

Voice of the Industry



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# Building a Submarine Cable: Navigating the Regulatory Waters of Licensing and Permitting

Andrew D. Lipman and Nguyen T. Vu Given the rising global demand for data, telecommunications companies around the world are scrambling to add bandwidth capacity on international and intercontinental submarine cable routes. Over 95 percent of overseas communications are now carried by submarine cables, as the increased capacity, speed, and security make submarine cables the preferred medium for transporting data. Data and voice transfer over these cables is not only cheaper, but also quicker than via satellite. According to recent reports, international bandwidth usage has been growing at close to 60% year over year during the past few years. Demand for



additional bandwidth has been especially prominent in emerging markets in Africa, Asia, and the Middle East. In fact, there are at least nine publicly announced submarine cables either under construction or in the planning stages around Africa.

Companies have sought to keep pace with this growing demand by constructing new submarine cables to connect points throughout the world. Indeed, construction of subsea cables is no longer limited to traditional telecommunications carriers, as large users of telecommunications capacity are now participating directly in consortia to build and operate submarine telecommunications cables.

Construction of new submarine cables, however, can be tempered by the licensing and permitting process and country-specific regulatory regimes that may stand as roadblocks to the rapid deployment of new international submarine cable systems.

### Regulatory Issues Related to Building a Submarine Cable System

There are a multitude of regulatory issues involved in submarine cable licensing and permitting that can dramatically affect the time and cost for such projects. Many countries require that the builder of a subsea cable system obtain a telecommunications license and a separate submarine cable license issued by the relevant communications regulator. Depending on the jurisdiction, the process for obtaining these licenses can take months. Other permits may also be necessary, including defense or national security authorizations, environmental permits, and permits for construction and land use. To effectively obtain all of the requisite permits and licenses, coordination of licensing and permitting is critical to the success of a submarine cable build-out.

In emerging markets, obtaining the required licenses and permits is generally more difficult, as these markets tend to have less developed legal and regulatory regimes while subjecting applicants to additional "red tape," and the overall application and review process is less transparent. Many jurisdictions also have "localization" rules that require the use of the local labor force for construction, or other professionals such as attorneys licensed in that jurisdiction to submit the applications for the licenses and permits. Moreover, construction of submarine cables may also be met with opposition from commercial fisherman's unions or other seabed users.

### U.S. Regulations Concerning Submarine Cable Systems

There are a number of different permits and licenses required to land and operate a submarine cable in the United States. In addition to the Federal Communications Commission's ("FCC") telecommunications licensing requirements, other federal, state, and local permits are generally required. The number of authorizations required depends on where the cable lands, and whether the cable passes through any environmentally sensitive areas. Obtaining these federal, state, and local permits can be onerous and may take up to 12 or more months.

On the federal side, cable owners are required to obtain a cable landing license from the FCC, permits from the Army Corps of Engineers, and – depending on whether the cable goes



through a National Marine Sanctuary – a permit from the sanctuary superintendent.

### FCC Approval Process

All submarine cables landing in the United States must be licensed by the FCC. This license is issued pursuant to the Submarine Cable Landing License Act of 1921 and Section 1.767 of the FCC's Rules. The FCC has established a streamlined cable licensing process that can result in a license being granted within 45 days of the date the application is put on public notice. The application consists of a description of the submarine cable, including the type and number of channels and its capacity, a specific description of the cable landing stations in the United States and the foreign countries where it will land, a map showing the geographic coordinates of all landing stations, a statement as to whether the cable will be operated on a common carrier or private carrier basis, and ownership information.

### Parties to the License Application

Under the FCC's cable licensing rules, all entities that: (1) own or control a U.S. landing station, or (2) own or control a five percent or greater interest in the cable system and will use the U.S. segments of the cable system must be parties to the cable license application. In other words, all such entities will be colicensees. In addition, all original owners of the cable, regardless of the amount of their ownership interest, must be identified in the application, although they do not have to be licensees if they do not meet the criteria discussed above.

### Section 214 Authorization for Submarine Cables

In addition to obtaining a cable landing license, which authorizes the installation of the submarine cable facilities, a service license under Section 214 of the Communications Act of 1934, as amended (the "Act"), may be required. Many submarine cable systems in the United States are operated on a noncommon carrier basis. That means that the owners are not legally compelled to serve the public indifferently and may sell capacity on an individual case basis. To obtain non-common carrier status, the operator must show that there are alternative common carrier facilities available on the cable route and that there are no reasons implicit in the nature of the operations of the cable system that demand common carrier treatment. If this showing is made, no additional FCC authority is needed to operate the cable.

If, however, a proposed licensee plans to operate the cable system on a common carrier basis or is unable to make the above showing, the FCC's rules require the licensees to operate the facility as a common carrier facility and obtain authority to provide international telecommunications services under Section 214 of the Act. The Section 214 application is submitted at the same time as the cable license application and the authorizations are generally granted concurrently.

