

**No. 20-2365**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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CHINA TELECOM (AMERICAS) CORPORATION,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of an Order of  
the Federal Communications Commission

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**RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S  
OPPOSITION TO MOTION FOR STAY**

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The Federal Communications Commission opposes Petitioner China Telecom's motion to stay the disclosure of certain redacted information in its FCC filings to the Executive Branch agencies that are responsible for advising the Commission on relevant matters of national security, law enforcement, and foreign policy. *See In re China Telecom (Ams.) Corp.*, 35 FCC Rcd. ---, 2020 WL 7396311, at \*22–24 ¶¶ 62–70 (rel. Dec. 14, 2020) (*Order*) (Mot. Exh. A at 37–40). China Telecom filed that

information in a proceeding to address the Executive Branch agencies' recommendation to revoke the company's authorizations to participate in the U.S. communications market, and the Commission reasonably determined that inviting those agencies to respond to the company's filings will aid its deliberations. The agencies have a legitimate need to review the unredacted filing in order to fully advise the Commission in this proceeding, and China Telecom offers no reason to think that the agencies will not protect the confidentiality of that information as required by law or that the company will suffer any other unlawful harm.<sup>1</sup>

## **BACKGROUND**

### **A. Statutory And Regulatory Background**

Congress established the Federal Communications Commission in 1934 to oversee and safeguard the Nation's communications networks. In doing so, Congress directed the Commission to use its regulatory authority to serve "the purpose of the national defense" and "the purpose

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<sup>1</sup> The Commission respectfully requests that the Court rule on the stay request in sufficient time to allow the Executive Branch agencies to review the materials at issue and to address them in comments that are due to be filed with the Commission by January 19. *See Order* ¶¶ 15, 68–69, 71 (Mot. Exh. A at 9–10, 39–40); *see also* 47 C.F.R. § 0.442(d)(4) (providing that if a party timely moves for a judicial stay, the materials will not be disclosed until a court rules on the stay request).

of promoting safety of life and property,” among other things. 47 U.S.C. § 151. The Commission accordingly treats the “[p]romotion of national security” as “an integral part of the Commission’s public interest responsibility” and “one of the core purposes for which Congress created the Commission.” *Order* ¶ 2 (Mot. Exh. A at 2).

Under Section 214 of the Communications Act, any party seeking to operate a transmission line used for interstate or foreign communications must obtain authorization from the Commission. 47 U.S.C. § 214(a). The Commission has granted blanket authorization for any telecommunications carrier to construct or operate domestic transmission lines, *see* 47 C.F.R. § 63.01(a), but may revoke that authorization from any carrier if doing so is warranted to protect the public interest. *Order* ¶¶ 3 & nn.8–9, 8 n.28 (Mot. Exh. A at 2–3, 6). Carriers seeking to construct or operate international transmission lines must obtain express authorization from the Commission, *see* 47 C.F.R. § 63.18, and the Commission is authorized to later revoke any carrier’s international Section 214 authorization when warranted to protect the public interest. *Order* ¶ 3 & n.10 (Mot. Exh. A at 3). Carriers must also obtain Commission authorization in order to transfer control of any domestic or international transmission lines. 47 C.F.R. §§ 63.04, 63.24.

One of the critical public-interest factors the Commission considers under Section 214 is whether a carrier's operation of domestic or international transmission lines raises national security, law enforcement, or foreign policy concerns because the carrier is under foreign ownership. *Order* ¶ 4 (Mot. Exh. A at 3–4). The Commission's longstanding practice has been to seek “the expertise of the relevant Executive Branch agencies”—including the Department of Justice, the Department of Homeland Security, and the Department of Defense—to help assess national security and other concerns arising from a carrier's foreign ownership, and the Commission “has accorded deference to their expertise in identifying such a concern.” *Id.* ¶ 5 (Mot. Exh. A at 4).<sup>2</sup>

The Commission's practice of seeking advice from Executive Branch agencies on foreign-ownership concerns is informally known as “Team Telecom” review. *Order* ¶ 9 n.30 (Mot. Exh. A at 6). Earlier this year,

