Before the
Federal Communications Commission
Washington, DC 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	)	

SUPPLEMENTAL COMMENTS OF
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

The National Telecommunications and Information Administration (NTIA), as the President's principal adviser on telecommunications and information policy, respectfully submits these supplemental comments in the above-captioned proceeding. Specifically, NTIA is filing this pleading on behalf of the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (known informally as Team Telecom), which is composed of the Departments of Justice, Defense, and Homeland Security (the Committee, or the Agencies). These comments address issues raised in the public draft Report and Order the Commission released on September 9, 2020 (Report and Order),[1] and has scheduled for consideration at the September 2020 Open Commission Meeting on September 30, 2020.[2]

In June 2016, the Commission issued a Notice of Proposed Rulemaking (NPRM) to improve the timeliness and transparency of the process involving the referral of certain

[1] *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Public Draft Report and Order, FCC-CIRC2009-03 (rel. Sept. 9, 2020), https://docs.fcc.gov/public/attachments/DOC-366782A1.pdf [hereinafter "Report and Order" and "Proposed Rules"].

[2] Federal Communications Commission, FCC Announces Tentative Agenda for September Open Meeting, Press Release (Sept. 9, 2020), https://docs.fcc.gov/public/attachments/DOC-366779A1.pdf.

applications with reportable foreign ownership to Executive Branch agencies for assessment of any national security, law enforcement, foreign policy, or trade policy concerns.[3] In August 2016, NTIA submitted comments on behalf of the Agencies in response to the NPRM.[4] In September and November 2016 and in June 2020, NTIA submitted additional comments on behalf of the Agencies responding to issues raised by other commenters.[5]

The current draft of the Commission's Report and Order would: (1) establish timeframes for Executive Branch review largely consistent with Executive Order 13913 (E.O.);[6] (2) exclude certain types of applications from referral to the Executive Branch agencies; (3) require applicants to make certain national security and law enforcement-related certifications; and (4) require applicants with reportable foreign ownership to file answers to standard triage questions with the Committee at the same time they submit their applications to the

[3] *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, 31 FCC Rcd 7456 (2016) [hereinafter "2016 NPRM"].

[4] Comments of National Telecommunications and Information Administration, IB Docket No. 16-155 (filed Aug. 18, 2016), https://ecfsapi.fcc.gov/file/10819006022362/Executive%20Branch%20Comments%20on%20IB%20Dkt%20No.%2016-155.pdf. For convenience, all subsequent citations to Comments or Reply Comments shall refer to pleadings filed in IB Docket No. 16-155.

[5] Supplemental Comments of National Telecommunications and Information Administration (filed June 19, 2020), https://ecfsapi.fcc.gov/file/1061941615891/Supplemental%20Comments%20in%20Process%20Reform%20for%20Executive%20Branch%20Review%20Proceeding%20(IB%20Dkt.%2016-155).pdf; *Ex Parte* Supplemental Comments of National Telecommunications and Information Administration (filed Nov. 10, 2016), https://ecfsapi.fcc.gov/file/111098749340/Executive%20Branch%20Supplemental%20Comments.pdf; Reply Comments of the National Telecommunications and Information Administration Reply (filed Sept. 2, 2016), https://ecfsapi.fcc.gov/file/10902899122508/Executive%20Branch%20Reply%20Comments%20in%20IB%20Dkt.%20No.%2016-155.pdf.

[6] Exec. Order No. 13913, 85 Fed. Reg. 19643 (Apr. 4, 2020) [hereinafter "E.O."].

Commission.[7] NTIA and the Committee respectfully submit the following comments related to the Report and Order and associated Proposed Rules.

A. Categories of Applications Generally Excluded from Referral

The Committee notes that the Report and Order would exclude from the Commission's referral to the Executive Branch agencies several categories of applications, including:

(1) International Section 214 applications where the applicant has an existing mitigation agreement, there are no new reportable foreign owners of the applicant since the effective date of the mitigation agreement, and the applicant agrees to continue to comply with the terms of that mitigation agreement;[8] and

(2) International Section 214 applications from an applicant which the Executive Branch reviewed within 18 months of the filing of the application but did not recommend any mitigation and where there are no new reportable foreign owners of the applicant since that review.[9]

It is the Committee's view that, pursuant to Executive Order 13913, it has the authority to reconsider any application or license that the Committee or Executive Branch agencies have previously reviewed.[10] As the Commission notes in the Report and Order, under E.O. Section 6, the Committee may at any time review an existing license that the Commission had previously referred to the Committee.[11] Therefore, although the Commission will no longer be referring the

