

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)
)

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

1 M Street, SE
Washington, DC 20003
Rick Kaplan
Jerianne Timmerman
Erin Dozier
Emily Gomes

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE QUESTIONNAIRE SHOULD ONLY GATHER INFORMATION ON INTERESTS THAT
CONFER CONTROL OR INFLUENCE OVER THE PETITIONER OR LICENSEE 3

 A. The Commission Should Modify Certain Definitions and Questions to Closely Tailor its
 Inquiries to Relevant Interests 3

 B. The Questionnaire Should be Clarified or Modified to Ensure that Petitioners Can
 Provide Clear, Accurate and Relevant Responses 8

III. THE COMMISSION SHOULD ELIMINATE QUESTIONS CONCERNING ACTIVITIES THAT ARE
BEYOND THE SCOPE OF COMMISSION AND COMMITTEE REVIEW..... 9

IV. THE COMMISSION SHOULD DEVELOP A FURTHER STREAMLINED QUESTIONNAIRE FOR
“FOLLOW-ON” PETITIONS AND MAKE OTHER PROCEDURAL CLARIFICATIONS11

V. CONCLUSION.....12

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**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby responds to the Public Notice in the Commission’s pending proceeding regarding Executive Branch review of certain FCC applications and petitions involving reportable foreign ownership. Last year, the Commission adopted an order establishing a new process for transaction reviews by the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (Committee).² The Notice seeks comment on a proposed set of standardized national security and law enforcement questions that applicants/petitioners will be required to answer as part of the review process.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 *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Report and Order, IB Docket No. 16-155, 35 FCC Rcd 10927 (2020) (Order).

³ See International Bureau Seeks Comment on Standard Questions for Applicants Whose Applications Will be Referred to the Executive Branch for Review Due to Foreign Ownership, IB Docket No. 16-155, DA No. 20-1545 (Dec. 30, 2020) (Public Notice or Notice).

As discussed below, NAB applauds the efforts of the Executive Branch and the Commission to streamline and standardize the review process in several ways, including making available standard questions for applicants/petitioners.⁴ We urge the Commission to adopt modifications to the proposed questionnaire to ensure that the questions capture information about those ownership interests and activities relevant to the Committee's review, and are no more burdensome and time-consuming than necessary. Information concerning holders of interests or relationships with other parties that, by definition, cannot influence a petitioner should be excluded from the scope of the questionnaire.

The questionnaire also should reflect that issues beyond the scope of the Commission's review of an application/petition are not properly within the scope of Committee review. The Committee's review of applications and petitions stems from FCC referral of such filings, and the Committee's review should analyze whether the proposed transaction will implicate national security, law enforcement, foreign policy or trade policy issues arising from the assignment or transfer of the broadcast license, not from a broadcast licensee's other lines of business, if any.

Finally, it is important that the questions are applied fairly across all industry segments. Section 310(b) petitions filed by broadcasters are no more likely to raise issues of concern to the Committee than applicants in the telecom or wireless industries. Singling out broadcasters for heightened scrutiny without a rational basis for doing so would be contrary to the Administrative Procedure Act (APA).

⁴ See Comments of NAB, IB Docket No. 16-155 (Jun. 18, 2020) (NAB 2020 Comments) at 3-7; Reply Comments of NAB, IB Docket No. 16-155 (Jul. 2, 2020) (NAB 2020 Reply Comments) at 4-7; Order, 35 FCC Rcd at 10941, ¶ 40.

II. THE QUESTIONNAIRE SHOULD ONLY GATHER INFORMATION ON INTERESTS THAT CONFER CONTROL OR INFLUENCE OVER THE PETITIONER OR LICENSEE

A. The Commission Should Modify Certain Definitions and Questions to Closely Tailor its Inquiries to Relevant Interests

NAB proposes several modifications to the questionnaire to allow the Committee to evaluate ownership and other interests relevant to its review, rather than collecting information on parties that lack influence or control over licensee or parent company operations. Since these interests cannot implicate national security, law enforcement, foreign policy or trade policy concerns, eliminating them from the questionnaire will streamline both the Committee's review and the burdens imposed on broadcast petitioners.

Officers/Directors. First, NAB proposes that the Commission modify its definitions of "Corporate Officer"⁵ and "Senior Officer."⁶ NAB previously proposed narrowing the definition of the term "officer" to include only executive officers and, for a publicly-traded parent of a licensee, to define this term consistent with Section 16 of the Securities and Exchange Act and the Securities and Exchange Commission's (SEC) implementing rules.⁷ As we explained previously, some broadcast companies assign a title of "Senior 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 act on behalf of individual broadcast stations or small groups of stations, even though these individuals do not have

⁵ The questionnaire defines a "Corporate Officer" as "any Individual hired or appointed by the Entity's board of directors that has actual or apparent authority to exercise day-to-day management responsibilities over an Entity." Attachment E at 3.

