Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

On behalf of the Executive Branch, the U.S. Department of Commerce, National Telecommunications and Information Administration ("NTIA"), respectfully submits the following comments responding to the above-captioned Notice of Proposed Rulemaking entitled, *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*.[1] The NPRM, in turn, was issued after NTIA submitted a letter to the Commission on May 10, 2016, which proposed certain process reforms to improve the ability of the Executive Branch to review applications that raise national security or law enforcement issues expeditiously and efficiently.[2]

Sections I, II and III below contain comments primarily on the following three elements of the NPRM: 1) additional information proposed to be required from applicants; 2) a proposed new certification requirement for applicants; and 3) proposed establishment of required time

[1] *In the Matter of Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Notice of Proposed Rulemaking (rel. June 24, 2016) ("NPRM").

[2] *See* Letter from Assistant Secretary Lawrence E. Strickling, NTIA, to Marlene Dortch, Secretary, Federal Communications Commission, re: Information and Certification from Applicants and Petitioners for Certain International Licenses and Other Authorizations (dated May 10, 2016), *available at:* https://ecfsapi.fcc.gov/file/60001841509.pdf ("NTIA Letter").

periods for Executive Branch review of applications. Section IV below contains comments on various other matters raised by the NPRM.

I. Additional information required from applicants

1. *Information to be filed with applications*

The Commission proposes to require that applicants submit additional information regarding ownership, network operations and related matters in connection with applications that the Commission currently refers to the Executive Branch for review.[3] The Commission seeks comment on this proposal and any alternative or additional methods to streamline the application process and increase transparency, while providing the Executive Branch with the information needed to conduct its national security and law enforcement review. NPRM ¶ 10. In particular, the Commission seeks comment on whether the use of a publicly available set of standardized questions for which the answers must be provided at the time of filing an application will help streamline the Executive Branch review process. For instance, the Commission asks whether the inclusion of responses to the standardized questions at the time the application is filed will result in more timely review than the use of the individualized questions that are sent to the applicant after the application has been filed. NPRM ¶ 23. The Commission further asks how, if answers are not provided when the application is filed, a later filing would serve the goal of expediting Executive Branch review of the applications. *Id.*

[3] These include "applications with reportable foreign ownership for international section 214 authorizations, applications to assign or transfer control of domestic or international section 214 authority, submarine cable landing licenses and applications to assign or transfer control of such licenses, and petitions for section 310(b) foreign ownership rulings (broadcast, common carrier wireless, and common carrier satellite earth stations)." NPRM ¶ 13.

We concur with the proposal, which is consistent with the request set forth in the NTIA Letter. Currently, the Executive Branch seeks this sort of information directly from applicants after the Commission has referred the applications to the Executive Branch. The Executive Branch generally sends applicants a set of questions seeking information on the applicant's ownership, business model and network operations. We assess that requiring applicants to provide this information with the application will reduce the need for follow-up requests for information, and thereby expedite the overall processing of such applications. We further assess that because such information is necessary to fully review applications, it would defeat the purpose of expediting that review if applicants were to submit applications to the Commission without this information and subsequently supplement their applications with this information, even if they were required to do so within a certain time period.

The Commission further seeks comment on the proposed categories of information, and in particular whether there are more narrowly tailored questions that can adequately serve the goals sought in the NTIA Letter; and whether there are additional questions that should be included, and if so, what those questions are. NPRM ¶ 20. The categories of information set forth in the NPRM are: 1) corporate structure and shareholder information; 2) relationships with foreign entities; 3) financial condition and circumstances; 4) compliance with applicable laws and regulations; and 5) business and operational information, including services to be provided and network infrastructure. NPRM ¶ 18.

We emphasize that at issue in the NPRM are the broad categories of questions proposed, and not the specific questions themselves, which would be proposed through a subsequent process consistent with the Paperwork Reduction Act (PRA) that includes opportunity for public

comment. The five categories of information included in the Commission proposal are clearly relevant to Executive Branch review, and necessary for the Executive Branch to assess whether an application presents national security or law enforcement concerns. Considerations include, but are not limited to, preventing abuses of U.S. communication systems, and protecting the confidentiality, integrity and availability of U.S. communications; protecting the national telecommunications infrastructure; preventing fraudulent or otherwise criminal activity; and preserving the ability to effectuate legal process for communications data. While some information currently required in applications may fall into one or more of the five categories, when specific questions are adopted they can be tailored to avoid seeking information that is duplicative of what is already required.