[7] *See* Report and Order ¶¶ 16-20, 29-39.
[8] Report and Order ¶¶ 30, 33; Proposed Rule § 1.40001(a)(2)(iii).
[9] Report and Order ¶ 30; Proposed Rule § 1.40001(a)(2)(iv).
[10] *See* E.O. § 6; *see also* E.O. § 10(e) ("The Committee shall monitor any mitigation measures imposed by the FCC as a condition on a license.").
[11] E.O. § 6(a) ("The Committee may review existing licenses to identify any additional or new risks to national security or law enforcement interests of the United States."); *see also* Report and Order ¶ 35.

aforementioned categories of international Section 214 applications to the Committee for review, the Committee requests that the Commission notify the Committee that it is reviewing applications that fall within these categories. Further, the Committee supports the Commission's decision to retain discretion to refer applications in these two categories for review should the individual circumstances warrant.[12]

B. Categories of Information and Standard Questions

The Committee supports the Commission's proposal to draft a set of "Standard Questions" concerning national security and law enforcement issues that relevant applicants will be required to answer directly to the Committee at the same time they submit their applications to the Commission.[13] As the Report and Order notes, NTIA provided detailed, sample triage questions in its 2020 NPRM comments, which the International Bureau could use as the basis for developing those standard questions.[14]

Given the unique nature of each application, however, the Committee notes that it may still request additional information from an applicant through tailored questions before notifying the Commission that an application is complete. However, the availability of applicants' answers to standard national security and law enforcement questions at the inception of the Committee's review will in many cases expedite the Committee's review of referred applications.

[12] *See* Report and Order ¶ 30.
[13] *See id.* ¶¶ 40-53.
[14] *Id.* ¶¶ 45-47.

The Committee notes its understanding that the proposed rules associated with the Commission's development of standard questions,[15] including new rules requiring the Committee to notify the Commission that it has or will send tailored questions to the applicant,[16] will not be applicable until the International Bureau has finalized its standard questions through a notice and comment procedure.[17]

C. Proposed Commission Rules for Secondary Assessments[18]

As an initial matter, the Committee affirms its commitment to evaluating national security and law enforcement concerns as efficiently as possible, to provide predictability for the business community and facilitate the Commission's prompt adjudication of applications. In that spirit, within three months of the E.O.'s issuance, the Committee resolved approximately half of the then-pending applications that had been referred to it and its informal predecessor up to that point, which is a testament to the value of the E.O., its structure, clarity, and empowerment of the Committee. However, the Committee has a number of concerns with the Report and Order's new requirements related to secondary assessments.

Specifically, Proposed Rule 1.40004(c) suggests that the Committee must seek the Commission's approval to conduct a secondary assessment.[19] That would conflict with the

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[15] *See, e.g.*, Proposed Rule 1.40003(b) (providing that the standard questions are available on the FCC's website); *id.* 1.40003(c) (requiring applicants to submit answers to the standard questions directly to the Committee).

[16] *See* Proposed Rule 1.40002(b)(1) (requiring the Committee to inform the Commission in its deferral request whether it will send or has sent tailored questions to the applicant); *see also id.* 1.40004(a).

[17] *See* Report and Order ¶ 45.

[18] Proposed Rule 1.40004(c).

[19] *See id.* ("In cases of extraordinary complexity, when the Executive Branch notifies the Commission that it needs more than the 120-day period for review of the application, petition, or other filing under paragraph (a) of this section, the Executive Branch ***may request*** an additional 90-day period to review the application, petition, or other filing, in accordance with the secondary assessment provisions of Executive Order 13913 . . . .") (emphasis added).

President's direction under the E.O.: per Subsection 5(b)(i)(C), during the initial review period, the Committee may determine "that a secondary assessment of an application is warranted because risk to national security or law enforcement interests cannot be mitigated by standard mitigation measures." When the Committee has so determined, "it ***shall conduct*** such an assessment to further evaluate the risk posed to national security and law enforcement interests of the United States and to determine whether to make any recommendations pursuant to section 9 of this order."[20] The Committee must notify the Commission of its "determination that a secondary assessment is warranted."[21]

1. The "Complete Explanation" Requirement

The Report and Order would also require the Committee to file a notification that the Committee has determined that a secondary assessment of an application is needed that includes "a ***complete explanation*** as to why that is warranted."[22] The Commission acknowledges that this explanation may need to be filed on a confidential basis[23] and justifies this step based on a desire for transparency and the assumption that secondary assessments should be rare.[24] The corresponding Proposed Rule states that "in cases of extraordinary complexity," the Executive Branch "may request an additional 90-day period to review the application," provided that the Committee "[e]xplains in a filing on the record why it was unable to complete its review within the initial 120-day period."[25]

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[20] E.O. § 5(c) (emphasis added).
[21] *Id.*
[22] Report and Order ¶ 85 (emphasis added).
[23] Report and Order n.208, p. 33.
[24] Report and Order ¶ 86.
[25] Proposed Rule 1.40004(c)(1). Additional new requirements for the secondary assessment period are discussed in more detail below.

