

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

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

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby replies to comments on the Public Notice in the Commission’s pending proceeding regarding Executive Branch review of some FCC applications involving foreign ownership. This Notice incorporated a recent Executive Order establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (Committee) into the record in this proceeding,² sought comment on the Executive Order and asked parties to refresh the record.³

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² Executive Order 13913 of April 4, 2020; Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, 85 Fed Reg. 19643, Sec. 5 (Apr. 8, 2020) (Executive Order).

³ See International Bureau Refreshes Record in Executive Branch Review Process Proceeding (IB Docket 16-155); Adds Executive Order 13913 into Record and Seeks Comment, Public Notice, DA No. 20-452 (Apr. 27, 2020) (Public Notice or Notice). See also *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, IB Docket No. 16-155, 31 FCC Rcd 7456 (2016) (NPRM) (seeking comment on ways to improve the process for executive branch review of certain applications and petitions for declaratory ruling involving reportable levels of foreign investment (together, applications)).

According to multiple commenters, a transparent, predictable and efficient Executive Branch review process is critical to attracting needed foreign investment in communications entities and infrastructure in the United States.⁴ Failing to attract such investment, they observe, presents significant risks to our communications ecosystem, particularly in light of economic challenges resulting from the global COVID-19 pandemic.⁵ Commenters believe that an improved process can appropriately balance the need to review applications to address national security, law enforcement and foreign policy concerns while still completing those reviews in a timely, transparent and predictable manner. NAB urges the Commission to work with the Executive Branch to ensure that the opportunity for reform created by the NPRM and Executive Order does not fall short of what is needed to attract necessary foreign

⁴ See, e.g., Comments of INCOMPAS, IB Docket No. 16-155 (Jun. 18, 2020) (INCOMPAS Comments) at 2 (“the lack of transparency and uncertain timeframes that today accompany the Team Telecom review process likely have delayed and deterred domestic and foreign investment in cables landing in the United States, and in the long run could contribute to decisions to land international submarine cables in Canada or Mexico rather than in the United States”); Comments of EQT AB, IB Docket No. 16-155 (Jun. 18, 2020) (EQT Comments) at 2 (“U.S. sellers are increasingly hesitant to deal with foreign investors where Executive Branch review is a factor. If this trend continues, it could have a harmful impact on the U.S. telecommunications market as business owners confront challenges in attracting and maximizing capital needed to re-invest back into the industry, especially as carriers, both large and small, seek to inject capital into more extensive deployment of broadband across the U.S.”); Comments of CTA, IB Docket No. 16-155 (Jun. 18, 2020) (CTA Comments) at 4 (if reviews are “vague, unpredictable, and/or shrouded in secrecy, the inevitable result is to chill investment activity and complicate innovation”); Comments of Joint international Providers, IB Docket No. 16-155 (Jun. 18, 2020) (Joint International Providers Comments) at 4 (“In light of the state of financial markets and restricted availability of capital as a result of the COVID-19 pandemic, it is even more crucial . . . to accelerate the review process . . .”); Comments of T-Mobile USA, Inc., IB Docket No. 16-155 (Jun. 18, 2020) (T-Mobile Comments) at 9 (“a prolonged review process may delay transactions, investments or market entry that could improve service offerings, expedite technological innovation, and/or increase competition – thereby delaying or denying those benefits to consumers and the country. Over time, such delay and unpredictability may ultimately discourage foreign investment and its accompanying economic benefits, creating its own national security risk.”); Comments of NAB, IB Docket No. 16-155 (Jun. 18, 2020) (NAB Comments) at 3-7.

⁵ *Id.*

investment and enable U.S. communications entities to innovate and deliver world-class services to the American public.

In our reply comments, NAB urges the Commission to work with the Committee to further streamline and expedite Executive Branch review by: (i) developing and deploying standardized, industry-specific questions that applicants can address at the same time they file their FCC applications; (ii) commencing the 120-day initial review period upon receipt of the responses to these standardized questions; (iii) eliminating or truncating the review process for applications involving recently vetted investors and those from allied nations; and (iv) deeming Executive Branch review complete if the Committee has not acted within 120 days or provided written justification for an extension of the review. We also support proposals in the record to create procedural safeguards ensuring due process in connection with the Committee's new authority to review existing licenses.

