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	)	

REPLY 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 replies to comments submitted in response to the above-captioned Notice of Proposed Rulemaking ("NPRM").[1] The NPRM 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 and law enforcement issues expeditiously and efficiently.[2]

On August 18, 2016, the Executive Branch, again through NTIA, submitted initial comments in response to the NPRM.[3] A range of other entities also submitted comments,

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[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) , *available at* https://ecfsapi.fcc.gov/file/0624291751645/FCC-16-79A1.pdf.

[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) ("NTIA Letter"), *available at* https://ecfsapi.fcc.gov/file/60001841509.pdf.

[3] Comments of National Telecommunications and Information Administration, IB Docket No. 16-155 (filed Aug. 18, 2016) ("NTIA Comments"), *available at* https://ecfsapi.fcc.gov/file/10819006022362/Executive%20Branch%20Comments%20on%20IB%20Dkt%20No.%2016-155.pdf. For convenience, and unless otherwise noted, all subsequent citations to "Comments" shall refer to pleadings filed on August 18, 2016, in IB Docket No. 16-155.

including telecommunications companies, trade associations, and law firms, which provided valuable perspectives on the economic implications of both the current process by which the Executive Branch processes applications referred to it by the Commission, as well as the changes proposed to that process by the NPRM.

Industry comments emphasized the importance of an open investment environment, which is an interest the Executive Branch shares. Consistent with the U.S. open investment policy, and as indicated in our initial comments, Executive Branch review of Commission applications must also consider whether there are national security or law enforcement risks associated with those applications, which requires a careful assessment of intelligence and national security information, as well as engagement with applicants.

Industry comments also expressed frustration at the current review process, which they perceive to be time-consuming, inconsistent and opaque. The Executive Branch requested that the Commission undertake the current rulemaking specifically to standardize and streamline the current process, in order to reduce the time it takes to review and mitigate most applications, and to improve transparency. The Executive Branch believes that most of the proposed reforms would help to accomplish these goals without sacrificing the need for care and deliberation that review for critical national security and law enforcement equities requires.

In these reply comments, we expand upon our previous comments to address several of the major issues raised by comments submitted by other parties. In addition to discussing areas where our views differ from some of the other commenters, we also highlight areas of agreement. Sections I, II and III below address the following three elements of the NPRM: 1) the proposal to require additional information from applicants; 2) a proposed new certification requirement for applicants; and 3) the proposed establishment of mandatory time periods for

Executive Branch review of applications. Section IV below addresses various other matters raised by other commenters on the NPRM.

I. Additional information required from applicants

Other commenters generally agreed with our assessment that requiring applicants to provide certain information with their applications will reduce the need for follow-up requests for information, and thereby expedite the overall processing of such applications. Disagreement arises, however, with respect to certain categories of information that some commenters believe is not relevant to the Executive Branch's review, or that some commenters believe to be overly broad, vague or burdensome.

As a threshold matter, it is important to note that only the broad categories of questions proposed in the NPRM are currently at issue and that specific questions would be proposed through a subsequent process, which would be undertaken consistent with the Paperwork Reduction Act (PRA), which also includes opportunity for public comment. 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.[4] Accordingly, to the extent that commenters object to specific questions – for example, concerns that requiring information about other licenses held by an applicant is unnecessary and burdensome[5] – these objections should be addressed through the subsequent PRA process, not through this rulemaking.

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[4] NPRM ¶ 18.

[5] *See, e.g.*, Comments of CTIA at 7 (CTIA Comments), *available at* https://ecfsapi.fcc.gov/file/1081852276570/CTIA%20Exec%20Branch%20Review%20Comments.pdf; Comments of T-Mobile USA, Inc. at 10 (T-Mobile Comments), *available at* https://ecfsapi.fcc.gov/file/1081891785362/Filing.pdf.