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<sup>2</sup> See also, e.g., *Rules & Policies on Foreign Participation in the U.S. Telecomms. Mkt.*, 12 FCC Rcd. 23891, 23919–20 ¶¶ 62–63 (1997) (*Foreign Participation Order*) (recognizing that “foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch,” and committing to “accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before” the Commission).

the Commission and the Executive Branch acted to memorialize this review process and to establish a formal interagency Committee within the Executive Branch as the successor to Team Telecom. *Id.* ¶ 5 & n.14 (Mot. Exh. A at 4); *see* Executive Order No. 13913, 85 Fed. Reg. 19643 (Apr. 4, 2020) (establishing an interagency Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector); *Process Reform for Executive Branch Review of Certain FCC App'ns & Pets. Involving Foreign Ownership*, 35 FCC Rcd. 10927 (2020) (*Executive Branch Review Order*).

If a carrier seeking international Section 214 authorization has reportable foreign ownership, the Commission refers the application to the Executive Branch for review. *Executive Branch Review Order*, 35 FCC Rcd. at 10935–36 ¶ 24; *see* 47 C.F.R. §§ 1.40001–1.40004. The Executive Branch may allow the application to proceed without objection; it may recommend that any authorization be conditioned on the applicant entering into a “mitigation agreement” (often in the form of a “letter of assurances”) requiring the applicant to abide by certain commitments made to the Executive Branch; or it “may recommend that the Commission deny [the] application based on national security or law enforcement grounds.” *Executive Branch Review Order*, 35 FCC Rcd. at

10930–31 ¶¶ 5–6; *see* 47 C.F.R. § 1.40004. The Commission “accords the appropriate level of deference” to the Executive Branch’s recommendation, but “ultimately makes its own independent decision on whether to grant a particular application.” *Executive Branch Review Order*, 35 FCC Rcd. at 10930 ¶ 7; *accord* 47 C.F.R. § 1.40001(b).

The Executive Branch may also occasionally “review existing [authorizations] to identify any additional or new risks to national security or law enforcement interests.” *Executive Branch Review Order*, 35 FCC Rcd. at 10962–63 ¶ 90 (quoting Executive Order No. 13913 § 6(a), 85 Fed. Reg. at 19645). If that review identifies unacceptable risks to national security or law enforcement, the Executive Branch may recommend that the Commission modify an authorization to require additional mitigation measures or, if the risks cannot reasonably be mitigated, it may recommend that the Commission revoke the authorization. *Ibid.* (citing Executive Order No. 13913 § 9(b), 85 Fed. Reg. at 19646). If the Executive Branch recommends that an authorization be revoked, the Commission will conduct a proceeding to “provide the authorization holder such notice and an opportunity to respond as is required by due process and applicable law, and appropriate in light of

the facts and circumstances, including any opportunity for the [Executive Branch] to reply.” *Id.* at 10964 ¶ 92.

### **B. Factual Background And Proceedings Below**

Petitioner China Telecom (Americas) Corporation (“China Telecom”) provides communications service under the Commission’s blanket authorization for domestic transmission lines and under two international Section 214 authorizations granted by the Commission. *Order* ¶ 8 (Mot. Exh. A at 5–6). China Telecom is a wholly owned subsidiary of China Telecom Corporation Limited, which is incorporated in the People’s Republic of China. *Id.* ¶ 6 (Mot. Exh. A at 4). Approximately 70.89% of China Telecom Corporation Limited’s stock is owned by China Telecommunications Corporation, a Chinese company that is wholly owned by an arm of the Chinese government, and another 11.96% of its stock is held by other entities registered or organized under Chinese law. *Id.* (Mot. Exh. A at 4–5). Because of China Telecom’s significant foreign ownership and other concerns, the company’s international Section 214 authorizations were conditioned on its compliance with several commitments made in a 2007 Letter of Assurances to the Department of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security. *Id.* ¶ 8 & n.26 (Mot. Exh. A at 5–6).