2. Whether applications should be submitted to the Commission or to the Executive Branch

The Commission seeks comment on whether it should receive and/or review applications seeking international section 214 authorizations or transfers of such authorizations, submarine cable landing licenses, satellite earth stations authorizations, and section 310(b) foreign ownership rulings in the first instance; and further seeks comment on what Commission staff should look for to determine whether the responses are sufficient to find the application acceptable for filing. NPRM ¶ 25.

The Commission should certainly receive applications and review answers in the first instance. The Commission currently and appropriately receives applications, and we do not believe that requiring additional information in the applications provides a basis for changing that practice. Serving as the entry point for applicants is a core Commission function, and

determining the sufficiency of applications – even with the additional information proposed to be added to the applications – is an administrative function best performed by the Commission.

While we do not take a position on what specifically Commission staff should look for to determine whether responses are sufficient to find applications acceptable for filing, we do recommend that the Commission allocate personnel with the requisite subject matter expertise so that the review is sufficient to ensure that all applicants have responded to the Executive Branch's questions and information requests. This initial Commission screening will serve the goal of expediting Executive Branch processing of such applications by reducing the resources that the Executive Branch must devote to making its independent judgment about the sufficiency of the applications referred to it, and reducing instances where the Executive Branch must stop the clock on any required time period for review until it assures itself that any identified defects have been fully cured.

The Commission further seeks comment on alternatives if its staff does not review the responses to the questions. For example, the Commission asks whether it should require a certification that the applicant has provided the responses to the Executive Branch at the time of filing or will do so within a specified period of time; and if so, what an appropriate period would be. The Commission further asks what, if its staff does not review the responses, the effect would be on the proposed time periods for Executive Branch review. In particular, the Commission asks when the proposed 90-day period for the review would start if the Executive Branch has to engage in back and forth with the applicant to get complete responses to the questions. NPRM ¶ 25.

We note at the outset that, as discussed in more detail in Section III(2) below, we have concerns with the approach presented by the Commission to proceed with issuance of a license if the Executive Branch does not respond within a fixed period of time, including any requested extensions. Consistent with the U.S. open investment policy, Executive Branch review considers whether there are national security risks associated with the application or license and requires a careful assessment of intelligence and national security information as well as engagement with the applicants. The Commission has traditionally deferred to the Executive Branch for this review. If the Commission were to proceed with issuance of a license prior to a response from the Executive Branch, there would likely be situations in which the United States would identify national security risks that could not easily be mitigated if the license were issued. The Executive Branch, however, is committed to a timely and expedited review of referred applications or petitions and to close communication with the Commission regarding the status of applications or petitions. We also reiterate that, for the reasons set forth above, the Commission should receive and review answers in the first instance. However, if that function were to be vested in the Executive Branch, we would propose at a minimum that when the Executive Branch flags an application as incomplete, further processing is only undertaken when all relevant information is submitted and the Executive Branch determines that any identified defects have been fully cured.

The Commission seeks comment on any reasons why it should or should not undertake the initial review of the answers for completeness – and in particular, whether there are concerns with its staff receiving, reviewing, storing and forwarding to the Executive Branch such personally identifiable and business sensitive information. In addition to asking what benefits

and burdens are involved in the Commission receiving and reviewing the answers to the threshold questions, the Commission also invites suggestions on heightened confidentiality protections for sensitive and proprietary financial, operational and privacy related information that applicants would provide. NPRM ¶ 29.

We reiterate that, for the reasons set forth above, the Commission should receive and review applications for completeness in the first instance. We assess that the potential sensitivity of information contained in the applications does not affect the Commission's role in serving as the single entry point for applications. Based on our experience over many years, we have confidence that the Commission is capable of implementing whatever measures are necessary to ensure the appropriate security of such information.