A number of commenters stated that information pertaining to financial condition and circumstances is not necessary for Executive Branch review, and has never been required before.[6] In fact, the Executive Branch has a longstanding practice of requesting financial information from applicants after an application has been filed. While the Executive Branch does not ask such questions of every applicant, standardizing the information requested from applicants would speed up the overall review process by ensuring that applications are submitted with a baseline level of information typically required for review, and eliminating much of the need for case-by-case requests for information following referrals to the Executive Branch by the Commission.

Moreover, the sort of financial information that has in the past been requested from applicants – and would continue to be provided by applicants as proposed by the NPRM – is very relevant to Executive Branch review of applications. For example, information about an applicant's revenue is relevant to, among other things, assessments of their business associations and potential links to entities of national security concern (*e.g.*, terrorist networks and foreign intelligence agencies). It is also important to note that the relevance of a specific piece of information may not be apparent in isolation, but may become so when analyzed alongside other information relevant to national security or law enforcement considerations. Although various commenters stated that the Commission already reviews this type of information and therefore they believe review by the Executive Branch is not only redundant but outside its purview,[7] the purpose of Executive Branch review (including its use of financial information) is specifically to

[6] *See, e.g.*, Comments of INCOMPAS at 9-10 (INCOMPAS Comments), *available at* https://ecfsapi.fcc.gov/file/1081896873783/Comments%20of%20INCOMPAS%20(IB%2016-155)%20(8-18-2016).pdf; T-Mobile Comments at 9.

[7] *See, e.g.*, T-Mobile Comments at 9; Comments of The United States Telecom Association at 7-8 (USTelecom Comments), *available at* https://ecfsapi.fcc.gov/file/108180923207356/Exec_Branch_Review_Comments.Aug18.pdf.

respond to requests by the Commission for input on national security and other matters within the purview and expertise of the Executive Branch.

A number of other commenters also stated that requiring information regarding compliance with applicable laws and regulations is overly broad. For example, some commenters stated that applicants may not possess information about compliance issues of other entities in which their shareholders have invested, and stated that the information requested should be limited by time and/or materiality.[8] Discussion of specific questions should be addressed through the subsequent process, which will be undertaken consistent with the PRA, but as a general matter, information related to compliance with applicable laws and regulations is central to Executive Branch review. For example, the facts on which a prior Commission enforcement action was based could also be material to assessments related to national security.

The different views among other commenters as to whether certain information is within the proper scope of Executive Branch review shows that inherent in standardized questions is the fact that certain questions will naturally be more relevant to some applications than others. For example, some commenters stated that information about an applicant's business model is often not available so far in advance and would be highly burdensome and overbroad to require; another acknowledged, however, that business and operational structure is relevant to the Executive Branch's review.[9] Similarly, various commenters stated that requiring information on relationships with foreign parties is overly broad, vague and burdensome; whereas another

[8] *See, e.g.*, T-Mobile Comments at 9-10.

[9] *Compare* CTIA Comments at 7 and Comments of Verizon at 5, *available at* https://ecfsapi.fcc.gov/file/1081863419987/VZ%20Comments%20Team%20Telecom%20NPRM%20Aug%2018.pdf *with* Comments of BT Americas Inc., Deutsche Telekom, Inc., Orange Business Services U.S. Inc. and Telefonica Internacional USA Inc. at 13-14 (BT Americas, et al. Comments), *available at* https://ecfsapi.fcc.gov/file/108180785512406/BT_Americas_et_al_Comments_on_TT_Reform_NPRM.pdf.

commenter acknowledged that such information is relevant to the Executive Branch's review.[10] Although standardized questions by their nature will not be specifically tailored to individual applicants, overall the information proposed to be required is that which the Executive Branch already requests at the initial stages of reviewing most applications, and standardizing the information requested from applicants would speed up the overall review process by eliminating much of the need for case-by-case information requests.

