

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

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

**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom) submits these comments in response to the Notice of Proposed Rulemaking (*Notice*) seeking comment on proposed changes to rules and procedures governing certain applications and petitions involving foreign ownership.<sup>1</sup> We support the Commission’s goal of improving the timeliness and transparency of the process under which certain applications are referred for Executive Branch review of matters pertaining to national security, law enforcement, foreign policy, and trade policy. We believe that the U.S. process for addressing foreign ownership issues, if done correctly, could serve as a best practice precedent and a model of transparency, efficiency, thoroughness, and timeliness – one that the U.S. can recommend with credibility to countries around the world.

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<sup>1</sup> *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, IB Docket No. 16-155, FCC 16-79 (Jun. 24, 2016) (*Notice*). For brevity, we will refer to applications, petitions for declaratory ruling, and other authorities sought collectively as “applications.”

## I. INTRODUCTION

USTelecom previously submitted comments<sup>2</sup> in response to the public notice seeking comment on a letter from the Executive Branch (NTIA Letter)<sup>3</sup> asking the FCC to obtain certain information and certifications from applicants and petitioners seeking international section 214 authorizations (and transfers thereof), “section 310 rulings,”<sup>4</sup> submarine cable landing licenses, and satellite earth station authorizations.<sup>5</sup> We reiterate and expand on those comments in this filing to address the Commission’s more specific proposals in the *Notice*.

## II. DISCUSSION

For entities subjected to Executive Branch review, the process can be time-consuming and burdensome. The additional scrutiny involved is unnecessary and unwarranted when an application does not involve reportable foreign ownership, and the Commission should avoid any “mission creep” by declining to broaden the scope of applications that would be subject to any rule changes adopted in this proceeding.<sup>6</sup> Likewise, the Commission should be clear about what types of applications require review. For the relatively few applications involving reportable

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<sup>2</sup> Comments of the United States Telecom Association, IB Docket No. 16-155 (filed May 23, 2016) (USTelecom Comments).

<sup>3</sup> Letter to Marlene H. Dortch, Secretary, FCC from Lawrence E. Strickling, Asst. Secretary for Communications and Information, U.S. Dept. of Commerce (filed May 10, 2016) (NTIA Letter).

<sup>4</sup> “Section 310 rulings” refers to authorizations to exceed the foreign ownership benchmarks under section 310(b) of the Communications Act, as amended, 47 U.S.C. § 310(b).

<sup>5</sup> Public Notice, *NTIA Letter Regarding Information and Certifications from Applicants and Petitioners for Certain International Authorizations*, IB Docket No. 16-155, DA 16-531 ( May 12, 2016).

<sup>6</sup> See *Notice* ¶ 6. The Commission could also take this opportunity to consider narrowing the types of applications that it refers for Executive Branch review.

foreign ownership that appropriately will be referred for review,<sup>7</sup> the rules adopted in this proceeding should ensure that they will be processed within a reasonable time period. For those applications that do raise national security, law enforcement, or other concerns, a commitment by all parties involved in the review process to adhere to an agreed-upon timetable should ensure that concerns and problems are addressed and remedied in a timely manner.

**A. The Commission Should Establish Specific Time Frames to Ensure Timely Executive Branch Review.**

As noted in our comments to the public notice, adherence to specific review deadlines is the best way to ensure the timeliness of the Executive Branch's review process. We agree with the Commission that time frames will bring clarity and certainty to the review process, to the benefit of all parties.<sup>8</sup>

The Commission's proposal to establish a 90-day review period for applications once referred to the Executive Branch strikes a reasonable balance between ensuring adequate time for review and avoiding needless and potentially costly delay in processing applications. Although the Commission did not also propose to establish a time period for its own preliminary review to ensure that an application is acceptable for filing, a commitment to conduct such review in a timely manner would further enhance the transparency and timeliness of the process and ensure that applications are not unduly delayed for reasons beyond the control of the applicants. We propose that the Commission commit to review and, unless an application is deemed unacceptable for filing, place all applications on public notice within 10 days of receipt. We further propose that, for applications deemed unacceptable for filing, applicants be given up to

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<sup>7</sup> See Notice ¶ 4 (noting that from 2013 to 2015, an average of 18 percent of relevant applications were referred for Executive Branch review).

<sup>8</sup> Notice ¶ 36.

10 days to respond and correct applications before they are dismissed without prejudice. These minor reforms will ensure due process and better protect the interests of applicants without unduly burdening the Commission.

