



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Gilberto C.,<sup>1</sup>  
Complainant,

v.

Steve Jurczyk,  
Acting Administrator,  
National Aeronautics and Space Administration  
(Goddard Space Flight Center),  
Agency.

Appeal No. 2021000076

Agency No. NCN-20-GSFC-00053

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency final decision, dated September 15, 2020, dismissing a formal complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

Since 2009, Complainant worked as a Library Systems Administrator for the Knowledge Management and Library Services Branch (hereinafter “Library”), of the Agency’s Goddard Space Flight Center in Greenbelt, Maryland. Over the years, Complainant’s services were provided through various contracting companies, most recently by Library Associates, LLC (hereinafter “LAC”).<sup>2</sup>

Pursuant to the “Statement of Work” agreed to by LAC and the Agency, LAC provides an expansive level of support: “The contract shall provide the necessary integrated library systems management, maintenance, and related library services needed for a broad and comprehensive

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

<sup>2</sup> LAC became Complainant’s employer on December 1, 2018.

electronic and core materials traditional library and information science support function, encompassing all aspects of information storage, retrieval, and delivery to ensure timely and efficient delivery of information resources relevant to GSFC mission.” More specifically, LAC employees staff the Library’s Information Services Desk, coordinate with the Agency to develop and maintain the Library’s collection, identify potential electronic resource acquisitions, provide circulation services, execute inter-library loans, analyze present and future technologies and systems as they relate to library functions, develop and implement plans for upgrading electronic resources, ensure all IT is maintained, participate in Goddard IT security forums, and maintain the Library’s catalog and repository.

In early 2017, three female Agency employees reported allegedly harassing behavior by Complainant to the Agency’s Library Supervisor (hereinafter “Supervisor-R”). Supervisor-R, who also functioned as Complainant’s site supervisor, brought the allegations to the attention of the Agency’s Anti-Harassment Program, the Agency’s procurement office, and the contracting company. The contracting company placed Complainant on administrative leave pending an investigation by the Agency’s Protective Services. When the investigation did not conclusively find harassment, Complainant was permitted to return to work, with restrictions set by Supervisor-R.<sup>3</sup>

In December 2018, the contract Complainant worked under was transferred to LAC. Complainant’s duties remained the same.

In July 2019, Supervisor-R received additional complaints from the three female employees. The concerns were brought to the Agency’s Contracting Officer Representative (COR) attention and he addressed the matter with LAC. LAC placed Complainant in leave without pay status for one week and ensured that Complainant received anti-harassment training. The Agency and LAC also determined that Complainant did not need to perform his duties at the Library. Consequently, upon his return to Goddard, Complainant was relocated from the Library to Building 35. He was to be escorted by another LAC employee, or select Agency employees, when his job duties required him to visit the Library.

Approximately two months later, in September 2019, LAC again placed Complainant on three days of administrative leave in response to harassment allegations. In October 2019, Supervisor-R learned that a female in Building 35 was experiencing incidents similar to those alleged by the three female employees. The individual, however, did not make a formal complaint.

LAC found that Complainant’s two-year history of complaints by Agency employees and the need to provide an escort for his access to the Library building, impacted its ability to effectively serve the Agency. Consequently, in a letter dated February 28, 2020, LAC terminated Complainant’s employment.

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<sup>3</sup> Complainant was instructed not to socialize with the three female employees and needed to be escorted to meetings.

Believing that the allegations by the female Agency employees and the Agency's responses to their claims constituted harassment based on his sex (male), color (white) and age (y.o.b. 1962), Complainant contacted an EEO Counselor on April 10, 2020. Informal efforts to resolve Complainant's concerns were unsuccessful. Subsequently, on June 14, 2020, Complainant filed a formal complaint.

The Agency framed the claims as follows:

1. On unspecified dates between September 2018 and February 28, 2020, Complainant was mocked, ostracized, disparaged, "bad-mouthed", and excluded by co-workers who accused him of sexual harassment.
2. In September 2018, Complainant was placed on administrative leave for two weeks due to sexual harassment allegations.
3. In September 2018, management restricted Complainant's work and prohibited him from contact with three female co-workers who accused him of sexual harassment, making it "impossible" for Complainant to complete his job duties.
4. In October 2018, Complainant was counseled.
5. In July 2019, Complainant was placed on Leave Without Pay for one week, and when he returned to work, he was relocated to a separate building, making it difficult for him to perform his job.
6. In September 2019, Complainant was placed on administrative leave for three days, following a sexual harassment accusation against him.
7. For the appraisal period ending on November 13, 2019, Complainant received a lower performance rating because of accusations made against him.
8. On February 28, 2020, Complainant was terminated from his Contract Systems Administrator position in the Knowledge Management Library Services Branch, Code 272.