There was widespread agreement among the other commenters that the additional information proposed to be included with applications should be submitted directly to the Executive Branch, rather than to the Commission, both to avoid delay and to ensure the security of that information.[11] As a threshold matter, we agree that any recipient of sensitive information – whether the Commission or the Executive Branch agencies – needs to have systems in place to safeguard that information appropriately. Moreover, we concur with the suggestion of various commenters that for applications containing certain especially sensitive information, there could be a process for submitting such information directly to the Executive Branch.[12] However, the Executive Branch continues to believe that, as a general matter, the Commission appropriately receives applications and then refers them as necessary to the Executive Branch, and requiring additional information in the applications does not provide a basis for changing that practice.[13]

[10] *Compare* Comments of Level 3 Communications, LLC at 19 (Level 3 Comments), *available at* https://ecfsapi.fcc.gov/file/108190289718483/Level%203_Team%20Telecom%20Reform%20Comments_Final.pdf and CTIA Comments at 8 *with* BT Americas, et al. Comments at 13-14.
[11] *See, e.g.*, CTIA Comments at 9.
[12] *See, e.g.*, INCOMPAS Comments at 16.
[13] *See* NTIA Comments at 4-5.

II. New certification requirement for applicants

As a threshold matter, many of the other commenters argued that the certification requirement should not apply to applicants without foreign ownership.[14] We believe, however, that it is appropriate for all applicants to certify their ability and willingness to respond to lawful requests for information. Specifically, the law enforcement and national security concerns addressed by the certification requirement apply equally to foreign and domestic companies – for example, the potential need for law enforcement agencies to request emergency assistance (*e.g.*, with respect to kidnappings, terrorist threats, or other exigent circumstances) from companies.

With respect to the substance of the certification requirements, some commenters asserted that one of these requirements – regarding compliance with the Communications Assistance to Law Enforcement Act (CALEA) – is unnecessary, because it does not impose any new requirement beyond existing law.[15] As noted in our initial comments, while it is true that CALEA's obligations are triggered independent of any certification, the proposed certification would help ensure that applicants consider and address these law enforcement needs prior to submitting license applications.[16] Moreover, precisely because CALEA's obligations exist regardless of the certification, the certification itself adds little if any burden on applicants.

Others pointed out that the second and third certifications (concerning compliance with legal process) may go beyond what the law currently requires.[17] Although existing authorities may not specifically require applicants to make communications and records available in a form

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[14] *See, e.g.*, Comments of Telecommunications Companies at 16 (Telecommunications Companies Comments), *available at* https://ecfsapi.fcc.gov/file/10818068394637/Comments%20of%20Telecommunications%20Companies.pdf.

[15] *See, e.g.*, USTelecom Comments at 9.

[16] *See* NTIA Comments at 8.

[17] *See, e.g.*, Comments of Telstra at 7-8 (Telstra Comments), *available at* https://ecfsapi.fcc.gov/file/1081839724359/Comments_of_Telstra.pdf.

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, as a practical matter, such assurances are a standard mitigation measure regularly requested from, and agreed to by, applicants during the license approval process. Obtaining assurances that companies will comply with existing legal requirements under CALEA (if applicable), and will provide communications and records thereof upon lawful request, helps ensure that applicants have considered and addressed these national security and law enforcement needs prior to submitting license applications. As discussed above, one illustration of the benefit of such advance preparation is helping to avoid situations in which emergency requests are served by law enforcement agencies on companies with these sorts of Commission licenses, but the companies are not equipped to respond in a timely fashion. While existing authorities may not specifically require all of the certifications, the certifications address concerns reasonably related to the public interest and relevant to whether a license should be granted. Although we understand the language of the second certification to include all communications, whether stored domestically or overseas, to the extent commenters are concerned that the second certification would require data localization,[18] we would support the proposal in the comments submitted by Telstra that "should the FCC adopt any certification requirement regarding U.S. law enforcement access to records, . . . the FCC [should] clarify that records need not necessarily be stored in the United States in order to satisfy such a certification."[19]

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

Industry commenters supported the NPRM provision that would require the Executive Branch to complete its review within 90 days, or be deemed to have no national security

[18] *See, e.g.*, INCOMPAS Comments at 13.
[19] *See* Telstra Comments at 8.

concerns with the granting of the license.[20] That view, however, does not take into account the complexity of the national security and law enforcement considerations that the Executive Branch must weigh in its review.

