

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Process Reform for Executive Branch	)	IB Docket No. 16-155
Review of Certain FCC Applications and	)	
Petitions Involving Foreign Ownership	)	

**JOINT COMMENTS OF HIBERNIA ATLANTIC U.S. LLC AND  
QUINTILLION SUBSEA OPERATIONS, LLC**

Hibernia Atlantic U.S. LLC (“Hibernia”) and Quintillion Subsea Operations, LLC (“Quintillion”), by their attorney, hereby jointly submit their comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1</sup> The Commission seeks comment on possible measures to improve the efficiency of the national security and law enforcement review conducted by the Executive Branch agencies<sup>2</sup> of certain applications with reportable levels of foreign ownership (the “covered applications”).<sup>3</sup>

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<sup>1</sup> *In re: Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, FCC 16-79 (June 24, 2016) (“NPRM”). The NPRM was issued in response to a May 10, 2016 letter from the National Telecommunications and Information Administration (“NTIA”), submitted on behalf of the Executive Branch, requesting the Commission adopt new rules regarding processing of applications involving reportable levels of foreign ownership. See NPRM, ¶2 citing Letter from the Honorable Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Marlene H. Dortch, Secretary, FCC (May 10, 2016) (“NTIA Letter”).

<sup>2</sup> The Commission states that it refers covered applications to the following Executive Branch agencies when there is reportable foreign ownership: Department of Homeland Security (“DHS”); the Department of Justice (“DOJ”), including the Federal Bureau of Investigations (“FBI”); the Department of Defense (“DOD”); the Department of State; the Department of Commerce, NTIA; the United States Trade Representative; and the Office of Science and Technology Policy. See NPRM, ¶ 6 & n. 16.

<sup>3</sup> The Commission proposes to apply any reforms adopted in this proceeding only to applications, with reportable levels of foreign ownership, for international Section 214 authority and transfers or assignments of the same, for submarine cable landing licenses

## I. INTRODUCTION

Hibernia is a provider of interstate and international telecommunications. It holds international and domestic Section 214 authority from the Commission and owns and operates two trans-Atlantic submarine cable systems, one of which connects points in the United States with foreign points.<sup>4</sup> Hibernia is also subject to a Letter of Assurance (“LOA”) between its parent, Hibernia NGS Limited, and “Team Telecom.”<sup>5</sup>

Quintillion is a provider of wholesale communications capacity located in Alaska. Quintillion has an application for a submarine cable landing license pending before the Commission<sup>6</sup> and, pursuant to special temporary authority, is currently constructing a submarine

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and transfers or assignments of the same, and petitions for declaratory rulings filed under Section 310(b) regarding foreign ownership of certain wireless licenses. *See id.*, ¶ 13.

<sup>4</sup> *See* File No. SCL-MOD-20020412-00022 (granted July 3, 2002) (modification of the Cable Landing License granted in SCL-LIC-19990804-00012) and File No. ITC-214-20090612-00283 (granted Dec. 11, 2009).

<sup>5</sup> *See* Letter of Assurance between KCK Limited and Hibernia NGS Limited and the Department of Justice, Department of Homeland Security, and Department of Defense (Dec. 19, 2014) *modifying* Letter of Assurance by and between Hibernia Group ehf, for itself and its subsidiaries Hibernia Atlantic U.S. LLC, Hibernia Atlantic Communications (Canada) Company, Hibernia Atlantic (UK) Limited, Hibernia Atlantic Cable System Limited, Hibernia International Assets Inc. (f/k/a CVC Acquisition (CI) Corporation), and Hibernia Media LLC, and the U.S. Department of Homeland Security, the U.S. Department of Justice, and the U.S. Department of Defense (September 30, 2010). While “Team Telecom” is not a formally constituted body, the term is used herein to refer primarily to DHS, DOJ (including the FBI), and DOD when conducting review of covered applications for national security and law enforcement purposes. Other Executive Branch agencies may provide input on these as well as foreign policy and trade policy concerns. *NPRM*. ¶ 1. These comments will refer to Executive Branch review to include both Team Telecom review and review, where it occurs, by Executive Branch agencies apart from the Team Telecom members.