II. TO MINIMIZE THE POTENTIAL FOR DELAY, THE COMMITTEE SHOULD DEVELOP STANDARDIZED, CLEAR AND INDUSTRY-SPECIFIC QUESTIONS FOR APPLICANTS

To facilitate an expedited review process, the Executive Order establishes a 120-day time limitation on the Committee's initial review of applications. Under the current review process, the Commission refers applications to the Executive Branch, which then provides the applicants with questions that must be addressed before Executive Branch review can begin. NTIA envisions that a similar process will continue to apply following implementation of the Executive Order.⁶ To improve transparency, NTIA provides examples of questions the

⁶ See Supplemental Comments of the National Telecommunications and Information Administration, IB Docket No. 16-155 (Jun. 18, 2020) (NTIA Supplemental Comments) at 6-7.

Committee may ask of applicants, and requests that the Commission post the sample questions on its website.⁷

As commenters observe, the current Executive Branch review process sometimes leaves applicants waiting months after submitting their applications to the FCC to receive a questionnaire from Team Telecom.⁸ If the new Committee process involves the same delays in gathering information, it will undermine the purpose of limiting initial review to 120 days.⁹ The Executive Order's establishment of a new Committee and review process creates an opportunity to further streamline this stage of the process and better effectuate the goals of both the NPRM and the Executive Order.

While NAB appreciates that the Executive Branch supports giving applicants advance notice of the types of information it will require, providing only sample questions falls short of the certainty and predictability needed by applicants and their investors, and builds the potential for significant delays into the process. To truly streamline and expedite review, NAB proposes two reforms. First, NAB renews its call, echoed by other commenters, for the Commission to work with the Committee to make standardized, industry-specific triage questions available for an applicant to answer and submit with their application.¹⁰ Second, applicants' submission of responses to those questions should trigger the start of the 120-day review period, regardless of whether the Committee later requires additional

⁷ NTIA Supplemental Comments at 6-7.

⁸ See T-Mobile Comments at 5-6.

⁹ See NAB Comments at 3-7.

¹⁰ See NAB Comments at 3-7; T-Mobile Comments at 5-6 (providing standardized questions will allow applicants to submit materials to the Committee contemporaneously with filing their application with the FCC allowing for the review clock to start promptly); Joint International Providers Comments) at 4-5 (the Commission and the Committee should establish standard questions for the initial review to accelerate the Committee's review process).

information.¹¹ The use of standardized questions would not prejudice the Executive Branch's ability to ask, receive and review answers to additional questions that the Committee deems necessary to address national security issues during its initial review period. To the extent that an applicant does not submit timely responses to any additional questions, the Executive Order allows for the initial review period to be extended to account for any unreasonable or unexcused delay by the applicant.¹² This process would closely align with the one already used by the Committee on Foreign Investment in the United States (CFIUS), in which a party filing a notice of a particular transaction must provide with its notice certain categories of information described in U.S. Treasury regulations to start the review clock, with CFIUS free to ask additional questions during the review period.¹³

To further streamline the process, NAB reiterates its comments in previous filings that broadcasters should not have to devote time and resources to addressing standardized questions that do not apply to broadcast operations and are therefore irrelevant to Executive Branch review of their applications.¹⁴ Given that the Executive Branch already anticipates

¹¹ This approach also should apply to currently pending applications. NTIA proposes that, following adoption of the Memorandum of Understanding required by the Executive Order, the Committee will review pending applications and "inform the Commission which applications are ready to be reviewed, thereby commencing the 120-day initial review period." NTIA Supplemental Comments at 4. Instead of the 120-day review period commencing on the date that the Committee determines the application is complete, it should commence on the date that applicants submitted those materials.

¹² See Executive Order 13913 at Sec. 5(d).

¹³ See 31 C.F.R. § 800.502 (setting forth the information that must be included with a voluntary notice of a transaction); § 800.502 (CFIUS notice is accepted after Staff Chairperson has determined that it complies with § 800.502, an applicable fee has been paid, and the notice has been disseminated to all members of the Committee).

