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February 17, 2020

**Elliot S. Davis**  
Senior Vice President, General Counsel,  
Chief Compliance Officer and Corporate Secretary

**VIA E-MAIL**

Ms. Deborah Curtis, Chief Counsel for Industry and Security  
U.S. Department of Commerce  
1401 Constitution Ave. NW, Room 3839  
Washington, DC 20230

**Re: Allegheny Technologies Incorporated Steel Exclusion Requests**

Dear Ms. Curtis:

I write in reference to Allegheny Technologies Incorporated's (ATI) requests for exclusion from the duties established in the President's Proclamation 9705 of March 8, 2018, specifically: ATI's exclusion request BIS-2018-0006-0326, which the Department of Commerce (Commerce) denied on April 19, 2019; ATI's exclusion request BIS-2018-0006-0889, which Commerce denied on April 19, 2019; and ATI's exclusion requests BIS-2019-0002-30331, -40190, and -40217, which are currently pending. With losses mounting and the viability of our Western Pennsylvania operations under direct threat from Commerce's withholding of tariff relief, I feel obliged to offer several points of clarification.

ATI supports the President's program of imposing additional duties on imported steel articles while directing "relief from the additional duties" where certain criteria are met. As ATI has made clear in public comments and in testimony offered during Commerce's 232 investigation, ATI agrees with Commerce's finding that "Domestic steel production is essential for national security." *Report on the Effect of Imports of Steel on the National Security*, January 11, 2018, 24. As a proud manufacturer of specialty steels and other critical alloys used in the production of land-based vehicles, naval systems, missiles and rockets, armor and munitions, aircraft engines, and airframes and other flight components, ATI shares Commerce's concern that "domestic steel producers have a shrinking ability to meet national security production requirements in a national emergency," *Report*, 49, as well as its assessment that a program of tariffs and appropriate exclusions can address this risk.

As we have explained in the materials filed on the record, Commerce should have granted requests BIS-2018-0006-0326 and BIS-2018-0006-0889, and should now grant the above-referenced pending requests for exclusion. Nothing the objectors have submitted on the record in the current proceedings rebuts ATI's showing that the exclusions are warranted for two separate and independent reasons. The steel articles that ATI needs to keep operating in Western Pennsylvania are not "produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," and the exclusions are also warranted "based upon specific national security considerations."

On this record, denying ATI's current exclusion requests in the same manner that Commerce denied ATI's previous exclusion requests would be arbitrary and capricious for several reasons.

*First*, Commerce must do more than provide a boilerplate denial. In particular, Commerce must articulate “a satisfactory explanation” for its decisions, “including a rational connection between the facts found and the choice made.” *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019). But the “boilerplate language” that Commerce included in its previous exclusion denials—essentially a recitation of the exclusion criteria and a statement that the Bureau of Industry and Security, having considered a similarly unexplained International Trade Administration finding, deemed them not to be met—“merely parrots the language of a statute without providing an account of how it reached its results.” *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995). Nor do such cursory statements demonstrate that Commerce has given a “hard look” to requests for exclusion. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). For the President's exclusion process to be meaningful, Commerce must take a “hard look” at each request and provide more than a boilerplate denial.

*Second*, Commerce must explain why some companies receive exclusions but others do not. “An agency must provide an adequate explanation to justify treating similarly situated parties differently.” *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776–77 (D.C. Cir. 2005). In granting Mid Continent Steel & Wire, Inc.'s request BIS-2018-0006-20377 in March 2019, Commerce appears to have recognized that articles offered on terms far exceeding a requestor's profit margin or threatening its commercial viability are not “produced in the United States in a sufficient and reasonably available amount.” The same fundamental situation applies here. Yet Commerce's denial of ATI's previous exclusion request did not explain why similarly situated companies, like Mid Continent Steel & Wire, received exclusions while ATI did not. “Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.” *Id.*