<sup>6</sup> *See In re: Quintillion Subsea Operations, LLC, Application for a License to Construct, Land and Operate a Private Fiber Optic Cable System Linking Points Within Alaska, and Request for Streamlined Treatment, Quintillion Subsea Cable System, File No. SCL-LIC-20160325-00009* (filed Mar. 25, 2016).

cable system that will connect multiple points within Alaska.<sup>7</sup> Quintillion is currently in discussions with Team Telecom regarding Quintillion's proposed submarine cable system.<sup>8</sup>

Hibernia and Quintillion recognize the imperative behind Executive Branch agency review of national security, law enforcement, and other matters raised by foreign investment in certain telecommunications ventures, such as certain submarine cable systems that land in the United States or certain international telecommunications carriers serving customers in the United States. However, such review has the inadvertent potential to discourage foreign investment in submarine cable systems and United States telecommunications carriers. Hibernia and Quintillion urge reform of the Executive Branch review process to reduce uncertainty and delays often associated with the review process. Hibernia and Quintillion appreciate NTIA's and the Commission's recognition that Executive Branch review of certain applications should be completed as expeditiously as possible, and welcome this opportunity to offer their views on improvements that should be introduced.

The Executive Branch review process would benefit from reforms in three basic areas, and Hibernia and Quintillion urge the Commission and the Executive Branch agencies to implement these reforms within the scope of their respective jurisdictions: (i) limit automatic Commission referral of applications to Team Telecom for review, particularly where the applicant is already subject to a LOA or National Security Agreement ("NSA") with Team Telecom; (ii) develop a list of standard questions to which applicants will provide responses

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<sup>7</sup> See *In re: Quintillion Subsea Operations, LLC, Application for a License to Construct, Land and Operate a Private Fiber Optic Cable System Linking Points Within Alaska, and Request for Streamlined Treatment, Quintillion Subsea Cable System, Revised Application for Special Temporary Authority, File Nos. SCL-STA-20160330-0010, SCL-LIC-20160325-00009* (granted April 11, 2016)

<sup>8</sup> *Id.* at 2.

directly to Team Telecom simultaneously with the submission of a covered application (except where the applicant has an existing LOA or NSA); and (iii) establish a definitive timeframe for completion of Executive Branch review of a covered application.

**II. THE COMMISSION SHOULD NOT AUTOMATICALLY REFER APPLICATIONS FOR TEAM TELECOM REVIEW WHERE THE APPLICANT IS SUBJECT TO AN LOA OR NSA**

Upon receipt of a covered application, it has been the Commission's current practice to automatically forward the application to Team Telecom for review.<sup>9</sup> Team Telecom's review, where it occurs, typically requires applicants to submit detailed and substantive information and often culminates with the applicants entering into an NSA or LOA.<sup>10</sup> It is often a costly and burdensome process for applicants, and can delay considerably the granting of an application before the Commission. Steps should be taken to ensure that applications are not referred to Team Telecom absent a good public policy reason to do so. In particular, the Commission should discontinue the practice of automatic referral of a covered application if the applicant – the applicant for Section 214 authority or the license or, in the case of corporate transactions requiring approval, the transferee or assignee of existing authorizations – is subject to an existing NSA or LOA.

Where an applicant is subject to an existing LOA or NSA, it already has undergone Team Telecom's review process for national security and law enforcement concerns. Automatic Commission referral of applications in those circumstances introduces unnecessary delays and may result in the waste of time and resources by both the applicant and the government. Holders of Section 214 authority and submarine cable licensees who have an

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<sup>9</sup> See, e.g., NPRM, ¶6.

<sup>10</sup> NPRM, ¶6.

effective NSA or LOA that submit new covered applications should be exempt from any automatic referral of their applications. The Commission should then proceed to review and act on the application under its streamlined rules, assuming they otherwise apply.