¹⁴ See NAB Comments at 4; Comments of CBS Corporation, 21st Century Fox, Inc., Univision Communications Inc. and NAB, IB Docket No. 16-155 (Aug. 18, 2016) at 2-5 ; Letter from Mace Rosenstein, Counsel to CBS Corporation, 21st Century Fox, Inc. and Univision Communications Inc., and Erin L. Dozier, NAB, to Marlene H. Dortch, FCC Secretary, IB Docket No. 16-155 (May 23, 2016) at 2 .

applicants answering “specifically tailored” questions,¹⁵ it makes little, if any, sense to require broadcasters to answer additional questions or make certifications that do not even apply to their operations at the time that they submit their applications. Indeed, requiring broadcasters to do so seems pointlessly burdensome and arbitrary and capricious. At the very least, questions and certifications relating to the operation of telecommunications networks (including but not limited to those concerning compliance with CALEA requirements) should not be part of broadcaster applications or submissions to the Executive Branch.

The Executive Branch also has requested that the FCC include additional questions on its forms for applicants to answer to improve the efficiency of the review process.¹⁶ NAB agrees that providing this information at the time an application is filed can streamline and expedite Executive Branch review and does not object to the substance of the additional questions. However, due to the sensitive nature of the information requested, applicants should provide the information directly to the Executive Branch as part of its confidential review process rather than to the FCC as part of its application.

In addition, NAB believes that some of the Executive Branch’s questions should be further refined to align with the goals of the Committee’s review, avoid confusion and enable applicants to answer the questions as accurately and completely as possible. For instance, many of these questions seek information regarding an applicant’s “corporate officers” or “senior-level” officers,¹⁷ which could encompass many individuals for whom the requested

¹⁵ NTIA Supplemental Comments at 7 (stating that the Committee intends to send an applicant a specifically tailored questionnaire after receiving an eligible application from the Commission).

¹⁶ NTIA Supplemental Comments at 8-10.

¹⁷ NTIA Supplemental Comments at 8-10.

information is not necessary to the Committee’s review.¹⁸ NAB proposes that these questions instead be limited to questions regarding executive officers, and that for a publicly-traded parent of a licensee, those officers be limited to those falling under Section 16 of the Securities and Exchange Act and the Securities and Exchange Commission’s implementing rules.¹⁹ Similarly, NTIA’s proposed question asking whether any third-party vendors, associated companies or investors have remote access to the applicant’s “network, systems, or records to provide managed services,” should clearly define terms such as “remote access” and “managed services.”²⁰ Finally, because the Committee’s review is focused on foreign participation, the Commission should narrow the scope of this question to seek information regarding *foreign* investors that have equity interests of five percent or greater in the company, or those that have remote access.²¹ There is no rational basis in this proceeding for requiring broadcasters or other communications providers to disclose information unrelated to foreign investment/participation.

¹⁸ For example, some larger broadcast companies may assign a title of “Vice President” to a relatively large number of individuals within their organizations as a matter of practice and to ensure that these individuals are recognized as having authority to take action on behalf of individual broadcast stations or small groups of stations, even though these individuals do not have authority to bind a company as a whole.

¹⁹ See 15 U.S.C. § 78p; 17 C.F.R § 240.16a-2.

²⁰ NTIA Supplemental Comments at 10.

²¹ Moreover, information provided in response to questions about equity interest holders should be knowledge-qualified (i.e., to the best of the applicant’s knowledge), particularly given that publicly traded companies have limited insight into the identity of beneficial owners of their stock until after holders are required, post-acquisition, to report their ownership of interests above five percent to the Securities and Exchange Commission (SEC). See *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Report and Order, 31 FCC Rcd. 11272, ¶¶ 46-47 (2016) (summarizing SEC reporting requirements for beneficial owners of stock in publicly traded companies).

III. NAB SUPPORTS ADDITIONAL MEASURES TO FURTHER STREAMLINE AND EXPEDITE EXECUTIVE BRANCH REVIEW

Several commenters propose additional modifications to streamline and expedite the Executive Branch review process and related Commission processes while still enabling a complete review. NAB believes these additional measures would serve the public interest by enabling broadcasters and other licensees to attract capital while still ensuring that proposed transactions do not raise foreign policy or national security concerns.

Commenters urge the Commission and Executive Branch to find ways to expedite the review process for entities that have been approved in the recent past,²² or are from countries considered United States allies.²³ As one commenter observes, once the Committee has completed a risk analysis with respect to a potential investor, “it should not need to re-review a subsequent transaction coming on the heels of a recent clearance when there has been no material change to the ownership structure of the purchaser.”²⁴ To avoid this, one commenter proposes that the Commission refer to the Committee only those applications and petitions containing new foreign ownership not previously reviewed, or those containing material changes in foreign ownership.²⁵ Another commenter suggests that the agencies truncate the review process for applicants who have been vetted and approved in connection with a prior transaction within the past 12-18 months.²⁶ Similar processes could be applied for investors from nations that are U.S. allies.