II. New certification requirement for applicants

1. Certifications to be submitted with applications

The Commission seeks comment on the three proposed certifications, which are that an applicant will: 1) comply with applicable provisions of the Communications Assistance for Law Enforcement Act (CALEA); 2) make communications to, from, or within the United States, as well as records thereof, available in a form and location that permits them to be subject to lawful request or valid legal process under U.S. law, for services covered under the requested Commission license or authorization; and 3) agree to designate a point of contact located in the United States who is a U.S. citizen or lawful permanent resident for the execution of lawful requests and/or legal process. NPRM ¶ 31.

We concur with the proposal to require certifications, which is consistent with the request set forth in the NTIA Letter. Currently, the Executive Branch often seeks such assurances from

applicants as standard mitigation measures. Requiring applicants to provide these assurances in the form of a certification accompanying the application will reduce the need for negotiation over mitigation measures providing the same assurances, and thereby significantly expedite the overall processing of such applications. In addition, by requiring applicants to certify that they will comply with existing legal requirements under CALEA (if applicable) and provide communications and records thereof upon lawful request, the proposed certification would help ensure that applicants consider and address these law enforcement needs prior to submitting license applications. As one illustration of the benefit of such advance preparation, there may be situations in which emergency requests are served by law enforcement agencies on companies with these sorts of Commission licenses (*e.g.*, with respect to kidnappings or other exigent circumstances) but the company is not equipped to respond in a timely fashion and as required by law. We assess that the certification requirement will help reduce the number of such instances.

2. Whether to apply new certification requirement to all applicants, or only to certain applicants

The Commission seeks comment on the Executive Branch proposal that all applicants seeking an international section 214 authorization or a submarine cable landing license, or applicants seeking to assign or transfer control of such authorizations, and petitioners for section 310(b) foreign ownership rulings (common carrier wireless, common carrier satellite earth stations, or broadcast), be required to make the certifications – not just those applicants with reportable foreign ownership. NPRM ¶ 33. Specifically, the Commission seeks comment on the premise that the certification requirement would address legitimate law enforcement concerns

that should apply regardless of foreign ownership. The Commission asks whether there are reasons the certification requirement should apply only to applicants with reportable foreign ownership; and how requiring certifications from all applicants would expedite the review of applications with reportable foreign ownership. The Commission further asks whether distinguishing between applicants with reportable foreign ownership and those without foreign ownership would raise concerns with respect to any U.S. treaty obligations, such as the non-discrimination/national treatment obligations common to U.S. free trade agreements. More broadly, the Commission invites comment on whether the benefits of the certifications outweigh the burdens related to compliance with the requirement. *Id.*

As stated in the NTIA Letter, we believe the proposed certifications should apply to all applicants, and not just those with reportable foreign ownership. This will limit those circumstances in which exigent law enforcement needs are not met (discussed above). With respect to the potential burden related to compliance with the requirement, for the reasons set forth in Section II(4) below, we assess the burden to be relatively low, and further assess any burden to be offset by the timing and other benefits of the certification requirement.

Similarly, the Commission seeks comment on whether the certifications regarding compliance with CALEA and making communications within the United States, as well as records thereof, available in a form and location that permits them to be subject to lawful request or valid legal process under U.S. law, should be applied to all applicants or only to certain applicants. It also seeks comment on whether these specific certifications should be applied more narrowly than proposed in the NTIA Letter – for example, whether they should only apply to common carrier licensees. (As an illustration, the NPRM cites a comment previously

submitted by the Broadcaster Representatives, which argued that CALEA compliance and intercept capabilities have nothing to do with broadcasting, with broadcast licenses or applicants that file a petition for a foreign ownership ruling under section 310(b).) The Commission seeks comment on considerations regarding the scope and implications of the certification proposal. NPRM ¶ 30.

We assess that while it is possible that not every element of the certification requirement will apply to every applicant, the certification form or directions could allow applicants to state which portions of any of the three the certifications do not apply and why. For example, with respect to the comment submitted by the Broadcaster Representatives, an applicant could certify that CALEA imposes no obligations on those holding only a broadcasting license. We assess that this presents a minimal burden on affected applicants and is much simpler than attempting to carve out certain types of applications and applicants that require either no certification or a modified certification.

