

**Agency to Industry Collaboration
Subcommittee Report
Commerce Spectrum Management Advisory Committee**

June 8, 2016

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Executive Summary

Question: How should traditional regulatory approaches change to better leverage and incorporate direct federal agency-to-industry collaboration, negotiation, and coordination to enable greater spectrum sharing?

Recommendations: The subcommittee engaged in several investigations of potential avenues for changes in the traditional regulatory approaches that would better enable collaboration. In general, the subcommittee believes that there are very few issues affecting collaboration, but has focused its recommendations on enabling better sharing of sensitive information between agency and industry stakeholders. The subcommittee makes the following recommendations:

- **Investigate Other Government/Non-Government Structures For Collaboration** – The National Spectrum Consortium (“NSC”) and the National Advanced Spectrum and Communications Test Network (“NASCTN”) should both be studied by the NTIA as potential models for technical data sharing between government/non-government entities. The subcommittee has determined that both of these entities have been able to allow sharing of protected information.
- **Review Other Government FACA Efforts For Potential Methods For Better Information Sharing** – Other FACA governmental bodies should be reviewed by NTIA that have allowed the sharing of classified/protected information between the government and non-government. The subcommittee has identified examples of advisory committees organized under FACA that have been able to have discussions of secret/classified information.

Responses - Complete

Question

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Response. The subcommittee work evolved from discussions from another subcommittee that was focused on transitional sharing as well as the working group process that was convened under the auspices of the CSMAC to provide technical analyses of sharing in the 1695-1710 MHz and 1755-1850 MHz spectrum bands. These two prior efforts made clear that it would be beneficial to find a way to make discussions between government and industry stakeholders on spectrum issues occur on a regular, routine basis. Such multi-stakeholder discussions were successful in helping to develop collaborative approaches for the 1695-1710 MHz, 1755-1780 MHz and 3550-3650 MHz spectrum bands. Each of these spectrum bands have since had FCC proceedings completed.

The subcommittee also reached out to the Department of Defense, Department of Justice, and the National Oceanic and Atmospheric Administration to discuss collaboration efforts that these Federal agencies have been engaged in with the commercial industry. These discussions revealed that, in general, collaboration among agencies and industry have been possible – but the main issues remained allowing access to classified/secret information when required to perform detailed engineering/technical studies.

Additionally, the subcommittee felt that the other pressing issue revolved around bidirectional sharing of spectrum – an issue that is being handled as a part of a separate CSMAC subcommittee. As such, the subcommittee determined that focusing the work of the group on a specific task – access to sensitive information by the industry – would be the most productive.

In light of the information gathered, the subcommittee believes that there may be an opportunity for NTIA to modify existing regulatory approaches to enable more seamless sharing of sensitive information between agencies and the industry. In particular, the subcommittee makes the following recommendations:

- 1. NTIA should explore whether the NSC or NASCTN models can be utilized for sharing of sensitive information with the commercial industry.**

To further investigate this issue, the subcommittee had separate discussions with the Department of Defense (“DoD”), the National Spectrum Consortium (“NSC”), and the National Advanced Spectrum and Communications Test Network (“NASCTN”) to determine the issues surrounding the sharing of sensitive information.

DoD Discussion. DoD noted that, in general, sharing of sensitive information may be possible so long as the parties to the information were vetted, limited, and subject to non-disclosure agreements. However, this would not extend to classified information – access to that

information would still require a security clearance and a Federal agency sponsor prior to any information being shared.

NSC Discussion. The subcommittee had a conference call with Ellen Purdy and Mica Dolan, representatives of the NSC. The NSC indicated that there were no limitations on any Federal agency from entering into an agreement with the NSC – but that NTIA could not be a part of the consortium. Industry parties would need to be a member of the NSC and the affected Federal agency would need to enter into a formal agreement between it and the DoD. The NSC indicated that the Department of Commerce could set up a similar process or could potentially use the contract already put in place by the NSC to share sensitive information between industry and Federal agencies, if appropriate. The NSC is not a FACA and the work/sharing of information would need to fall within the scope of the NSC contract. Still unclear if classified data could be shared via the NSC process, but clearance issues could at least be potentially worked through the process. NSC noted that its approach was streamlined through an approach called Other Transaction Agreement (“OTA”). Use of the OTA approach facilitates collaboration between industry and government stakeholders, particularly for acquisition. OTAs streamline compliance with the typical Federal Acquisition Regulations (“FARs”) and open up opportunities for non-traditional government contractors to compete for specific federal contracting opportunities. Industry membership in the NSC ranges from \$500 per year for a small company to \$1500 per year for larger companies. Additionally, government contractor requirements may be triggered by membership in the NSC – entities that do not wish to be governed by Federal government contractor requirements will need to consult with counsel to determine if membership in the NSC would render them “government contractors” or not.

NASCTN Discussion. Finally, the subcommittee also talked with the NASCTN. The NASCTN was established by the Department of Commerce (NIST and NTIA) in 2015 to organize a national network of Federal, academic, and commercial test facilities that would provide testing, modeling, and analysis necessary to develop and deploy spectrum-sharing technologies and inform future spectrum policy and regulations.¹ One of the key functions of the NASCTN is to protect controlled information (e.g., proprietary, classified, commercially sensitive) against unauthorized uses and disclosures, pursuant to applicable statutes, regulations, and agreements.² The subcommittee’s discussions with this group would indicate that the framework is in place under NASCTN to allow for the sharing of sensitive information, if appropriate in support of a specific test activity, all under the auspices of NTIA/NIST.

2. NTIA should investigate other government committees operating under the FACA requirements that have been able to allow access to classified information.

The subcommittee’s understanding is that the FACA requirements permit the discussion of classified information under certain limited circumstances. Under the Government in the Sunshine Act of 1976 (Public Law 94-409), FACA meetings that may be closed to the public include those that may have discussions of classified information.³ The subcommittee believes

¹ See <http://www.nist.gov/ctl/nasctn.cfm>.

² *Id.*

³ See

http://www.senate.gov/artandhistory/history/common/investigations/pdf/Gov_SunshineAct.pdf. See also

that the CSMAC could possibly be permitted to be “closed” for discussions of classified information so long as NTIA develops a methodology to ensure that the CSMAC participants in those discussions have the appropriate security clearances and have been sponsored by the relevant Federal agency for access to such information.

For example, the Advisory Committee for Trade Policy and Negotiations (“ACTPN”) is chartered under FACA, but has been able to have public discussions as well as private discussions.⁴ The subcommittee believes that the ACTPN explicitly cross-references another Act (the Trade Act) which may require confidentiality/secretcy of the content of certain meetings. In addition, other Industry Trade Advisory Committees (“ITAC”) are also organized under FACA with some of these committees having a similar ability to hold confidential/secret discussion due to the nature of their deliberations.⁵ The subcommittee recommends that NTIA explore whether the CSMAC charter could be amended to allow for similar discussions, potentially by cross-referencing other Acts that govern how information is exchanged/used with Special Government Employees.

<http://www.gsa.gov/portal/content/101010> (“Advisory committee meetings may be closed or partially closed to the public based upon provisions of the Government in the Sunshine Act of 1976 (Public Law 94-409). Examples of meetings that may be closed under the FACA are: (1) those including discussions of classified information; (2) reviews of proprietary data submitted in support of Federal grant applications; and (3) deliberations involving considerations of personnel privacy.”)

⁴ See <https://ustr.gov/about-us/advisory-committees/advisory-committee-trade-policy-and-negotiations-actpn>.

⁵ See <http://www.ita.doc.gov/itac/index.asp>.