²² Joint International Providers Comments at 5; EQT Comments at 7-8; T-Mobile Comments at 3-4.

²³ Joint International Providers Comments at 5 (citing, for example, Five Eye countries, NATO members or countries with close commercial and political ties to the United States, such as Aruba and Brazil); EQT Comments at 4-7.

²⁴ EQT Comments at 8.

²⁵ T-Mobile Comments at 3-4.

²⁶ EQT Comments at 8.

NAB agrees with these parties that their proposed approaches will not pose material risks to national security or foreign policy and will improve licensees' ability to "attract and maximize capital needed to reinvest in the communications industry."²⁷ We urge the Commission and the Executive Branch to develop a truncated review process for recently approved entities and those from allied nations. This could involve a shorter Committee review or a Commission decision not to refer certain applications to the Committee.

Commenters emphasize that completion of Executive Branch review within the initial 120-day review period should be the prevailing norm, with few exceptions, and observe that the Commission can play a helpful role in ensuring adherence to the Executive Order's 120-day time limit for initial review.²⁸ NAB agrees with these proposals and urges the Commission to implement them. Specifically, commenters propose that, if the Committee has not taken any action with respect to a proposed application by the end of the 120-day review period, its approval should be deemed granted by the Commission, and the Commission should move forward with its own processing of the application.²⁹ Commenters

²⁷ EQT Comments at 8. Truncating reviews for recently vetted investors and those from allied nations will give reviewing agencies more time and resources to scrutinize those transactions that actually pose potential national security risks. *Id.*

²⁸ Joint International Providers Comments at 3 (" . . . in certain exceptional cases, the Committee may require to use the additional 90-day extension allowed by the Executive Order; however, the use of this extension should be the exception not the norm."); T-Mobile Comments at 7-10 (expressing confidence that the Committee can complete its initial review in even less than 120 days, urging the agencies to apply a 90-day shot clock, and stating that extensions "should be used only when the Committee must review complex issues for which the initial review period is insufficient.").

²⁹ Joint International Providers Comments at 3 (the Commission should "adopt the timelines set forth in the Executive Order as *maximum* periods for the Committee to respond . . . The Committee's failure to act within such 120-day time frame shall be deemed as the Committee's clearance of the application."); INCOMPAS Comments at 2 ("If the Committee does not raise concerns or request additional time for its review within the initial 120-day period, then the Commission should deem the review complete and without objection from the Committee, and the Commission should proceed to act on the application or petition accordingly."); T-Mobile Comments at 10.

also propose that, in the event that the Committee believes it will be unable to complete its review within the 120-day period, the Committee should provide both the Commission and the applicant a written explanation of the reasons an extension is needed.³⁰ To facilitate this, one commenter urges the Commission to adopt rules clarifying that it will move forward to act on an application irrespective of the Committee’s recommendation if the Committee either: (1) has not responded by an applicable deadline; or (2) fails to provide the Commission with a substantive, appropriate and application-specific concern to justify the one-time 90-day extension.³¹ NAB agrees that these proposals would foster expedited reviews while still providing the Committee with a full opportunity to review proposed foreign investment in licensees. Adoption of the proposals will make the 120-day timeline for initial review more meaningful and better effectuate the purpose of the Executive Order. Accordingly, NAB supports adoption of rules to implement these proposals.

Commenters also discuss the Commission’s role with respect to the Committee’s new authority to evaluate existing FCC licenses to identify any new risks to national security or law enforcement interests of the United States. Commenters correctly observe that although substantive expertise on national security and law enforcement interests rests with the Executive Branch, the Commission still has an important procedural role to play. Specifically, Section 6 of the Executive Order establishes a “Committee License Review Process,” which enables the Committee to “review existing licenses to identify any additional

³⁰ T-Mobile Comments at 10; Joint International Providers Comments at 3 (“the Committee should provide the Commission and the applicant an explanation of the rationale for the extension and endeavor to conclude the process as expeditiously as possible”). T-Mobile further states that factors unrelated to the actual application, such as a heavy workload for the Committee, should not serve as a permitted basis for extensions. T-Mobile Comments at 10.