Any rules ultimately adopted by the Commission regarding application referrals to Team Telecom should be revised to reflect this proposed exemption from referral for applicants subject to an existing NSA or LOA.<sup>11</sup> The rules should also make plain that where an applicant certifies in its application that it has an existing NSA or LOA, the application will be processed according to the Commission's streamlined processing rules.

### **III. ANY PROPOSED ADDITIONAL APPLICATION INFORMATION AND CERTIFICATION REQUIREMENTS SHOULD BE LIMITED TO AVOID UNNECESSARY BURDENS**

Hibernia and Quintillion agree with NTIA and the Commission that early submission of information to Team Telecom, concurrent with the filing of a covered application, can facilitate expeditious review.<sup>12</sup> However, the Commission should not require such information be included in the application filed with the Commission because it is not pertinent to the Commission's review of the application. Rather, such information should be filed directly with the relevant Executive Branch agencies, and the applicant should certify in the application filed with the Commission that the information has been sent.<sup>13</sup> Submission to Team Telecom, rather than the Commission, ensures that the confidentiality of sensitive data will be maintained

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<sup>11</sup> NPRM, App. B (proposing adoption of rule 47 C.F.R. §1.6001 *et seq.* addressing application referral to Team Telecom)

<sup>12</sup> *See* NPRM, ¶¶ 18-20.

<sup>13</sup> Such certification would be a prerequisite to the application being accepted for filing and triggering public notice and the Commission's approval timeframes.

and avoids imposing additional obligations on Commission personnel to review or safeguard the information.<sup>14</sup>

The Commission's rules should specify the information that should be sent directly to Team Telecom in conjunction with a covered application. This list should be developed in consultation with Team Telecom and reflect the requests typically found in the Team Telecom triage questionnaires for certain types of covered applications. The Commission's rule should be subject to an exemption where an LOA or NSA already exists. Thus, applicants that already have an NSA or LOA with the Executive Branch agencies would simply notify the Commission of that fact in the application in lieu of certifying that the required information has been forwarded to Team Telecom.

In addition, Hibernia and Quintillion are concerned that the breadth of information requested in NTIA's proposed information and certification categories are overly broad. NTIA requested that applicants be required to provide information regarding the applicant's financial status and information regarding affiliate regulatory enforcement actions.<sup>15</sup> Hibernia and Quintillion assert the Commission should not require applicants to supply information from these two data categories automatically to Team Telecom with covered applications because they are outside the scope of Team Telecom's purview. Unwarranted expansion of Team Telecom's review process, especially if required of all applicants, will only delay the filing of applications in general and also extend the review process. Such outcomes would be contrary to the goal of reforming the Team Telecom review process. Such generalized

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<sup>14</sup> The information should be classified as confidential and proprietary and entitled to confidential treatment by the Executive Branch agencies as a matter of course as is the case today with responses to triage questionnaires.

<sup>15</sup> See NPRM, ¶18.

informational burdens should be avoided even if, theoretically speaking, it might be the case, in exceptional circumstances, that such information might be appropriately required by the Executive Branch agencies.<sup>16</sup>

#### **IV. THE TEAM TELECOM PROCESS SHOULD BE IMPROVED BY ADOPTING A DEFINITIVE TIMEFRAME FOR REVIEW AND GREATER TRANSPARENCY**

The critical challenges of the current Team Telecom review process are the uncertain timeframe and the lack of information regarding Team Telecom’s potential concerns during the review process. Hibernia and Quintillion submit that the Team Telecom review process would be improved greatly if (i) Team Telecom adhered to specific timelines for completion of its review; (b) Team Telecom informed applicants of concerns arising during the review process as early as practicable, and (c) specific points of contact were provided for each Team Telecom agency at the outset.

