Before
U.S. CUSTOMS AND BORDER PROTECTION
U.S. DEPARTMENT OF HOMELAND SECURITY
Washington, D.C.

In the Matter of

Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points

COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

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EXECUTIVE SUMMARY

The North American Submarine Cable Association ("NASCA"), the premier U.S. submarine telecommunications industry organization, urges U.S. Customs and Border Protection's ("CBP") to clarify and revise its proposed modification and revocation of ruling letters relating to CBP's application of the Jones Act, 46 U.S.C. § 55102 (the "Jones Act"), to the transportation of certain merchandise and equipment between coastwise points (the "CBP Proposal") in order to ensure that CBP's proposed actions would not disturb well-established CBP precedents finding that submarine cable installation and maintenance activities do not involve both lading and unlading of merchandise at U.S. coastwise points. Although the submarine telecommunications industry is not the stated target of CBP's proposed revocation action, the proposed summary revocation of letter rulings with holdings unrelated to the CBP Proposal's stated purpose and the vagueness of the proposal to revoke rulings for "substantially identical" transactions nevertheless creates uncertainty and threatens harm to the submarine telecommunications industry. NASCA believes that CBP can and should address these infirmities by confirming and clarifying its proposed actions in any CBP final rule.

The CBP Proposal seeks to reverse the agency's position stated in HQ 101925 that (1) certain incidental or *de minimis* transport between coastwise points does not constitute coastwise trade and (2) certain tools and repair supplies transported between two coastwise points are "vessel equipment" and not "merchandise" to the extent they are used in furtherance of the primary mission of the vessel.[1] Through these revisions, CBP intends to ensure its rulings are

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[1] Gen. Notice 19 CFR Part 177, *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points*, 51 Cust. B. & Dec. 1 (Jan. 18, 2017) ("CBP Proposal" or "Proposal").

consistent with (a) federal statutes and regulations amended or promulgated after HQ 101925 (Oct. 7, 1976), the ruling which is the primary focus of the CBP Proposal; and (b) Treasury Decision 49815(4) (Mar. 13, 1939), which defined "equipment" excluded from coastwise trade restrictions under the Jones Act.[2] Moreover, the CBP Proposal indicates that CBP intends to "revoke or modify any treatment previously accorded by CBP to substantially identical transactions."[3]

In these comments, NASCA requests that CBP (1) confirm that the primary activities of the submarine cable industry are not "substantially identical" to those at issue in HQ 101925; and (2) confirm the validity of its separate, long-established line of rulings holding that the laying and repair of submarine cables, and any subsequent discharge of small amounts of excess supplies, do not constitute coastwise trade because there is no continuity of transport between coastwise points.

First, CBP specifically identifies a number of rulings addressing vessel equipment that it intends to revoke to the extent these rulings categorize as exempt "vessel equipment" various tools and material used "in furtherance of the primary mission of the vessel." Four such rulings, HQ 105644 (June 7, 1982), HQ110402 (Aug. 18, 1989), HQ 114305 (Mar. 31, 1998), and HQ 115333 (Apr. 27, 2001) (collectively, "Cable Rulings"), address the laying and repair of submarine cables. Each of these rulings does indeed state that that cable laded on a vessel is vessel equipment (and not merchandise) to the extent it is used in furtherance of the primary mission of the vessel and are therefore subject to CBP Proposal's intended revocation to the extent inconsistent with CBP's current interpretation of "vessel equipment." Significantly,

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2 *Id.*

3 *Id.*

however, each of these Cable Rulings also relies on an entirely distinct line of reasoning to hold that cable laying and repair operations between two coastwise points, and the cable and repair materiel used in such operations, do not fall within the scope of the Jones Act's coastwise trading restrictions. As the Cable Rulings (and indeed decades of CBP decisions) reflect, the laying and repair of cable on the seabed breaks the continuity of transport for purposes of the Jones Act, and thus such activities are not subject to the Jones Act's restrictions. CBP should confirm that cable and repair materiel used in cable installation and repair activities are neither vessel equipment nor transported merchandise and therefore beyond the scope of the Jones Act's coastwise trading restrictions. It should do so by modifying the Cable Rulings, rather than summarily revoking them "to the extent they are contrary to the guidance set forth in [CBP's] notice." In doing so, CBP would provide greater clarity regarding the implications of its proposed revision of HQ 101925 while refraining from inadvertently calling into question its longstanding line of letter rulings finding that cable installation and repair do not constitute transport of merchandise between coastwise points. NASCA therefore proposes modifications to the Cable Rulings in Attachments A through D to these comments.

Second, CBP proposes to revise HQ 101925 (and other identified rulings) to hold that merchandise "incidental" to an operation or of *de minimis* value is subject to Jones Act restrictions to the extent it is laden and unladen at coastwise points, including platforms and other installations on the Continental Shelf. HQ 101925 addresses these issues in the context of a barge vessel engaged in construction, maintenance, repair, inspection and transport activities at offshore petroleum-related facilities. Such activities occur between coastwise points (*i.e.*, coastal ports and offshore platforms and other installations). CBP extends its revised analysis to "substantially identical" transactions, but does not provide further clarification. NASCA

accordingly seeks confirmation that the activities of the submarine telecommunications industry are not "substantially identical" within the meaning of the governing regulation, 19 C.F.R. § 177.12(c)(i)(C), which requires such transactions to involve "materially identical facts and issues." Cable ships do not transport merchandise between coastwise points because (1) submarine cable installation and repair involve paying out of cable onto the sea floor that breaks any continuity of transport and (2) there is no unlading of cable at a cognizable coastwise point recognized in CBP rulings, *i.e.*, an artificial island or structure used in resource exploration, such as an offshore platform, pipeline, or wellhead assembly.

In representing the interests of companies that own, install, or maintain submarine telecommunications cables in the territorial sea and on the outer Continental Shelf of the United States, and more importantly, that create and support thousands of American jobs, NASCA requests that CBP affirm its longstanding, separate line of rulings finding that submarine cable installation and repair activities are not coastwise transport of merchandise subject to Jones Act restrictions. Without such confirmation, the CBP Proposal, as currently crafted, could cause significant collateral harm to the U.S. submarine cable industry and U.S. economic and national security interests associated with submarine cables. Moreover, such decisions would drive manufacturing, marine maintenance, cable depot, and other related jobs out of the United States while increasing the costs and delays of critical submarine cable repairs.

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COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

The North American Submarine Cable Association ("NASCA"), the premier U.S. submarine telecommunications industry organization, submits these comments on behalf of its members and in response to Custom and Border Protection's proposal to revoke or modify certain ruling letters (and substantially identical transactions) relating to CBP's application of the Jones Act, 46 U.S.C. § 55102 (the "Jones Act"), to the transportation of certain merchandise and equipment between coastwise points (the "CBP Proposal"). In any CBP final rule, NASCA urges CBP to (1) clarify and limit the scope of "substantially identical transactions" to transactions that involve "materially identical facts and issues," as required by 19 C.F.R. § 177.12(c)(i)(C); and (2) confirm its long-standing line of rulings holding that the primary activities of the submarine cable industry are not subject to the Jones Act.

