

No. 22-1054

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PACIFIC NETWORKS CORP. and COMNET (USA) LLC,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

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

RESPONDENTS' OPPOSITION TO MOTION FOR STAY

INTRODUCTION

The Federal Communications Commission and the United States oppose the motion of Pacific Networks Corp. and its subsidiary ComNet (USA) LLC (collectively, the “Companies”) to stay the Commission’s *Revocation Order*, which revoked the Companies’ authorizations under Section 214 of the Communications Act to provide telecommunications service in the United States. *See In re Pac. Networks Corp. & ComNet (USA) LLC*, FCC 22-22, 37 FCC Rcd. ---, 2022 WL 905270 (rel. Mar. 23, 2022) (*Revocation Order*).

Based on an extensive record, the Commission found that the Companies—which are majority-owned by China’s Ministry of Finance—are subject to exploitation, influence, and control by the Chinese government, which has engaged in malicious cyber activities targeted at the United States. *See Revocation Order* ¶¶ 45–73. The Commission concluded that the Companies’ access to U.S. telecommunications networks and U.S. customer records “presents national security and law enforcement risks that warrant revocation of their section 214 authority,” *id.* ¶ 74, for two reasons. First, this access “present[s] the Companies, their parent entities, and therefore the Chinese government[] with numerous opportunities to access, monitor, store, and in some cases disrupt and/or misroute U.S. communications, which in turn allow them to engage in espionage and other activities harmful to U.S. national security and law enforcement interests.” *Ibid.*; *see id.* ¶¶ 78–113. Second, “the Companies’ conduct and representations to the Commission and Congress demonstrate a lack of trustworthiness and reliability that erodes the baseline level of trust that [the government] require[s] of telecommunications carriers given the critical nature of the provision of telecommunications service in the United States.” *Id.* ¶ 2; *see id.* ¶¶ 114–151.

The *Revocation Order* closely tracks several previous orders adopted “to protect the nation’s communications infrastructure from potential security threats” posed by carriers owned and controlled by the Chinese government. *Revocation Order* ¶ 3.

- In 2019, the Commission denied China Mobile’s request for Section 214 authorization based on evidence that, “due to its status as a subsidiary of a Chinese state-owned entity, China Mobile USA is vulnerable to exploitation, influence, and control by the Chinese government.” *Id.* ¶ 10; see *In re China Mobile Int’l (USA) Inc.*, 34 FCC Rcd. 3361 (2019).
- Last year, the Commission revoked China Telecom’s Section 214 authorizations based on evidence that it is subject to exploitation, influence, and control by the Chinese government and has made inaccurate, incomplete, and misleading representations to U.S. government agencies. *In re China Telecom (Ams.) Corp.*, 36 FCC Rcd. ---, 2021 WL 5161884 (rel. Nov. 2, 2021). This Court then denied China Telecom’s motion to stay that order, and the government recently filed its merits brief. See *China Telecom (Ams.) Corp. v. FCC*, No. 21-1233 (D.C. Cir. Dec. 2, 2021); Brief for

Respondents, No. 21-1233 (D.C. Cir. filed Mar. 17, 2022)
(*China Telecom Gov't Br.*).

- Earlier this year, the Commission revoked China Unicom's Section 214 authorizations based on similar evidence that it is subject to exploitation, influence, and control by the Chinese government and has made inaccurate, incomplete, and misleading representations to U.S. government agencies. *In re China Unicom (Ams.) Operations Ltd.*, 37 FCC Rcd. ---, 2022 WL 354622 (rel. Feb. 2, 2022). The Ninth Circuit recently denied China Unicom's motion to stay that order. *China Unicom (Ams.) Operations Ltd. v. FCC*, No. 22-70029 (9th Cir. Mar. 4, 2022).

The *Revocation Order* in this case is substantially similar to those previous orders and, as in those cases, the Companies' stay motion here should similarly be denied.

BACKGROUND

A. Statutory And Regulatory Background

Congress established the Federal Communications Commission to oversee and safeguard the Nation's communications networks. In doing so, Congress directed the Commission to use its regulatory authority to

“promot[e] safety of life and property” and to serve “the national defense.” 47 U.S.C. § 151. The “[p]romotion of national security” is thus “an integral part of the Commission’s public interest responsibility” and “one of the core purposes for which Congress created the Commission.” *Revocation Order* ¶ 3.