As the Commission noted in the *NPRM*, the current Team Telecom review process often takes many months.<sup>17</sup> Hibernia and Quintillion suggest the uncertainty regarding

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<sup>16</sup> Hibernia and Quintillion do not concede that this information is within the scope of data relevant to Team Telecom’s review of national security and law enforcement matters. NTIA also propose that applicants be required to certify that the applicant will make certain data available in a location and format that subjects the data to U.S. process of law. See *NPRM*, ¶31. Hibernia and Quintillion agree with other filers in this docket that requiring such a certification amounts to the imposition of a data localization requirement on applicants which the Commission should decline to impose in principle as antithetical to a “policy favoring the free flow of information.” See, e.g., Comments of Telecommunications Joint Commenters, IB Dkt No. 16-155, at 12 (the commitment demanded by the certification is a “[f]orced localization . . . antithetical to this policy favoring the free flow of information” and “appears improperly to enforce localization and repatriation [of records] in the United States.”) At most, any certification requirement pertaining to this subject should extend only to obligations already required by law rather than create a new data localization obligation.

<sup>17</sup> *NPRM*, ¶9. Commissioner O’Rielly has described the Team Telecom review process as an “[i]nextricable black hole. Once transaction applications are submitted, there is little to no information available to the Commission, much less applicants, on status or potential areas of concern, no timeline for conclusion. See Michael O’Rielly, “Team Telecom Reviews Need More Structure”, FCC Blog (Sept. 18, 2015, 2:18 PM),

the review timeframe can be ameliorated significantly by adoption of a definitive review timeframe. There is no real justification for the Team Telecom review timeframe being materially different than the statutory deadlines under which the Committee on Foreign Investment in the United States (“CFIUS”) operates when reviewing voluntary Notices involving the acquisition of certain United States businesses by foreign investors involving critical infrastructure.<sup>18</sup> Similar timeframes are warranted given that the Team Telecom agencies are involved in CFIUS reviews and the potential concerns of Team Telecom are typically a subset of the types of concerns that CFIUS might have.

The Team Telecom review clock should be triggered by an applicant’s submission of responses to the list of Team Telecom questions that Hibernia and Quintillion urge the Commission to adopt above.<sup>19</sup> Team Telecom should have no more than ten (10) business days, from the date of an applicant’s submission of that data, to advise the applicant if the information required by the rule is complete or if additional information is necessary to start the clock. This review structure would provide applicants with some certainty regarding anticipated commencement and completion of the review process.

The Team Telecom review process also would be greatly improved if the applicable Executive Branch agencies were required to advise applicants of any national security or law enforcement concerns identified by Team Telecom as early in the process as possible. By informing applicants of any potential concerns identified by Team Telecom during its review

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<https://www.fcc.gov/news-events/blog/2015/09/18/team-telecom-reviews-need-more-structure>

<sup>18</sup> See 31 C.F.R. §§ 800.502, 800.505, 800.506.

<sup>19</sup> As noted earlier, whether the information needs to be submitted with the application at all will be affected by the provisions of the applicant’s applicable LOA or NSA, where there is one already in place.

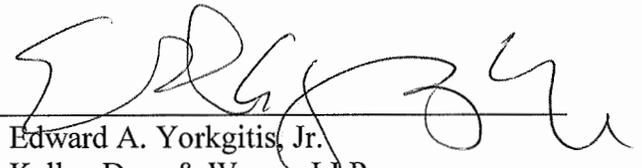
process, applicants would be able to provide any additional information necessary to address and dispel those concerns in expedited fashion thus allowing Team Telecom to complete its review in a timely manner. Earlier notice would also provide applicants with an opportunity to consider revisions to its transaction to address any concerns raised by Team Telecom or assist the applicant and Team Telecom in crafting appropriate mitigation provisions.

Finally, Hibernia and Quintillion propose individual contacts be identified for each of the Team Telecom agencies involved in review of an application. Identification of these contacts at the outset of the process, such as in response to the applicant's submission of the questionnaire responses, will provide transparency to the review process and facilitate good communications from the outset.

Respectfully Submitted,

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August 18, 2016