3. Whether the certifications would add any new legal requirements

The Commission seeks comment on whether, and in what ways, the proposed certifications might add any new legal requirements beyond those currently set out in the applicable statutes and rules. NPRM ¶ 34. The Commission notes previous commenters' concerns that the certifications would go beyond existing obligations of carriers under current statute and rules. The Commission seeks comment on proposals by some of the previous commenters, such as T-Mobile's proposal that certifications should be limited to compliance with obligations otherwise established in statute or regulation. The Commission also seeks comment on whether there are conflicts between U.S. law and other laws applicable to

communications made to or from other countries or records associated therewith, and if so, how applicants should resolve any such conflicts. The Commission asks whether the proposed certifications would raise foreign policy or other concerns regarding potential reciprocal demands by foreign regulatory authorities on U.S. entities. The Commission further asks whether this burden would vary by the type of license or authorization to which the certification applies. Finally, the Commission asks what experience prior applicants have had with any similar provisions under existing Letters of Assurance (LOAs) or National Security Agreements (NSAs). *Id.*

Insofar as the first of the three certifications commits the applicant to "comply with applicable provisions of" CALEA, it adds no new legal requirements whatsoever. Although existing authorities may not require that applicants make communications and records available in a form and location that permits them to be subject to legal process under U.S. law, or that applicants designate points of contact in the United States for the execution of legal process (which are the subject of the second and third certifications), as a practical matter, these are standard mitigation measures regularly agreed to by applicants during the license approval process. Requesting these certifications at the beginning of the application process will streamline the review process in the vast majority of cases where the certifications are applicable and is expected to improve significantly the efficiency of the process overall. The broad question of whether there exist conflicts between U.S. and foreign law goes beyond this proposed rulemaking.

With respect to the potential effect of the proposed rulemaking on reciprocal demands by foreign governments on U.S. companies, while such an effect is possible, it seems unlikely in

light of the fact that the proposed requirements are modest and designed as process improvements. In addition, the proposed requirements merely institutionalize and make transparent requirements that already exist as a matter of practice and that are applied after the filing of applications.

4. Burdensomeness of the certification requirement

The Commission seeks comment on whether the certification requirement will be burdensome, and if so, the nature and extent of any burden. NPRM ¶ 31. We believe that the added burden on applicants to provide the proposed certifications is low, especially when considered in light of the fact that such assurances are currently often required anyway as a standard mitigation measure. Moreover, we assess that in many cases, the overall burden would actually decrease because it would eliminate the time needed for communications between the Executive Branch and the applicants to arrive at the same result. To whatever extent a burden may in some instances be created by these proposals, however, such burden is greatly outweighed by the significant benefit to many applicants of the more transparent and efficient Executive Branch review that would generally result.

III. Establishment of required time periods for Executive Branch review of applications

1. Timeframe for applicants to provide additional information when applications are incomplete

The Commission seeks comment on what a reasonable time frame should be (such as, for example, seven days) for applicants to respond to Commission requests for additional information when the threshold questions have not been answered or the certification is incomplete. The Commission proposes that failure to respond within the time frame will be

grounds for dismissal of the application without prejudice to refiling. The Commission seeks comment on this proposal and any other recommendations on the process to ensure transparency to the public and applicants, and to promote an efficient review process. NPRM ¶ 37.

We assess that seven days is generally reasonable for applicants to respond to Commission requests for additional information when applicants have not answered threshold questions or have provided incomplete certifications. However, we would also support a mechanism for applicants to request an extension for good cause shown. Beyond that extension period, incomplete applications should be withdrawn and resubmitted when ready (or if necessary, denied without prejudice).

