

Alert | Technology, Media & Telecommunications



November 2024

FCC Aims to Overhaul Subsea Cable Regulations

Go-To Guide:

- FCC expected to initiate rulemaking on Nov. 21, 2024, to update U.S. submarine cable landing licensing.
- The proposed rules aim to increase FCC oversight of cable ownership and operations, addressing national security concerns.
- If enacted, the rules would expand information reporting requirements for applicants and licensees and could shorten license terms.
- Proposed rules may subject more entities to FCC requirements, including those that control terminal equipment and IRU holders.
- Current and prospective owners and operators of subsea cable systems should consider submitting comments to provide insights on how to address the FCC's objectives while limiting burdens on applicants and licensees.

On Oct. 31, 2024, the Federal Communications Commission (Commission or FCC) released a draft **notice of proposed rulemaking** (NPRM) initiating a comprehensive review of the Commission's rules on submarine cable licensing, primarily to address national security concerns. The Commission is expected to adopt the NPRM at its open meeting scheduled for Nov. 21, 2024. Comment and reply periods will begin following the NPRM's publication in the Federal Register.

The proposed measures aim to increase the FCC’s visibility into cable system ownership, how and where those systems operate, and what types of services are provided to address what the FCC perceives as heightened national security and foreign policy risks to U.S. communications infrastructure. In many cases, the proposals would codify conditions that the Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector (Team Telecom) routinely imposes upon cable licensees in mitigation agreements.

The new rules would revamp the submarine cable licensing process, which has remained largely unchanged for over 20 years. While submarine cable security has been a bipartisan issue in the past, it is unclear what level of priority and resources the FCC will dedicate to the proceeding with Commission leadership changes following the 2024 presidential election.

Specifically, the NPRM proposes to:

- Include more entities within the scope of parties required to obtain a submarine cable landing license—including those that own or operate Submarine Line Terminal Equipment (SLTE), indefeasible right of use (IRU) holders, and parties with 5% or greater ownership in a system.
- Shorten the existing 25-year license term, thereby requiring licensees to submit renewal applications more often.
- Expand the information required in applications, including the reporting of foreign ownership of 5% or more; supply more detailed information on the system; and certify adherence to cybersecurity plans and rules relating to the FCC’s Covered List.
- Adopt a three-year periodic reporting rule with the same expanded information-sharing requirements.
- Adopt a presumption that entities whose applications to land and operate undersea cables (or International Section 214 authority) were previously denied or revoked because of national security and law enforcement concerns shall not be qualified for a new submarine cable landing license.

If adopted, these rules might increase the regulatory burdens associated with obtaining and maintaining a submarine cable landing license in the United States. On the other hand, the new rules would “front-load” information Team Telecom commonly seeks in mitigation agreements and ad hoc reviews of existing licenses. In this respect, codifying certain requirements might provide prospective applicants with more regulatory certainty.

Proposed Expanded Scope of Cable Landing License Requirement

- *More entities considered to “land or operate” cable systems, thus requiring license:*
 - Submarine Line Terminal Equipment (SLTE): The FCC seeks comment on whether to require that entities owning or controlling the SLTE on a system apply for a cable landing license. Under the Cable Landing License Act—which provides the statutory basis for the president (and by delegation the Commission) to regulate subsea cables—no party may “land or operate” a subsea cable in the United States without a license. The FCC asks whether parties that own or control the SLTE should be considered to “land or operate” the cable system and thus be required to obtain a license.
 - Indefeasible Right of Use (IRU) Holders: Notably, the FCC tentatively concludes that IRU holders “likely meet these requirements.” It notes that SLTE “could be physically or logically accessed by IRU holders or grantees, thus potentially raising national security and law enforcement concerns arising from our lack of information about and regulatory oversight of these relationships and the

ownership of the IRU holder or grantee.” The NPRM implies that an IRU holder would be required to obtain a license only if it owns or controls SLTE implemented on the system, but the Commission does not expressly clarify that its interpretation would be so limited.