In April 2020, several Executive Branch agencies—the Department of Justice, the Department of Homeland Security, the Department of Defense, the State Department, the Department of Commerce, and the United States Trade Representative—jointly recommended that the Commission revoke and terminate China Telecom’s international Section 214 authorizations. *Order* ¶ 9 (Mot. Exh. A at 6–7); *see* Mot. Exh. B (Executive Branch Recommendation). The Executive Branch agencies warned of “substantial and unacceptable national security and law enforcement risks associated with [China Telecom’s] continued access to U.S. telecommunications infrastructure.” *Order* ¶ 9 (Mot. Exh. A at 6). Among other things, the Executive Branch agencies pointed to

- China Telecom’s ownership and control by the Chinese government, which the Executive Branch agencies believe has engaged in malicious cyber activities in the United States and could seek to use China Telecom’s U.S. operations to disrupt or misroute U.S. communications traffic or for economic espionage;
- China Telecom’s failure to comply with the terms of its Letter of Assurances, including its failure to take all practical measures to prevent unauthorized access to U.S. records, and its failure to timely respond to requests for evidence of compliance; and



- China Telecom’s misrepresentations about its cybersecurity practices and its apparent failure to comply with federal and state cybersecurity and privacy laws.

*Id.* (Mot. Exh. A at 6–7); *see also id.* ¶¶ 20–61 (Mot. Exh. A at 11–37).<sup>3</sup>

After receiving the Executive Branch recommendation, the chiefs of the FCC’s International, Wireline, and Enforcement Bureaus issued an Order to Show Cause directing China Telecom to demonstrate why the Commission should not initiate a proceeding to consider revoking its domestic and international Section 214 authorizations. *Order* ¶ 11 (Mot. Exh. A at 7–8); *see* Mot. Exh. C (Order to Show Cause).

China Telecom filed a lengthy response on June 8, 2020. Mot. Exh. D (Response). In addition to a 72-page legal brief, *see* Response Exh. 16, China Telecom submitted fifteen additional exhibits, *id.* Exhs. 1–15.<sup>4</sup> Although China Telecom filed a full and unredacted copy of these

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<sup>3</sup> The Executive Branch agencies also filed a separate classified appendix with additional information relevant to the recommendation, but represented that “the unclassified information alone is sufficient” to support revocation of China Telecom’s authorizations. *Order* ¶ 9 (Mot. Exh. A at 7).

<sup>4</sup> The copies of the response that China Telecom has filed with the Court appear to omit several hundred pages of interconnection agreements that were included with Exhibit 13 of its response and redacted in their entirety. The Executive Branch has not sought access to that exhibit, so those materials are not currently at issue in this appeal.

materials for the Commission's consideration, it asked that only a redacted copy be placed on the public docket and made available for public inspection. *See* Mot. Exh. F (Confidentiality Request).

The Department of Justice then asked the Commission to disclose to the participating Executive Branch agencies, pursuant to 47 C.F.R. § 0.442, unredacted copies of China Telecom's legal brief and four of the exhibits it relies on (Exhibits 3, 6, 8, and 9). *Order* ¶ 12 (Mot. Exh. A at 8); *see* Mot. Exh. G (Request for Access). It explained that "[t]he requested confidential information appears to address China Telecom Americas' compliance with [its] 2007 Letter of Assurances," an express condition of China Telecom's international Section 214 authorizations, and that it needs the unredacted material "to evaluate China Telecom Americas' response to the Executive Branch's recommendation and respond fully to the arguments raised." Request for Access at 2–3 (Mot. Exh. G at 2–3). The Executive Branch agencies committed to "protect the confidentiality of the requested information as specified by Commission regulations as well as their own agency regulations." *Id.* at 3 (Mot. Exh. G at 3).

China Telecom opposed the request, arguing that the agencies did not need access to the unredacted filing because the Commission had not specifically directed the Executive Branch to respond to China Telecom's

response. *Order* ¶ 12 (Mot. Exh. A at 8–9); *see* Mot. Exh. I (China Telecom Opposition). The FCC’s International Bureau denied the company’s objections, and China Telecom appealed to the full Commission. *Order* ¶¶ 13–14 (Mot. Exh. A at 9); *see* Mot. Exh. J (Bureau Ruling); *id.* Exh. K (Application for Review).