2. Executive Branch processing of applications

The Commission proposes, in keeping with current practice, to continue to request that the Executive Branch notify the Commission within the comment period established by the public notice if the Executive Branch will require additional time to review the application, *i.e.*, beyond the comment period established by the public notice. Any request to defer Commission action beyond the public notice period pending national security, law enforcement, foreign policy and trade policy review would be filed in the public record for the application. If the Executive Branch asks the Commission to defer action on an application beyond the public comment period for the application, the Commission proposes the Executive Branch complete its review within 90 days of the release of the accepted-for-filing public notice. If the Executive Branch completes review prior to the end of the 90-day period, the Commission proposes that the Executive Branch notify the Commission at the time the review is complete. If the Executive Branch requires additional review time, the Commission proposes that the Executive Branch

may receive a one-time additional 90-day extension, provided it explains why additional time is required and provides status updates every 30 days. If the Executive Branch does not notify the Commission within the prescribed period that it is requesting additional time to review the application, the Commission proposes to deem that the Executive Branch has not found any national security, law enforcement, foreign policy or trade policy issues present, and the Commission will move ahead with action on the application. The Commission seeks comment on this proposal and on any alternative proposals for processing such applications. NPRM ¶¶ 36, 40, 43.

We have serious concerns about both the rigid time frame that the Commission proposes for Executive Branch review of the applications referred to it, and the Commission suggestion that it will consider the Executive Branch not to have any concerns with a particular application if it fails to complete its review within the specified time frame. NPRM ¶ 40. The assumption that silence denotes acceptance creates the potential for the license to be granted without full consideration of potential Executive Branch concerns. If the Commission were to proceed with issuance of a license prior to a response from the Executive Branch, there are likely to be situations in which the United States would identify national security risks that could not easily be mitigated after issuance of the license. Although no rule currently requires the Commission to obtain Executive Branch concurrence before proceeding to act on an application, as a matter of practice and comity, the Commission routinely confers with the Executive Branch before proceeding in the absence of an Executive Branch response. The Executive Branch and Commission should have a common commitment to focusing on national security, law enforcement and foreign policy concerns, taking into account our open investment policy.

As for the proposed timetables for Executive Branch review, the United States has a strong and longstanding commitment to safeguarding U.S. national security while maintaining an open investment climate and the Executive Branch recognizes the need for efficient and expeditious action when the Commission seeks the views of the Executive Branch. The Commission has traditionally deferred to the Executive Branch on pending matters that affect national security, as described in FCC Order 97-398, in which the Commission clarified that it, "will continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us." [4] Consistent with the U.S. open investment policy, the Executive Branch review of Commission applications or petitions must consider whether there are national security risks associated with the application and requires a careful assessment of intelligence and national security information, as well as engagement with the applicants.

Applications with substantial foreign ownership raise a complex of critical policy and security concerns that typically require extensive and searching investigation. It is therefore imperative that the Executive Branch has all the time needed to ensure that all national security considerations are fully vetted and that national security concerns are mitigated for each Commission application that it reviews. We also recognize the need for, and are therefore fully committed to a timely and efficient review of referred applications or petitions that is focused, thorough, and concluded in a manner that is proportional to risk. Indeed, the NTIA Letter sent to

[4] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket Nos. 97-14 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891, 23920 ¶ 63 (1997).

the Commission on May 10, 2016, stated that in conjunction with the proposal to require additional information and certifications to be included with applications, the Executive Branch for its part would "ensure that reviews of applications by relevant departments and agencies are promptly coordinated." The Executive Branch is also committed to close communication with the Commission regarding the status of these applications and petitions. Significant Executive Branch resources are required not only to process applications, but also to engage in ongoing monitoring of agreements even after the Commission has granted a license. We are committed to ensuring accountability and transparency as we review applications or petitions referred by the Commission. A Senior Executive Service official in each of the Executive Branch agencies will ensure that the review is conducted in an efficient and diligent manner, that any procedural concerns or delays are rapidly resolved, and that any such delays are promptly communicated.

Moreover, we do not believe it is necessary or helpful to restrict the Executive Branch to an enumerated list of factors that provide a basis for an extension, because the need for extensions may be case-specific and not predictable, and because the notification requirement will provide sufficient accountability and transparency. In certain situations in which particular applications take longer to process than might be desired, there are generally good reasons – for instance, a particular application may present especially complex issues or the need for extensive investigation; an applicant may fail to respond to follow-up questions in a timely and productive manner; or it may be challenging to identify and reach agreement on the appropriate set of measures to mitigate the national security risks. Requiring a Commission determination on whether to grant an extension on a one-time basis would needlessly require the Commission to become involved in national security determinations – a decision to which it has traditionally

deferred to the Executive Branch. Because of this, the Commission should not limit the number of extensions that the Executive Branch may receive, but rather the Commission should grant additional extensions as needed by the Executive Branch to complete its review.

