

**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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**REPLY IN SUPPORT OF  
RESPONDENTS' MOTION TO DISMISS**

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Respondents' motion to dismiss explained that the Court lacks jurisdiction over China Telecom's petition for review of an *Order* in which the Commission instituted a proceeding to consider whether to revoke China Telecom's authorizations to operate domestic and international communications service within the United States. As we showed, an order that merely initiates or governs further agency proceedings is neither final agency action nor subject to immediate review under the

collateral-order doctrine. *See, e.g., FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n*, 680 F.2d 810 (D.C. Cir. 1982) (*NRDC*).

The opposition fails to meaningfully rebut that showing. China Telecom will be free to pursue judicial review upon any final order resolving the agency proceeding. But its attempt to obtain review of an interlocutory order at this juncture is premature and must be dismissed.

## ARGUMENT

### **A. The *Order* Neither Marks The Consummation Of The Commission's Decisionmaking Process Nor Has Any Direct Legal Consequences.**

As previously explained, *see* Mot. 13–15, the *Order* challenged here is not the consummation of the agency's decisionmaking process, nor does it impose any direct legal consequences on China Telecom.

1. The *Order* here marks the beginning of the Commission's decisionmaking process, not the end. As the Supreme Court held in *Standard Oil*, the “threshold determination” to institute a further proceeding is not reviewable final agency action, 449 U.S. at 239–45, nor is it reviewable under the collateral-order doctrine, *id.* at 246; *accord NRDC*, 680 F.2d at 815–17 & n.16. Nothing in the *Order* purports to reach any final determination on the validity of China Telecom's

authorizations, and it remains possible that after review of the full record, the Commission may conclude that China Telecom's authorizations should not be revoked or modified, leaving nothing for the Court to review. *See Standard Oil*, 449 U.S. at 244 n.11; *NRDC*, 680 F.2d at 816–17.

China Telecom appears to assume (Opp. 13–14, 16) that the hearing procedures are sufficiently final and eligible to be reviewed separately. But even if piecemeal review of procedural rulings were available, the Commission's current procedural determinations are not yet conclusive. The agency pleading cycle is still ongoing, and China Telecom remains free in its pleadings to further press its arguments—including the arguments it contends the Commission has not yet fully addressed—for why additional process should be afforded. Should those arguments prove persuasive, the Commission retains discretion to modify the procedures employed in its ongoing proceeding or to offer supplemental process. *Cf. Standard Oil*, 449 U.S. at 242 (awaiting final agency action allows “the agency an opportunity to correct its own mistakes”). That the Commission has not reached a final determination as to these procedural issues is further demonstrated by the fact that the Commission has postponed any decision, and requested further comment, on the interrelated issue of what standard of proof to employ when assessing the

record. *See Order* ¶ 15 n.49.

Even if the Commission were unlikely to modify its procedures, awaiting the conclusion of the underlying proceeding would still be the proper course. For one thing, the resulting order may aid this Court's review by offering further explanation or support for the Commission's procedural determinations. For another, the Commission's analysis in reaching a final determination on whether to revoke the company's authorizations may shed light on the appropriateness of the procedures the agency employed, the adequacy of the record it compiled, and whether any alleged error was prejudicial. *See Mot.* 22–23 (citing *NRDC*, 680 F.2d at 817). Finally, as the Supreme Court explained in *Standard Oil*, allowing interlocutory review would be improvident because it could “lead[] to piecemeal review,” 449 U.S. at 242, which “would tend to interfere with the proper functioning of the agency,” “burden the courts,” and “at least is inefficient, and may be unnecessary.” *Eastman Kodak Co. v. Mossinghoff*, 704 F.2d 1319, 1325 (4th Cir. 1983); *see also Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr., LLC*, 305 F.3d 253, 260–61 (4th Cir. 2002). “By deferring review now,” on the other hand, “the court may be able to consider all such issues in a single review proceeding.” *NRDC*, 680 F.2d at 817.

2. The *Order* also does not have any direct legal consequences or alter China Telecom’s legal status.<sup>1</sup> See *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (requiring “action \* \* \* by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow’”). Nothing in the *Order* revokes or modifies China Telecom’s legal authorizations or restricts its right to provide service. That would require a further order.