⁶ The questionnaire defines a "Senior Officer" as "the Chief Executive Officer, President, Chief Financial Officer, Chief Information Officer, Chief Technical Officer, Chief Operating Officer, Senior Vice President, or any other similarly situated Individual that has actual or apparent authority to act on behalf of the Entity." Attachment E at 4.

⁷ NAB 2020 Reply Comments at 6-7, *citing* 15 U.S.C. § 78p; 17 C.F.R § 240.16a-2.

authority to bind the company as a whole.⁸ Treating all individuals with the title of “Senior Vice President” as corporate or senior officers for purposes of the triage questionnaire is unnecessary because all such individuals do not have the authority to make executive decisions at the company level. Significantly, none of the questionnaires for applications/petitions in other services propose requiring disclosure of information concerning Senior Vice Presidents.⁹ Imposing this obligation exclusively on broadcasters places an undue and unjustified burden on broadcast petitioners.

Insulated Interests. The Commission also should modify the definition of the term “Ownership Interest” to exclude any insulated limited partners, insulated members, private company shareholders subject to agreements limiting their rights to standard investor protections, and public company shareholders that are “passive” investors with interests below 10 percent.¹⁰ This would conform the disclosures required for the questionnaire to those required for the filing of Section 310(b) petitions under the Commission’s rules.¹¹ Section 1.5001 of the rules requires specific approval of a foreign investor to hold more than 5% of voting or equity interest in a licensee, unless the investor: (i) meets applicable standards for passive investors under SEC reporting requirements for public companies; (ii) is subject to limitations in a shareholder agreement (for private corporations); or (iii) meets

⁸ NAB 2020 Reply Comments at 7.

⁹ See Notice at Attachments A (International Section 214 Authorization Application), B (Application for an Assignment or Transfer of Control of an International Section 214 Authorization), C (Submarine Cable Landing License Application), D (Application for Assignment or Transfer of Control of a Submarine Cable Landing License) and F (Section 310(b) Petition for Declaratory Ruling Involving a Common Carrier Wireless or Common Carrier Earth Station Licensee).

¹⁰ Attachment E at 4. The Commission also should modify the discussion of the term “Ownership Interest” appearing as a sub-bullet in the definition of the term “Controlling Interest”). *Id.* at 3.

¹¹ See 47 C.F.R. §1.5001(i)(1)-(3).

the insulation criteria for limited partnerships or limited liability companies.¹² Modifying the questionnaire's definitions to eliminate these interests, which, by definition, cannot influence a parent company or licensee, will enable the Committee to focus its review on those foreign ownership interests that may confer such influence. This modification also will avoid imposing undue burdens on broadcast applicants. Relatedly, the Commission should revise the questionnaire to clarify that information is not required for existing owners that are planning to sell their entire interest or decrease their interest below the five percent threshold as part of the transaction. Parties that will not hold a five percent or greater interest in a licensee following the transaction connected to a 310(b) petition are not relevant to Committee review.

Equity Interests of Five Percent or More. Because the Committee's review is focused on foreign participation, NAB again urges the Commission to narrow the scope of the questionnaire to seek information regarding *foreign* investors that have equity interests of five percent or greater in the licensee, or those that have remote access.¹³ The Commission should modify the definition of the term "Ownership Interest" (and the discussion of the term "Ownership Interest" as a sub-bullet in the definition of the term "Controlling Interest") to reflect this change.¹⁴ The record in this proceeding provides no rational basis for requiring broadcasters or other communications providers to disclose information unrelated to foreign investment/participation.

Foreign Parties. The Section 310(b) questionnaire contains an expansive definition of "Foreign Party" in Question 3 and incorporates this term in numerous subsequent questions.

¹² *Id.*

¹³ NAB 2020 Reply Comments at 7.

¹⁴ Attachment E at 3, 4.

By incorporating Foreign Parties throughout the questionnaire, the questions essentially equate such parties with a licensee's largest interest holders, officers or directors. Given the nature of the relationships as defined in the questionnaire, Foreign Parties cannot exert any influence or control over a licensee. Moreover, the limited nature of some of the relationships covered by the very broad definition of Foreign Party would make it extremely burdensome for licensees to address such detailed questions about these entities. The Commission remove the term Foreign Party from the questionnaire except for Question 3 and impose a time limit on its scope.