In part I of these comments, NASCA provides background information on submarine telecommunications cables and cable ships, as well as information regarding NASCA itself. In

part II, NASCA explains CBP's long established line of reasoning holding that the laying and repair of submarine cable, and the discharge of any excess cable, do not fall within the scope of the Jones Act's coastwise trading restrictions because such activities do not involve the *transport* of merchandise between coastwise points. CBP should affirm that this line of reasoning remains unaffected by the revocations in the CBP Proposal. In part III, NASCA explains why CBP's intent to apply the proposed revisions to "substantially identical transactions," without further clarification, could result in the inapposite imposition of Jones Act restrictions on activities, such as the laying and repair of submarine cable, that are uniquely different from those at issue in the rulings discussed in the CBP Proposal. CBP should accordingly modify its proposal to appropriately identity the scope of "substantially identical transactions," and expressly state that they do not include the laying and repair of submarine cables. In part IV, NASCA explains the potential harm to U.S. economic and national security interests that could arise should CBP fail to affirm that submarine cable installation and maintenance activities remain beyond the scope of the Jones Act's coastwise trading restrictions.

I. BACKGROUND: THE SUBMARINE CABLE INDUSTRY AND NASCA

A. Submarine Telecommunications Cables and Cable Ships

Contrary to popular perception, approximately 99 percent of U.S. intercontinental telephone, data, and Internet traffic travels by submarine cable—a percentage that has increased over time. Submarine cables provide higher-quality, more reliable and secure, and less expensive communications than do communications satellites. Submarine cables also provide the principal connectivity between the contiguous United States and Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. The U.S. territorial sea, exclusive economic zone ("EEZ"), and outer Continental Shelf ("OCS") contain significant existing submarine cable infrastructure, and more is planned. According to the Federal Communications

Commission ("FCC"), 63 in-service submarine cable systems traverse these areas, and at least 9 more have been announced or are currently under construction.[4]

Submarine cables play a critical role in ensuring that the United States can communicate domestically and internationally, thus supporting the commercial and national security endeavors of the United States and its citizens. Submarine cables support U.S.-based commerce abroad, and provide access to Internet-based content, a substantial proportion of which is located in the United States, as evidenced by international bandwidth buildout. Submarine cables also carry the vast majority of U.S. Government traffic, as the U.S. Government does not generally own or operate its own submarine cable systems.

Submarine cables—which are the diameter of a garden hose—are laid and repaired by cable ships built specifically for cable-related operations and designed for covering vast distances and multi-month deployments. Cable ships are crewed by highly trained and experienced merchant mariners, submersible engineers, and cable operations staff. In the course of cable-laying and repair operations, the crew pays out cable from enormous holding tanks and splices in repeaters from special racks. These ships use a variety of remotely-operated vehicles, sea plows, lines, and grapnels for manipulating cable and repeaters beyond the ship. Almost all ships are purpose-built, and attempts to convert other flat-bed vessels have been less than successful, as such vessels are ill-suited to withstand rough weather conditions and must pay cable out directly from an unprotected deck.

Although damage to submarine cables is rare, it is typically caused by commercial

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[4] *See* Federal Communications Commission, Submarine Cable Landing Licenses at Licensed Cables (July 13, 2016), https://www.fcc.gov/research-reports/guides/submarine-cable-landing-licenses. According to the FCC's IBFS database, six submarine cable landing licenses have been granted since their list was last updated and three applications are pending.

fishermen, vessel anchors, hurricanes, underwater landslides, and seismic events such as earthquakes. Timely repairs are critical given the economic and national-security significance of traffic carried by these cables. Consequently, maintenance providers and cable ships must be prepared to respond rapidly with continuously-qualified personnel, vessels on stand-by, and appropriate equipment.

Cable maintenance providers contract with individual owners of submarine cable systems and with regional maintenance authorities for the provision of long-term maintenance services. They also occasionally contract with system owners for one-off maintenance operations. Cable and repeaters for repairs are typically manufactured on a system-specific basis and kept on hand for immediate use by the maintenance provider.

B. NASCA

NASCA is the principal non-profit trade association for submarine-cable owners, submarine-cable maintenance authorities, and prime contractors for submarine-cable systems operating in North America. NASCA's members include:

- Alaska Communications System
- Alaska United Fiber System Partnership, a subsidiary of General Communication, Inc.
- Alcatel-Lucent Submarine Networks
- Apollo Submarine Cable Ltd.
- AT&T Corp.
- C&W Networks
- Global Cloud Xchange
- Global Marine Systems Ltd.
- GlobeNet Cabos Submarinos America, Inc.

- Hibernia Atlantic
- Level 3 Communications, LLC
- PC Landing Corp.
- Rogers Communications
- Southern Cross Cable Network
- Sprint Corporation
- Tata Communications (America) Inc.
- Tyco Electronics Subsea Communications LLC
- Verizon Business

NASCA serves both as a forum and advocacy organization for its members' interests. NASCA's members own and operate the vast majority of active submarine cable systems landing in the United States, and support thousands of jobs in the United States.

II. CBP SHOULD AFFIRM ITS LONG STANDING POSITION THAT CABLE LAYING AND REPAIR, AND CABLE MATERIALS, ARE NOT SUBJECT TO THE JONES ACT WHEN THE UNDERLYING ACTIVITY BREAKS THE CONTINUITY OF TRANSPORT BETWEEN COASTWISE POINTS

CBP specifically identifies a number of rulings addressing vessel equipment that it intends to revoke to the extent they are contrary to the guidance set forth in the CBP Proposal. Four such rulings, HQ 105644 (June 7, 1982), HQ110402 (Aug. 18, 1989), HQ 114305 (Mar. 31, 1998), and HQ 115333 (Apr. 27, 2001) (collectively, "Cable Rulings"), address the laying and repair of submarine cables. Each of these rulings does indeed state that the cable laded on a vessel is equipment (and not merchandise) to the extent it is used in furtherance of the primary mission of the vessel. In this respect, the Cable Rulings are subject to the CBP Proposal's intended revocation. Nevertheless, these rulings contain separate analysis recognizing that the laying and repair of cable, does not involve transport between coastwise points and therefore that

such activities, and the cable and repair material used in those activities, do not fall within the scope of the Jones Act's coastwise trading restrictions. This foundational and entirely distinct analysis has been followed by the CBP for decades. In order to ensure that the CBP Proposal does not undermine rulings that are critical to the operation of the submarine cable industry, NASCA and its members call on CBP to affirm the separate line of rulings—and their underlying rationale—treating submarine cable installation and maintenance activities as beyond the scope of the Jones Act's coastwise trading restrictions. To do otherwise could inflict grave harm on the U.S. submarine cable industry and U.S. economic and national security interests.

A. Decades of CBP Rulings Have Held That Cable and Cable-Laying Repair Are Not Subject to the Jones Act's Coastwise Trading Restrictions

The Jones Act provides that a non-coastwise qualified vessel "may not provide any part of ***the transportation of merchandise by water, or by land and water, between points in the United States*** to which the coastwise laws apply, either directly or via a foreign port . . ."[5] CBP regulations state that "a coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ('coastwise point') is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise."[6] Based on the clear statutory language and CBP's implementing regulation, CBP has consistently ruled for decades that submarine cable or pipe installation and repair activities on the seabed are not subject to Jones Act restrictions.[7]

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5 46 U.S.C. § 55102(b) (emphasis added).

6 19 C.F.R. § 4.80b(a).