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's suggestion that it will assume the Executive Branch has no concerns about a particular application if it does not complete its review within the specified time frame. As noted in our initial comments, the assumption that silence denotes acceptance creates the potential for a license to be granted without full consideration of potential Executive Branch concerns.[21] 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.[22] 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 and in recognition of Executive Branch expertise, 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

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[20] *See, e.g.*, Level 3 Comments at 2-5; Telstra Comments at 5-6.

[21] *See* NTIA Comments at 14.

[22] *See id*. One commenter noted that rigid time periods for Executive Branch review, combined with equating silence with concurrence, will encourage the Executive Branch to recommend denying applications in situations where more time might have enabled it to resolve its concerns. That commenter suggested that the Commission adopt rules to govern denial proceedings. *See* Comments of TMT Financial Sponsors at 13 (TMT Comments), *available at* https://ecfsapi.fcc.gov/file/1081831005414/Comments.pdf. Although we believe that this proposal goes beyond the scope of the current rulemaking, and would seem to invite constraints on the Commission's statutory discretion, we agree that the commenter has identified the difficult situation the proposed rule would create for the Executive Branch, which is responsible for reviewing applications for critical national security and law enforcement concerns in a complex and dynamic global and technological context.

commitment to addressing national security, law enforcement, foreign policy and trade concerns, consistent with our open investment policy.

The Executive Branch recognizes the need for timely and efficient review of referred applications and petitions that is focused, thorough and concluded in a manner that is proportional to risk. Indeed, the NTIA Letter sent to the Commission on May 10, 2016, represented that, in conjunction with the proposal to require additional information and certifications with applications, the Executive Branch would "ensure that reviews of applications by relevant departments and agencies are promptly coordinated."[23] We are committed to ensuring accountability and transparency as we review applications and petitions referred by the Commission; and to that end, 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.

Multiple commenters appeared to base their position with respect to required time periods on the fact that the Committee on Foreign Investment in the United States (CFIUS) process involves such time periods, which are established by statute.[24] For purposes of reasonable time periods for review, however, the process for reviewing Commission licenses is not analogous to the CFIUS process for several reasons. First, companies that have filed a notice with CFIUS are required to respond to CFIUS requests for additional information within three business days, or else CFIUS can reject the notice from the CFIUS process, resetting the CFIUS timeline. Second, CFIUS agencies have more tools to obtain relevant information. For example, CFIUS has

[23] NTIA Letter at 2.

[24] *See, e.g.*, Comments of Satellite Industry Association at 3, *available at* https://ecfsapi.fcc.gov/file/1081839114800/SIA%20Comments%20on%20Team%20Telecom%20NPRM.pdf.

subpoena authority to compel companies to provide information necessary for its review; and the National Intelligence Council is required by statute to produce a threat analysis for every transaction under CFIUS review within 20 days of the start of a CFIUS review. Third, CFIUS can impose mitigation upon companies if negotiations over a mitigation agreement stall, which among other things may lead companies to voluntarily withdraw and refile if beneficial (which restarts the clock on the review).

Multiple commenters stated that any extensions beyond 90 days should be rare and should be limited to an additional 90 days.[25] Many commenters further stated that extensions should require Commission approval.[26] We anticipate that, should required time periods be established, extensions will be necessary primarily in situations in which more time is needed to address national security considerations, and requiring the Commission to decide whether to grant an extension on a one-time basis would require the Commission to become involved in national security determinations, on 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 should provide for additional extensions as needed by the Executive Branch to complete its review.

