

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| NTIA Letter Regarding Information and |) | IB Docket No. 16-155 |
| Certifications from Applicants and Petitioners |) | |
| For Certain International Authorizations |) | |

COMMENTS OF T-MOBILE USA, INC.

Cathleen A. Massey
Josh L. Roland
T-MOBILE USA, INC.
601 Pennsylvania Ave., NW
Washington, DC 20004
(202) 654-5900

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I. INTRODUCTION AND SUMMARY

T-Mobile USA, Inc. (“T-Mobile”)¹ hereby responds to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice seeking comment on a May 10, 2016 letter from the National Telecommunications and Information Administration (“NTIA”), on behalf of the Executive Agencies, asking the Commission to obtain information and certifications from applicants for certain international authorizations.² T-Mobile applauds the Commission and NTIA for taking the initiative to improve the “Team Telecom” process wherein the Commission seeks the views of Executive Branch agencies—including the Departments of Defense, Justice, Homeland Security, Commerce, State, and the United States Trade Representative—as to whether an application involving reportable foreign ownership poses national security, law enforcement, foreign policy, or trade concerns. T-Mobile fully supports

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly-traded company.

² Public Notice, *NTIA Letter Regarding Information and Certifications from Applicants and Petitioners for Certain International Authorization*, IB Docket No. 16-155, DA 16-531 (May 12, 2016) (“*Public Notice*”), attaching Letter from The Honorable Lawrence E. Strickling, Assistant Secretary for Communications & Information, U.S. Dept. of Commerce, to Marlene H. Dortch, Secretary, FCC (May 10, 2016) (“*NTIA Letter*”).

reforms to the existing “Team Telecom” process that would reduce delays and add transparency. The company strongly encourages the Commission to move forward promptly in this regard.

Some of the proposals outlined in the NTIA letter, however, would not ameliorate the issues associated with Team Telecom review. The proposals appear to extend new information and certification requirements to a vast number of applicants and applications that are not and have never been subject to Team Telecom review, without any evidence that doing so would improve the Team Telecom review process. On the contrary, such requirements would impose unnecessary costs and burdens on a multitude of entities for no apparent reason and with no apparent benefit. To the extent that NTIA and the Executive Agencies are proposing that all of these additional applicants and applications should be subject to Team Telecom review, such a proposal is unwarranted and wholly contrary to the stated goal of “improve[ing] the ability of the Executive Branch to expeditiously review and efficiently respond to the applications.”³ Massively multiplying the number of applications for Team Telecom to review is plainly not the answer.

If limited to applicants and applications/petitions that today are subject to Team Telecom referral, the requirement to file certain upfront information and make reasonable certifications with the FCC application could help to speed and focus the Executive Agencies’ review. However, T-Mobile encourages the Commission to ensure requested information and certifications are narrowly tailored to match the scope of Team Telecom’s review, are clear and not overly burdensome, and do not exceed the requirements of current U.S. law. In addition, the Commission should consider implementing additional reforms to the Team Telecom process to

³ *Public Notice* at 1.

effectuate expeditious and efficient review. Most importantly, the Commission should impose deadlines or a time limit on the Executive Agencies' review.

Effective reform must focus on streamlining the Team Telecom process, making it more efficient, expeditious, and transparent. T-Mobile is pleased to offer suggestions on reforms which will give applicants certainty and insight into the process, while also enabling the Executive Agencies to perform their important review to protect U.S. national security, law enforcement, foreign policy, and trade interests.

II. T-MOBILE STRONGLY SUPPORTS EFFORTS TO REFORM THE TEAM TELECOM PROCESS.

T-Mobile congratulates the Commission and NTIA for their leadership in initiating efforts to improve the Team Telecom review process. While the checks and insight the Executive Agencies bring to the table are very important, the process for their review is sorely in need of reform. The current Team Telecom process is often unduly lengthy, opaque, and sometimes extremely burdensome. In a global economy, it can impede beneficial foreign investment in U.S. companies. Indeed, the Team Telecom process creates significant challenges for foreign-owned companies needing certainty to execute carefully planned transactions and business expansions in order to compete effectively in the vigorously competitive telecommunications marketplace. Indeed, the timeframe for Team Telecom review has seemed to grow longer and become even more uncertain over the years.

