
IMPACT OF NATIONAL SECURITY REVIEW ON SUBMARINE CABLES LANDING IN THE UNITED STATES

Andrew Lipman, Troy Tanner (Bingham McCutchen LLP)

Email: andrew.lipman@bingham.com

Bingham McCutchen, LLP, 2020 K Street, N.W., Washington, DC 20006, USA

Abstract: The United States has increased attention on the operation of submarine cables by foreign entities. Both the Federal Communications Commission and “Team Telecom” -- an ad hoc task force of Executive Branch agencies, closely examine cable license applications with foreign ownership and impose conditions to address national security issues. Foreign persons, however, should not be dissuaded from entering the U.S. market. Nearly all projects can ultimately receive approval through proper structuring to address basic security concerns. Parties must be flexible and creative, but there is still room for foreign investment in the U.S. submarine cable market.

1. TEAM TELECOM AND THE FCC LICENSING PROCESS

In recent years, the United States Government, reacting to real and perceived threats from cyber-terrorism, the loss and theft of sensitive information, and high-profile hacking incidents (including the Pentagon’s computer systems), has become increasingly concerned with protecting the nation’s telecommunications infrastructure. Acquisitions of U.S. telecommunications carriers and network operators by non-U.S. persons have been subject to national security review for a number of years. More recently, however, “Team Telecom” -- an ad hoc task force comprising the Departments of Defense, Homeland Security and Justice (including the Federal Bureau of Investigation) that examines such deals -- has begun to review new cable landing license applications as well. Team Telecom’s new focus on this area promises to slow the Federal Communications Commission (FCC) licensing process. Even more troubling, it has the potential to discriminate against cables with significant non-U.S. ownership.

Background on FCC Licensing Process.

All submarine cables landing in the United States must be licensed by the FCC. This license is issued pursuant to the Submarine Cable Landing License Act of 1921 and Section 1.767 of the FCC’s Rules. The FCC has established a streamlined cable licensing process that in most cases results in a license being granted within 45 days of the date it is put on public notice. The application consists of a description of the submarine cable, including the type and number of channels and its capacity, a specific description of the cable landing stations in the United States and the foreign countries where it will land, a map showing the geographic coordinates of all landing stations, a statement as to whether the cable will be operated on a common carrier or private carrier basis, and ownership information. The filing fee for cable landing licenses is \$16,820.

Under the FCC’s cable licensing rules all entities that (1) own or control a U.S. landing station or (2) own or control a five percent or greater interest in the cable system and will use the U.S. segments of the cable system must be parties to the cable license application. In other words,

all such entities will be co-licensees. In addition, all original owners of the cable, regardless of the amount of their ownership interest, must be identified in the application, although they do not have to be licensees if they do not meet the criteria discussed above.

What Is Team Telecom and Why Is It Involved In The FCC Licensing Process? Team Telecom started as a subset of the Committee on Foreign Investment in the United States or CFIUS. CFIUS is an inter-agency committee of the U.S. Government that is chaired by the Secretary of the Treasury and is empowered to review acquisitions of U.S. companies by non-U.S. persons. Team Telecom got its name because these agencies took the lead in reviewing transactions involving telecommunications carriers on behalf of CFIUS.

Until recently, Team Telecom limited its activities to matters within the jurisdiction of CFIUS, specifically, transactions involving the acquisition of U.S. carriers and network operators by foreign persons. Beginning in 2002, Team Telecom began to expand its role, which it was able to do because of the public nature of the FCC licensing process.

Under FCC rules, most license applications are subject to public notice and comment periods. The purpose of this process is to allow members of the public, including other government agencies, to opine as to whether granting the license serves the public interest. Further, when the FCC liberalized its licensing rules for international carriers in the mid-1990s, it agreed to seek the input of the Executive Branch regarding law enforcement, national security, and public safety issues. In practical terms, any FCC application with significant foreign ownership -- ten percent is the unofficial trigger -- is sent to the Executive Branch for review.

Until recently, the Executive Branch rarely exercised its authority to review FCC applications outside of large mergers and acquisitions. After 9/11, however, Team Telecom became more active, reviewing nearly every FCC application with foreign ownership and frequently imposing conditions intended to address national security and law enforcement issues. Team Telecom first starting reviewing applications for international service licenses issued by the FCC under Section 214. A non-U.S. applicant for a Section 214 license is now routinely required to sign, depending on the applicant's proposed activities, a letter of assurance or a more onerous network security agreement (NSA).

Team Telecom's review of submarine cable landing licenses is more recent. Team Telecom has long reviewed transactions involving the sale of submarine cable assets or operators. For example, the acquisition of Global Crossing by STT and the sale of the Tycom Global Network to VSNL were both reviewed extensively by Team Telecom as part of the CFIUS review process. The requirement that new cable licensees enter into NSAs dates only to January of this year when Verizon Business (Verizon) entered into an NSA for the Trans-Pacific Express Cable Network (TPE) it is building with a consortium of Chinese, Korean, and Taiwanese carriers. Two other agreements followed shortly after and another is pending. In short, it is clear that, going forward, all landing license applicants with substantial foreign ownership will be required to enter into NSAs as a condition to obtaining their licenses.

How Does Team Telecom Review Work? Although Team Telecom is an ad hoc group, the review process is fairly well-trod, especially in the context of Section 214 applications. As noted, the FCC sends copies of applications with

foreign ownership to the Executive Branch for review. Team Telecom then typically asks applicants to answer a set of questions (referred to as the “triage questions”). The questions address the applicant’s planned services and facilities, where call data and other information will be stored, how data will be secured, and who will have access to the applicant’s network and data. In most cases, Team Telecom also will ask the FCC to defer granting the application until Team Telecom has completed its review. This typically results in the removal of the application from streamlined processing at the FCC and the withholding of FCC approval until Team Telecom’s review is complete.