The questionnaire asks whether any Relevant Party (i.e., the proposed broadcast licensee, its parent company, and any Individual or Entity with an Ownership Interest in either the licensee or the parent company) has existing, planned, or prior relationships, partnerships, funding arrangements, or service contracts, directly or indirectly, with any of the following:

- a) Foreign companies or foreign Entities;
- b) Any Foreign Government or any Entity owned or controlled by a Foreign Government;
- c) Any foreign political entities or Foreign Political Parties;
- d) An Individual or Entity outside the United States, not a citizen of, or domiciled within, the United States, or not subject to the jurisdiction of the United States, and not having a principal place of business or presence in the United States.¹⁵

The proposed questionnaire defines each of these entities as a "Foreign Party" for purposes of responding to subsequent questions, thereby treating Foreign Parties in the exact same manner as Relevant Parties.¹⁶ By including Foreign Parties in subsequent questions, the questionnaire appears to require a broadcaster to gather extensive, detailed information on each Foreign Party, even if it has a relatively insignificant relationship with that party, such as a one-time agreement for access to a location for the production of a

¹⁵ Attachment E, Question 3.

¹⁶ Questions 11-21, 26, 31-34.

single program. There is no rationale for treating an entity that may have a single program production agreement with the licensee or parent in the exact same manner as a licensee's officers, directors or major shareholders. Such an agreement simply cannot confer sufficient influence to justify the burden of requiring broadcast petitioners to obtain and file such extensive information. This information may also be difficult or impossible to obtain from a third party that neither the licensee nor its parent exerts any control over. Moreover, as with several other questions, the proposed questionnaire singles out broadcasters for these extensive disclosures while exempting all other communications applicants/petitioners from similar treatment.¹⁷ NAB urges the Commission to eliminate any references to Foreign Parties in Questions 11-21, 26 and 31-34. Should the Committee require additional information on any relationships with Foreign Parties, it can request the additional information from the petitioner.

NAB also is concerned that the definition of "Foreign Party" contains no time limitation. Questionnaires associated with Committee reviews for most other services only require the applicants to identify existing or planned relationships – not *prior* relationships – with foreign entities.¹⁸ NAB proposes that the Commission modify the scope of this question to eliminate prior relationships. If the relationships at issue are not current or planned, then they do not create opportunities for foreign entities to impact broadcaster operations and are therefore irrelevant to Committee review. If the Commission does not believe it should eliminate all prior relationships from the definition of "Foreign Party," it should at least establish a defined "look-back" period of six months prior to the date a Section 310(b) petition is filed.

¹⁷ See Notice at Attachments A, B, C, D and F.

¹⁸ See Notice at Attachments A, B, C, and D.

B. The Questionnaire Should be Clarified or Modified to Ensure that Petitioners Can Provide Clear, Accurate and Relevant Responses

Limit PII. The proposed questionnaire requires an applicant to disclose personally identifiable information (PII) concerning a broad array of investors.¹⁹ In some instances, such information is not known to the licensee or its parent company, and a petitioner may be unable to obtain it. This will be particularly problematic with respect to larger, publicly traded investors. Accordingly, NAB urges the Commission to revise the questionnaire to limit the requirement to disclose information about publicly traded shareholders to publicly available information (e.g., if a publicly traded investment firm is a shareholder of a broadcast 310(b) petitioner, the petitioner does not have to obtain PII of the firm's investors but can instead provide information on the firm's officers and directors based on publicly available information).

Relatedly, Question 19 requires a petitioner to identify and provide PII for any non-U.S. individual who has access to “[p]hysical facilities or equipment under the Relevant Party’s control.” This question appears to sweep in virtually any non-U.S. employee, all of whom presumably have access to “physical facilities” of the Relevant Parties, and thus seems to require each Relevant Party to supply PII on every single non-U.S. employee. This would be particularly burdensome for applicants/petitioners that have foreign subsidiaries. NAB proposes that this question be narrowed to describe specific types of facilities or equipment that would give rise to potential Committee concerns and to focus on U.S. facilities only. Providing sensitive PII for every non-U.S. employee would be overly broad, unduly burdensome and intrusive.

¹⁹ See e.g., Attachment E, Questions (2)(b)(i) and 24(b).

III. THE COMMISSION SHOULD ELIMINATE QUESTIONS CONCERNING ACTIVITIES THAT ARE BEYOND THE SCOPE OF COMMISSION AND COMMITTEE REVIEW

The questionnaire should reflect that issues beyond the scope of the Commission's review of an application/petition also are not properly within the scope of Committee review. The Committee's review of applications and petitions stems from FCC referral of such filings, and the Committee's review should analyze whether the proposed transaction will implicate national security, law enforcement, foreign policy or trade policy issues arising from the assignment or transfer of the broadcast license, not from other business lines a broadcaster may be involved in or activities the FCC cannot lawfully regulate. For these reasons, NAB proposes that the Commission eliminate questions 29, 30, and 34 in their entirety because they concern issues outside of the scope of the Commission's jurisdiction and are thus not properly the subject of Committee review.