Unlike the Committee on Foreign Investment in the United States (“CFIUS”), which similarly reviews transactions involving foreign ownership for national security issues, Team Telecom is not currently subject to any deadlines for action. CFIUS has authority to review transactions “by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States” to determine the effects of the transaction

on the national security of the United States.⁴ Once an applicant has filed a notice with CFIUS that is deemed to be complete, CFIUS has thirty days to review the transaction and a possible additional forty-five days in which to conduct an investigation.⁵ In contrast, the FCC's referral of applications and petitions to the Executive Agencies operates on no set schedule. Often, the agencies do not appear to begin their review until several months after the FCC's comment cycle on the application has ended. The lack of transparency and a set timeframe makes it difficult for applicants to plan and execute their business transactions and new license procurements.

T-Mobile has firsthand experience with the challenges and unpredictability of the Team Telecom process. In T-Mobile's experience, Team Telecom's review of even routine applications involving no change in foreign ownership regularly extends the normal processing time of FCC applications by many months and sometimes a year or more. For example, only a few months after Team Telecom had both conducted a thorough review of T-Mobile's ownership in the T-Mobile/MetroPCS transaction⁶ and completed a detailed site visit of T-Mobile facilities, T-Mobile filed several *pro forma* transfer applications and accompanying Section 310(b) petition to add a new wholly-owned foreign subsidiary to its ownership structure.⁷ Because ultimate ownership of the licenses was not changing, such a *pro forma* transfer transaction would normally not require any prior FCC approval. However, because a foreign-organized subsidiary was being inserted into the ownership structure, the transaction required both prior FCC approval

⁴ 50 U.S.C.A. § 4565.

⁵ *Id.* See also U.S. Department of the Treasury, Resource Center, Process Overview, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (Dec. 1, 2010).

⁶ See *Applications of Deutsche Telekom AG, T-Mobile USA, and MetroPCS Communications, Inc. for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order and Declaratory Ruling, 28 FCC Rcd 2322, ¶¶ 97-99 (2013).

⁷ IBFS File No. ISP-PDR-20130924-0006 (filed Sept. 24, 2013).

and Team Telecom review. Despite its very recent review of the company and the *pro forma* nature of the transaction, Team Telecom began its review process anew, which took several months to conclude.⁸

One reason for the lengthy processing time despite the routine nature of the filing appeared to be because a Team Telecom member agency raised an objection substantively unrelated to the *pro forma* transfer months after the Team Telecom review process had begun. The objection concerned activity that was not compelled by law or T-Mobile's network security agreement. The late-raised objection required emergency negotiations through the Christmas holidays to enable the transaction to proceed prior to the end of year tax deadline. This eleventh hour activity could have been avoided if a structured process were in place that required agencies to raise any objection by a certain date, just as agencies must in the CFIUS process. This example illustrates how the lengthy and unstructured Team Telecom process can create significant and unanticipated issues for businesses, which often face external deadlines to close transactions or achieve certain operational milestones.

T-Mobile has also observed that the FCC's adoption of new foreign ownership rules, designed to reduce the number of repetitious filings referred to Team Telecom, seems to have had the effect of lengthening the reviews of applications referred. In 2013, the Commission modified its foreign ownership policies and procedures to "reduce the regulatory costs and burdens imposed on common carrier and aeronautical radio station applicants, licensees, and spectrum lessees; provide greater transparency and more predictability with respect to the Commission's foreign ownership filing requirements and review process; and facilitate

⁸ See Public Notice, International Authorizations Granted, Report No. TEL-01650, DA 14-24, IBFS File No. ISP-PDR-20130924-0006 (Jan. 9, 2014).

investment from new sources of capital.”⁹ The Commission estimated that the rule changes would result in a reduction of the number of section 310(b) petitions for declaratory ruling filed annually by 40 to 70 percent.¹⁰ While the number of petitions may have been reduced, the foreign ownership review process has not become faster. Indeed, Team Telecom appears now to view all referred filings from the Commission as “one last bite at the apple,” in practice leading to lengthier and more aggressive reviews and requests.

