



WILTSHIRE
& GRANNIS LLP

1200 18TH STREET, N.W., STE. 1200
WASHINGTON, D.C. 20036-2516
U.S.A.

TEL +1 202 730 1300
FAX +1 202 730 1301
WWW.WILTSHIREGRANNIS.COM
ATTORNEYS AT LAW

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BY ELECTRONIC FILING

Ms. Jennifer Golladay
Bureau of Ocean Energy Management
U.S. Department of the Interior
381 Elden Street, HM 1328
Herndon, Virginia 20170

Re: Docket No. BOEM–2011–0082, Right-of-Way Grant of Submerged Lands on the Outer Continental Shelf to Support Renewable Energy Development

Dear Ms. Golladay:

Through its counsel, the North American Submarine Cable Association (“NASCA”) welcomes the opportunity to comment on the Bureau of Ocean Energy Management’s draft right-of-way grant form for renewable energy development on the outer continental shelf (“OCS”).¹ NASCA is the principal non-profit trade association for undersea-cable owners, undersea-cable maintenance authorities, and prime contractors for undersea-cable systems operating in North America. NASCA’s members include: Alaska Communications System; Alaska United Fiber System Partnership; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Limited; AT&T Corp.; Brasil Telecom of America, Inc. / GlobeNet; Columbus Networks; Global Marine Systems Ltd.; Hibernia Atlantic; Level 3 Communications, LLC; Reliance GlobalCom; Southern Cross Cable Network; Sprint Communications Corporation; Tata Communications (America) Inc.; Tyco Electronics Subsea Communications LLC; and Verizon Business. NASCA regularly represents its members interests in regulatory proceedings before various federal and state agencies and in discussions with other parties operating the marine environment, including traditional and alternative energy companies and commercial fishermen.

¹ See Bureau of Ocean Energy Management, Right-of-Way Grant of Submerged Lands on the Outer Continental Shelf to Support Renewable Energy Development, Request for Comment, BOEM–2011–0082, 77 Fed. Reg. 52,353 (Aug. 29, 2012) (“Request for Comment”), attaching a draft Right-of-Way Grant of Submerged Lands on the Outer Continental Shelf to Support Renewable Energy Development (“Draft ROW Grant”).

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As described on pages 4 through 6 of the attached comments, which NASCA filed in a related BOEM proceeding and which NASCA incorporates by reference here,² undersea cables carry more than 95 percent of the international voice, data, and Internet traffic of the United States, a percentage that is expected to continue to increase. Without undersea cable infrastructure, the global Internet would not function. Customary international law and various international treaties grant to undersea cables unique rights and freedoms not granted to any other activities in the marine environment.³ Moreover, undersea cable operators have developed a set of private coordination and cooperation mechanisms permitting shared—and sometimes cooperative—use of important coastal and marine regions, to the mutual benefit of all parties. The potential for conflict between undersea telecommunications cables and energy-related activities on the OCS continues to grow, making it all the more imperative for all parties operating the marine environment to be aware of the relevant regimes and to coordinate their activities accordingly.

With respect to the Draft ROW Grant, NASCA remains concerned that it makes no reference to undersea cables and only very general references to other federally-permitted activities and property on the OCS. For a grantee unfamiliar with the legal and regulatory regimes governing undersea cables, the grantee could be left with the impression that the ROW Grant provides it with the right to exclude undersea cable-related activity from the grant area, with protection from undersea cable-related activity, or with limited liability or immunity from liability with respect to undersea cable-related activities in the grant area, when in fact it does not and cannot, as BOEM has no statutory authority to confer such rights. As with BOEM's other regulatory activities on the OCS, NASCA believes it important for the Draft ROW Grant to account not just for the presence and maintenance of existing undersea cables but also permit surveying for and installation of new undersea cables traversing the U.S. OCS and landing in the United States.

NASCA believes that with a few textual additions and modifications, these issues could be addressed, thereby assuring a greater awareness by grantees of the presence of, and legal obligations pertaining to, undersea cables on the OCS. NASCA therefore recommends the following changes to the Draft ROW Grant, which NASCA has organized to correspond to the section numbers of the Draft ROW Grant.

² See Comments of the North American Submarine Cable Association, Atlantic OCS Proposed Geological And Geophysical Activities, Mid-Atlantic and South Atlantic Planning Areas Draft Programmatic Environmental Impact Statement, Docket No. OCS/EIA/EA BOEM 2012-005 (filed May 30, 2012) (“NASCA Mid- and South-Atlantic DPEIS Comments”).

³ See *id.* at 8-12.

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Section 1

NASCA recommends that BOEM add to the end of Section 1’s second sentence the phrase, “including the statutory prohibitions on willful and negligent damage to submarine cables and statutory provisions permitting private lawsuits for damages, as codified at 47 U.S.C. §§ 21-33.” As discussed in detail on pages 14 and 15 of the attached NASCA Mid- and South-Atlantic DPEIS Comments, U.S. law provides that damaging an undersea cable—whether deliberately or through negligence—is a federal offense punishable by fine, imprisonment, or both and that such statutory prohibitions are not a bar to private lawsuits for damages due to breaking or injury to an undersea cable. NASCA believes it critical for grantees to be aware of the potential consequences of damage to undersea cables.