³¹ T-Mobile Comments at 10.

or new risks to national security or law enforcement interests of the United States” upon a majority vote of the Committee Members.³² The Committee is required to promptly notify Committee Advisors of its plans to conduct such review, but the FCC is not an Advisor, and the Committee is not otherwise required to notify the Commission of its plans.³³ Section 6 significantly expands the scope of Executive Branch review, which traditionally has been limited to pending applications and petitions. Absent appropriate procedural safeguards, this new authority could create a substantial deterrent to foreign investment in United States communications entities, because securing such investment could attract scrutiny long after the investment is approved and, ultimately, jeopardize the centerpiece of a licensee’s operations—its FCC license.

Commenters propose several procedural safeguards to help ensure that reviews of existing licenses are consistent with the Communications Act of 1934 (Act), the Administrative Procedure Act (APA), due process requirements and the public interest. T-Mobile urges the Commission to work with the Committee to ensure it receives notice of Committee plans to conduct reviews of existing licenses, observing that the Commission might otherwise learn of such reviews only after an extensive record has been compiled concerning the license at issue.³⁴

Commenters also propose steps to ensure that affected licensees are afforded due process.³⁵ The “‘core requirements’ of due process” are “‘adequate notice . . . and a

³² Executive Order, Section 6(a)-(b).

³³ Executive Order, Section 6(c).

³⁴ T-Mobile Comments at 12-13.

³⁵ T-Mobile Comments at 11-13 (it is “imperative that the Commission make clear that when it receives a request from the Committee to revoke or condition an existing FCC license it will review the request critically and adhere to strict due process procedures”); CTA Comments at 7-8.

genuine opportunity to explain,”³⁶ and in the absence of “fair notice,” an “agency may not deprive a party of property.”³⁷ An affected licensee therefore must be afforded a full opportunity to know the substance of the concerns raised against it and to respond to those concerns before a license is conditioned, denied or revoked.³⁸ And in light of the Commission’s affirmative public interest finding that the grant, assignment or transfer of a license serves the public interest, the Commission’s standards for an existing license to be conditioned or revoked should be very high.³⁹

NAB agrees with these commenters’ proposals, as they are required by law and decades of judicial precedent involving the FCC specifically. Since the earliest days of broadcasting, the courts have found that FCC “proceedings must satisfy the ‘pertinent demands of due process.’”⁴⁰ The courts, moreover, have reversed various FCC actions, including dismissing and denying applications, where the Commission failed to meet its due process/notice obligations.⁴¹ NAB accordingly urges the Commission to work with the Executive Branch to obtain notice of the commencement of any Section 6 reviews; to ensure that licensees subject to those reviews have adequate notice and an opportunity to be

³⁶ *Proper v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991), quoting *Gray Panthers v. Schweiker*, 652 F.2d 146, 165 (D.C. Cir. 1980).

³⁷ *General Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

³⁸ T-Mobile Comments at 12-13. See also CTA Comments at 7-8 (urging FCC to provide notice of the Committee’s intent to examine a license and to seek comment from both licensees and members of the public, consistent with its obligations under the APA).

³⁹ T-Mobile Comments at 12.

⁴⁰ *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 802 (D.C. Cir. 1948), quoting *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933) (stating that whether the Federal Radio Commission, the pre-Act predecessor of the FCC, acted within its statutory authority and whether its proceedings satisfied the pertinent demands of due process “are appropriate questions for judicial decision”).

⁴¹ See, e.g., *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (noting that the FCC “[c]onced[ed] that the denial of a broadcast license triggers due process protection”); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

heard, as required by due process; and to seek public comment on any actions the Commission may be requested to take as a result of Section 6 reviews.

IV. CONCLUSION

NAB supports additional reforms to promote the goals of the NPRM and Executive Order. Access to international capital is critical to broadcasters' ability to innovate and compete, particularly given the economic challenges resulting from COVID-19. We urge the Commission to work with the Committee to further streamline and expedite Executive Branch review by: (i) developing and deploying standardized, industry-specific questions that applicants can address at the same time they file their FCC applications; (ii) commencing the 120-day initial review period upon receipt of the responses to these standardized questions; (iii) eliminating or truncating the review process for applications involving recently vetted investors and those from allied nations; and (iv) deeming Executive Branch review complete if the Committee has not acted within 120 days or provided written justification for an extension of the review. We also support proposals in the record to create procedural safeguards and guarantees of due process in connection with the Committee's new authority to review existing licenses.

Respectfully submitted,

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