It is important to emphasize that the delays and uncertainty associated with the current Team Telecom review process have resulted in unintended negative consequences. Although the Commission has noted that “foreign investment has been and will continue to be an important source of financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job creation,”¹¹ the Team Telecom process often discourages U.S. companies from accessing foreign capital. In today’s global economy, such a result is simply unacceptable. In some cases, foreign companies have chosen not to invest in U.S. companies or initiate U.S. operations to avoid the uncertainties of Team Telecom review. The Team Telecom process is intended to protect national security and foreign policy interests—not to create a regulatory barrier to foreign investment. The public interest would best be served by giving applicants certainty that their applications will be reviewed by Team Telecom in a timely and transparent manner.

⁹ *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act, as Amended*, Second Report & Order, 28 FCC Rcd 5741, ¶ 1 (2013).

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 3.

III. REFORM SHOULD FOCUS ON STREAMLINING REVIEW OF THOSE APPLICATIONS REFERRED TO TEAM TELECOM.

A. Reforms Should Not Add Filing Burdens on Applicants and Applications Not Subject to the Team Telecom Process.

One major aspect of the NTIA Letter’s proposal in particular would be directly counter to the proceeding’s goal to “improve the ability of the Executive Branch to expeditiously and efficiently review and respond to the applications.”¹² The NTIA Letter requests the Commission to require that *all* “applicants and petitioners” seeking “international section 214 authorizations and transfers, section 310 rulings, submarine cable landing licenses, and satellite earth station authorizations” submit specific information on ownership, network operations, and related matters as part of their applications and make certain certifications.¹³ However, only a small fraction of entities filing such applications have foreign ownership subject to Team Telecom review, and even a smaller fraction of applications filed by such entities seek approval for new or changed foreign ownership that would require Team Telecom review. There is no basis to require applicants without cognizable foreign ownership to submit to these new requirements. Those entities and their applications are not and have never been subject to Team Telecom review. Even for those applicants with substantial foreign ownership, there is no reason to impose additional filing burdens on them for applications that are not submitting new or changed foreign ownership (*i.e.*, where their current foreign ownership has been reviewed and is not changing).

Requiring applicants and applications not subject to referral to Team Telecom to shoulder significant additional burdens to facilitate Team Telecom review is illogical and should be rejected. The public interest would plainly not be served by adding costs and burdens to the

¹² *Public Notice* at 1.

¹³ *Id.* at 1, 4.

license application process for no reason. Further, increasing the volume of licensing applications and materials to be reviewed by the Commission's International Bureau staff will only serve to strain Commission resources and lengthen the review process for all applications—which again clearly seems contrary to the public interest.

It is not clear from the NTIA Letter whether the Executive Agencies are seeking to expand the number of applications referred to Team Telecom through the expansive list of applicants and applications that are proposed to be subject to the new filing and certification requirements. Any reform that would send more applications to Team Telecom should be rejected. The articulated goal of this proceeding is to streamline and improve the Team Telecom process. That goal plainly cannot be accomplished by vastly increasing the volume of applications referred for review. And, there is no public interest rationale for subjecting to Team Telecom review applications that do not propose new or changed foreign ownership.

B. Any Required Information Requests or Certifications Must Be Clear and Reasonable, and Should Not Extend Beyond the Bounds of Current U.S. Law.

To improve the Team Telecom review process, the NTIA Letter asks the Commission to require that certain applicants “(1) provide information on ownership, network operations, and related matters as part of the applications; and (2) certify compliance with certain law enforcement assistance requirements.”¹⁴ If limited to applicants and applications/petitions appropriately subject to Team Telecom referral, T-Mobile believes that the filing of upfront information and certification submissions with the FCC application could help to speed and focus the Executive Agencies' review. However, T-Mobile encourages the Commission to ensure that any requested information and certifications are narrowly tailored to match the scope

¹⁴ *Id.* at 1.

of Team Telecom’s review, are clear and reasonable, and do not exceed the requirements of current U.S. law.