In its September 15, 2020 decision, the Agency dismissed claims (2) through (7) for untimely EEO Counselor contact. The Agency found that the alleged events "occurred between three months and eighteen months beyond the 45-day deadline." Additionally, the entire complaint was dismissed for failure to state a claim. Citing factors from Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) and Commission Enforcement Guidance, the Agency reasoned that it did not exhibit sufficient control to be considered Complainant's joint employer.

While Complainant asserted that the Agency controlled when, where, and how his work was performed, the Agency stated that his work was done based on the contract terms. LAC, however, was the entity that directly assigned tasks to Complainant, paid him, approved his leave, and issued his termination. The Agency found that the fact that Complainant's work was performed at an Agency facility, during Agency business hours, was insufficient to support employee status.

Complainant filed the instant appeal.

### ANALYSIS AND FINDINGS

#### *Joint Employer Status*

EEOC Regulation 29 C.F.R. §1614.103(a) provides that complaints of employment discrimination shall be processed in accordance with Part 1614 of the EEOC regulations. The regulation goes on to state that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment. See EEOC Regulation 29 C.F.R. § 1614.103(c).

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission reaffirmed its long-standing position on "joint employers" and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, "Threshold Issues," Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual)<sup>4</sup>; EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), "Coverage Issues," Question 2; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

Agencies often conclude that an individual is not an employee based solely on the fact that the individual performs work pursuant to a contract between the federal government and an outside organization and the outside organization, not the federal government, controls the pay and benefits of that individual. See, e.g., Helen G. v. Dep't of the Army, EEOC Appeal No. 0120150262 (Feb. 11, 2016); Nicki B. v. Dep't of Educ., EEOC Appeal No. 0120151697 (Feb. 9, 2016). These elements are just two of the factors relevant to joint employment under the Commission's long-standing position and it is not at all surprising that they would be present when an individual working under a federal contract for a federal agency raises a complaint of discrimination.

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<sup>4</sup> The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at [www.eeoc.gov](http://www.eeoc.gov).

The term “joint employer” refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker’s employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, “Coverage Issues,” at Question 2. EEOC considers, *inter alia*, the Agency’s right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker’s schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2-III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F.App’x 253, 256 (6<sup>th</sup> Cir. 2013) (“Entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment’”) (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6<sup>th</sup> Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390.

The language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists. In determining a worker’s status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency. Baker v. Dep’t of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep’t of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep’t of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant’s appraisal with input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep’t of the Army, EEOC Appeal No. 0120122211, 2012 WL 5818075 (Nov. 8, 2012). Similarly, where a staffing firm terminates a worker after an agency communicates it no longer wants the worker’s services, this supports a finding that the agency has joint or *de facto* power to discharge the worker. See, e.g., Complainants v. Dep’t of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015); see also Skanska USA Bldg., Inc., 550 Fed. App’x at 254, 256 (where defendant removed staffing firm’s workers from job site without challenge from staffing firm, and after such removals staffing firm generally fired worker, this pointed to joint employment); Butler v. Drive Auto. Indus. of America, Inc., 793 F.3d 404, 414-15 (4<sup>th</sup> Cir. 2015).

The EEOC considers an entity's right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. Enforcement Guidance, "Coverage Issues," at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of an individual's work, but does not generally exercise that right, the entity may still be found to be a joint employer).

In assessing the right to control, EEOC does not consider any one factor to be decisive and emphasizes that it is not necessary to satisfy a majority of the factors. In particular, the fact that an individual performs work pursuant to a contract between the federal government and an outside organization and is paid and provided with benefits by that organization, on its own, is not enough to show that joint employment does not exist. Rather, the analysis is holistic. All the circumstances in the individual's relationship with the agency should be considered to determine if the agency should be deemed the worker's joint employer. Enforcement Guidance, "Coverage Issues," at Qs. 1 and 2. In sum, a federal agency will qualify as a joint employer of an individual if it has the requisite right to control the means and manner of the individual's work, regardless of whether the individual is paid by an outside organization or is on the federal payroll. See id., at Q. 2.

In the instant case, there are many factors that indicate an employee/employer relationship between Complainant and the Agency. Complainant and the Agency shared a continuing relationship, over ten years, that long precedes the Agency's December 2018 contract with LAC. As noted by Complainant on appeal, his work at Goddard "transcended any specific contractor as he worked for NASA, regardless of which contractor held the contract." During his decade with the Agency, Complainant maintained the same position and responsibilities. Further, the parties do not dispute that Complainant's hours were set by the Agency<sup>5</sup>, his work was done at the Agency's facility and with Agency equipment. It was the Agency that moved Complainant's work area from the Library to another building at the Goddard Space Flight Center.