7 *See, e.g.*, Customs Service Decision 79-321, 13 Cust. B. & Dec. 1481 (Dec. 12, 1978) (concluding that the Jones Act does not prohibit use of a foreign vessel to lay pipe between points embraced by the coastwise laws of the United States because it is not landed as cargo but is only paid out in the course of the laying operation); Treasury Decision 78-387, 12 Cust. B. & Dec. 826 (Oct. 7, 1976) (same) ("T.D. 78-387"); *Am. Mar. Officers Serv. v. STC*

1. Submarine Cable Installation and Repair Involve Paid-Out Cable that Breaks the Continuity of Transport

Submarine cable installation and repair, which occurs on the ocean surface, in the water column, and on the seabed, breaks the continuity of transport between any two or more coastwise points. Indeed, the CBP Proposal indirectly recognizes this separate analysis inasmuch as it does not revise subparagraph 1 of HQ 101925 which states: "Further, since the use of a vessel in pipelaying is not a use in the coastwise trade, a foreign-built vessel may carry the pipe which it is to lay between such points. It is the fact that the pipe is not landed by only paid out in the course of the pipelaying operation which makes such operation permissible."[8] While such non-transport activity occurs occasionally in other industries, it is the primary activity of the submarine cable industry. Accordingly, it is vital that CBP continue to recognize this statutory-based analysis that treats activity involving the transport of merchandise from one coastwise point to another coastwise point differently from activity involving material used in laying and repairing cable on the seabed.

CBP and its predecessors have long relied upon this statutory distinction to hold that the sole use of a non-coastwise-qualified vessel to lay pipe or cable between points in the United States or in international waters does not violate the Jones Act's coastwise trading restrictions. As noted in Treasury Decision 78-387 "not every movement between points in the United States is deemed to be a transportation within the meaning of the coastwise laws."[9] Similarly, and with respect to submarine cables in particular, Customs Service Decision 79-346 held that:

Submarine Sys., Inc., 949 F.2d 121 (4th Cir. 1991) (same). *See also*, Customs Ruling Letter HQ 112866 (Aug. 31, 1993) (ruling that laying of cable is not coastwise trade); Customs Service Decision 89-40, 23 Cust. B. & Dec. 617 (Dec. 2, 1988) (same).

8 CBP Proposal at 7.

9 T.D. 78-387 at 826-27.

> Aspects of cable laying and pipelaying operations have been held not to be coastwise trade for the purposes of section 883 [prior codification of the Jones Act] . . .
>
> The Customs Service has held that the sole use of a vessel to lay cable between points in the United States does not violate the coastwise laws. It is the fact that the cable is not landed but is merely paid out in the cable-laying operation which makes the operation permissible.[10]

This same rationale applies to cable repair operations. Customs Service Decision 79-346 held that "[t]here is no distinction [to be] made between the repair of existing cable and the laying of new cable."[11] In short,

> [t]he characteristic of cable laying, the absence of a landing of merchandise, which places the activity outside the coastwise laws, provides the basis for our ruling that the transportation of cable and repair materials by a vessel, to be used by the crew of the vessel, in the repair of the cable, is not prohibited by the coastwise laws.
>
> Since the replacement cable and the repaired sections of existing cable are repair materials used by the repair vessel in the cable repairs, the transportation of those items by the repair vessel is not prohibited by the coastwise law so long as they are not landed at a second point in the United States. [12]

Subsequent decisions further clarified that the subsequent unlading of a small amount of unused cable and cable repair equipment does not constitute coastwise trade because:

> [t]he use of the equipment between American ports will have broken the continuity of the transportation between American ports. This rule applies to any small amount of similar equipment (5% or less of the equipment) that was laden for use but was not in fact needed during the operation of the vessel.[13]

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[10] Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979) ("C.S.D. 79-346").

[11] *Id*. *See also* T.D. 78-387 at 827.

[12] C.S.D. 79-346 at 1523.

[13] Customs Service Decision 82-136, 16 Cust. B. & Dec. 945 (June 7, 1982).

In sum, the operation of cable laying and repair breaks the continuity of transport between coastwise points for purposes of the Jones Act, and thus such operations may be carried out by non-coastwise qualified vessels. Further, under the same rationale, such non-coastwise qualified vessels may subsequently discharge a small amount of unused cable and repair material at a coastwise point.

NASCA recognizes that the Jones Act does apply to cable, cable equipment and other material laded at a coastwise point and which, *without any intervening activity,* is either (a) unladed for storage at another coastwise point; or (b) transferred to another vessel at another coastwise point. Nevertheless, NASCA believes it remains vital for the submarine cable industry to continue to rely on the language of the Jones Act and decades of CBP precedent interpreting installation and maintenance activities as beyond the Jones Act's scope. These activities include:

- Lading cable, cable equipment and repair material at a coastwise point and then proceeding to lay (or repair) cable on the seabed in the U.S. territorial sea or on the U.S. outer Continental Shelf; and
- Upon completion of the installation or repair activity, discharging a small amount of unused cable or other material at a coastwise point, as the exact quantum of cable to be used in the installation or repair cannot always be determined in advance.

In both scenarios, the cable, cable equipment and repair material are not "merchandise" under the Jones Act because they are not goods or wares intended *for transportation* between two coastwise points. While the CBP does not state its intent to undermine this established analysis in the CBP proposal, it nevertheless does so by seeking to revoke, rather than modify, the Cable Rulings which rely upon the analysis in large measure.

2. Submarine Cable Installation and Repair Do Not Involve Unlading at a Coastwise Point

CBP has also consistently interpreted the Jones Act to require unlading at a cognizable coastwise point under the Jones Act or the Outer Continental Shelf Lands Act, 43 U.S.C.

§ 1333(a) ("OCSLA"). In its key industry guidance regarding coastwise transport of merchandise, CBP summarized its rulings as follows:

> The Jones Act is extended to artificial islands and similar structures, as well as to mobile oil drilling rigs, drilling platforms, and other devices attached to the seabed of the outer continental shelf for the purpose of resource exploration operations. For example, drilling rigs located on the OCS are considered points or places in the U.S. for purposes of enforcing the Jones Act. Similarly, floating, anchored warehouse vessels, when anchored on the OCS to supply drilling rigs on the OCS, are also points in the U.S. for purposes of the Jones Act, since they are essential to the operation of the drilling rig. See Customs Service Decisions (C.S.D.s) 81-214 and 83-52; see also, HQ 107579 (May 9, 1985). Likewise, the Jones Act is extended to mobile oil drilling rigs during the period they are secured to or submerged onto the seabed of the OCS. See Treasury Decision (T.D.) 54281(1). The installation or device must be permanently or temporarily attached, and ***it must be used for the purpose of exploring for, developing or producing resources therefrom, in order to be considered a coastwise point***.[14]

CBP has never found that submarine cable installation or repair constitutes unlading at a coastwise point. In this regard, submarine cable installation and repair differs markedly from transport of supplies or repair materiel to coastwise points expressly targeted by the CBP Proposal: offshore platforms, pipelines, and wellhead assemblies.[15] CBP should affirm this distinction.

B. CBP Should Modify Rather than Revoke the Cable Rulings to Clarify the Validity of Its Reasoning Concerning Cable Laying and Repair Activities

CBP's Proposal to revoke the Cable Rulings unnecessarily calls into question CBP's well-established and separate lines of precedent holding that cable laying and repair operations are not coastwise trade. The CBP Proposal expressly identifies the Cable Rulings as rulings it

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[14] U.S. Customs & Border Protection, *What Every Member of the Trade Community Should Know About Coastwise Trade: Merchandise* at 4 (Jan. 2009) (emphasis added), https://www.cbp.gov/sites/default/files/documents/CoastwiseTradeMerchandise%20ICP.pdf.