1. Team Telecom should not be reviewing the applicant’s financial situation or compliance history.

The NTIA Letter proposes the submission of upfront information in a number of areas, including with respect to the applicant’s “financial condition and circumstances” and “compliance with applicable laws and regulations.”¹⁵ Both of these areas relate directly to the applicant’s financial and character qualifications, which Congress clearly granted the FCC authority to review and which the agency has gained expertise in reviewing since its inception. Given that the FCC is the expert agency for such matters, there appears to be no reason for the imposition of additional information requirements so that Team Telecom can conduct a parallel, duplicative review. In fact, the duplication of administrative resources would plainly be contrary to the public interest. Further, expanding the scope of Team Telecom’s review to include additional issues more properly handled by the Commission will not help to streamline the review process, but rather do the opposite. For these reasons, T-Mobile urges the Commission to decline to impose these two information requests.

2. The applicant should only have to certify to the accuracy and completeness of its application to the best of its knowledge at the time of filing.

The NTIA Letter proposes that applicants certify that all information submitted “whether at the time of submission of the application/petition *or subsequently in response to either FCC or Executive Branch agency request* is accurate and complete to the best of Applicant’s knowledge.”¹⁶ This open-ended time commitment for certification makes compliance

¹⁵ NTIA Letter at 3.

¹⁶ *Public Notice* at Attachment A, 1 (emphasis added).

impossible. An individual filing a certification on behalf of his or her company at the time of submission cannot possibly certify that information provided at an unspecified time in the future and under unspecified circumstances will be accurate and complete. Such certification is more reasonably limited to the particular submission at hand.

3. Required certifications must not extend beyond the bounds of U.S. law and policy.

Certain of the NTIA Letter’s proposed certification provisions are written so broadly as to go beyond the requirements of existing U.S. laws or to legislate new requirements where litigation and public debate is ongoing. Congress has established laws—or has made the conscious decision not to adopt laws—concerning data localization, data retention, law enforcement assistance and encryption, which balance law enforcement interests with many other concerns. The FCC and the Executive Branch agencies have no authority to disrupt the policy position enshrined in statute and should not use application certification language to do so.

For example, the second proposed certification attached to the NTIA Letter is broad enough to be read as prohibiting encryption, establishing duties to decrypt, and requiring disclosure to government agencies that is not legally compelled. The proposed certification language requires applicants to agree “to make communications . . . available in a form and location that permits them to be subject to a valid and lawful request or legal process.”¹⁷ The FCC should clarify that such agreement extends only to obligations otherwise established in statute or regulation. Namely, the Commission should specify that such certification is limited to

¹⁷ *Id.*

compliance with the Communications Assistance for Law Enforcement Act (“CALEA”)¹⁸ and the Stored Communications Act.¹⁹

The proposed certification language also appears to be trying to improperly enforce localization and repatriation in the United States. The Executive Branch has made clear that U.S. policy favors the free flow of information, which is antithetical to forced localization. Notably, the Commerce Department recently announced its Digital Economy Agenda, which identifies “promoting a free and open Internet worldwide” as its number one key opportunity, and states that the global free exchange of information, with minimal barriers to the flow of data and services across borders, “is the lynchpin of the digital economy’s success.”²⁰ Any certification requirement that is contrary to this concept must not be adopted.

IV. THE COMMISSION SHOULD TAKE CERTAIN ADDITIONAL STEPS TO IMPROVE THE TEAM TELECOM PROCESS.

In considering next steps for improving the Team Telecom process, the Commission should also look beyond the reforms suggested in the NTIA Letter. In this regard, T-Mobile proposes two improvements intended to address the delay issues plaguing the Executive Agency review process and to protect the sensitive business information likely to be required to be filed with the FCC application.