The Committee believes this proposed notification requirement is problematic for several reasons. First, the requirement to provide a "complete explanation" would require the Committee to provide the Commission with an unfinished draft of its concerns, which neither the Commission nor applicants are entitled to under the E.O., and which should be protected from public disclosure as pre-decisional and deliberative.[26] Second, the additional 90 days is likely to be necessary in precisely those cases where there is a basis to believe that national security or law enforcement concerns warrant more scrutiny, but the Committee is not prepared to make a recommendation. Identifying those inchoate concerns without completing the necessary due diligence risks tainting the administrative record before the Commission with speculation, conjecture, incomplete information, or otherwise inappropriate material, which could later complicate litigation concerning the Committee's recommendation or the Commission's ultimate decision. Third, to the extent the Committee's explanation relies on classified information, requiring the Committee to provide such an explanation to the Commission at that stage of its review requires it, in turn, to obtain authority from the originating intelligence agency to share that information with the Commission, with the potential that such information becomes part of the administrative record and subject to litigation. At a minimum, this will require additional time (meaning that the Committee would need to identify this explanation well before the initial 120-day period has concluded); and if the Committee is unable to obtain permission to share the

[26] *See, e.g.*, E.O. § 9 (outlining procedures through which the Committee and NTIA will notify the Commission of its final recommendations related to application and license reviews); *cf. Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462 (D.C. Cir. 2014) ("A form of executive privilege, the deliberative process privilege covers deliberative, pre-decisional communications within the Executive Branch. One of the rationales for the privilege is to encourage the candid and frank exchange of ideas in the agency's decisionmaking process."). To the extent Proposed Rule 1.40004(d)(1) also requires the Committee to provide detailed status updates every 30 days during the secondary assessment period, the Committee also objects on the basis that this would inappropriately also require it to reveal pre-decisional and deliberative-process analyses.

classified information with the Commission, it may be unable to explain why the secondary assessment is required.

Finally, although secondary assessments under the E.O. may rarely be required, it is premature to make that judgment at this stage, less than six months after the E.O. was promulgated and before the first tranche of applications has been under consideration for even 120 days. The Committee will make such a determination on a case-by-case basis whenever the Committee's initial review indicates that "risk to national security or law enforcement interests cannot be mitigated by standard mitigation measures," as required by the E.O.[27] Such instances may not be restricted to "cases of extraordinary complexity," as the Commission's Proposed Rule presently states.

2. The 210-Day Overall Limit on the Committee's Review

The Committee also has a number of concerns with the Commission's additional new requirement for secondary assessments under the E.O., as detailed in Proposed Rule 1.40004(c)(2), and notes that the Report and Order do not explain the reasoning behind this provision. The Committee encourages the Commission to reconsider including it as drafted in the final rule, because Proposed Rule 1.40004(c)(2) is irreconcilable with the Commission's other proposed rules, the stated intent of the Report and Order, and the E.O. If adopted as drafted, the Proposed Rule will also have a detrimental effect on applicants and the E.O. review process.

Proposed Rule 1.40002(c)(2) allows the Committee to request a 90-day secondary assessment period, provided that the Committee notifies the Commission of its ultimate recommendation

[27] E.O. § 5(b)(i)(C).

> no later than 210 days, plus any additional days as needed for escalated review and for NTIA to notify the Commission of the Committee's final recommendation . . . from the date of the Chair's acceptance of the applicant's, petitioner's, or other filer's complete responses to the tailored questions, provided that the acceptance date is within thirty (30) days of the date of the Commission's referral in accordance with § 1.40002(a), and subject to subsection (e) of this section.[28]

This Proposed Rule establishes a timeline that is inconsistent with the timelines established by the E.O. and Proposed Rules 1.40004(a), (b), and (f). If the Committee Chair notifies the Commission of the Committee's acceptance of an applicant's responses to tailored questions as complete more than 30 days after the Commission's referral, the 210-day overall review period created in Proposed Rule 1.40004(c)(2) will start sooner than the initial 120-day period created in the E.O. and Proposed Rules 1.40004(a) and (b). Additionally, while the 120- and 90-day review periods may be extended in accordance with the E.O. under Proposed Rule 1.40004(f), there is no similar provision to correspondingly extend the 210-day overall review period set forth in Proposed Rule 1.40004(c)(2).