In the *Order* under review, the Commission first determined that “sufficient cause exists to initiate a proceeding on whether to revoke and terminate China Telecom Americas’ domestic and international section 214 authority,” and therefore instituted a revocation proceeding. *Order* ¶¶ 15–16 (Mot. Exh. A at 9–10); *see id.* ¶¶ 15–61 (Mot. Exh. A at 9–37). To inform that proceeding, the Commission invited the Executive Branch agencies and any other interested parties to submit comments on China Telecom’s response to the Order to Show Cause, to be followed by an opportunity for China Telecom to reply. *Id.* ¶¶ 1, 71 (Mot. Exh. A at 2, 40). The Executive Branch’s comments are due by January 19, and any reply by March 1. *Ibid.*

The Commission then granted the agencies’ request for access to the unredacted material and denied China Telecom’s objections. *Order* ¶¶ 62–70 (Mot. Exh. A at 37–40). The Commission explained that both a federal statute, 44 U.S.C. § 3510, and an FCC regulation, 47 C.F.R.

§ 0.442, expressly authorize the Commission to make this information available to other federal government agencies if certain conditions are met, and those conditions are all satisfied here. *Order* ¶¶ 65–69 (Mot. Exh. A at 37–40). It observed that the Executive Branch agencies are subject to multiple statutory and regulatory provisions requiring them to preserve the confidentiality of any information disclosed to them, and that the Department of Justice “has assured in writing that the agencies will protect the confidentiality of the requested information as specified by the Commission’s regulations as well as by their own agenc[ies] regulations.” *Id.* ¶ 66 (Mot. Exh. A at 38).

The Commission disagreed with China Telecom’s argument that the Executive Branch agencies have no “legitimate need” to review the material at issue. *Order* ¶¶ 67–69 (Mot. Exh. A at 38–40). As the Commission explained, the Executive Branch agencies are “charged by law with assisting the Commission ‘in its public interest review of national security and law enforcement concerns’” at the heart of this proceeding, and “for the [Executive Branch] to assist [that] review, it must have access to all of the information \* \* \* that relates to potential national security and law enforcement concerns.” *Id.* ¶ 69 (Mot. Exh. A at 39) (quoting Executive Order No. 13913 § 3(a), 85 Fed. Reg. at 19643).

## ARGUMENT

Like other requests for interim relief, a stay is “an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.” *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc). “A stay is an ‘intrusion into the ordinary processes of administration and judicial review,’ and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted).

To obtain a stay, China Telecom must show that (1) it is likely to succeed on the merits, (2) it will likely suffer irreparable injury without a stay, (3) a stay will not harm any other parties, and (4) the public interest favors a stay. *Nken*, 556 U.S. at 434; *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). No relief may be granted unless all four requirements are individually satisfied. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *as reinstated on remand*, 607 F.3d 355 (4th Cir. 2010) (per curiam). China Telecom has not come close to satisfying those exacting requirements here.

## I. China Telecom Is Not Likely To Succeed On The Merits.

First and foremost, China Telecom cannot show that it is likely to prevail on the merits. A court may overturn the Commission's decision to disclose relevant materials to the participating Executive Branch agencies only if that decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *TCR Sports Broad. Holdings, L.L.P. v. FCC*, 679 F.3d 269, 274 (4th Cir. 2012). The court's task is "only \* \* \* to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Ibid.* (internal quotation marks and citations omitted).

"[A]n agency may make available to another agency" information it has collected "if the disclosure is not inconsistent with applicable law." 44 U.S.C. § 3510(a). When information is provided to another agency, it remains subject to the same protections against unlawful disclosure that apply to the originating agency. *Id.* § 3510(b). The Commission's regulations further provide that any "[i]nformation submitted to the Commission in confidence \* \* \* may be disclosed to other agencies of the Federal government" if the information remains subject to those

protections, the other agencies have a legitimate need for the information, the disclosure is not prohibited by other laws, and the Commission has not given any specific assurances that the information would not be disclosed. 47 C.F.R. § 0.442(b); *see Order* ¶ 65 (Mot. Exh. A at 37–38). The Commission found that all of these requirements are satisfied here. *Order* ¶ 70 (Mot. Exh. A at 40).