Some factors suggest that Complainant was only a contractor, an employee of LAC. He was paid by LAC, who also provided him with benefits and withheld taxes. It was LAC that issued Complainant's February 28, 2020 termination, on LAC letterhead. In the letter, LAC did not reference direction by the Agency, but described its inability to effectively fulfill its contract with the Agency with Complainant on the team.

Other aspects of the record do not as easily denote Complainant's status as an employee or contractor, such as the daily circumstances of his position. In its decision, the Agency stated that Complainant received assignments directly from LAC. Further, in response to the appeal, the Agency argues that Complainant only "contends generally that unidentified individuals at NASA oversaw his daily work . . ." without indicating whether those individuals were Agency employees or part of LAC management.

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<sup>5</sup> The Agency seems to contend that since Complainant's duty hours were established in the "Statement of Work", they are not attributable to the Agency. The Commission disagrees, as the hours align with the Agency's hours of operation.

However, Complainant counters that he interacted regularly with Agency employees and lists the names of both Agency and LAC individuals. A review of both parties' descriptions of the underlying harassment claims themselves indicate Agency managerial control over Complainant. Supervisor-R, an Agency employee, is described as Complainant's onsite supervisor. It is Supervisor-R who imposed restrictions on Complainant's movements after receiving complaints from the female Agency employees. In addressing the employees' concerns it seems that LAC management was not onsite. Instead, the record makes repeated references to discussions and actions by Supervisor-R and COR, also an Agency employee. Moreover, Complainant's access to the three Agency employees who accused him of harassment and his later inability to effectively perform his job due to the restrictions imposed upon him, suggest essential interactions with Agency employees. Therefore, when considering the factor of Complainant's daily work conditions, we find that the record supports the conclusion that this aspect of Complainant's employment suggests his status as an Agency employee.

In looking beyond the termination letter itself, issued by LAC, the record is not definitive as to the Agency's influence over the removal decision. Yet, we note that in the EEO Contract Worker Questionnaire the Agency stated that *both* LAC and the Agency can discharge Complainant. In May 21, 2020 correspondence from LAC, regarding Complainant's allegations of discrimination by LAC, the contracting firm contends that the termination was fueled by the many investigations and restrictions placed on Complainant directly by the Agency. According to LAC, it was not even provided copies of the internal Agency investigations, but simply complied with its requests to put Complainant on leave or provide additional training. This action, along with the fact that LAC was willing to re-hire Complainant indicates some level of control by the Agency over Complainant's removal.

Therefore, on balance, the evidence shows sufficient control by the Agency over Complainant's employment to be considered a joint employer for the purposes of the EEO process. The Agency erred in dismissing the formal complaint on the ground that Complainant was not an applicant or employee and lacked standing. In light of this determination, we shall now consider the Agency's dismissal of some claims on alternative grounds.

#### *Untimely Counselor Contact*

Additionally, the Agency dismissed claims (2) through (7) because Complainant waited beyond the time limit for contacting an EEO Counselor. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

Complainant argues on appeal that all eight claims are part of one continual hostile work environment, and only the termination (claim (8)) is a discrete act. Therefore, citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002), Complainant contends that based on the timely raised termination claim, the remainder of the complaint should also be treated as timely.

The Supreme Court of the United States has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). The Court further held, however, that “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” Id.

Here, we find that alleged actions taken by the Agency in claims (2) through (7) describe discrete actions – namely placement on leave and a disciplinary counseling. Therefore, we find that the Agency properly dismissed the events for untimely counselor contact.<sup>6</sup>

### CONCLUSION

The Agency’s decision is **AFFIRMED** in part, with respect to the dismissal of claims (2) through (7), and **REVERSED** in part, regarding the Agency’s status as a joint employer. The complaint is **REMANDED** for further processing in accordance with the **ORDER** below.

### ORDER (E0618)

The Agency is ordered to process the remanded claims (claims 1 and 8) in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant’s request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency’s letter of acknowledgment to Complainant, 2) a copy of the Agency’s notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant’s request for a hearing, a copy of complainant’s request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

### IMPLEMENTATION OF THE COMMISSION’S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission’s corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

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<sup>6</sup> Nevertheless, to the extent that these incidents appear to have led to his removal, the claims shall be investigated.



Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

#### STATEMENT OF RIGHTS - ON APPEAL

##### RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

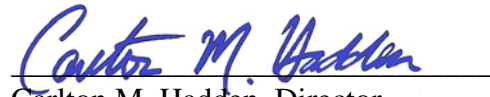
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

March 5, 2021

Date