Multiple commenters stated that extensions should be accompanied by a justification; some stated that the circumstances justifying an extension should be extremely limited;[27] and some argued that extensions should only be sought based on force majeure (*e.g.*, a natural disaster), or based on material and significant new information provided to the Executive Branch

[25] *See, e.g.*, INCOMPAS Comments at 2, 7.
[26] *See, e.g.*, *id.* at 7-8.
[27] *See, e.g.*, TMT Comments at 12.

in an untimely fashion.[28] We do not believe it is necessary or helpful to restrict the Executive Branch to an enumerated list of factors as a basis for an extension, because the need for extensions may be case-specific and not predictable. That being said, we do support the suggestion that, for transparency purposes, extensions should be accompanied by an explanation to both the Commission and the applicant; although in some circumstances the explanation to the Commission might need to include classified or other sensitive information that cannot be provided to the applicant. That notification requirement will provide sufficient accountability and transparency.

Multiple commenters stated that the time period required for Executive Branch review (if established) should start upon referral to the Executive Branch, which should occur upon release of the Commission's public notice stating an application is accepted for filing.[29] Some commenters proposed that the Executive Branch have a certain number of days (for example, seven or ten) to make a determination that an application is complete.[30] Other commenters proposed that when the Executive Branch notifies the Commission of a defect in an application, the Commission should delay putting the application on the public record and starting the clock; whereas absent Executive Branch notification of a defect, the Commission should issue the public notice without delay – because that would purportedly encourage the Executive Branch to make determinations of completeness as quickly as possible.[31]

We believe that the Commission should continue to receive applications in the first instance and forward to the Executive Branch only those that the Commission determines are complete. In addition to being the proper role for the Commission, as the promulgator of the rule

[28] *See* Level 3 Comments at 5; INCOMPAS Comments at 7.
[29] *See, e.g.*, Telecommunications Companies Comments at 6-7.
[30] *See, e.g.*, TMT Comments at 9.
[31] *See, e.g.*, T-Mobile Comments at 12.

and the ultimate adjudicator of the application, this initial Commission screening will expedite Executive Branch processing of applications by ensuring that applications are typically complete before the Executive Branch's review begins, and reducing instances in which the Executive Branch must suspend the time period for review until it assures itself that any identified defects have been fully cured. Certainly, the Executive Branch should not be held to reviewing applications that are incomplete under the terms of the rule.

However, if that function were to be vested in the Executive Branch, we agree with some of the commenters that the time period required for Executive Branch review (if established) should start upon an Executive Branch determination that an application is complete. We also believe that the Executive Branch should not be required to make a determination of completeness within a set amount of time. The Executive Branch will endeavor to make such determinations as quickly as possible, but putting yet another constraint on that piece of the process is unnecessarily rigid.

IV. Other matters

Various commenters argued that certain types of applications should be excluded – either from the proposed requirements for additional information and certifications or from Executive Branch review altogether. We do not agree that the Commission should limit the scope of the NPRM, because doing so, while seemingly appropriate in certain circumstances, could have unintended – and negative – effects on Executive Branch review of other applications. For example, multiple commenters stated that additional information should not be required from applicants that are pure resellers and will not own or control any telecommunications facilities.[32] Even these types of applications, however, require review by the Executive Branch, because the

[32] *See, e.g.*, CTIA Comments at 10.

companies possess records that may be requested in the course of national security or criminal investigations. If such an applicant, for instance, had a shareholder who was the target of a national security or criminal investigation, or was affiliated with a foreign entity that was the target of a national security or criminal investigation, the question of whether requests for the company's records could alert the target to the existence of an investigation would be relevant to the Executive Branch review of the application.