China Telecom’s sole argument against disclosing the requested material to the Executive Branch agencies is its contention (Mot. 7–12) that there is no “legitimate need” for the agencies to review the material under 47 C.F.R. § 0.442(b)(2). That argument is wholly without merit. China Telecom filed the material at issue in opposition to the Executive Branch agencies’ recommendation to revoke its international Section 214 authorizations, and the Executive Branch agencies have sought access to that material so that they may “respond fully to the arguments raised by China Telecom.” DOJ Request at 2 (Mot. Exh. G at 2); *see Order* ¶ 67 (Mot. Exh. A at 38–39). And now that the Commission has formally instituted proceedings to consider whether to revoke China Telecom’s authorizations, the Commission has determined that its deliberations will be aided by inviting the Executive Branch to respond to China Telecom’s filing. *Order* ¶ 68–69 (Mot. Exh. A at 39–40); *see id.* ¶¶ 1, 71

(Mot. Exh. A at 2, 40) (giving the Executive Branch forty days “to respond to China Telecom[’s] June 8, 2020[] filing,” followed by forty days for China Telecom to file any reply).<sup>5</sup>

As the *Order* explains, the Executive Branch agencies are “charged by law with assisting the Commission ‘in its public interest review of national security and law enforcement concerns that may be raised by foreign participation’” in U.S. communications networks. *Order* ¶ 69 (Mot. Exh. A at 39) (quoting Executive Order No. 13913 § 3(a), 85 Fed. Reg. at 19643). And “for the [Executive Branch] to assist [that] review, it must have access to all of the information \* \* \* that relates to potential national security and law enforcement concerns.” *Ibid.* Disclosing the requested material to the participating agencies therefore serves a

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<sup>5</sup> China Telecom complains (Mot. 7–8, 9) that the Order to Show Cause did not expressly invite the Executive Branch to file a reply addressing China Telecom’s response. But the Commission reasonably concluded that the Executive Branch should be permitted to file a reply if it believes one is warranted, *Order* ¶ 67 (Mot. Exh. A at 38–39), and now that the Commission has officially instituted a revocation proceeding, it has opened a pleading cycle to allow full input from the Executive Branch and any other interested parties, *id.* ¶ 68 (Mot. Exh. A at 39). The Commission amply explained why allowing the Executive Branch an opportunity to respond to the information and arguments presented in China Telecom’s filing is likely to aid its deliberations in this proceeding. *See, e.g., id.* ¶ 69 (Mot. Exh. A at 39–40).



legitimate need by enabling the Executive Branch agencies to fulfill their responsibility to advise the Commission on the foreign-ownership concerns that are central to this proceeding.

For the Executive Branch agencies to fully evaluate the information and arguments put forward by China Telecom, the Commission found that they must be able to “review[] the confidential information at issue.” *Order* ¶¶ 67–68 (Mot. Exh. A at 38–39); *see also id.* ¶ 15 (Mot. Exh. A at 10) (directing that the Executive Branch agencies be supplied with the requested material “so that these entities may fully participate in this process”). Having put this material in issue and signaled the potential relevance of this information by citing the material in its arguments opposing the Executive Branch recommendation, China Telecom cannot now seek to shield its arguments from scrutiny by preventing the Executive Branch agencies from reviewing and having an opportunity to respond to the information it supplied. Any information that China Telecom “consider[s] relevant [to the Commission’s] determination as to whether [its] authorizations should be revoked” presumably would “also be relevant for the [Executive Branch] to review in assisting the Commission in making that determination.” *Id.* ¶ 69 (Mot. Exh. A at 39–