### "Team Telecom" Review

While acquisitions of U.S. telecommunications carriers and network operators (including submarine cable licensees) by non-U.S. persons have been subject to national security review for a number of years, more recently, however, "Team Telecom" -- an *ad hoc* task force comprising the Departments of Defense, State, Homeland Security and Justice, including the Federal Bureau of Investigations that examines such deals -- has begun to review new submarine cable landing license applications as well, particularly as most subsea cable applications have some form of foreign ownership or participation.

Although Team Telecom is an *ad hoc* group, the review process is fairly well-trod, especially in the context of new submarine cable licenses. The FCC provides copies of applications with foreign ownership to the Executive Branch for review. Team Telecom then typically asks applicants to answer a set of questions (referred to as the "triage questions") concerning issues such as how call data and other information will be stored, how data will be secured, and who will have access to the applicant's network and data. In most cases, Team Telecom will ask the FCC to defer granting



the license application until Team Telecom has completed its review. This typically results in the removal of the application from streamlined processing at the FCC and the withholding of FCC approval until Team Telecom's review is complete. Team Telecom's review of submarine cable applications, however, tends to be substantially more timeconsuming than a review of a Section 214 application. Moreover, given that the FCC will not grant a landing license until Team Telecom has approved, it is unlikely that a license will be issued in less than six months.

Although applicants can wait for Team Telecom to receive their applications from the FCC, most applicants are proactive and contact Team Telecom immediately upon filing an FCC application (and sometimes before filing). There are several advantages to this approach. Most obviously, contacting Team Telecom can move the application closer to the top of Team Telecom's list and thus speed review. Second, it allows the applicant to begin to characterize its application for Team Telecom and answer any questions promptly. Third, and most substantively, actively engaging Team Telecom puts the applicant in the best position to suggest and craft solutions to any law enforcement and national security issues in a more favorable manner, including negotiating any eventual conditions, such as a national security agreement ("NSA") that Team Telecom may eventually require.

Foreign persons should not be dissuaded from entering the U.S. market. While the path to approval may be a bit more winding than in the past, and in most instances applicants will likely be required to enter into an NSA or other form of national security commitment, nearly all projects can ultimately receive approval. Moreover, the government is amenable to a variety of ownership and control structures provided that their basic security concerns are addressed satisfactorily in the NSA or other security commitment. Parties must be flexible and creative, but there is still room for foreign investment in the U.S. submarine cable market.

#### **Other Federal Authorizations**

In addition to the FCC cable license, submarine cable systems must obtain a federal permit from the Army Corps of Engineers (the "Corps") under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 (the "Rivers and Harbors Act"). Section 10 of the Rivers and Harbors Act governs all work in or affecting navigable waters of the United States, while Section 404 of the Clean Water Act governs discharges of dredged or fill material into waters of the United States. If an individual permit is required for the project, the Corps must first complete an environmental review under the National Environmental Policy Act before issuing the permit. The Corps must also consult with the applicable federal resource agencies (such as the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service) under the Endangered Species Act if the project has the potential to affect protected species.

When the Corps issues a permit in an area where a state also asserts regulatory jurisdiction (limited to three miles off shore), it must receive from the state a consistency determination under Section 307(c)(1) of the Coastal Zone Management Act, stating that the activities authorized under the permit are consistent with the state's Coastal Zone Management Plan. In addition, a Corps permit for any discharges in an area under concurrent state jurisdiction requires a certification from the state under Section 401 of the Clean Water Act that the authorized activities will be consistent with state water quality standards. Furthermore, in some cases special approval is required if the cable goes through a National Marine Sanctuary.

### State and Local Authorizations

On the state and local side, the permits required depend on the state and municipality in which the cable lands. For instance, California has some of the most onerous environmental permitting requirements of any state in the country. If a cable project in California requires an approval from a state or local agency and if the landing of the cable may have a significant effect on the environment, an Environmental Impact Report ("EIR") will be needed under the California Environmental Quality Act. The EIR process can take several years, especially for projects that are controversial, that are challenged by aggressive project opponents, or that are located in environmentally sensitive areas.

Depending on the route and landing point for the proposed cable, a coastal development permit could also be required. In some states, approval may also be required by the state lands commission, which exercises jurisdiction over tidelands and submerged lands adjacent to the coast and offshore islands of the state.

## Streamlining the Licensing and Permitting Process

In order to handle the myriad of federal and state permits, applicants -- either the subsea cable sponsors or their suppliers, depending on the division of permitting responsibilities in the cable's supply contract -- generally convene a pre-application meeting with all federal, state and local agencies that may have jurisdiction over the project. In general, most of the permit applications require detailed information on the location of the cable and its potential environmental impact. Moreover, most of these permitting processes involve public consultation proceedings and can become politically charged. Past cable projects, have resulted in substantial opposition from environmental and fishing interests. Although these disputes have ultimately been resolved in most cases, they can result in delay and substantial additional costs. As such, having sufficient lead time to obtain all applicable permits and having knowledgeable and experienced advisors in this area is critical to securing all necessary approvals for timely commencement of operations.



Andrew Lipman has spent more than 30 years developing the firm's Telecommunications, Media and Technology Group into one of the largest practices of its kind in the nation. He practices in

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