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11 July 2008

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation, IB Docket No. 04-47

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's rules, I hereby notify the Commission of two *ex parte* presentations made on July 10, 2008 on behalf of the entire membership of the North American Submarine Cable Association ("NASCA") in the above-referenced proceeding.¹ *First*, Stephanie Weiner of Harris, Wiltshire & Grannis LLP, and I met with Aaron Goldberger, Legal Advisor, and Brent Greenfield, Special Counsel, to Chairman Kevin Martin. *Second*, Stephanie Weiner and I met with Wayne Leighton, Special Advisor to Commissioner Deborah Taylor Tate. In each of these meetings, the participants discussed issues raised in the attached presentation, NASCA's consolidated petition for reconsideration and petition to defer, and NASCA's previous filings in the above-captioned proceeding.

¹ NASCA's current members include: Alaska United Fiber System Partnership; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Ltd.; AT&T, Inc.; Brasil Telecom GlobeNet; Columbus Networks; Global Marine Systems Limited; Hibernia Atlantic; Level 3 Communications, LLC; Southern Cross Cables Limited; Sprint Communications Corp.; Tata Communications (fka Teleglobe-VSNL); Tyco Telecommunications (US) Inc.; and Verizon Business.

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Should you have any questions or require further information, please contact me by telephone at +1 202 730 1337 or by e-mail at kbressie@harriswiltshire.com.

Respectfully submitted,



Kent D. Bressie
Counsel to the
North American Submarine Cable Association

Attachment

cc: Aaron Golberger
Brent Greenfield
Wayne Leighton



NORTH AMERICAN SUBMARINE CABLE ASSOCIATION— VIEWS RE THE FCC’S NEW CZMA RULES FOR UNDERSEA CABLE OPERATORS, IB DOCKET NO. 04-47

OVERVIEW

- In 2007, the FCC adopted new environmental rules that could greatly and needlessly delay the issuance of cable landing licenses for new undersea cables landing in the United States or its territories.
- The FCC’s new rules, which purport to implement the Coastal Zone Management Act (“CZMA”):
 - Upset 35 years of well-established legal interpretation and practice by states/territories, Army Corps, and FCC itself;
 - Are based on a flawed interpretation of the CZMA;
 - Are unworkable in practice and ignore how states and territories implement the CZMA, for example, making it impossible to obtain the required permit from the State of Florida while also complying with the FCC’s new rules;
 - Impose a significant regulatory burden without any corresponding benefit; and
 - Undermine the FCC’s cable landing license streamlining rules and established policy of encouraging investment and infrastructure development.
- At the end of the day, the FCC’s new rules will not subject any previously unreviewed undersea cable activities to new scrutiny by the states and territories.
- For these reasons, NASCA urges the FCC to grant NASCA’s petition for reconsideration and rescind the new CMZA rules.

NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

Background on Federal-State Regulation

U.S. Offshore Jurisdiction

- The United States gives both the federal government and individual state and territorial governments concurrent authority to regulate certain activities within a certain distance of the shoreline.
- Federal authority extends 12 nautical miles offshore.
- For 50 states and territories (American Samoa, Guam, Puerto Rico, and U.S. Virgin Islands), state and territorial authority extends:
 - Geographically: 3 nautical miles offshore.
 - Based on affects: over activities—wherever located—“affecting” 3-nautical-mile zone.

Coastal Zone Management Act

- CZMA is a federal statute allowing U.S. states or territories to establish and conduct coastal management plans.
- The federal government—acting through the National Oceanic and Atmospheric Administration (“NOAA”)—must approve new and modified coastal management plans.

Consistency Certifications

- CZMA allows a state or territory to require that federal permitting and licensing actions affecting state coastal zone be “consistent” with state coastal management program.
- States may list federal activities subject to consistency reviews, and also review “unlisted activities.”

CZMA and the Army Corps

- *All* undersea cable projects are subject to CZMA consistency reviews as part of U.S. Army Corps of Engineers’ permitting under the Rivers and Harbors Act of 1899 and the Clean Water Act.
- Applications for Army Corps permits contain extensive environmental analysis that is more than sufficient to allow for consistency determinations by the states and territories.

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FCC Actions to Date

Longstanding FCC Practice

- For 35 years, CZMA, coastal management plans, and consistency reviews existed without specific FCC rules.
- FCC deferred to other government agencies in environmental matters.
 - FCC licensing focused on diplomatic, national security, and competition issues.
 - FCC did conclude in 1970s that undersea cable construction had no significant environmental effects—a finding it continues to endorse.

2004 Rulemaking in IB Docket No. 04-47

- FCC asserted that CZMA now compels it to allow states/territories to review undersea cable projects and impose permit conditions before FCC may grant cable landing license.
- NASCA opposed FCC's proposals on legal and policy grounds.
- NOAA opposed FCC's proposals as unnecessary.
- No state or territory supported the FCC's proposals or otherwise indicated that existing FCC rules precluded review of undersea cable projects for consistency purposes.
- Yet FCC—with no record support—adopted its initial proposals.