40).<sup>6</sup>

China Telecom also briefly suggests (Mot. 11–12) that the Executive Branch agencies do not need any additional information because they have “already reached a conclusion and recommended that the Commission revoke [its] authorizations.” But it is *the Commission* that must make the ultimate determination whether to revoke China Telecom’s authorizations after review of the full record compiled through the underlying agency proceedings. *See Order* ¶ 5 (Mot. Exh. A at 4) (“The Commission ultimately makes an independent decision in light of the information in the record”); *Executive Branch Review Order*, 35 FCC Rcd. at 10930 ¶ 7 (“[T]he Commission accords the appropriate level of deference to the Executive Branch agencies in their areas of expertise[,] but ultimately makes its own independent decision”). And the Commission has reasonably determined that receiving the Executive Branch’s input on the information and arguments presented in China Telecom’s response to the Order to Show Cause is warranted to help it fully evaluate whether

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<sup>6</sup> China Telecom is therefore incorrect (Mot. 10) to liken the request for access to the unredacted material to “a form of discovery.” The Executive Branch is not seeking to elicit additional facts or evidence, but instead merely seeks to review material that China Telecom has previously entered into the record in this proceeding.

to revoke China Telecom’s authorizations, given the Executive Branch’s special expertise on matters of national security and foreign policy. *Order* ¶¶ 67–69 (Mot. Exh. A at 38–40).

For similar reasons, China Telecom is mistaken in asserting (Mot. 8, 9) that “DOJ and the public are on the same footing” in this proceeding. This proceeding was triggered by an Executive Branch recommendation to revoke China Telecom’s authorizations, and the material at issue seeks to rebut the Executive Branch’s assessment. The Executive Branch is uniquely suited to help the Commission evaluate that response. The national security and foreign policy concerns raised in this proceeding lie “uniquely within the expertise of the Executive Branch,” and the Commission accordingly relies on “the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy.” *Foreign Participation Order*, *supra* note 2, 12 FCC Rcd. at 23919–20 ¶ 62–63. And unlike the general public, the Executive Branch agencies are subject to multiple statutory and regulatory provisions which ensure that they must preserve the confidentiality of any information disclosed to them. *Order* ¶ 66 (Mot. Exh. A at 38).

## II. China Telecom Will Not Be Irreparably Injured By Lawful Disclosure To Other Federal Agencies In Accordance With FCC Regulations.

China Telecom also fails to meet the requirements for a stay because it has not made the requisite showing of irreparable harm. To obtain a stay, China Telecom “must demonstrate more than just a ‘possibility’ of irreparable harm.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). Instead, any party seeking preliminary relief “must make a clear showing of irreparable harm,” and that harm must be “actual and imminent” and “neither remote nor speculative.” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 283 (4th Cir. 2002); *see also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1895) (“the injury must be both certain and great; it must be actual and not theoretical”). “[B]are allegations of what is likely to occur are of no value[,] since the court must decide whether the harm will *in fact* occur.” *Bloodgood v. Garraghty*, 783 F.2d 470, 476 (4th Cir. 1986) (quoting *Wis. Gas*, 758 F.2d at 674).

China Telecom speculates (Mot. 12–14) that disclosing the identity of its customers to the government could upset some customers and could cause it to lose some business. But China Telecom fails to explain why any customers would actually be threatened by the government’s knowledge that they purchase communications services from it, and it

offers no tangible evidence of any actual or threatened customer loss. Indeed, “none of those customers have come to the Commission to object [to] the release of this information.” *Order* ¶ 69 n.260 (Mot. Exh. A at 39). China Telecom cites cases finding irreparable harm where the potential economic loss was so great as to “indeed threaten the future existence of [the movant’s] business” and amount to “[t]he destruction of a business” (Mot. 14), but fails to show that it faces any comparable threat here.

At any rate, China Telecom *already* divulged its customers’ identities to the government when it filed that information with the Commission, and did so under a regulatory scheme that expressly authorized the Commission to disclose that information to other federal agencies. If any customers are aggrieved, the responsibility lies with China Telecom’s disclosing this information to the Commission, not with any subsequent intragovernmental review of the information as expressly provided by law.