As a practical matter, of course, the *Order* may expose China Telecom to “the expense and disruption of defending itself” in the revocation proceeding. *Standard Oil*, 449 U.S. at 244. But as we have explained, those practical (rather than legal) consequences do not entitle it to immediate review. See Mot. 16–17, 19–20. The Supreme Court has explained that “the expense and annoyance of litigation is part of the social burden of living under government,” *Standard Oil*, 449 U.S. at 244 (internal quotation marks omitted)—especially for entities that have sought licenses to do business in a closely regulated industry—and “this burden is different in kind and legal effect from the burdens which have

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<sup>1</sup> Thus, even if the Commission’s procedural rulings were set in stone and not open to reconsideration, they still would not be subject to review at this time. China Telecom’s contrary view “mistake[s] exhaustion for finality.” *Standard Oil*, 449 U.S. at 243; accord *Eastman Kodak*, 704 F.2d at 1324.

been considered” a basis for allowing judicial review, *Eastman Kodak*, 704 F.2d at 1324–35. “The burden of defending oneself in an [allegedly] unlawful administrative proceeding” does not excuse a party from “proceeding in the administrative forum” and awaiting a final decision before “raising [its] claims \* \* \* in due course.” *Bennett v. U.S. SEC*, 844 F.3d 174, 184–86 (4th Cir. 2016); *see also S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006).

China Telecom is thus incorrect in suggesting (Opp. 18) that its due process rights are violated simply by allowing the agency proceeding to go forward. The Due Process Clause is violated when a party is ultimately deprived of liberty or property to which it is entitled, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999), but China Telecom has not yet been—and might never be—deprived of anything. If the Commission does decide to revoke China Telecom’s authorizations, that decision can be reviewed (and, if necessary, remedied) through a normal postjudgment appeal. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). In the meantime, the ordinary burdens of having to participate in an administrative proceeding—even one alleged to be unlawful—are not a legally cognizable injury. *Bennett*, 844 F.3d at 184–86 (citing *Standard Oil*, 449 U.S. at 244). China Telecom has not even attempted to claim

that it will suffer any other tangible harm during the pendency of the agency proceeding, and it can continue within that proceeding to pursue effective relief against any possibility of future harm, so there is no reason to allow it to bypass the remaining agency process.

China Telecom's reliance (Opp. 15–16) on *Dow AgroSciences LLC v. National Marine Fisheries Service*, 637 F.3d 259 (4th Cir. 2011), is likewise misplaced. As the court there explained, the biological opinion at issue had direct and immediate legal consequences because any person who did not comply would face criminal liability for knowingly taking an endangered species. *Id.* at 265; see *Bennett*, 520 U.S. at 169–70, 178 (same); *Sackett v. EPA*, 566 U.S. 120, 126 (2012) (similar). Here, by contrast, the *Order* does not expose China Telecom to any new liability and has no coercive effect.

**B. China Telecom's Challenges Are Not "Wholly Collateral" To The Ongoing Proceedings.**

Review at this time also would be inappropriate because the *Order* is intertwined with, rather than wholly collateral to, the ongoing agency proceedings. This Court has held that "claims are not wholly collateral when they are 'the vehicle by which [petitioners] seek to reverse' agency action." *Bennett*, 844 F.3d at 186. That is the case here: China Telecom's

petition for review “appears to be the ‘vehicle by which [it] seeks’ to vacate” any forthcoming order that might conclude that its authorizations should be revoked. *Id.* at 186–87; *see* Mot. 22 n.4.

China Telecom’s procedural challenges are also intertwined with the merits in other respects. China Telecom contends (Opp. 11 n.50, 21–22) that, weighing all of the relevant considerations, the potential benefit of additional procedures in guarding against an erroneous outcome in the underlying proceeding exceeds the fiscal and administrative burdens those procedures would entail. But that fact-intensive, case-specific inquiry would benefit from a full understanding of the matters in dispute. At this interim stage—with parties still developing the record and filing new pleadings—the precise matters in dispute, the nature of the evidence being considered, and how these matters will play into the Commission’s analysis all remain in flux.

