction over them beyond 3 NM. This limits state permit jurisdiction to the same limit.

We also decline to adopt *the* suggestion of Global Crossing that the Commission commence a proceeding to examine the review procedures of state, local, and Federal agencies that are responsible for permitting submarine cable systems. Global Crossing, although recognizing the importance and significance of land use and environmental issues, is concerned about increased costs and deployment delays it has experienced as a result of such regulatory activity. Global Crossing states that a single cable system with two landings often includes review and some form of approval by as many as 25 different governmental resources and land use agencies, taking over two years to complete. It may be more effective for Global Crossing to bring such issues directly to the attention of the agencies that are performing these various land use and environmental reviews. Similarly, we decline to adopt Level 3's suggestion that we preempt state review and licensing of submarine cables. Level 3's and Global Crossing's suggestions go beyond the scope of this proceeding.

Before adopting the NPRM, the FCC should carefully review the impact and role of the various federal and state permits on international cable deployment to the United States and overseas and whether preemption should be considered.

## CONCLUSION

The ICPC urges the FCC to maintain its present Cable Landing License Rules and reject the NPRM. If the FCC elects to change its rules to adopt CZMA restrictions, any such modification should be expressly limited to the FCC's territorial jurisdiction. Finally, any modification of the Rules should be in harmony with customary international law and the treaties regulating international cables to which the United States is a party or adheres.

Respectfully submitted on behalf of the  
**International Cable Protection Committee**

By   
\_\_\_\_\_  
Jon Reynolds, ICPC Secretariat

Dated 6 May 2004

**APPENDIX A**

**ICPC Members**

**APPENDIX B**

**Letter from the Department of Defense Representative for Ocean Policy Affairs to  
Director, Department of Environmental Protection, dated September 20, 2001.**