Section 2

NASCA recommends that BOEM revise the first sentence of Section 2(a) to read “The Grantor hereby grants to the Grantee the exclusive right and privilege vis-à-vis other persons engaged in renewable energy development, and subject to the terms and conditions of this grant and applicable regulations, to conduct activities in the area identified in Addendum A of this grant (“granted area”) that has been approved by the Grantor.” As presently drafted, without the phrase “vis-à-vis other persons engaged in renewable energy development,” the Draft ROW Grant suggests that BOEM is conferring on the grantee the right to exclude other persons—including undersea cable operators engaged in installation and maintenance activities—from conducting such activities in the granted area. NASCA does not believe that BOEM intended to confer such a right but nevertheless believes the BOEM should strive for greater clarity with this provision.

As described in detail on pages 8 through 12 of the attached NASCA Mid- and South-Atlantic DPEIS Comments, U.S. treaty obligations and customary international law as recognized by the United States grant undersea cable operators unique freedoms to install and repair undersea cables in the exclusive economic zone (“EEZ”) and continental shelf areas of a coastal state, including the United States. Consistent with these rights and freedoms, the Outer Continental Shelf Lands Act (“OCSLA”) does not grant any agency jurisdiction permitting jurisdiction over undersea cables in the EEZ or on the continental shelf beyond the U.S. territorial sea.⁴ U.S. jurisdiction extends “to the subsoil and seabed of the outer Continental Shelf and to 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*

⁴ See also Presidential Proclamation No. 5030 (10 Mar. 1983), No. 7219 (Aug. 2, 1999) (providing that establishments of an EEZ and a contiguous zone, respectively, did not infringe on the high-seas freedoms to lay and repair submarine cables).

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for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.”⁵

Section 3

NASCA recommends that BOEM revise Section 3(a) to read as follows: “All renewable energy-related rights in the granted area not expressly granted to the Grantee by the Act, applicable regulations, this grant, or any approved GAP are hereby reserved to the Grantor.” Without the phrase “renewable energy-related,” this provision could be interpreted to suggest that BOEM retains the right to restrict undersea cable-related activities in the granted area. As noted above with respect to Section 2, OCSLA—consistent with U.S. treaty obligations and customary international law as recognized by the United States—confers no such authority on BOEM.

Section 6

NASCA recommends that BOEM add after the first sentence the following text: “The Grantee must also comply with the statutory prohibitions on willful and negligent damage to submarine cables, codified at 47 U.S.C. §§ 21-33.” NASCA believes that this point is best addressed in the introductory language of Section 6, rather than in Section 6(a) (which refers to activities that could “unreasonably interfere with or endanger”) because unreasonable interference or endangerment are not the legal standards imposed by 47 U.S.C. §§ 21-33 with respect to cable damage.

NASCA further recommends that BOEM amend Section 6(a) to include at the end the phrase “including submarine cables licensed under the Cable Landing License Act, 47 U.S.C. §§ 34-39.” Although the Federal Communications Commission (“FCC”) does not assert licensing jurisdiction for undersea cable facilities beyond the limits of the U.S. territorial sea, it does require the license applicants to file a description and map of the entire undersea cable system, whether traversing the high seas or EEZ, continental-shelf, or territorial-sea areas of other countries. These documents are publicly available on the FCC’s web site. As presently drafted, Section 6 focuses only on energy-specific laws and regulations, meaning that the grantee could be unaware of its obligations vis-à-vis undersea cables.

⁵ 43 U.S.C. § 1333(a)(1) (emphasis added).

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Section 8

NASCA recommends that BOEM amend Section 8(d) to read “damage to property, including undersea cables.” As noted above with respect to Sections 1 and 2 of the Draft ROW Grant, 47 U.S.C. §§ 21-33 impose statutory prohibitions on, and permit private lawsuits for damages for, cable damage.

Section 10

NASCA recommends that BOEM amend Section 10 to require that a grantee notifying BOEM of a proposed transfer or assignment also notify any undersea cable operator whose facilities traverse the grantee’s granted area. Given the rights and freedoms that undersea cable operators would enjoy even in granted areas, NASCA believes it appropriate for undersea cable operators to have notice of ownership changes that could affect the grantee’s ability to comply with the grant conditions.

* * * * *

NASCA appreciates BOEM taking these comments into consideration as it finalizes the Draft ROW Grant. Should BOEM have any questions regarding these comments, please contact the undersigned by telephone at +1 202 730 1337 or by e-mail at kbressie@wiltshiregrannis.com

Respectfully submitted,



Kent D. Bressie

*Counsel for the
North American Submarine Cable Association*

Attachment