We also find reasonable the Commission's proposal to allow up to an additional 90 days for additional Executive Branch review where a legitimate need for additional time is demonstrated.<sup>9</sup> In particular, we support the proposal to require written notification of all extension requests by the reviewing agencies in the public record (with adequate protections to protect non-public information)<sup>10</sup> so that parties are not left in the dark about the status of their applications. We also ask the Commission to clarify that, rather than adopting "a one-time additional 90-day extension,"<sup>11</sup> it would be adopting up to three 30-day extensions for a maximum extension of 90 days, as described in the *Notice*.<sup>12</sup> That is, reviewing agencies would need to check in with the Commission at 30-day intervals on the status of review and explain why additional time is needed.

We decline to propose specific factors or reasons that would provide an adequate basis for an extension, but would support a general standard to require more than a statement that the Executive Branch needs more time; that is, agencies seeking review should have to specify what prevented them from completing the review in the allotted 90 days and any subsequent 30-day

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<sup>9</sup> See *Notice* ¶¶ 36, 39-46.

<sup>10</sup> As proposed, agencies could file a short statement in the public record, and a more detailed explanation to Commission staff in a non-public filing. *Notice* ¶ 43.

<sup>11</sup> *Notice* ¶ 39.

<sup>12</sup> See *id.* at ¶ 43.

extensions thereafter. And, consistent with the Commission’s rule governing motions for extension of time, extensions should “not be routinely granted” without good cause.<sup>13</sup>

Finally, we oppose any proposal that would dismiss an application if an applicant fails to respond within seven days to a request by the Executive Branch for additional information,<sup>14</sup> or if an applicant fails to respond within seven days of receiving a draft mitigation agreement either by signing the agreement or offering a counter-proposal.<sup>15</sup> Given the typical complexity of such negotiations and lack of bargaining power of most applicants in that process, applicants should be allowed adequate time to obtain the data necessary to respond to an information request and to evaluate a proposed mitigation agreement without being required to request an extension under threat of dismissal. Instead, we propose that applicants be entitled to take up to an additional 14 days to respond to an information request or draft mitigation agreement (beyond the initial seven days proposed for such responses) by notifying the Executive Branch that they require additional time to respond. To prevent any prejudice to the review process, the 90-day clock should automatically be stopped for the duration of any such extension. Otherwise, dismissal should occur only where it is shown that an applicant is non-cooperative or no longer wishes to pursue an application.

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<sup>13</sup> 47 C.F.R. § 1.46.

<sup>14</sup> *See Notice* ¶ 45.

<sup>15</sup> *See Notice* ¶ 46 (proposing that an applicant’s failure to respond in seven days “would result in dismissal of the applications”).

**B. The Commission Should Not Expand the Scope of Applications Subject to Executive Branch Review.**

We support the Commission’s express intent not to expand on the types of applications that currently are referred for Executive Branch review.<sup>16</sup> Consistent with the goal of streamlining this process, the Commission also should adopt its proposal not to seek review of applications for transfer of control of domestic section 214 authority.<sup>17</sup> We likewise agree that the Commission should not seek review of *pro forma* notifications that do not involve a change in control of a license, and in other such instances where an assignment or transfer of ownership or control does not take place.<sup>18</sup> Similarly, the Commission should confirm that only those section 310 license applications requesting rulings for section 310(b) “[a]uthorization to exceed foreign ownership benchmarks” will be subject to any new information and certification requirements.<sup>19</sup>

We also seek a clear statement from the Commission confirming that only entities with reportable foreign ownership will be subject to any new requirements adopted in this proceeding.<sup>20</sup> For example, if a consortium made up of U.S. companies with no reportable foreign ownership and entities that have reportable foreign ownership submits a joint submarine cable landing license application, only the latter should be subject to Executive Branch review. That is, the Commission should make clear that any new reporting and certification requirements would apply on an entity-specific basis.

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<sup>16</sup> Notice ¶13.

<sup>17</sup> Notice ¶14.

<sup>18</sup> See Notice ¶ 47.

<sup>19</sup> See USTelecom Comments at 3-4.

<sup>20</sup> See Notice ¶¶ 4-6.

**C. The Commission Should Only Collect Information and Require Certifications Necessary for Executive Branch Review.**

We fully appreciate the need for reviewing agencies to have access to certain information about foreign ownership, network operations, and related matters, and we understand that receiving such information sooner rather than later in the process can significantly streamline the time needed for review and improve the efficiency of the review process overall. Thus, filing some information up front with applications involving foreign ownership that will be subject to Executive Branch review makes sense, and the proposal that the Commission collect certain information with applications is reasonable. However, information should be sought only from applicants with reportable foreign ownership, and should be limited to that “necessary for the agencies to assess whether an application with reportable foreign ownership raises national security or law enforcement concerns,” as requested by NTIA.<sup>21</sup>

NTIA does not specify what questions should be asked when requesting information from applicants, but rather identifies areas that should be covered to address matters such as corporate structure and relationships with foreign entities, business and operational information, and compliance with applicable laws and regulations.<sup>22</sup> We agree with some commenters, as noted in our comments to the public notice, that the scope of this information request may be overly broad and potentially outside the scope of what is necessary to determine any potential effect on national security, law enforcement, foreign policy or trade.<sup>23</sup> For example, information such as financial records and regulatory compliance history may be relevant to the Commission’s assessment in deciding whether to grant an application, but likely has little or no bearing on areas

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<sup>21</sup> *Notice* ¶ 20 (citing NTIA Letter at 4).