2007 Report & Order in IB Docket No. 04-47, FCC 07-118

- Adopted new Note to FCC Rule Section 1.767(a)(10)
 - Operator must determine whether it is required to certify to the state(s) where the cable lands that its proposed activities will comply with the enforceable policies of the coastal management programs of the relevant state(s).
 - If state(s) require consistency certification, certification must be included as part of FCC application.
 - Rule took effect on October 25, 2007.
- Adopted new Certification in FCC Rule Section 1.767(k)
 - Applicant must certify that “the submarine cable system will not be located in any states where the cable landing licenses may be subject to the consistency certification requirements of the Coastal Zone Management Act, 16 U.S.C. 1456.”
 - Rule has not yet cleared OMB process.

Legal Flaws in FCC's New Rules

Not Legally Necessary

- Contrary to assertions in 2007 Report & Order, CZMA did not require new FCC rules to allow states to review cable landing license applications.
- Legal burden that rests with the states, should they choose to bear it, in listing activities and reviewing applications for unlisted activities.

Impossibility of Compliance

- Problems with “unlisted activities”: the new rules compel applicants to make definitive determinations about whether CZMA certifications are required “before filing their applications”; but states would not even seek NOAA approval for CZMA review of an unlisted activity until *after an application is filed*.
- “Florida paradox,” explained below.

Inconsistency with FCC Landing-Point Rules

- 47 C.F.R. § 1.767(a)(5) allows operators to apply for cable licenses at a preliminary planning stage using only general landing points, whereas new rules would preclude such applications.

Inconsistency with FCC Streamlining Rules

- Would prevent a cable operator from making effective use of the 45-day licensing calendar by precluding filing or grant of application absent conclusion of duplicative state/territorial reviews.
- Would subvert intent of streamlining rules, which were “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. . . . As a result, the costs of deploying submarine cables should decrease to the ultimate benefit of U.S. consumers.” *Submarine Cable Streamlining Report and Order*, 16 FCC Rcd. 22,167, 22,168 ¶ 1 (2001).

Inconsistency with U.S. WTO Obligations

- Introduces impermissible uncertainty and delay into the licensing process by precluding FCC from making publicly available “the period of time normally required” to license a submarine cable, as required by the WTO Reference Paper.

Case Study: Florida

- Applicants now face a classic and inescapable “Catch-22” in Florida: to obtain state approval, they need the FCC cable landing license, but to obtain the FCC cable landing license, they need state approval.
 - Florida does not require a separate state consistency review for a project requiring both state and federal licenses, but instead treats the issuance of the state license as the consistency determination. *See Fla. Stat. Ann. § 380.23(1) (2007).*
 - To obtain the necessary approval for undersea cable installations, Florida requires that applicants first obtain and submit a copy of their FCC cable landing license. *See Fla. Admin. Code §§ 18-21.004(1)(1)(a) & 18-21.00401 (2007).*
 - But, to obtain a cable landing license under the FCC’s new rules, an applicant would first need to obtain and submit a state consistency determination (*i.e.*, state permit approval) from Florida before the cable landing license could be granted.
- Thus, under the new rules, there is no way to obtain the federal and state approvals necessary to land an undersea cable in Florida.

Real-World Harms to Undersea Cable Operators

Regulatory Uncertainty

- Operator cannot predict whether state/territory will scrutinize a particular undersea cable project.

Delay

- FCC mistakenly concluded that its rules would impose a maximum delay of six months and that such delay was “minimal.”
- Any delay is potentially catastrophic.
 - “Time to market” of paramount importance for all cable projects.
 - Delays severely disrupt manufacturing, installation, and other schedules due to constraints imposed by weather, fishing-season timeframes, cable ship availability, and factory capacity.
- For systems landing in multiple states, new rules would allow a single state or territory to hold an entire undersea cable project hostage, as new rules condition the availability of the cable landing license on the concurrence of *all* states.

Interference with Cable Financing Efforts:

- Rules deprive cable operators of the ability to signal to investors and lenders that a undersea cable project is consistent with U.S. foreign policy, national security, telecommunications connectivity, and competition objectives.

Needless Reordering of Permitting Process

- Ultimately, FCC’s new rules threaten to reorder the entire permitting process for undersea cables, disrupting well-established approaches to permitting.

Duplicative Regulation

- CZMA-Army Corps consistency process already provides sufficient protection for state/territorial coastal management programs.
- ***At the end of the day, FCC’s new rules will not subject any previously unreviewed undersea cable activities to new scrutiny by the states and territories.***

NORTH AMERICAN SUBMARINE CABLE ASSOCIATION



Further FCC Proceedings and NASCA Requests for Action

NASCA Petition for Reconsideration

- Seeks to defer implementation of new certification requirement pending FCC consideration of petition for reconsideration.
- Asks the FCC to reconsider and rescind all new CZMA rules.
- NOAA's March 17, 2008, *ex parte* underscores need for reconsideration of new CZMA rules.
 - NOAA believes that neither FCC nor applicant need take any action so long as a state does not list the cable landing license as subject to consistency review.
 - But NOAA mistakenly assumes that new CZMA rules do not obligate applicant to take any action, whereas rules actually require certification from applicant that the state will not subject the application to review.

NASCA OMB Challenge

- Notified FCC and OMB of failure to comply with the Paperwork Reduction Act and the White House Office of Management and Budget rules.