Question 31 asks the respondent to "[d]escribe the intended viewer/listener base of the Licensee's broadcasts, primary language spoken of the target audience, and other demographics." It further seeks information on "how services are offered to each category of viewers/listeners and platform[s]" and "[i]dentification of any specific business or economic sectors that supply advertising" to the licensee and its parent company. As the Commission and courts have repeatedly held, both the First Amendment and Section 326 of the Communications Act prohibit the Commission from engaging in censorship or dictating what content stations air, with very few exceptions (e.g., political broadcasting, indecency and obscenity).²⁰ The Commission does not regulate the formats stations choose or which

²⁰ Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. See also *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 650 (1994) ("the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."); *id.* at 651

advertising they air, and has repeatedly declined to substitute its judgment concerning programming for that of the licensee. Given the backdrop of the First Amendment and the Section 326 prohibition on censorship, questions concerning a station's format, target audience, and sources of advertising are not appropriate for Executive Branch review. Whether a petitioners' broadcast signals are carried via cable or satellite (Question 21) is also simply irrelevant to FCC or Committee review.

Question 34 asks for information on whether certain parties "that offer application or web-based content collect, process, or store any U.S. subscriber data."²¹ It asks the applicant/petitioner to identify the types of data collected for each subscriber and who has access to such data, including whether it is shared with third parties and whether there are any limitations on third parties' use of the data, among other questions. Customer data privacy and security are beyond the scope of the Commission's review of broadcast transactions and Section 310(b) petitions. Although the Communications Act and the Commission's rules require telecommunications carriers to protect customer proprietary network information (CPNI), there is no comparable statutory framework or rule that applies to data privacy or security in the broadcast context. Because the Commission does not regulate consumer data privacy or security of broadcast audiences and has no authority to

("[O]ur cases have recognized that Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126 (1973) (describing "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" as a "problem of critical importance to broadcast regulation and the First Amendment"); *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) (although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.").

²¹ Attachment E, Question 34.

review broadcasters' data privacy and security practices either generally or in connection with proposed transactions, Committee review of broadcasters' data privacy and security practices in the context of Section 310(b) petitions would be inappropriate.

IV. THE COMMISSION SHOULD DEVELOP A FURTHER STREAMLINED QUESTIONNAIRE FOR "FOLLOW-ON" PETITIONS AND MAKE OTHER PROCEDURAL CLARIFICATIONS

NAB proposes one additional modification to the questionnaire itself and a clarification concerning placement of applications/petitions that are the subject of Committee review on public notice. First, if a petitioner that has previously been granted a declaratory ruling approving foreign investment needs to file an additional petition to obtain specific approval of a new investor, NAB proposes that the petitioner be permitted to file a streamlined questionnaire seeking information only on that new investor, rather than having to complete the questionnaire with respect to all Relevant Parties. This will enable the Commission and the Committee to thoroughly review the new investor, without imposing the burdens of filing information concerning all the parties that were previously reviewed and approved by the Commission and the Committee.

NAB also seeks clarification about the timing of the release of public notices of applications/petitions. In the Order, the Commission stated that its formal referral of an application/petition to the Committee for review will be the issuance of a public notice that an application/petition has been accepted for filing and discussed other procedural steps to govern communications between the Commission and the Committee.²² In addition to these helpful processes, NAB urges the Commission to clarify that it will issue public notices accepting applications/petitions for filing promptly and independently of the Committee's review of the questionnaire responses. So long as an applicant/petitioner has provided its

²² Order at ¶¶ 81-84.

questionnaire responses to the Committee, there is no need for the Commission to delay issuance of a public notice until the Committee confirms that responses are complete.

V. CONCLUSION

NAB appreciates the Commission's ongoing efforts to create a transparent, time-limited Executive Branch review process, including its adoption of standard questions for applicants and petitioners. We urge the Commission to make minor changes to the proposed standard questions to ensure that the questionnaire requires information about only those interests and activities relevant to the Committee's review. These modifications also will streamline the Committee's review and avoid undue burdens on broadcast petitioners, without impeding the Committee's ability to make additional inquiries after the initial questionnaire is completed. NAB's proposed modifications also will ensure that broadcast applicants and petitioners are not needlessly and unjustifiably subjected to greater scrutiny than applicants and petitioners in other communications services.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1 M Street, SE
Washington, DC 20003
(202) 429-5430



Rick Kaplan
Jerianne Timmerman
Erin Dozier
Emily Gomes

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