3. Timeframe for applicants to respond to follow-up questions from the Executive Branch, and for negotiation on mitigation measures

The Commission proposes that applicants be required to respond to Executive Branch follow-up questions within seven days; and if an applicant does not provide the requested information on time, the Commission would have discretion to dismiss the application without prejudice. The Executive Branch would need to notify the Commission of an applicant's failure to provide the information, and applicants would have the option of requesting additional time to respond, but an extension beyond the initial seven days would stop the 90-day clock proposed by the Commission until the information is provided. Similarly, the Commission also proposes that upon receiving a draft mitigation agreement, an applicant would have seven days to respond, either by signing the agreement or offering a counter-proposal. An applicant could request an extension beyond the initial seven days, but that would stop the 90-day clock proposed by the Commission. Negotiation of a mitigation agreement could involve several rounds of seven-day review periods (or longer if extensions are sought), if multiple drafts and counter-proposals are exchanged. Failure of an applicant to respond within seven days or any approved extension period would result in dismissal of the application without prejudice. The Commission seeks comment on these proposals. In particular, the Commission requests comment on whether seven days are sufficient time to respond to follow-up questions, and what impact allowing a longer

period would have on the 90-day period for the Executive Branch review proposed by the Commission. NPRM ¶ 39.

While for the most part we agree with the procedures proposed by the Commission with respect to follow-up questions and negotiations on mitigation, with respect to mitigation agreements, the proposal seems to anticipate situations in which even without extensions, the process could include several rounds of seven-day periods to exchange multiple drafts and counter-proposals. A related issue is what happens if negotiations ultimately fail and an applicant refuses to agree to the proposed mitigation terms. We propose that the Commission deny a license in such a circumstance. Alternatively, under its own authority, the Commission could also impose the mitigation measures requested by the Executive Branch as a condition of granting a license.

To allow for situations in which an applicant may need more than seven days to respond to either follow-up questions or proposed mitigation measures, we propose a mechanism whereby an applicant may request an extension beyond seven days. Granting such an extension should be wholly at the discretion of the Executive Branch.

IV. Other Issues

The Commission seeks comment on whether there are situations in which an applicant should not be required to file the additional information proposed by the Commission. For example, the Commission asks whether it should require an applicant to provide such information when the applicant has an existing LOA or NSA and there has been no material change in the foreign ownership since it negotiated the LOA or NSA. The Commission asks whether non-facilities-based carriers should be subject to the information request. NPRM ¶ 21.

Applicants should be required to file this information in all instances, regardless of whether they have existing mitigation in place. The proposed additional filing requires applicants to provide the Executive Branch with updated information, and it reminds all parties of the relevant rules and restrictions. Existing LOAs and NSAs may also not overlap completely with the new information (or certifications) required to be filed, and may not include mechanisms by which the information being requested is provided or updated. In addition, for efficiency, each application should stand on its own – particularly because even if the factors addressed in the LOAs or NSAs have not materially changed, there may be other relevant changes in the overall operating environment (*e.g.*, changes in technology or in foreign affairs) that need to be considered in tandem with the application. Further, depending on the age of the agreement, both the Executive Branch and the applicant benefit from a new review of the change in status. For example, by viewing the applicant in light of the existing compliance history, the monitoring agencies may conclude that conditions to the license are no longer necessary, which would benefit the applicant. In a similar vein, an assessment of new information could lead the Executive Branch to conclude that the risks have changed (whether for the better or worse), and accordingly the mitigation could be tailored to address that change.

With respect to the question of whether there are any situations in which an applicant should not be required to file the information – and in particular, whether non-facilities based carriers should be required to submit the information – we believe that all such applicants should be required to submit the additional proposed information, and indeed the Executive Branch has in the past assessed risk arising from these types of applicants as well. We also note that the

added burden on applicants to provide this information is relatively low, and in some cases the burden is reduced for the reasons discussed in more detail above.