<sup>22</sup> *Notice* ¶18 (citing NTIA Letter at 3).

<sup>23</sup> *See* USTelecom Comments at 4; *Notice* ¶ 20.

over which the Executive Branch has authority. Moreover, regarding requests for information on corporate structure and operations, many of USTelecom's member companies engage in multiple, diverse business areas that may be unrelated to the application under review. It would be overly intrusive and burdensome to require business and operation information on unrelated businesses. The Commission therefore should mandate that any information sought for Executive Branch review be limited to information related to the business and facilities that are the subject of the applications under review.

We agree that a flexible approach that would allow modification of the questions within certain enumerated categories is more appropriate than attempting to predetermine and codify every question the Executive Branch will need to ask each applicant, given that different applications and applicants will raise different issues. To prevent further delay in the process, the Commission should also ensure that nothing in the rules prevents the Executive Branch from asking for supplemental information after review has commenced, as necessary.

We further agree that the submission of information as proposed would be an information collection that is subject to the Paperwork Reduction Act (PRA) and other applicable statutory and regulatory requirements. Thus parties should have the opportunity to comment on the scope of the collection through the PRA process.<sup>24</sup>

Also, rather than the Commission reviewing the content and substance of the responses to questions to be submitted for Executive Branch review, we see no need for the Commission to micromanage in this way, adding another layer of bureaucracy (and more time) to the process. To the extent information is incomplete or missing, the agencies can seek it directly from applicants. At most, the Commission could have applicants certify that they have included all

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<sup>24</sup> Notice ¶ 22.

requested information. In the alternative, as proposed by some commenters, the information could be sent directly to the Executive Branch.<sup>25</sup>

Regarding the proposed certification requirement, we continue to have concerns about the scope of that request, which would be a significant expansion of what is currently required for international authorizations. As an initial matter, it is not clear whether the Commission proposes to require certifications from *all applicants*, as NTIA appears to be asking, or just those with reportable foreign ownership.<sup>26</sup> If the former, the implications would be far-reaching, and would greatly expand the scope of this proceeding without apparent good reason or justification. Forcing certification requirements upon applicants that otherwise would not be subject to Executive Branch review will not “reduce the need for routine mitigation” nor “facilitate a faster response” to the review process.<sup>27</sup> Although addressing legitimate national security and law enforcement concerns are important goals, this proceeding should not be used to undertake such a significant expansion of regulatory authority. If the Commission thinks otherwise, it should initiate a rulemaking for that specific purpose.

Substantively, some of the proposed certifications appear to impose requirements that are outside the scope of Executive Branch or Commission authority, or are otherwise inappropriate as a general matter. For example, most if not all domestic applicants that would be subject to Executive Branch review are already subject to CALEA compliance,<sup>28</sup> so an additional certification requirement might create confusion, and likely could not be enforced as to foreign entities. Moreover, some of the proposed certification provisions may be in conflict with treaty

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<sup>25</sup> *Notice* ¶ 25.

<sup>26</sup> *See Notice* ¶ 30.

<sup>27</sup> *Id.*

<sup>28</sup> Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 *et seq.*

and free trade agreements. Also, as mentioned in comments to the public notice, the Commission may not have clear authority in some instances to require persons to identify, intercept, or provide to law enforcement documentation of communications within and outside the United States.<sup>29</sup> Thus, the Commission must identify clear authority before imposing the proposed certification requirements, and otherwise should tread lightly before mandating these certifications as a basis for grant (or revocation) of an FCC license or authorization, especially for applications otherwise not subject to Executive Branch review.

### III. CONCLUSION

Process reform, when done right, has the potential to save the Commission and the public significant time and resources, and we support this effort to increase the efficiency of the Executive Branch review process. At the same time, we caution that an important guidepost should be whether the benefits of submitting the specific information and certifications requested outweigh the potential costs and burdens.

Respectfully submitted.

By: 

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<sup>29</sup> See USTelecom Comments at 4; Notice ¶ 34.