[15] CBP Proposal at 16, 18.

intends to revoke "to the extent they are contrary to the guidance set forth in this notice."[16] This statement leaves open the possibility that the Cable Rulings will remain valid to the extent they are not contrary to the CBP Proposal, but NASCA believes this approach creates unnecessary uncertainty. The CBP Proposal expressly and separately identified non-cable rulings that it intended only to modify, rather than revoke, in order to avoid overbroad revocations affecting other unrelated and still-valid holdings in those rulings.[17] CBP should do the same with the Cable Rulings.

With respect to vessel equipment, CBP's guidance focuses on aligning CBP's determination of what constitutes exempt vessel equipment with T.D. 49815(d), which does not expressly define such equipment to include tools and other items used in furtherance of the primary mission of the vessel. While the Cable Rulings do favorably cite the "primary mission of the vessel" reasoning, they do not depend upon it. Significantly, each of the Cable Rulings stresses that cable laying and repair operations break the continuity of transport between coastwise points and are therefore not subject to the Jones Act's coastal trading restrictions:

- HQ 114305 holds that the unlading of cable-laying equipment by a foreign-flagged cable-laying vessel at a coastwise port other than the one at which it was laded does not constitute a violation of the Jones Act because "[s]uch equipment is not only 'vessel equipment' as defined above, ***its use aboard the vessel between United States points is considered to break the continuity of the transportation between coastwise points.***" (*citing* Customs ruling letter 109054, dated August 4, 1987) (emphasis added).

- HQ 115333 holds that the use of a foreign flagged vessel to lay cable between coastwise points does not constitute a violation of the Jones Act, stressing ***"[t]he rationale for this holding is that such cable is not only laid, and not 'transported," between points in the United States***, but is also being used in furtherance of the primary mission of the cable-laying vessel and is therefore similar to vessel equipment (*citing* Customer ruling letter 114305, dated march 31, 1998).

[16] *Id.* at 4, 5.

[17] *See id.* at 6.

- HQ 105644 holds that (a) foreign-built vessel which transports cable used by the vessel in a cable-laying operation is not engaged in the coastwise trade; and (b) up to 5% of the unused cable laden on a vessel and intended for use in a cable-laying operation may be unladen at a second point in the United States because "***[s]uch cable is not only laid, and not 'transported,' between points in the United States,*** but is also being used in the furtherance of the primary mission of the cable-laying vessel and is therefore similar to vessel equipment . . . ***The use of the equipment between American ports will have broken the continuity of the transportation between American ports. This rule applies to any small amount of similar equipment (5% or less of the equipment) that was laden for use but was not in fact needed during the operation of the vessel.***" (emphasis added).

- HQ 110402 holds that the carriage of cable by a foreign-built cable-laying and repair vessel from its point of lading in the United States to a second point in the United States where it will be either temporarily unladed into an offshore storage depot or unladed directly onto another foreign-built cable-laying and repair vessel located within U.S. territorial waters does violate the Jones Act. The key distinction between this decision and HQ 10566, HQ 115333 and HQ 114305 is that there was no break in the continuity of transport as between the two U.S. points. Indeed, CBP affirmed the underlying analysis when it stated that the "Customs Services has held that the sole use of a non-coastwise-qualified vessel to lay cable between points in the United States or in international waters does not violate the coastwise laws. ***Such cable is not only laid, and not "transported," between points in the United States*** . . . (emphasis added).

In short, each of the Cable Rulings relies upon the established and distinct line of reasoning that holds that the laying and repair of cable between two U.S. coastwise points breaks the continuity in transport—a break in continuity that also applies to a small amount of cable intended for use but ultimately not used.

Accordingly, NASCA believes that outright revocation of the Cable Rulings is inappropriate and unnecessary. CBP should instead modify each of the Cable Rulings to state that cable used for installation or repair, including small amounts of cable discharged following an installation or repair activity, is neither vessel equipment nor merchandise due to the break in continuity of transport. In Attachments A, B, C and D, NASCA proposes modifications to HQ 114305, HQ 115333, HQ 105644, and HQ 110402. These modifications reconcile the Cable

Rulings with CBP's proposed revision of HQ 101925 and CBP's separate and longstanding line of letter rulings finding that cable installation and repair do not constitute transport of merchandise between coastwise points. By adopting modifications to those letter rulings, rather than summarily revoking them, CBP would avoid the lack of precision inherent in a revocation "to extent they are contrary to the guidance set forth in [CBP's] notice."

III. CBP SHOULD CONFIRM THAT THE SCOPE OF SUBSTANTIALLY IDENTICAL TRANSACTIONS DOES NOT INCLUDE THE PRIMARY ACTIVITIES OF THE SUBMARINE TELECOMMUNICATIONS INDUSTRY

CBP proposes to revise HQ 101925 (and other identified rulings) to hold that merchandise "incidental" to an operation or merchandise of *de minimis* or no value is subject to Jones Act restrictions to the extent it is laden and unladen at coastwise points, including platforms and other installations on the outer Continental Shelf pursuant to OCSLA. CBP extends its revised analysis to "substantially identical" transactions, but does not provide further clarification. As proposed, CBP's blanket statement that it intends to apply its revised revisions to HQ 101925 to "substantially identical transactions" would, at a minimum, create significant confusion for the submarine telecommunications industry.

To remedy this uncertainty, CBP should clarify in its final rule in this proceeding that the activities of the submarine telecommunications industry are not "substantially identical" within the meaning of 19 C.F.R. § 177.12(c)(i)(C), which requires such transactions to involve "materially identical facts and issues." HQ 101925 addresses these revisions in the context of a barge vessel engaged in construction, maintenance, repair, inspection and transport activities at offshore petroleum-related facilities. Cable ships, by contrast, do not transport merchandise between coastwise points because (1) submarine cable installation and repair involve paying out of cable onto the sea floor that breaks any continuity of transport and (2) there is no unlading of cable at a cognizable coastwise point recognized in CBP rulings, *i.e.*, an artificial island or

structure used in resource exploration, such as an offshore platform, pipeline, or wellhead assembly.

IV. WITHOUT FURTHER CLARIFICATION, CBP's PROPOSAL COULD HAVE A FAR-REACHING AND DAMAGING IMPACT ON THE SUBMARINE CABLE INDUSTRY AND U.S. ECONOMIC AND NATIONAL SECURITY INTERESTS

NASCA and its members urge CBP to affirm the line of rulings that apply to the laying and repair of cables in order to avoid undue harm to U.S. economic and national security interests. Given the U.S. Government's reliance on such cables to communicate with its civilian and military personnel worldwide and with other governments, and given the dollar-value of commerce conducted using submarine cables, the collateral damage could be significant. By way of example, the U.S. Federal Reserve estimates that submarine cables globally carry an excess of $10 trillion a day in transactions, a significant portion of which are transactions occurring in the United States.[18] Moreover, the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") network uses submarine cables to transmit financial data to more than 8,300 member financial institutions throughout the world.[19] Many of these member institutions reside in the United States and are central parts of the U.S. economy, not to mention sizeable employers of U.S. residents. Jeopardizing the continuity of such critical infrastructure should be avoided.

Among the issues with the CBP Proposal, undermining the previous line of rulings would create confusion for the submarine telecommunications industry, and could perversely push current U.S.-based submarine cable manufacturing, depot activities, and ship positioning outside the United States. By potentially impeding the conduct of submarine cable installation and

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[18] Michael Sechrist, *New Threats, Old Technology*, Harvard Kennedy School, 9 (Feb. 2012), https://citizenlab.org/cybernorms2012/sechrist.pdf.

[19] *Id.* at 9-10.

maintenance activities from the United States except on coastwise-qualified ships, the CBP Proposal could potentially encourage further offshoring of the U.S. submarine cable industry, thus jeopardizing a significant number of well-paying jobs. NASCA and its members assume that this is not the intent of CBP in putting forth its Proposal.