¹⁸ 47 U.S.C. § 1002 (stating that that no law enforcement agency or officer has authority to require or prohibit any particular design of equipment, facilities, services, features, or system configurations to be adopted and that telecommunications carriers are not responsible for decrypting or ensuring the government’s ability to decrypt any communication).

¹⁹ 18 U.S.C. §§ 2702, 2703 (stating that a provider does not have the duty to respond to a government “request” for disclosure of customer communications or records absent legal compulsion and imposing retention requirements only upon the specific request of a governmental entity, and only for a ninety-day period).

²⁰ Alan Davidson, Commerce Department, “The Commerce Department’s Digital Economy Agenda,” <https://www.commerce.gov/news/blog/2015/11/commerce-departments-digital-economy-agenda> (Nov. 9, 2015); Commerce Department Digital Economy Agenda, http://www.nist.gov/director/vcat/upload/Davidson_VCAT-2-2016_post.pdf at 5 (Feb. 2016).

A. The Commission Should Impose Time Limits on Team Telecom’s Review.

The primary complaint about the Team Telecom process has long been its length and unpredictability. To address this, the Commission should require that Team Telecom complete its review and articulate any objections within a reasonable period from the date the application or petition appears on Public Notice. T-Mobile believes that 90 days is an appropriate and reasonable period of time for this review. At the end of this timeframe, the Commission should move forward with its processing of the application or petition. Imposing a set time clock on Team Telecom’s review would give applicants certainty that their applications will be handled in an expeditious and efficient manner as well as impose a structure and rigor on the Executive Agencies’ review.

On the unusual occasion where Team Telecom requires more time to complete its review, it should be able to request that the Commission grant it limited additional time (*i.e.*, not to exceed 60 days). Workload should not be a basis for granting an extension request. Rather, Team Telecom should be required to articulate confidentially to both the Commission and the applicant their specific concern(s) regarding the application, why they require additional time to investigate such concern(s), and how the additional time will allow them to resolve the issue. The applicant would then have the opportunity to provide any additional necessary information and keep the process moving forward.

Imposing a clock on Team Telecom’s review is not inappropriate. The core Team Telecom agencies and their staff who review foreign investment already operate ably under CFIUS statutory deadlines. The 90-day clock proposed above would simply extend existing CFIUS procedures to Team Telecom proceedings. There is no compelling policy reason why a

CFIUS review of national security and law enforcement concerns should receive priority over a Team Telecom review of the same interests.

B. The Commission Should Takes Steps to Protect the Confidentiality of Any Sensitive Information Submitted.

As indicated above, T-Mobile believes the submission of appropriate additional information with applications subject to referral to Team Telecom could help to expedite the Team Telecom review process. Much of the additional information that the Executive Agencies seek, however, includes sensitive information about shareholders and operational issues (and potentially the company's financial situation) that must be kept confidential. The Commission should institute a process whereby such applicant information is accorded confidential treatment as a matter of course. This process should enable confidential information to be filed and stored separately from other portions of the application that will become public. Ensuring appropriate protections for such sensitive data facilitates the free flow of information between applicants, the Commission, and Team Telecom, and will thus aid in the expeditious processing of applications and petitions.

V. CONCLUSION

T-Mobile applauds the Commission and NTIA for initiating efforts to improve the process for Executive Agency review of certain FCC applications and petitions involving foreign ownership. Team Telecom plainly serves a vital function in identifying and resolving potential national security, law enforcement, foreign policy, or trade concerns raised by FCC applicants with foreign ownership. Nevertheless, reform of the process is urgently needed to provide certainty regarding the timing of FCC application processing and to build more transparency into the process. T-Mobile urges the Commission to ensure that any reforms are appropriately

designed to streamline the process and do not impose unnecessary burdens or requirements that exceed existing U.S. law.

Respectfully submitted,

T-MOBILE USA, INC.

By: /s/_____

Cathleen A. Massey

Josh L. Roland

T-MOBILE USA, INC.

601 Pennsylvania Ave., NW

Washington, DC 20004

(202) 654-5900

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