According to Proposed Rule 1.40004(a) and (b) and the Report and Order, if the Committee informs the Commission that it will be sending tailored questions through a timely deferral letter and sends tailored questions to the applicant within 30 days of the Commission's referral, then the Commission's 120-day review period begins at the same time as the Executive Order's 120-day review period, *i.e.*, when the Chair notifies the Commission that the applicant's responses are complete.[29] However, according to Proposed Rule 1.40004(c)(2), the Commission's 210-day overall review period starts "from the date of the Chair's acceptance of . . . complete responses to the tailored questions, ***provided that the acceptance date is within thirty***

[28] Proposed Rule 1.40002(c)(2).
[29] Report and Order ¶ 82; Proposed Rule 1.40004(a), (b); E.O. § 5(b)(iii).

(30) days of the date of the Commission's referral."[30] Accordingly, if the Committee, pursuant to Proposed Rules 1.40004(a) and (b), sends out tailored questions within 30 days of the Commission's referral, but the applicant does not provide a complete response until, for example, 60 days after the Commission's referral, under the E.O. and Proposed Rules 1.40004(a) and (b), the Committee's 120-day review period would start shortly after day 60, when the Chair notifies the Commission that the applicant's responses are complete; however, under Proposed Rule 1.40004(c)(2), the Commission's 210-day overall review period would appear to begin on day 31, even though the applicant's responses to the tailored questions are still incomplete.[31]

Additionally, the Committee is concerned that Proposed Rule 1.40004(f), which states in pertinent part that "in accordance with the Executive Order . . . the Executive Branch may in its discretion extend the initial 120-day review period or 90-day secondary assessment period," is not explicitly applicable to the 210-day review period in Proposed Rule 1.40004(c)(2).[32] The extension of a review period is appropriate in circumstances where granting an applicant's request for an extension of time in which to submit complete responses or information to the Committee is reasonable but will inevitably delay the review process. Proposed Rule 1.40004(c)(2) would penalize the Committee for that delay while, on the other hand, the E.O. and Proposed Rule 1.40004(f) allow the Committee to give the applicants the time they need to answer the questions without taking away from the time the Committee has to review their answers in either the 120- or 90-day periods. If the Committee cannot extend the 210-day

[30] Proposed Rule 1.40004(c)(2) (emphasis added).
[31] *Id.* The Proposed Rule does not explicitly state when the 210-day overall review period actually starts if the Committee does not accept the applicant's responses as complete within 30 days of the date of the Commission's referral; however, the reasonable inference is that the 210-day overall review period would start on day 31.
[32] Proposed Rule 1.40004(f).

overall review period, it will severely limit, if not wholly nullify, the Committee's ability to extend the 120- and 90-day review periods based on an applicant's request for an extension to provide responses. Absent this discretion, the Committee may have to more frequently recommend that the Commission dismiss an application without prejudice due to incomplete or untimely responses under Proposed Rule 1.40004(d)(1).

Accordingly, the Committee recommends that the Commission modify Proposed Rule 1.40004(c)(2) to ensure that the timelines it establishes are synchronous with the timelines provided in Proposed Rule 1.40004(a) & (b), Proposed Rule 1.40004(f), and the E.O. The Committee suggests the Commission make explicit that, in instances where the Committee Chair has notified the Commission in the deferral letter that it intends to issue tailored questions by a date certain (within 30 days of the Commission's referral of an application) and notifies the Commission when it has issued tailored questions within 30 days of the Commission's referral of an application, the 210-day overall review period in Proposed Rule 1.40004(c)(2) will <u>not</u> commence 30 days after the Commission's referral. The Committee respectfully recommends the Commission instead modify the rule to start the 210-day overall review period at the same time as the 120-day review period, "when the Chair of the Committee determines that the applicant's, petitioner's, or other filer's responses to any questions and information requests from the Committee are complete" as detailed in 1.40004(b), in the event the exceptions in 1.40004(e) do not apply. Additionally, the Commission should add a provision to the effect that, in the event the Committee extends the 120- and 90-day review periods, as allowed in Proposed Rule 1.40004(f), the overall 210-day review period would also be extended.