Moreover, the CBP Proposal could harm U.S. economic and national security interests by jeopardizing timely repairs and rendering them more costly. Given the importance of submarine cables to the U.S. economy and national security, various federal agencies have sought to ensure the continuity and security of communications on submarine cables, as well as timelier repair and restoration;

- Because of their critical importance to U.S. economic and national security interests, submarine cables have long been designated as critical infrastructure by the U.S. Government.[20]

- The FCC"s Communications Security, Reliability, and Interoperability Council ("CSRIC"), produced three landmark reports addressing the need for (1) spatial separation, (2) greater interagency and interjurisdictional coordination to ensure that that government permitting activities and policies would streamline permitting and avoid increasing risks of submarine cable damage from other marine activities, and (3) geographic diversity of submarine cable routes and landings to enhance network resilience.[21] As part of its response to these reports and recommendations, the FCC

[20] *See* The White House, Presidential Policy Directive – Critical Infrastructure Security and Resilience, PPD-21 (Feb. 12, 2013), www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil; *See* Department of Homeland Security, Communications Sector-Specific Plan (2010), www.dhs.gov/xlibrary/assets/nipp-ssp-communications-2010.pdf.

[21] CSRIC IV Working Group 8, Submarine Cable Routing and Landing, *Final Report – Protection of Submarine Cables Through Spatial Separation* (Dec. 2014), https://transition.fcc.gov/pshs/advisory/csric4/CSRIC_IV_WG8_Report1_3Dec2014.pdf; CSRIC V, Working Group 4A, Submarine Cable Resiliency, *Final Report - Interagency and Interjurisdictional Coordination* (June 2016), https://transition.fcc.gov/bureaus/pshs/advisory/csric5/WG4A_Report-Intergovernmental-Interjurisdictional-Coordination_June2016.pdf; CSRIC V, Working Group 4A, Submarine Cable Resiliency, *Final Report – Clustering of Cables and Cable Landings* (Sept. 2016), https://transition.fcc.gov/bureaus/pshs/advisory/csric5/WG4A_Final_091416.pdf.

established a federal interagency working group to ensure more effective interagency coordination and greater awareness of submarine cables.

- CBP's parent agency, the Department of Homeland Security ("DHS"), has sought to minimize the threats of terrorist attacks on, and unauthorized access to, submarine cable systems by monitoring equipment and software used in initial installations and repairs (particularly foreign-manufactured equipment), contracts for system maintenance and security (particularly with non-U.S. persons), and access to restoration messages and system status-reports (particularly by non-U.S. persons). These requirements have now been incorporated into the standard national security mitigation arrangements negotiated by DHS and the other "Team Telecom agencies (the Departments of Justice and Defense) with the owners of a submarine cable system connecting the United States with foreign points.

- The National Coordinating Center for Communications ("NCC")—part of DHS's National Communications System—is a joint government-industry body that coordinates the initiation, restoration, and reconstruction of U.S. Government national security and emergency preparedness telecommunications services, both domestically and internationally.[22]

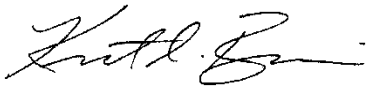
The CBP Proposal could undermine these and other efforts by pushing submarine cable manufacturing, depot activities, and ship positioning outside the United States and making it more difficult to use the appropriate repair material and cable-laying equipment when and where they are needed, all of which could make repairs more costly and less timely.

[22] *See* Department of Homeland Security, National Coordinating Center for Communications (Apr. 13, 2017), https://www.dhs.gov/national-coordinating-center-communications.

CONCLUSION

For the reasons stated above, NASCA urges CBP to clarify in any final rule that it does not intend to revoke or revise its long-standing line of rulings holding that submarine cable laying and repair operations do not constitute coastwise trade under the Jones Act.

Respectfully submitted,



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April 18, 2017

LIST OF ATTACHMENTS

ATTACHMENT A: **Proposed Revision of HQ 114305**

ATTACHMENT B: **Proposed Revision of HQ 115333**

ATTACHMENT C: **Proposed Revision of HQ 105644**

ATTACHMENT D: **Proposed Revision of HQ 110402**

ATTACHMENT A

HQ [_____]
VES-3-01-RR:IT:EC [_____]
CATEGORY: Carriers

Terrence B. Price, Secretary Treasurer
Robert E. Landweer & Co., Inc.
911 Western Avenue, Suite 208
Seattle, Washington 98104

Re: Headquarters Ruling Letter 114305 (March 31, 1998); Coastwise Trade; Cable-Laying; Vessel Equipment; 46 U.S.C. § 55102; 19 C.F.R. § 4.80b(a); Treasury Decision 49815(4)

Dear Mr. Price:

On March 31, 1998, the United States Customs Service (now Customs and Border Protection ("CBP"))[1] issued Headquarters Ruling Letter ("HQ") 114305. In HQ 114035, you proposed using a foreign-flagged vessel in a cable-laying operation in Alaska. CBP held that the proposed activity was not in violation of the coastwise laws. This holding remains unchanged. However, we have recently recognized that our stated analysis is not entirely consistent with 46 U.S.C. § 55102 (the "Jones Act"), [2] 19 C.F.R. § 4.80b(a) and Treasury Decision 49815(4) (March 13, 1939), a decision which sets forth the definition of "equipment" for coastwise trade purposes. Accordingly, this ruling, HQ [_____], modifies HQ 114305 to provide an analysis of the facts set forth therein that is more consistent with the foregoing statute, regulation and decision.

FACTS:

A local company represented by Robert E. Landweer & Co., Inc., has been awarded a cable-laying contract in Alaska. In connection with this contract the company has chartered a Panamanian-flagged cable-laying vessel.

The current program calls for the vessel to arrive at Morgan City, Louisiana, where the charter will start. In Morgan City the vessel will load cable-handling equipment and tools necessary for the loading of cable. Upon completion of this loading the vessel will sail to South Hampton, England, to load the cable. This loading can only be done with the cable-handling

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1 The U.S. Customs Service will hereinafter be referred to as CBP.

2 Formerly 46 U.S.C. § 883.

equipment placed on the vessel in Morgan City.

Upon completion of the cable loading, the vessel will proceed to Seattle, Washington, where the balance of the cable-handling equipment will be loaded onto the vessel. The vessel will then proceed to Alaska to lay cable between Skagway, Alaska, and Haines, Alaska. There will be no dredging operations performed in connection with the cable-laying. Upon completion of the job, any excess cable (expected to be a small amount) will be offloaded in Skagway.

The vessel will then proceed back to Seattle where the equipment loaded at Seattle will be offloaded at the same pier where it was loaded. The equipment loaded in Morgan City will also be offloaded at Seattle. At this time the vessel will come off charter and depart the United States.

ISSUES:

1. Whether the use of a foreign-flagged vessel to lay cable between coastwise points constitutes a violation of 46 U.S.C. § 55102.

2. Whether the unlading of cable-laying equipment by a foreign-flagged cable-laying vessel at a coastwise point other than the one at which it was laded constitutes a violation of 46 U.S.C. § 55102.

3. Whether the unlading of foreign-laded excess cable by a foreign-flagged cable-laying vessel at a coastwise point constitutes a violation of 46 U.S.C. 46 U.S.C. § 55102.