- **Data Center Owners:** The NPRM also seeks comment on the whether the statute should apply to data center owners due to “the access they have over submarine cables and the site operations, such as physical security, power, backup power, HVAC, and other environmental support essential to proper operations of cable landing systems housed in their facilities.” It notes that data center owners routinely seek waivers of the cable landing station rules. This indicates that the Commission may be considering *excluding* data center owners from the scope of the Cable Landing License Act, which would provide regulatory certainty and prevent the need for waiver requests.
- **5% Ownership Threshold:** Currently, to trigger the requirement to obtain a cable landing license, a party must own 5% or more of the cable system. The FCC asks for comment on whether an entity with *any* ownership should instead be required to obtain a license. It also requests comment on how parties typically calculate ownership for purposes of regulatory filings (e.g., based on fiber pairs, capacity, capital contribution, etc.). Relatedly, a catchall question asks what type of capacity arrangements, if any, should fall within the licensing requirement.

Proposed Shortened License Term

- The Commission proposes to shorten the existing 25-year license term and asks for comment on how this would correspond to real-world system lifespans. It does not propose a specific number of years, but floats five, 10, and 15 years as possibilities.
- The FCC tentatively concludes that it will retain its authority to conduct ad hoc reviews at any time, regardless of whether the FCC ultimately shortens the license term.
- Finally, while it does not affirmatively propose to do so, the FCC asks for comment on whether a shortened license term should apply to existing licenses as well as future ones. For example, if an existing license has been active for 10 years, and the license term were shortened to 15, then that license would only have five years left in its term.

Proposed Updated Application Requirements

- **Reportable Foreign Ownership Threshold to 5%:** Currently, FCC applicants must report foreign ownership of 10% or greater as part of the license application, which in turn triggers Team Telecom’s national security review of the application. The Commission proposes to lower the threshold to 5%, consistent with its proposal to do the same in the context of the International Section 214 licensing process (the authorization required to offer telecommunications services with an international component in the United States).
- **System Information:** With an initial cable landing license application, an applicant is currently only required to provide a general description of the cable system. The NPRM proposes, and asks for comment on, a requirement that new applicants for new licenses, modifications, transfers of control, assignments, and renewals submit the following information:
 - **Cable Infrastructure:** length of the cable; location of branching units and landing points (both inside and outside the United States), including beach manholes; route position lists with geographic coordinates of the wet plant; number of fiber pairs on the cable; and design capacity.

- *Current and Future Service Offerings*: types of capacity services currently or planned to be offered; types of customers; whether the applicant has capacity via an IRU or leasehold interest; where the services will be marketed or offered; and general terms and conditions of customer contracts (e.g. length of term, SLAs, termination rights, etc.).
 - **Note on Confidentiality**: The Commission proposes to treat specific location information as presumptively confidential and requests comment on whether other system information should enjoy the same treatment.
- **Compliance Certifications**: Long included in Team Telecom mitigation agreements, the Commission now proposes to require a host of certifications in all types of submarine cable applications.
 - *Regulatory Compliance*: Potential measures include certification that the applicant is complying with FCC rules and related statutes, and certifications in numerous other areas, including criminal and antitrust law and misconduct or fraudulent conduct before any other government agency. The FCC also asks whether applicants should be required to disclose whether they are under FCC investigation.
 - *Cybersecurity*:
 - **Cybersecurity Plans**: The Commission is considering requiring all applicants to certify that they take reasonable measures to protect the confidentiality, integrity, and availability of their systems, and to describe their cybersecurity plans in detail. Specifically, the descriptions would need to identify cyber risks, detail the controls used to combat those risks, and examine how those controls are implemented in practice to effectively mitigate the risks. The FCC does not propose to require adopting specific cybersecurity frameworks but tentatively concludes that the NIST framework would be sufficient. The Commission proposes to require a senior officer of the applicant/licensee to sign the certification.
 - **Specific Security Practices**: The FCC also asks for comment on whether it should affirmatively require certain specific security measures to be implemented as a condition of obtaining or receiving a license. These include changing default passwords, implementing firewalls, and using multifactor authentication, among others.
 - **Responsibility for Contractors' Actions**: Notably, the FCC proposes that “if an applicant relies on a third-party contractor for provision of a communications system or service,” then the cybersecurity plan must “cover” the system(s) or service(s) offered by the third-party. This might include submarine cable suppliers, which are typically not applicants for cable landing licenses. Therefore, if adopted, this pass-through requirement might impact supply contract negotiations.
 - *FCC Covered List*: The Commission proposes to require that applicants certify that they do not use any services or equipment on the FCC’s Covered List. For existing licensees that would need to make this certification in a periodic report, the FCC asks, to the extent a licensee currently uses services or equipment on the Covered List, whether they should be required to remove it from their system. Even broader, the Commission asks whether licensees should be prohibited from “purchasing, obtaining, maintaining, improving, modifying, or otherwise supporting” any such goods or services, potentially irrespective of whether they are used on the cable system.
 - *Traffic Interruption*: The Commission asks whether to codify the common mitigation agreement condition that licensees maintain the ability to physically or logically interrupt, in whole or in part, traffic on the system transiting to and from the United States.