Finally, China Telecom’s professed concern about customer goodwill is no basis to prevent the Executive Branch agencies from reviewing *other*, non-customer-related information that China Telecom seeks to shield from disclosure, and therefore cannot bear the weight that China Telecom seeks to give it here.

Equally unavailing is China Telecom’s suggestion (Mot. 13 & n.31) that its information could be “leaked,” despite all of the statutory and regulatory confidentiality protections that would govern the Executive Branch’s handling of the information, *see Order* ¶ 66 (Mot. Exh. A at 38), and the Executive Branch agencies’ express commitment to “protect the confidentiality of the requested information,” Request for Access at 3 (Mot. Exh. G at 3). As the Commission explained, “there is simply no reason to believe that these federal agencies \* \* \* will not properly guard and maintain the confidentiality of that information as they are required to do by regulation and statute.” *Order* ¶ 66 (Mot. Exh. A at 38). The statutory scheme presumes that the agencies to which the information is disclosed will abide by these requirements, *see* 44 U.S.C. § 3510(b), and sheer speculation that information could nonetheless be leaked is insufficient to overcome that presumption. Absent clear and compelling evidence to the contrary, courts must presume that government officials—particularly those responsible for protecting national security and public safety—will properly discharge their official duties. *See, e.g., Nardea v. Sessions*, 876 F.3d 675, 680 (4th Cir. 2017); *United States v. Wilson*, 262 F.3d 305, 315 (4th Cir. 2001); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975).

China Telecom cites two news articles discussing leak investigations (Mot. 13 n.31), but neither article proves that there have been unlawful disclosures by federal agencies or that such disclosures occur regularly. Nor does China Telecom attempt to show that the information at issue here resembles the sort of information that has ever purportedly been leaked, and the FCC is aware of no instance in the history of Team Telecom review where a federal agency improperly disclosed any confidential information. In fact, China Telecom has provided similar confidential information to the Executive Branch agencies in the past, *see* Request for Access at 3 (Mot. Exh. G at 3), and the company does not contend that the government has ever failed to protect its information. Indeed, given the Executive Branch's established record of safeguarding this type of information, "[n]o party \* \* \* opposed sharing of business confidential information" with the Executive Branch when the Commission formalized the Team Telecom review process earlier this year. *Executive Branch Review Order*, 35 FCC Rcd. at 10964 ¶ 93; *see Order* ¶ 68 n.259 (Mot. Exh. A at 39).

### **III. A Stay Would Impair The Government's Ability To Respond To Potential National Security Threats And To Protect The Public Interest.**

The public interest also weighs heavily against a stay here, particularly given the pressing national security and public safety interests at stake. The *Order* explains that the “national security and law enforcement concerns raised by the Executive Branch agencies and the evidence in the record” provide ample cause to believe that there are “substantial and unacceptable national security and law enforcement risks associated with China Telecom Americas’ continued access to U.S. telecommunications infrastructure.” *Order* ¶ 21 (Mot. Exh. A at 12). Any stay could seriously impair the government’s ability to address these threats and to protect the American public.

The Commission has long recognized that “foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch,” and it accordingly relies on “the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy.” *Foreign Participation Order*, *supra* note 2, 12 FCC Rcd. at 23919–20



¶ 62–63; *accord Order* ¶ 21 (Mot. Exh. A at 12). The Commission’s ability to evaluate and address those concerns in this proceeding could be impaired if it were deprived of the Executive Branch’s full assessment of any relevant material.

Given the serious national security and public safety concerns at stake, it is imperative that the Commission be able to complete this proceeding quickly. The *Order* therefore stressed the need to “promptly” produce the requested material in time to permit the Executive Branch agencies to fully address them in comments that are due by January 19. *Order* ¶ 15 (Mot. Exh. A at 9–10). China Telecom’s dismissive attempt to portray “a slight delay in disclosure” as insignificant (Mot. 16) ignores the pressing interests at stake here.

## CONCLUSION

The motion for stay should be denied.

Dated: January 4, 2021

Respectfully submitted,

*/s/ Scott M. Noveck*

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