China Telecom’s attempt to liken this case to cases involving involuntary medication of criminal defendants (Opp. 20, 21 n.78) only underscores the flaws in its argument. Involuntary medication has palpable physical and psychological effects separate and apart from facilitating further adjudicatory proceedings. And unlike the inquiry into whether a defendant should be medicated, assessing the adequacy of



agency procedures is closely intertwined with matters that will be further developed and potentially illuminated by the agency's analysis in reaching any final determination.

**C. China Telecom Will Have Full Opportunity To Raise Any Legal Challenges Once The Commission Issues A Final Decision.**

Finally, China Telecom will have full and effective opportunity to challenge the agency's procedures (alongside any other challenges it wishes to raise) on appeal from any final decision on whether to revoke the company's authorizations. *See* Mot. 21–23. The *Order's* procedural determinations, and any further or reconsidered procedural rulings the Commission might make, “will merge in[] the Commission's decision on the merits” and be subject to review at that time. *Standard Oil*, 449 U.S. at 246. Indeed, the Court may be better able to review any challenge at that time, with “the benefit of a fully developed factual record” and the Commission's explanation and analysis of the matters it deems dispositive. *See NRDC*, 680 F.2d at 817. If the hearing procedures are found unlawful, and if China Telecom can show it was prejudiced as a result, the Court could offer effective relief by ordering a new hearing. *Id.* at 816. “[T]he availability of relief on review of a final order \* \* \* dictates against judicial review at this time.” *Ibid.*

It is true that “deferring review until there has been a final agency decision” could entail the effort and expense of “additional administrative proceedings” if the initial hearing is invalidated. *NRDC*, 680 F.2d at 816. “That risk, however, is inherent in a system of judicial review that is limited to final orders” and “cannot justify reviewing agency action that is otherwise interlocutory.” *Ibid.*; *accord S.C. State Bd.*, 455 F.3d at 445 (“Although it is undoubtedly less convenient for a party \* \* \* to have to wait until after trial to press its legal arguments, no protection \* \* \* will be lost in the delay.”).

China Telecom cannot avoid this conclusion by attempting (Opp. 22–23) to characterize its claims as asserting a sort of “right not to stand trial” under allegedly unlawful procedures. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 871–73 (1994). As the Supreme Court has explained in rejecting similar arguments, if that were enough, “virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a ‘right not to stand trial’” and be subject to disruptive interlocutory appeals, undermining “the efficient and congressionally mandated allocation of judicial responsibility.” *Id.* at 873.

Instead, as our motion explained—citing a half-dozen cases that China Telecom nowhere acknowledges or addresses in its opposition—this Court and the Supreme Court have regularly required parties to await full adjudication of a case before they can seek judicial review of challenges to the lawfulness of the underlying proceedings. Mot. 18–20 & n.3. To hold otherwise would improperly “swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.” *Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Rev. Comm’n*, 742 F.3d 82, 86 (4th Cir. 2014).

Although China Telecom dresses some of its procedural challenges in the language of “due process,” its challenges here are not meaningfully different from the essentially identical challenge to agency hearing procedures in *NRDC*, or from challenges to an agency’s authority to exercise jurisdiction at all,<sup>2</sup> or from any other case in which a party purports to assert a right not to stand trial under allegedly unlawful

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<sup>2</sup> See, e.g., *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939) (agency orders “setting a case for hearing despite a challenge to its jurisdiction \* \* \* are not reviewable”); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225 (4th Cir. 2008) (no interlocutory review of argument that the EEOC lacked jurisdiction over the appellant); see also *Carefirst*, 305 F.3d 253 (no interlocutory review of argument that matter was being litigated in the wrong forum).

circumstances. That China Telecom frames some of its arguments in constitutional terms makes no difference, as “[t]he Supreme Court has rejected analogous arguments” that “constitutional claims” automatically qualify for interlocutory review. *Bennett*, 844 F.3d at 184. And many of the procedural arguments China Telecom seeks to raise are not actually constitutional or due process claims at all, such as its mine-run APA argument contending merely that the agency was insufficiently heedful of its own precedent.

## CONCLUSION

For the foregoing reasons, and those stated in our motion to dismiss, China Telecom's petition for review of the Commission's interlocutory *Order* is premature and must be dismissed.

Dated: February 19, 2021

Respectfully submitted,

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