– *Third-Party Access:*

- **Foreign-Owned Managed Network Service Providers (MNSPs):** Currently, only applicants with reportable ownership are required to disclose whether they also outsource network management functions to foreign-owned MNSPs. However, the FCC views this as a gap because applicants without foreign ownership over the cable could nonetheless provide foreign entities with significant access to the system by contracting with foreign MNSPs. Therefore, the Commission proposes to require that all applicants disclose whether they use or plan to use foreign-owned MNSPs in the cable operations. Applications where parties certify “yes” would routinely be referred to Team Telecom irrespective of the cable’s foreign ownership. The Commission also asks whether to require applicants to “explain in detail” the nature of the foreign control over the MNSP. Beyond the scope of the phrase “use in the operation of the submarine cable,” which could potentially cover a large swath of service providers, these proposed requirements might create additional diligence hurdles in negotiations with service providers if applicants were required to obtain and disclose to the U.S. government details on those entities’ ownership structures.
- **Network Operation Centers (NOCs):** Similarly, the FCC proposes that all applicants—regardless of foreign ownership—should be required to supply NOCs’ locations. It asks whether this should encompass “data centers, PoPs, and/or main distribution facilities.”

Proposed 3-Year Periodic Reporting

- **Periodic Information Reporting:** In addition to shortening the 25-year term, the FCC proposes to adopt a periodic three-year review of all licenses in which licensees must supply updated information on the system and certify that they comply with applicable rules and license conditions. The types of information the FCC is considering requiring of licensees track with the updated application information detailed above and include current ownership information, points of contact, service descriptions, cable system specifications, description of foreign-owned MNSPs use, and cybersecurity and regulatory certifications.
- **Filing Mechanics and Streamlining Measures:** The licensee would submit a filing in the FCC’s International Communications Filing System, which the FCC would not need to grant or acknowledge. Failure to file could subject the licensee to enforcement or revocation proceedings. To streamline the process, the Commission asks whether licensees should be allowed to submit a short statement that the licensee complies with the Commission’s rules and its most recent report. In addition, the FCC requests comment on how to account for cable systems with joint licensees, floating the possibility that one licensee could submit responses on behalf the entire group of joint licensees. This would be consistent with current industry practice in the context of ad hoc Team Telecom reviews.
- **Existing License Due Dates:** Finally, for existing licensees, the Commission proposes a prioritization schedule determining the initial due dates of the first periodic report following the rule’s potential adoption:
 - *Category 1:* Submarine cable systems that (1) have a licensee that is directly or indirectly wholly or partially owned by a government of, or other entities with a place of organization in, a “foreign adversary” country, as defined in the Department of Commerce’s rule, 15 CFR § 791.4; (2) have a licensee with a place of organization in a “foreign adversary” country; or (3) land in a “foreign adversary” country (six months after the rules’ effective date);

- *Category 2*: Submarine cable systems where the Commission’s recent review of the license occurred four or more years ago and where a licensee has reportable foreign ownership (six months following Category 1);
- *Category 3*: Submarine cable systems where the Commission’s most recent review of the license occurred less than four years ago and where a licensee has reportable foreign ownership (six months following Category 2);
- *Category 4*: All other submarine cable systems, including those where no licensee has reportable foreign ownership (six months following Category 3).

The FCC’s analysis of which licensed cables would fall into each category is set forth in the NPRM’s Appendix D.

Proposed Streamlining Application and Capacity Data Collection Procedures

The Commission asks for comment on ways to make its application procedures more efficient. It also asks how it can streamline the process for collecting annual capacity report data currently submitted by all licensees. To the extent interested parties are routine filers, these requests for comment provide the opportunity to advise the Commission of inefficiencies in the licensing and reporting processes and offer improvements.

Conclusion

Given the potential for significant changes to the regulatory landscape surrounding submarine cable systems, current and prospective owners and operators should closely monitor these proceedings and consider participating in the comment process to help shape the final rules and protect their interests in this critical infrastructure.

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