Although applicants can wait for Team Telecom to receive their applications from the FCC, most applicants are proactive and contact Team Telecom immediately upon filing an FCC application (and sometimes before filing). There are several advantages to this approach. Most obviously, contacting Team Telecom can move the application closer to the top of Team Telecom’s list and thus speed review. Second, it allows the applicant to begin to characterize its application for Team Telecom. Simply put, some applications -- such as those for resold services or with non-controlling foreign ownership -- raise fewer issues and can be approved more quickly. Third, and most substantively, actively engaging Team Telecom puts the applicant in the best position to suggest and craft solutions to any law enforcement and national security issues in a more favorable manner.

Team Telecom’s review in the submarine cable context is slightly less clear, primarily because there is less precedent. In procedural terms, the process is likely to be similar to that for Section 214 applications, with Team Telecom asking the FCC to defer action pending Team Telecom’s approval. If the experience of recent applicants is any indication,

however, Team Telecom’s review of submarine cable applications is likely to be substantially more time-consuming. The FCC licensing process for the Trans-Pacific Express Cable (TPE) and the Asia-America Gateway Cable Network (AAG), for example, both took nearly 11 months, and the Unity Cable took 17 months, including the Team Telecom process. Other recent applications by Columbus Networks and the Gemini Bermuda consortium took less time but still required upward of six months. Substantively, recent NSAs make clear that applicants for cable landing licenses are going to have to make substantially greater commitments than in the past.

What Are The Provisions Of An NSA?

Like the Team Telecom review process, the terms of NSAs have become fairly standardized. In the submarine sector, NSAs have recently been signed by Verizon (for the TPE consortium, the Gemini Bermuda Cable System, and the CB-1 Cable System), Columbus Networks (for its CFX-1 cable connecting Columbia, Jamaica, and the United States), AT&T (for the AAG consortium), and PPC-1 Limited (for the PPC-1 Cable System, connecting Guam and Australia). These NSAs have a number of standard provisions addressing issues such as physical security of the network facilities, requirements to store certain calling data in the United States, obligations to cooperate with U.S. law enforcement, and the screening of personnel who will have access to the system or calling data.

However, the NSAs, and especially the TPE NSA, also have new requirements that seem to be a result of the identities of the non-U.S. participants. For example, the TPE NSA mandates that Verizon, the U.S. landing party, will own or obtain an indefeasible right of use in all TPE facilities located in U.S. territory. In addition, only Verizon may direct the activities of TPE’s U.S. landing vendor.

The TPE agreement also has stricter personnel screening requirements than past agreements, requiring Verizon to conduct detailed background checks. In short, the obligations placed on Verizon go substantially beyond those of past NSAs. While the reasons for these requirements have not been made public, it seems likely that they were motivated by Team Telecom's concerns regarding the participation of the mainland China's incumbent carriers in TPE, and especially the fact that those carriers control landing stations in China.

The TPE NSA also was the first to have more specific requirements regarding the configuration of the system than prior agreements. For instance, Verizon must be able to cut off traffic to and from the United States at the Verizon-controlled cable terminal. Verizon must also configure the systems so that the TPE NOC (which must be located in the U.S.) can view the status of all segments of the cable. The Gemini Bermuda and CB-1 agreements contain similar requirements (although they allow the NOCs to be located in Bermuda). Conversely, Verizon must ensure that the non-U.S. landing parties to TPE cannot view the status of the network beyond the optical distribution frame at the U.S. termination point.

It is too early to tell whether the TPE NSA is going to become the new standard. Although the AAG NSA was very similar, the Gemini Bermuda and CB-1 NSAs, which were also signed by Verizon, and the Columbus Networks agreement do not incorporate the most onerous provisions of the TPE agreement. Rather, those provisions seem to have been driven by concerns specific to the TPE and AAG projects, probably related to the significant participation by government owned carriers. At the same time, recent NSAs are broader in scope than prior generations and are indicative of closer scrutiny of landing license applicants.

2. PRACTICAL EFFECTS OF TEAM TELECOM REVIEW OF LANDING LICENSE APPLICANTS

There are several lessons to be taken away from Team Telecom's involvement in submarine cable landing license applications. First, FCC approval will take longer than in the past where there is foreign participation in the cable system. The FCC's streamlining rules were intended to reduce the time required to obtain cable landing licenses to as little as 45 days. However, given that the FCC will not grant a landing license until Team Telecom has approved, it seems unlikely that a license involving foreign owners will be issued in less than six months.

The second lesson is that it is critical that parties building a submarine cable system think long and hard about U.S. national security and law enforcement issues in structuring their systems. Parties should consider having a U.S.-based landing party control and operate U.S.-based facilities and non-U.S. parties should be prepared to accept limitations on their ability to control the U.S. portion of the network and to obtain access to U.S. facilities and data.

Third, parties should be prepared to engage Team Telecom immediately upon filing their FCC applications and to have comprehensive responses and practical solutions to any questions or concerns raised by the government.

Finally, foreign persons should not be dissuaded from entering the U.S. market. While the path to approval may be a bit more winding than in the past, nearly all projects can ultimately receive approval. Moreover, the government is amenable to a variety of ownership and control structures provided that their basic security concerns are addressed satisfactorily. Parties must be flexible and creative, but there is still

room for foreign investment in the U.S.
submarine cable market.