The Commission proposes to adopt requirements that focus on the categories of information to be collected so as to afford the Commission flexibility to vary the specific questions as appropriate to the circumstances at the time. The specific questions would be subject to the PRA process, whereby applicants and other interested parties would have the opportunity to comment. The Commission seeks comment on this proposal. NPRM ¶ 22.

We concur with the proposal. Over time, the Executive Branch has developed questions, tailored to specific applicants and application types, which would likely form the basis for our recommended questions as part of the PRA process. As the NPRM notes, for illustrative purposes the Executive Branch filed sample questions that show the types and extent of information it seeks to obtain. NPRM ¶ 19.

The Commission seeks comment on whether there is information that the Executive Branch may require that cannot be provided when an application is filed, but which could be made available later in the review process. The FCC asks whether an application should be considered complete and acceptable for filing if there is information that an applicant cannot provide at the time of filing. In particular, the Commission asks whether there are specific questions for submarine cable applicants or other applicants that should not be required at the time the applicant files. NPRM ¶ 24.

As a general matter, applications should not be submitted (or if submitted, should not be accepted) until applicants are positioned to provide all necessary information. Normally, whatever time might be saved by getting an application filed would be offset by the loss of time

and other resources that would result from processing incomplete applications. There may be certain limited circumstances, however, in which an applicant, for a specific and justifiable reason, wants to submit an application before it is able to provide responses to all of the required questions. In such limited circumstances, at a minimum the applicant should explain why complete responses cannot yet be provided, and why it is necessary and appropriate to submit the application even in the absence of such information. In addition, the applicant should provide an estimate of when the information will be available, and should provide such information as soon as it becomes available. The Executive Branch should also have discretion whether or not to accept an incomplete application, based on the circumstances and the explanation and other information submitted by an applicant.

The Commission proposes to amend section 0.442 of its rules to make clear that sharing confidential information with Executive Branch agencies, under applicable protections relating to unlawful disclosure of information, is permissible without the pre-notification procedures of that rule. The Commission seeks comment on this proposal. The Commission asks whether the obligations of the various Executive Branch agencies are different than the Commission's obligation to protect its information. If so, the Commission asks what the differences are and what the possible impact is of those differences. NPRM ¶ 28.

While we do not take a position on whether to amend section 0.442, we note that to the extent the Commission notifies the Executive Branch of applicable Commission handling restrictions, in an instance where an applicable Commission restriction were more stringent than an applicable Executive Branch restriction, the Executive Branch would treat the information under the more stringent requirement.

The Commission has encouraged those who have had experience in negotiating routine LOAs that cover compliance with CALEA and other law enforcement assistance requirements to address whether and in what ways and by how much time the proposed certifications might have expedited Executive Branch review of their applications. NPRM ¶ 32.

While situations vary widely and we are not able to provide a standard timeframe (or even an average timeframe), as a general matter, our experience indicates that the necessity for even standard mitigation materially increases the time required to process applications, both in terms of the time for negotiations and the time for interagency coordination that accompanies those negotiations. As noted by the Commission, a substantial proportion of mitigation agreements currently involve issues covered by the proposed certification requirement, and nothing beyond those. NPRM ¶ 32. We therefore assess that even without being able to quantify the amount of time that would be saved during the review process by the proposed certification requirement, such a requirement would significantly expedite the review process.

The Commission seeks comment on whether Executive Branch agencies should identify a single point of contact or point agency for referral of applications and any inquiries the Commission or applicants have during the course of the Executive Branch review process for any given application. In the alternative, the Commission seeks comment on whether each participating agency should identify its own points of contact. NPRM ¶ 37.

We assess that a single point of contact is advisable and should be a designated Executive Branch agency. We suspect multiple agency points of contact will lead to conflict with established interagency coordination procedures. That being said, even if a single agency serves

as the point of contact, that agency may certainly still elect to put another agency directly in contact with the Commission and/or with applicants when the circumstances warrant.

If obtained, the Commission proposes to provide Executive Branch contact information on its website along with the standardized national security and law enforcement questions. The Commission seeks comment on this proposal. NPRM ¶ 37.