*Third*, Commerce cannot blind itself to relevant evidence. It is arbitrary and capricious for an agency to ignore “relevant factors” or “entirely fail[] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Yet that is exactly what Commerce plans to do by expressly refusing to consider product prices. 83 Fed. Reg. 46026, 46038 (Sept. 11, 2018) (explaining that the “Department will not consider” “product prices and the conflicting impacts of such prices on U.S. domestic steel producers and users in determining whether there could be sufficient domestic capacity”). Commerce claims to be following “criteria taken from the Proclamations.” *Id.* Yet by blinding itself to the role of price in an inquiry into whether an article is “reasonably available” (except, as in the Mid Continent case, where it apparently elects to consider this information), Commerce misreads the relevant criterion and negates the President's intent.<sup>1</sup> In adjudicating ATI's requests for

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<sup>1</sup> After considering the Commerce's recommendation that exclusions be granted upon a showing of “lack of sufficient U.S. production capacity of comparable products,” the President authorized exclusions for articles not produced in the United States “in a sufficient *and reasonably available* amount or of a satisfactory quality.” *Report*, 9, 61; Proclamation 9705, § (1)(emphasis added).

exclusion, Commerce must take into account that (i) historically there has been no stainless steel slab market in the United States, nor has one developed since the 232 tariffs were implemented; (ii) without a market, there is no process to establish and maintain competitive and reasonable pricing; (iii) in one case the proposed prices for stainless steel slab offered by a U.S. producer to ATI – one of the same producers that objected to ATI’s exclusion requests – were the same as or higher than those for which ATI could sell the finished product; and (iv) in all other cases, purchasing the U.S. stainless slab at the proposed pricing would result in significant losses to ATI. Refusing to consider this relevant evidence of price and reasonable availability would be just as unreasonable as EPA’s refusal to consider relevant evidence of costs in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

*Fourth*, Commerce must address ATI’s specific arguments in support of the exclusions. Indeed, Commerce’s own regulations require the agency to “be responsive to any of the objection(s), rebuttal(s) and surrebuttal(s) for that submitted exclusion request.” 15 C.F.R. § Pt. 705, Supp. 1(i)(A). Not only is it arbitrary and capricious for any agency to disregard its own regulations, *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014), but the Administrative Procedure Act itself requires agencies to “respond to ‘relevant’ and ‘significant’ public comments,” *City of Portland, Oregon v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007). Commerce must do more than offer the boilerplate that it has “considered the evidence provided, including in the exclusion request as well as any applicable objection filings.”

*Finally*, Commerce cannot allow undisclosed ex parte communications—particularly with objectors—to infect the adjudication of specific requests for exclusion from the President’s Proclamation. “Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among ‘conflicting private claims to a valuable privilege,’ the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved.” *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (citing *U. S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 523 (D.C. Cir. 1978) (agency relied upon improper ex parte communications in deciding whether to grant exemption from antitrust laws)). To ensure the integrity of the adjudicatory process, Commerce’s own regulations require objections to be “subject to public review and made available for public inspection and copying,” 15 C.F.R. § Pt. 705 Supp. 1(b)(5)(1), and disavow consideration of any objection not in formal compliance with the written guidelines, *id.* Supp. 1(h)(1)(ii).

Unfortunately, ATI has reason to believe that its competitors, in addition to opposing ATI’s exclusion requests on the record, have provided additional analysis to certain officials in an apparent attempt to furtively sway the outcome of ATI’s requests. ATI is deeply concerned that such ex parte communications, to which ATI has not received an opportunity to respond on the record, may be directly or indirectly informing Commerce’s decisions on ATI’s exclusion requests. Needless to say, it would be arbitrary and capricious for Commerce to disregard its own regulations, but undisclosed ex parte communications would also flout basic notions of due process and preclude effective judicial review based on a complete administrative record.

Ms. Deborah Curtis, Chief Counsel for Industry and Security

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We appreciate Commerce's careful consideration of ATI's requests and commitment to implementing the President's Proclamation.

Sincerely yours,



Allegheny Technologies Incorporated

cc:

Michael J. Walsh Jr., Chief of Staff and exercising the delegated duties of the General Counsel,  
Department of Commerce

The Honorable Joseph H. Hunt, Assistant Attorney General, Civil Division, United States  
Department of Justice

Michael Granston, Deputy Assistant Attorney General (Commercial Litigation Branch), Civil  
Division, United States Department of Justice

David Morrell, Deputy Assistant Attorney General (Federal Programs Branch), Civil Division,  
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