As another example, multiple commenters stated that absent a material change in foreign ownership, applicants already subject to mitigation measures should be exempt from the requirement to provide additional information and even from referral to the Executive Branch altogether.[33] Even with respect to the same applicant, however, mitigation measures relevant to a previous application may not necessarily be relevant to a new application. In addition, even if there has not been a material change in the foreign ownership itself, there may be new facts about the owners that are relevant to Executive Branch review. In short, there may be relevant changes in the overall operating environment (which could also include, for example, changes in technology or in the global security situation) that are not addressed by previous mitigation measures and that need to be considered in tandem with a new application.

One commenter stated that seven days is too short for applicants to reply to follow-up questions, and applicants should instead be afforded fourteen days (another commenter says ten days), with the clock stopped for the duration of the reply period.[34] Because we recognize that the seven days proposed by the Commission may not be sufficient for applicants in all situations, we would support a mechanism for applicants to request an extension from the Executive Branch for good cause shown. For the same reason, we would support some of the other commenters'

[33] *See, e.g.*, BT Americas, et al. Comments at 8-9.
[34] *See* USTelecom Association Comments at 5.

proposals to provide more time to respond to follow-up questions,[35] so long as any required time period for Executive Branch review is suspended while the responses are pending.

We believe that some of the other proposals by various commenters with respect to follow-up questions would be too rigid. Specifically, one commenter suggested requiring that follow-up questions be sent by day 45;[36] various commenters suggested that agencies' follow-up questions be consolidated and sent to applicants as a single set of questions;[37] and one commenter suggested that there be no more than two rounds of follow-up questions.[38] This level of detail is too prescriptive, given that every application is unique, responses to questions can be unpredictable and warrant follow-up, and the Executive Branch must consider many different factors in its review. One commenter further stated that follow-up questions should be limited to the scope of the proposed standard questions,[39] but that sort of limitation is inconsistent with the Executive Branch review, which may often require tailored questions beyond the scope of the standard questions in order to obtain information relevant to national security and law enforcement assessments.

Multiple commenters stated that each agency should provide a point of contact for applicants.[40] Although we support the idea of establishing designated points of contact to make the process as smooth and transparent as possible, we believe that a single point of contact is

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[35] *See, e.g.*, Joint Comments of CBS Corporation, 21st Century Fox, Inc., Univision Communications Inc. and the National Association of Broadcasters at 6, *available at* https://ecfsapi.fcc.gov/file/108181608706840/Executive%20Branch%20Review%20Comments%20IB%20Docket%20No%20%2016-155%2008-18-16.pdf.

[36] *See* Comments of Sprint Corporation at 3, *available at* https://ecfsapi.fcc.gov/file/1081852690485/Sprint%20Comments%2008182016.pdf.

[37] *See, e.g.*, T-Mobile Comments at 7.

[38] *See* Telecommunications Companies Comments at 8.

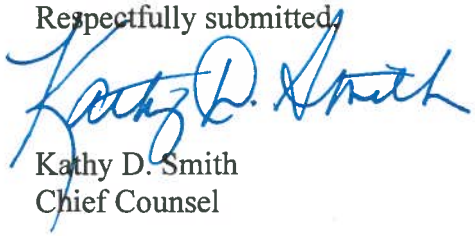
[39] *See* Level 3 Comments at 7.

[40] *See, e.g.*, Joint Comments of Hibernia Atlantic U.S. LLC and Quintillion Subsea Operations, LLC at 9, *available at* https://ecfsapi.fcc.gov/file/1081848350200/Joint%20Comments%20of%20Hibernia%20Atlantic%20U.S.%20LLC%20and%20Quintillion%20Subsea%20Operations%20LLC%20IB%2016-155.pdf.

advisable, which should be a designated Executive Branch agency, as multiple agency points of contact could complicate rather than streamline interagency coordination. Even if a single agency serves as the point of contact, that agency may elect to put another agency directly in contact with the Commission and/or with applicants when the circumstances warrant.

We appreciate your consideration of these views.

Respectfully submitted,



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