We concur in part and non-concur in part with the proposal. We concur that the Commission website should include the standardized national security and law enforcement questions. In addition, we recommend the Commission put not only the questions but also sample answers on its website, to aid applicants in drafting complete applications on the first try, which will also mitigate any challenges associated with these reforms – especially with respect to smaller and less experienced applicants. We non-concur with the proposal to provide Executive Branch contact information on the Commission website, based on our comment above that the Commission should be the sole entry point for applications. Once an application has been deemed complete by the Commission and referred to the Executive Branch, however, we can ensure that applicants have any necessary Executive Branch points of contact.

The Commission proposes to process on a non-streamlined basis international section 214 and submarine cables applications with foreign ownership that are referred to the Executive Branch for review. The Commission seeks comment on this proposal and seeks suggestions on alternative changes to its processing of applications. NPRM ¶ 38. The Commission further proposes to remove from streamlining any applications involving joint domestic and international section 214 authority where foreign ownership of the international 214 authorization alone would be cause for non-streamlined processing. The Commission seeks

comment on this proposal and seeks suggestions on alternative changes to its processing of applications. *Id.*

We concur with the proposals. As a practical matter, we note that most such applications cannot be handled under the current streamlined timeframe and therefore wind up being taken out of streamlined processing in any event. Therefore, the Commission proposal to exempt these applications from streamlining altogether will create realistic expectations and thereby prevent applicants from taking actions in reliance on timeframes that will likely not occur.

The Commission seeks comment on whether there are categories of applications involving foreign ownership that it should generally not refer to the Executive Branch. (For example, currently the Commission does not refer a pro forma notification because by definition there is no change in the ultimate control of the licensee.) One previous commenter asserts that applications for transactions that involve resellers with no facilities should not be referred to the Executive Branch. If the Commission adopted this position, it asks how it would know that no facilities are being assigned/transferred in the proposed transaction. The Commission asks whether there are other categories of applications that it should generally not refer to the Executive Branch, such as when the applicant has an existing LOA or NSA and there has been no change in the foreign ownership since the Executive Branch and the applicant negotiated the relevant LOA or NSA. The Commission also seeks comment on whether it might review and not refer to the Executive Branch certain categories of applications. The Commission asks how this process would work and which categories of applications might be included. The Commission asks whether internal Commission review for national security and law enforcement concerns would serve to expedite the processing of applications. NPRM ¶ 47.

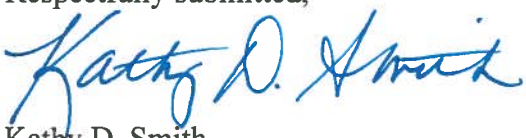
We oppose excluding categories of applications with foreign ownership from the referral process to the Executive Branch. Upon referral, however, the Executive Branch may determine that further review is not necessary in a particular circumstance – for example, where there is attributable foreign ownership associated with the application only because of an intermediary entity incorporated outside the United States but full ownership and control of the company rests with U.S. citizens. Moreover, and as discussed above, existing LOAs and NSAs may also not overlap completely with the new information or certifications required to be filed. In addition, even if the factors addressed in the LOAs or NSAs have not materially changed, there may be other relevant changes in the overall operating environment (*e.g.*, changes in technology or in foreign affairs) that need to be considered in tandem with the application. Further, depending on the age of the agreement, both the Executive Branch and the applicant benefit from a new review of the change in status. For example, by viewing the applicant in light of the existing compliance history, the monitoring agencies may conclude that conditions to the license are no longer necessary, which would benefit the applicant. In a similar vein, an assessment of new information could lead the Executive Branch to conclude that the risks have changed (whether for the better or worse), and accordingly the mitigation could be tailored to address that change.

The Commission seeks comment on its proposal to include applicants' applicable voting interests in the information required. NPRM ¶ 49. We concur with the proposal because voting interests are relevant to Executive Branch determinations and are among the information we currently seek from applicants.

The Commission seeks comment on its proposal to require applications to include a diagram showing the ten-percent-or-greater interests in the applicant. NPRM ¶ 50. We concur

with the proposal, and we currently often request a diagram showing even just five-percent-or-greater interests in the applicant. If the Commission were to similarly require diagrams showing five-percent-or-greater interests in the applicant, that could save additional processing time in situations in which the Executive Branch might need to go back to an applicant and request a diagram with that greater level of detail.

Respectfully submitted,



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