Under Section 214 of the Communications Act, any carrier seeking to use or operate a transmission line for interstate or foreign communications must obtain authorization from the Commission, which “may attach to the [authorization] such terms and conditions as in its judgment the public convenience and necessity may require.” 47 U.S.C. § 214(a) & (c). The Commission has granted blanket authority for any carrier to operate or transmit over domestic transmission lines, *see* 47 C.F.R. § 63.01(a), “subject to the Commission’s ability to revoke [that] authority when warranted to protect the public interest.” *Revocation Order* ¶ 4 & nn.9–10. If a carrier seeks to operate or transmit over international transmission lines, it must obtain authorization from the Commission, *see* 47 C.F.R. § 63.18, and the Commission may later revoke that authorization if warranted to protect the public interest. *Revocation Order* ¶ 4 & n.11.

One of the critical issues the Commission considers in granting or revoking Section 214 authorizations is whether a carrier's provision of telecommunications service in the United States raises national security, law enforcement, or foreign policy concerns due to the carrier's foreign ownership. *Revocation Order* ¶ 5. In addressing that issue, the Commission's longstanding practice has been to seek "the expertise of the relevant Executive Branch agencies" to help assess national security and other concerns arising from a carrier's foreign ownership. *Ibid.*; see also *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").

If a carrier appears to present unacceptable risks to national security or law enforcement, the agencies may recommend that the Commission require additional mitigation measures or, if the risks cannot reasonably be mitigated, that the Commission revoke the carrier's authorizations. *Process Reform for Executive Branch Review of Certain FCC Appls. & Pets. Involving Foreign Ownership*, 35 FCC Rcd. 10927, 10962–63 ¶ 90

(2020) (citing Executive Order No. 13913 § 9(b), 85 Fed. Reg. 19643, 19646 (Apr. 4, 2020)). If these concerns could result in an authorization being revoked, the Commission will institute a revocation 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.” *Id.* at 10964 ¶ 92.

B. Factual Background

Pacific Networks and its subsidiary ComNet were authorized to provide telecommunications service under the Commission’s blanket grant of domestic Section 214 authority and under two international Section 214 authorizations granted by the Commission. *Revocation Order* ¶ 6. The Companies’ international authorizations were conditioned on their compliance with commitments made in a 2009 Letter of Assurances to the Department of Justice and the Department of Homeland Security. *Id.* ¶¶ 2 n.3, 6, 138. The Letter of Assurances requires, among other things, that the Companies “take all practicable measures to prevent unauthorized access to, or disclosure of the content of[,] communications or U.S. records.” *Id.* ¶¶ 6 n.23, 138 n.727, 140.

After Executive Branch agencies raised concerns over other carriers owned and controlled by the Chinese government, FCC staff issued an *Order to Show Cause* directing the Companies to, among other things, (1) provide information on their ownership and operations, including the extent to which they may be subject to exploitation, influence, or control by the Chinese government; (2) identify the services they provide under their Section 214 authority; and (3) demonstrate why the Commission should not institute a proceeding to consider revoking their Section 214 authorizations. *In re Pac. Networks Corp. & ComNet (USA) LLC*, 35 FCC Rcd. 3733 (2020) (*Order to Show Cause*); see *Revocation Order* ¶¶ 10–11.

The Companies' filings reflect that they are indirectly wholly-owned by CITIC Telecom International Holdings Limited ("CITIC Tel"), which in turn is ultimately majority-owned by a Chinese conglomerate known as CITIC Group Corporation, which the Companies describe as their "ultimate parent." *Revocation Order* ¶¶ 7, 45–47 & n.217. The record shows that CITIC Group is controlled and funded by China's Ministry of Finance, which owns 100% of its equity interest. *Id.* ¶ 7.

The Companies informed the Commission that they provide several services pursuant to their Section 214 authorizations. ComNet relies on

this authority to provide Wholesale International Direct Dial (IDD) service, which “handles international voice traffic,” and Retail Calling Card service, which allows users to place calls through its local or toll-free access numbers. *Revocation Order* ¶¶ 9 & nn.38–39, 83, 94. Pacific Networks relies on this authority to provide Multi-Protocol Label Switching Virtual Private Network (MPLS VPN) services, which “enable its customers to operate business applications among various customer sites both within the United States and internationally.” *Id.* ¶¶ 9 & n.40, 106. The Companies also provide various other services for which they say they do not require Section 214 authorizations. *Id.* ¶ 9.