D. Commission's Policy on Major Amendments to Applications Pending Committee Review

Additionally, the Committee identifies some concerns regarding the term "major amendments," as it applies to a Commission application at the time it is undergoing Committee review. The Commission advised in footnote 207 to the Report and Order that:

> The filing of major amendments during the pendency of a referred application will not restart the 120-day review clock. Rather, we expect that the Committee will factor its review of an amendment, including the possibility of follow-up questions for the applicant(s), into its 120-day review (or 90-day secondary assessment, should an amendment be filed during the secondary assessment). The Committee could extend either the initial review or secondary assessment in the course of obtaining additional information from an applicant in connection with the amendment (e.g., ownership information if the amendment pertains to a newly added applicant owner).[33]

The Committee notes that the E.O. has no provision for the Committee to "restart" a review period because of a major amendment to an application. However, that does not mean the potential issues posed by a late-filed "major amendment" should remain unaddressed. The Report and Order does not define "major amendments," but it does provide an example: a new applicant owner. At the extreme, under the Report and Order, if an applicant adds a new foreign owner or, depending on the precise definition of a "major amendment," a new segment and destination to an international submarine cable, on day 119 of the 120-day initial review period or day 89 of the 90-day secondary assessment, it will not need to file a new application, and the Committee cannot otherwise restart the review period. The potential risks of this rule are clear: an applicant could attempt to evade the Committee's review of a major amendment by filing it late in the E.O.'s review periods. Depending on the nature of the additional information for a late-filed amendment, extending the review period is not automatically a panacea and does not

[33] Report and Order ¶ 85, n. 207.

necessarily give the Committee enough additional time to review and analyze the information that the applicant provides.

Therefore, the Committee recommends that the Commission clarify its definition of "major amendments" in the Report and Order and further specify that, at the time it files an amendment, the applicant must also update its responses to the Commission's standard questions and any Committee tailored questions, which is consistent with the new certifications required in the Proposed Rules.[34] The Committee would also request that the Commission outline under what, if any, circumstances an amendment would so significantly alter an application from the original submission that it could result in a request or requirement that the applicant withdraw and refile a new application under the Commission's current rules. In doing so, the Committee recommends the Commission consider how it can ensure that its policy of seeking the Committee's expertise and according deference to its recommendations regarding national security and law enforcement risks associated with certain Commission applications is not circumvented.

E. Commission's Inclusion of CLOUD Act Citation in Proposed Rules

In the Certification regarding the Availability of Communications and Records (Proposed Rules 63.18(q)(1)(ii) and 1.5001(n)(2)(ii)), the Commission includes a list of examples of U.S. laws that might be used to request an applicant's records and communications:

> including but not limited to: (1) the Wiretap Act, 18 U.S.C. § 2510 *et seq.*; (2) the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, amended by the Clarifying Lawful Overseas Use of Data Act, 18 U.S.C. § 2523 *et seq.*; (3) the Pen Register and Trap and Trace Statute, 18 U.S.C. § 3121 *et seq.*; and (4) other court orders, subpoenas or other legal process.[35]

[34] *See, e.g.*, Proposed Rule 1.5001(n)(2)(iv).
[35] Proposed Rules 63.18(q)(1)(ii) & 1.5001(n)(2)(ii).

The Committee notes that the Clarifying Lawful Overseas Use of Data Act, Public Law 115-141, Div. V, 132 Stat. 1213-25 (2018) (hereinafter "CLOUD Act"), amended the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*; the Wiretap Act, 18 U.S.C. § 2510 *et seq.*; and the Pen Register and Trap and Trace Statute, 18 U.S.C. § 3121 *et seq.*, among others. Accordingly, limiting the "amended by the Clarifying Lawful Overseas Use of Data Act, 18 U.S.C. § 2523 *et seq.*" language to the Stored Communications Act but not the other two statutes might cause confusion. Additionally, since the CLOUD Act amends multiple statutes, it is applicable to various sections of Title 18 of the United States Code beyond 18 U.S.C. § 2523 *et seq*. Although that provision is referenced in the Stored Communications Act, the CLOUD Act amendments to the Stored Communications Act are integrated into 18 U.S.C. § 2701 *et seq*. Finally, there have been other amendments to these statutes over the years, so mentioning the CLOUD Act but not, for example, the USA PATRIOT Act of 2001, Pub L. No. 107-56, 115 Stat. 272, might cause further confusion. The Committee respectfully suggests that the Commission remove the clause "amended by the Clarifying Lawful Overseas Use of Data Act, 18 U.S.C. § 2523 *et seq.*"[36]

Respectfully submitted,

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[36] *See id.*