LAW AND ANALYSIS:

The Jones Act, Title 46, United States Code Section 55102 (46 U.S.C. § 55102) provides that the transportation of merchandise between U.S. coastwise points must be conducted by coastwise-qualified vessels, *i.e.*, vessels that are U.S.-built, owned and documented. Specifically, Section 55102 provides, in pertinent part, that:

> Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via foreign port, unless the vessel
>
> (1) is wholly owned by citizens of the United State for purposes of engaging in the coastwise trade; and
>
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The regulations promulgated under the authority of 46 U.S.C. § 55102(a) provide, in pertinent part, that:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise.

19 C.F.R. § 4.80b(a).

The coastwise laws generally apply to (a) points located in the U.S. territorial sea; (b) points located in internal waters, landward of the territorial sea baseline, in cases where the baseline and the coastline differ; and, pursuant to OCSLA[3] (c) points located on the Outer Continental Shelf, including artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of exploring for, developing, or producing resources therefrom, or any such installation or device (other than a ship or vessel) for the purpose of transporting such resources.

With respect to the laying of cable, CBP has held that the sole use of a non-coastwise-qualified vessel to lay cable between points in the United States or in international waters does not violate 46 U.S.C. § 55102. The rationale for this holding is that such cable is laid, and not "transported," between points in the United States. Accordingly, as the cable is not being used in coastwise trade within the meaning of the Jones Act (*i.e.*, transportation between coastwise points), it is not merchandise for transportation for purposes of 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a). (Customs Service Decision 79-346, dated January 30, 1979).

In regard to equipment used by a cable-laying vessel during the course of a cable-laying operation, Customs has held that such equipment may be laden on a vessel at a coastwise point and used by the vessel for cable-laying operations and may later be unladen at a second coastwise point without violation of 46 U.S.C. § 55102. Similarly to the laying of the cable itself, the use of such equipment aboard the vessel between United States points is considered to break the continuity of the transportation between coastwise points. (Customs Service Decision 82-136, dated June 7, 1982). Accordingly, it is not necessary to determine whether such cable equipment is vessel equipment within the meaning of Treasury Decision 49815(4).

As for the excess cable in question, since it was laded foreign (South Hampton, England), the fact that it is to be unladed at a coastwise point (Skagway, Alaska) is of no consequence for purposes of this ruling. There is no coastwise movement, consequently no violation of 46 U.S.C. § 55102 would arise as a result of its being unladed at Skagway.

HOLDINGS:

1. The use of a foreign-flagged vessel to lay cable between coastwise points does not constitute a violation of 46 U.S.C. § 55102.

2. The unlading of cable-laying equipment by a foreign-flagged cable-laying vessel at a coastwise port other than the one at which it was laded does not constitute a violation of 46

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[3] The Outer Continental Shelf Lands Act, Pub. L. 95-372, Title II, Section 203 (Sept. 19, 1978), 43 U.S.C. § 1333 ("OCSLA").

U.S.C. § 55102.

3. The unlading of foreign-laded excess cable by a foreign-flagged cable-laying vessel at a coastwise point does not constitute a violation of 46 U.S.C. § 55102.

ATTACHMENT B

HQ [_____]
VES-3-01-RR:IT:EC [_____]
CATEGORY: Carriers

Douglas R. Burnett
195 Broadway
New York, New York 10007-3189

Re: Headquarters Ruling Letter 115333 (April 27, 2001); Coastwise Trade; Cable-Laying; Vessel Equipment; 46 U.S.C. App. § 55102; 19 C.F.R. § 4.80b(a); Treasury Decision 49815(4)

Dear Mr. Burnett:

On April 27, 2001, the United States Customs Service (now Customs and Border Protection ("CBP"))[1] issued Headquarters Ruling Letter ("HQ") 115333 in response to your letter dated March 26, 2001, regarding the proposed use of a foreign-flagged vessel in a cable laying operation in Puerto Rico and Washington State. While our ruling on this matter is unchanged, CBP has recently recognized that its stated analysis is not entirely consistent with 46 U.S.C. § 55102 (the "Jones Act"),[2] 19 C.F.R. § 4.80b(a) and Treasury Decision 49815(4) (March 13, 1939), a decision which sets forth the definition of "equipment" for coastwise trade purposes. Accordingly, this ruling, HQ [_____], modifies HQ 115333 to provide an analysis of the facts set forth therein that is more consistent with the foregoing statute, regulation and decision.

FACTS:

A European manufacturer of submarine electrical power cables plans to charter a Norwegian-flag vessel to lay submarine cables in Puerto Rico and Washington, USA.

The European manufacturer plans to charter the C/S HAVILA, a Norwegian-flag vessel designed to lay submarine cables. Four separate submarine electrical power cables will be loaded onto the HAVILA in Halden, Norway, the location where the cables are manufactured.

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1 The U.S. Customs Service will hereinafter be referred to as CBP.

2 Formerly 46 U.S.C. § 883.

The vessel then plans to sail for San Juan, Puerto Rico, where it will lay two of the electrical power cables between Puerto Rico and two U.S. adjacent islands. The vessel then plans to proceed via the Panama Canal to Anacortes, Washington, where the remaining two cables will be laid between two islands and the mainland in Washington State. Following completion of this cable installation, the ship will depart United States waters.

ISSUE:

Whether the use of a foreign-flagged vessel to lay cable between coastwise points constitutes a violation of 46 U.S.C. § 55102.

LAW AND ANALYSIS:

The Jones Act, Title 46, United States Code Section 55102 (46 U.S.C. § 55102) provides that the transportation of merchandise between U.S. coastwise points must be conducted by coastwise-qualified vessels, *i.e.*, vessels that are U.S.-built, owned and documented. Specifically, Section 55102 provides, in pertinent part, that:

> Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via foreign port, unless the vessel
>
> (1) is wholly owned by citizens of the United State for purposes of engaging in the coastwise trade; and
>
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The regulations promulgated under the authority of 46 U.S.C. § 55102(a), provide, in pertinent part, that:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise.

19 C.F.R. § 4.80b(a).

The coastwise laws generally apply to (a) points located in the U.S. territorial sea; (b) points located in internal waters, landward of the territorial sea baseline, in cases where the baseline and the coastline differ; and, pursuant to OCSLA[3] (c) points located on the Outer Continental Shelf, including artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of

[3] The Outer Continental Shelf Lands Act, Pub. L. 95-372, Title II, Section 203 (Sept. 19, 1978), 43 U.S.C. § 1333 ("OCSLA").

exploring for, developing, or producing resources therefrom, or any such installation or device (other than a ship or vessel) for the purpose of transporting such resources.

With respect to laying of cable, the Customs Service has held that the sole use of a non-coastwise-qualified vessel to lay cable between points in the United States or in international waters does not violate 46 U.S.C. App. § 55102. The rationale for this holding is that such cable is laid, and not "transported," between points in the United States. (Customs Service Decision 79-346, dated January 30, 1979). Accordingly, as the cable is not being used in coastwise trade within the meaning of the Jones Act (*i.e.*, transportation between coastwise points), it is not merchandise for transportation for purposes of 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b(a). (Customs Service Decision 79-346).

Further, Customs has held that equipment used by a cable-laying vessel during the course of a cable-laying operation, may be laden on a vessel at a coastwise point and used by the vessel for cable laying operations and may later be unladen at a second coastwise point without violation of 46 U.S.C. § 55102 because the use of such equipment aboard the vessel between United States points is considered to break the continuity of transportation between coastwise points. (Customs Service Decision 82-136, dated June 7, 1982).

HOLDING:

The use of a foreign-flagged vessel to lay cable between coastwise points does not constitute a violation of 46 U.S.C. App. § 55012.