C. Proceedings Below

1. The Companies answered the *Order to Show Cause* by submitting a 37-page response and numerous exhibits. *See* Mot. Exh. A (exhibits omitted). FCC staff then sought the views of relevant Executive Branch agencies on the information the Companies provided. *Revocation Order* ¶ 13. The Executive Branch agencies advised the Commission that “the same national security and law enforcement concerns that the Executive Branch raised in the China Telecom * * * and China Mobile [proceedings] apply equally to” the Companies here. *Id.* ¶ 14; *see*

Executive Branch Response (Mot. Exh. D).¹ The agencies also pointed to a recent congressional investigation report identifying similar concerns.²

The Commission then determined that the Companies had “failed at this stage to dispel serious concerns regarding their retention of section 214 authority,” and accordingly issued an *Institution Order* commencing a full proceeding to consider whether to revoke the Companies’ authorizations. *In re Pac. Networks Corp. & ComNet (USA) LLC*, 36 FCC Rcd. 6368 (2021) (*Institution Order*); see *Revocation Order* ¶ 15. The Commission advised that the revocation proceeding would afford the Companies “further opportunity” to explain “why the Commission should not * * * revoke and/or terminate their * * * section 214 authorizations” and “to respond to this Order and to offer any additional evidence or arguments.” *Institution Order* ¶¶ 13, 19; see also *id.* ¶ 69 (the revocation proceeding “will provide [the Companies] an

¹ “Given * * * the limited time allotted for response,” the agencies stated that their response did not constitute a formal “recommendation * * * pursuant to Section 6 of [Executive Order] 13913,” but instead “offer[ed] [their] views pursuant to their discretion to communicate information to the FCC.” Executive Branch Response at 1; see *Revocation Order* ¶ 43.

² Executive Branch Response at 2 (citing Staff of S. Perm. Subcomm. on Investigations, 116th Cong., *Threats to U.S. Networks: Oversight of Chinese Government-Owned Carriers* (June 9, 2020) (PSI Report)).

additional opportunity to respond to this Order” and, if they wish, “to provide further evidence”).

To that end, the Commission directed the Companies to submit a written response to the concerns discussed in the *Institution Order* and to answer several additional questions. *Institution Order* ¶ 70 & App’x

A. The Commission then invited the Executive Branch agencies and the public to file any comments, and allowed the Companies to reply. *Id.*

¶ 70. The Commission denied the Companies’ requests to conduct the revocation proceeding through more formal hearing procedures or to appoint an administrative law judge to preside over the proceeding. *Id.*

¶¶ 14–21. Instead, the Commission explained, the presentation and exchange of full written submissions before the Commission itself “is sufficient to resolve the ultimate questions in most section 214 cases while providing carriers with due process.” *Id.* ¶ 17.

The Companies filed a comprehensive 84-page response to the *Institution Order*, a reply to further comments by Executive Branch agencies, and a supplemental letter in January 2022 (all in addition to their earlier response to the *Order to Show Cause*). See Mot. Exhs. A–C.

2. After reviewing the full record, the Commission issued the *Revocation Order* revoking and terminating the Companies' domestic and international Section 214 authorizations. *In re Pac. Networks Corp. & ComNet (USA) LLC*, FCC 22-22, 37 FCC Rcd. ---, 2022 WL 905270 (rel. Mar. 23, 2022) (*Revocation Order*). At the outset, the Commission again rejected various procedural objections the Companies had raised, explaining that the procedures used for the revocation proceeding were consistent with the Commission's rules, established policies, and due process. *Id.* ¶¶ 18–43.

Turning to the merits, the Commission found that “the Companies’ ownership and control by the Chinese government raise significant national security and law enforcement risks by providing opportunities for the Companies, their parent entities and affiliates, and the Chinese government to access, monitor, store, and in some cases disrupt and/or misroute U.S. communications, which in turn allow them to engage in espionage and other harmful activities.” *Id.* ¶ 2; *see id.* ¶¶ 74–113. In addition, the Commission found, “the Companies’ conduct and representations to the Commission and Congress demonstrate a lack of trustworthiness and reliability that erodes the baseline level of trust that the Commission and other U.S. government agencies require of

telecommunications carriers given the critical nature of the provision of telecommunications service in the United States.” *Id.* ¶ 2; *see id.* ¶¶ 114–151. Finally, the Commission concluded that the Companies cannot be trusted “to cooperate and be fully transparent * * * in such a way that would allow the current mitigation agreement or a more stringent mitigation agreement to be effective.” *Id.* ¶ 156; *see id.* ¶¶ 152–156.