ATTACHMENT C

HQ [_____]
VES-3-01-CO:R:CD:C [_____]
CATEGORY: Carriers

[Cover letter, directed as indicated below, omitted]

Mr. V.P. Tomalonis
Transoceanic Cable Ship Co.
201 Littleton Road
Morris Plains, NJ 07950

Re: Headquarters Ruling Letter 105644 (June 7, 1982) Concerning the Applicability of the Coastwise Laws to Cable-Laying Operations by a Foreign-Built Vessel; 46 U.S.C. § 55102; Treasury Decision 49815(4)

ISSUE:

Whether the Use of a Foreign-built Vessel to Lay Cable Between Points in the United States and to Land Surplus Cable Violates Title 46, United States Code, Section 55102.

BACKGROUND:

On June 7, 1982, the United States Customs Service (now Customs and Border Protection ("CBP"))[1] issued Headquarters Ruling Letter ("HQ") 105644 to address the application of the coastwise trade laws, 46 U.S.C. § 55102 (the "Jones Act"),[2] to the facts presented below concerning the cable-laying activities of a foreign-built vessel, with cable laded at one coastwise point and the unused portion of the cable unladed at a different coastwise point. CBP held that the facts, as presented in HQ 105644 and restated below, did not reflect a coastwise trade violation. While the holding of HQ 105644 remains unchanged, CBP has recently recognized that its stated analysis in HQ 105644 is not entirely consistent with the Jones Act or with Treasury Decision 49815(4) (March 13, 1939), a decision which sets forth the definition of "equipment" for coastwise trade purposes. Accordingly, this ruling, HQ [_____], modifies HQ 114305 to provide an analysis of the facts set forth therein that is more consistent with the foregoing statute and decision.

FACTS:

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1 The U.S. Customs Service will hereinafter be referred to as CBP.
2 Formerly 46 U.S.C. § 883.

Cable will be laden aboard the subject foreign-built vessel at Newington, New Hampshire and will be transported to Wilmington, North Carolina via Port Everglades, Florida, Newington, New Hampshire and St. Thomas, Virgin Islands. Approximately 1,100 nautical miles of cable will be laid between Vero Beach, Florida and St. Thomas, Virgin Islands. The operator of the vessel asks whether a coastwise violation will occur if the unused portion of the cable, as much as 40 nautical miles in length (less than 5% of the cable laden on the vessel), is unladed at a United States port other than the port at which the cable was laden aboard the vessel.

LAW AND ANALYSIS:

The Jones Act, Title 46, United States Code Section 55102 (46 U.S.C. § 55102) provides that the transportation of merchandise between U.S. coastwise points must be conducted by coastwise-qualified vessels, *i.e.*, vessels that are U.S.-built, owned and documented. Specifically, Section 55102 provides, in pertinent part, that:

> Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via foreign port, unless the vessel
>
> (1) is wholly owned by citizens of the United State for purposes of engaging in the coastwise trade; and
>
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

Based on the clear language of this statute, the Customs Service has held that the sole use of a vessel to lay cable between points in the United States does not violate the coastwise laws. Such cable is paid out or laid, and not "transported," between points in the United States. (Customs Service Decision 79-346, dated January 30, 1979) Further, CBP has ruled that equipment laden on a vessel at a coastwise point and deployed on the seabed between coastwise points may later be unladen at a second coastwise point without violation of 46 U.S.C. § 55102. Similarly to the laying of the cable itself, the use of the equipment between American ports will have broken the continuity of the transportation between American ports. This rule applies to any small amount of similar equipment (5% or less of the equipment) that was laden for use but was not in fact needed during the operation of the vessel. (Customs Service Decision 82-136, dated June 7, 1982). Accordingly, it is not necessary to determine whether such cable equipment is vessel equipment within the meaning of Treasury Decision 49815(4).

While the use of the cable in connection with the operation of the cable-laying vessel does not violate the coastwise laws, the transportation and landing of cable that was not placed on the vessel to be used in a cable-laying operation, other than cable retrieved to be paired, at a port in the United States other than at the port at which the cable was laden aboard the vessel constitutes a violation of 46 U.S.C. § 55102.

HOLDING:

A foreign-built vessel which transports cable used by the vessel in a cable-laying operation is not engaged in the coastwise trade of the United States. If up to 5% of the cable laden on a vessel and intended for use in a cable-laying operation is not used, it may be unladen at a second point in the United States without violation of Title 46, United States Code, Section 55102. Accordingly, such cable will be treated at the time of unlading in the same manner as equipment of the vessel. However, if after loading cable at a place in the United States, a foreign built vessel transports (*i.e.*, does not lay out the cable between places) and lands the cable, other than cable to be repaired, at a second place in the United States, the vessel will be considered to have transported merchandise in the coastwise trade in violation of Section 55102.

ATTACHMENT D

HQ [_____]
VES-3-06-CO:R:P:C [_____]
CATEGORY: Carriers

Shant J. Harootunian, Esq.
American Telephone and Telegraph Company
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Re: Headquarters Ruling Letter 110402 (August 18, 1989); Applicability of Coastwise Merchandise Law to Proposed Carriage of Cable by a Foreign-built Vessel; 46 U.S.C. § 55102; 19 C.F.R. § 4.80b(a); Treasury Decision 49815(4)

Dear Mr. Harootunian:

On August 18, 1989, the United States Customs Service (now Customs and Border Protection ("CBP"))[1] issued Headquarters Ruling Letter ("HQ") 110402. In HQ 110402, CBP held that the carriage of cable by a foreign-built cable laying and repair vessel from its point of lading in the United States to a second point in the United States where it will be either temporarily unladed into an onshore storage depot or unladed directly onto another foreign-built cable-laying and repair vessel located within U.S. waters, which vessel will subsequently install the cable, constitutes a violation of the coastwise laws, 46 U.S.C. § 55102,[2] This holding remains unchanged. However, we have recently recognized that our stated analysis is not entirely consistent with 46 U.S.C. § 55102 (the "Jones Act"), 19 C.F.R. § 4.80b(a) and Treasury Decision 49815(4) (March 13, 1939), a decision which sets forth the definition of "equipment" for coastwise trade purposes. Accordingly, this ruling, HQ [_____], modifies HQ 110402 to provide an analysis of the facts set forth therein that is more consistent with the foregoing statute, regulation and decision.

FACTS:

Transoceanic Cable Ship Company ("Transoceanic"), a wholly owned subsidiary of American Telephone and Telegraph Company ("AT&T"), proposes to use two of its vessels, the

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1 The U.S. Customs Service will hereinafter be referred to as CBP.

2 Formerly 46 U.S.C. § 883.

C.S. BROWN and the C.S. LONG LINES, for the transportation and installation of telecommunications cable. Both of the aforementioned vessels are foreign-built. Under the proposal, approximately 41 kilometers of SL telecommunications cable would be laded at its site of manufacture, Newington, New Hampshire, aboard the C.S. LONG LINES which would transport the cable to Honolulu, Hawaii. Upon arrival in Honolulu it is contemplated that the cable would be directly transferred from the C.S. LONG LINES to the C.S. BROWN and then be laid between the Loihi Seamount and the Island of Hawaii by the C.S. BROWN. Because the C.S. BROWN is assigned to cable repair duties in the Pacific Ocean, it is possible that the C.S. BROWN may be engaged in a repair when the C.S. LONG LINES arrives at Honolulu on August 19, 1989, its present estimated time of arrival. In such event, the cable would be temporarily off-loaded into a storage depot for subsequent loading aboard the C.S. BROWN upon its availability.

The installation of this cable is being offered by AT&T to the Hawaii Institute of Geophysics ("HIG") of the University of Hawaii, Manoa, as a part of the Hawaii Undersea Geo-Observatory Project ("Project Hugo"). Project Hugo involves the design, construction, installation, testing and operation of a permanent deep-ocean scientific laboratory on the Loihi underwater volcano. Project Hugo will permit the study of submarine volcanic, biologic and oceanographic processes. By establishing the observatory on the Loihi Seamount, HIG will be able to add significantly to its knowledge of the morphology, eruptive characteristics, lava volatility, water chemistry, seismicity, internal structure, life processes at volcanic vents and slope stability. Project Hugo would become part of the larger Hawaiian Volcanic Observatory seismic network and would add continuity to the snapshots of information obtained by short ocean seismic studies, submergible dives and surface mapping studies.

Project Hugo has been submitted by HIG to the National Science Foundation ("NSF") for support. As part of that process, AT&T has conducted a peer review in which it has concluded that the conceptual design of Project Hugo is feasible. AT&T is willing to support Project Hugo by supplying the SL cable and installing it by the C.S. BROWN, thereby reducing the cost support required from NSF by over $320,000. AT&T would not charge any sum for freight, or the value of the cable or its services in installing the cable. Rather, AT&T would be donating its services as a part of Project Hugo in the interest of furthering submarine volcanic research and the gathering of scientific data.

ISSUE:

Whether the carriage of cable by a foreign-built cable laying and repair vessel from its point of lading in the United States to a second point in the United States where it will be either temporarily unladed into an onshore storage depot or unladed directly onto another foreign-built cable-laying and repair vessel located within U.S. territorial waters which will subsequently install the cable constitutes a violation of 46 U.S.C. § 55102.

LAW AND ANALYSIS:

The Jones Act, Title 46, United States Code Section 55102 (46 U.S.C. § 55102) provides that the transportation of merchandise between U.S. coastwise points must be conducted by

coastwise-qualified vessels, *i.e.*, vessels that are U.S.-built, owned and documented. Specifically, Section 55102 provides, in pertinent part, that:

> Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via foreign port, unless the vessel
>
> (1) is wholly owned by citizens of the United State for purposes of engaging in the coastwise trade; and
>
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The regulations promulgated under the authority of 46 U.S.C. § 55102(a) provide, in pertinent part, that:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise.

19 C.F.R. § 4.80b(a)

The coastwise laws generally apply to (a) points located in the U.S. territorial sea; (b) points located in internal waters, landward of the territorial sea baseline, in cases where the baseline and the coastline differ; and, pursuant to OCSLA[3] (c) points located on the Outer Continental Shelf, including artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of exploring for, developing, or producing resources therefrom, or any such installation or device (other than a ship or vessel) for the purpose of transporting such resources.

The CBP has held that the sole use of a non-coastwise-qualified vessel to lay cable between points in the United States or in international waters does not violate the coastwise laws. Such cable is laid and not "transported," between points in the United States. The Customs Service has also ruled that cable equipment laden on a non-coastwise-qualified vessel at a coastwise point and used in the cable-laying operation may be later unladen at a second coastwise point without violation of 46 U.S.C. § 55102. The use of the equipment between American ports will have broken the continuity of the transportation between American ports, and accordingly there is no need to determine whether such cable equipment is vessel equipment

[3] The Outer Continental Shelf Lands Act, Pub. L. 95-372, Title II, Section 203 (Sept. 19, 1978), 43 U.S.C. § 1333 ("OCSLA")

within the meaning of Treasury Decision 49815(4). This rule applies to any small amount of similar equipment that was laden for use but was not in fact needed during the operation of the vessel.

While the use of cable in connection with the operation of a cable-laying vessel does not violate the coastwise laws, the transportation and landing of cable that was not placed on the vessel to be used in a cable-laying operation, other than cable retrieved to be repaired, at a port in the United States other than at the port at which the cable was laden aboard the vessel constitutes a violation of 46 U.S.C. § 55102.

Accordingly, the transportation of cable from Newington, New Hampshire (the point of lading) to Honolulu, Hawaii (the point of unlading) by the C.S. LONG LINES (a non-coastwise-qualified vessel) constitutes a violation of 46 U.S.C. § 55102 in view of the fact that it was not laden for use on board that particular vessel. The transportation is merely a movement of merchandise between two coastwise points and the continuity of transportation is not broken by any cable-laying activity. The fact that AT&T is providing its services free of charge is irrelevant. We emphasize that a violation of Section 55102 occurs in both alternatives presented (either when the unlading is to an onshore storage facility in Hawaii or directly onto the C.S. BROWN located within U.S. territorial waters).

Counsel cites three prior Customs rulings in support of his position to permit the operation described above. All three rulings are distinguishable from the case now under consideration. In ruling 103217 we held that no violation of Section 55102 occurs when repair cable is laden at a coastwise point on a cable-laying and repair vessel not qualified to engage in the coastwise trade, carried on the vessel for a substantial period as part of its cable repair inventory, and off-laden at a second coastwise point. In that particular case the cable in question was aboard the vessel under consideration for approximately three years, a period deemed sufficient to break the continuity of the transportation between coastwise points. In rulings 108985 and 105644 we held that a small percentage of the total amount of cable laded aboard a non-coastwise-qualified cable-laying and repair vessel and unladed at a second coastwise point did not constitute a violation of Section 883 in view of the fact that such cable was laded in anticipation of actual need and treated at the time of unlading in the same manner as equipment of the vessel doing the transporting in question.

In all three of the cases cited above by counsel, the cable in question was originally laded aboard the particular vessels in anticipation of actual need of the vessels to lay and repair cable on the seabed. In the case now under consideration, the lading of cable aboard the C.S. LONG LINES is not intended to be laid on the seabed by the C.S. LONG LINES. The sole purpose of the lading is to transport merchandise between two different coastwise points, a violation of Section 55102.

We recognize that the proposed use of the C.S. LONG LINES appears to be indirectly related to Project Hugo. Although the Customs Service has ruled that the use of a vessel in oceanographic research and survey, or teaching courses such as oceanography is not coastwise

trade, the C.S. LONG LINES is not itself being used for that purpose. Accordingly, the exemption from the coastwise laws recognized by Customs in this area does not apply.

You request, as an alternative to a ruling permitting this transportation, a waiver of the coastwise laws. Other than legislation enacted by Congress to explicitly exempt a particular vessel from the application of the navigation laws, the only other waiver authority is that contained in the Act of December 27, 1950 (64 Stat. 1120), under which the navigation laws may be waived by the Secretary of the Treasury in the interest of national defense. This Act, among other things, directs the granting of a waiver upon the request of the Secretary of the Defense and permits such a waiver upon the written recommendation of the head of any other United States Government agency.

Although we are not of the opinion that the proposed use of the C.S. LONG LINES would justify a waiver of Section 55102, should you wish to pursue this matter further we suggest you direct your request to the following: [omitted]

HOLDING:

The carriage of cable by a foreign-built cable-laying and repair vessel from its point of lading in the United States to a second point in the United States where it will be either temporarily unladed into an onshore storage depot or unladed directly onto another foreign-built cable-laying and repair vessel located within U.S. territorial waters which will subsequently install the cable constitutes a violation of 46 U.S.C. § 55102 in view of the fact that the purpose of the vessel was not to lay the cable on the seabed, but merely to transport such cable between coastwise points.