The Commission ordered the Companies to discontinue all services provided under Section 214 within 60 days—that is, by May 23, 2022—and to notify all affected customers 30 days beforehand. *Id.* ¶¶ 158–162.

ARGUMENT

“[T]he extraordinary relief of a stay pending appeal” bears “stringent requirements.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1016, 1017 (D.C. Cir. 2018) (per curiam). To obtain a stay, the Companies must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm without a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). As this Court and the Ninth Circuit have recently ruled in materially indistinguishable circumstances, *see supra* pp. 3–4, the Companies cannot satisfy those exacting requirements.

I. THE COMPANIES ARE NOT LIKELY TO PREVAIL ON THE MERITS.

The Companies' stay motion fails to show that the Commission committed any error, and on that basis alone the motion should be denied. *See Citizens for Responsibility*, 904 F.3d at 1017–19 (that there is “little prospect of success” is “an arguably fatal flaw for a stay application”).

A. Substantial Evidence Supports The Commission's Conclusions.

The extensive record in this proceeding amply supports the Commission's decision to revoke the Companies' authorizations because their access to U.S. telecommunications infrastructure and U.S. customer records presents “significant national security and law enforcement risks,” *Revocation Order* ¶ 74, and because their inaccurate and incomplete representations to the government independently show that they lack the requisite trustworthiness and reliability.

1. The Companies are subject to exploitation, influence, and control by the Chinese government.

The Companies do not dispute their extensive ties to the Chinese government. Through their parent companies, the Companies are ultimately majority-owned and controlled by the Chinese government.

Revocation Order ¶¶ 7, 45. Their corporate leadership overlaps and is closely associated with that of their parent companies, *id.* ¶¶ 49–50, which are closely linked to the Chinese government and to the ruling Chinese Communist Party, *id.* ¶¶ 58–62. The parent companies have significant authority and control over the Companies’ operations, *id.* ¶¶ 47, 51–67, and the Companies and their parent entities could be forced to comply with Chinese government requests under Chinese laws, *id.* ¶¶ 63–72.

The Companies also do not dispute that, in recent years, the Chinese government has used Chinese information technology firms to engage in extensive espionage and other malicious cyber activities, including activities targeted at the United States. *Revocation Order* ¶ 14; *see* Executive Branch Response at 2–9; *China Telecom Gov’t Br.* at 26. And the Companies have not shown that they have the power to refuse any Chinese government commands.

2. The Companies’ authorizations pose serious national security and law enforcement risks.

The *Revocation Order* meticulously explains how the Companies’ authorizations pose serious national security and law enforcement risks. When the Companies provide communications service to U.S. customers,

they gain access to sensitive customer records—including details on what phone numbers a customer calls, at what times, and for how long—and often personal identifying information including customer names, addresses, and credit card numbers. *See, e.g., Revocation Order* ¶¶ 82–87, 95–97, 107–108, 140. And when the Companies provide service over their own facilities or those of their affiliates, they also have the ability to intercept or misroute the underlying communications. *See, e.g., id.* ¶¶ 85, 93, 96, 98–100, 109–111.

The Companies’ stay motion does not seriously dispute that their Wholesale IDD and MPLS VPN services can be exploited in these ways. *Cf. Revocation Order* ¶¶ 91–113 (discussing these vulnerabilities).³ And contrary to the Companies’ arguments, the *Revocation Order* fully explained how ComNet’s Retail Calling Card service can likewise be exploited. In providing that service, ComNet—and therefore the Chinese government—has access to “some of the most sensitive personal information that carriers and providers have about their customers,”

³ The Companies briefly contend (Mot. 10) that “if there were any significant vulnerability, the[y] would have failed in the market.” But their ties to the Chinese government can confer advantages, such as lower prices due to government financial support, that can make their offerings more attractive. *See* PSI Report at 2, 8, 21–22.

including details on “phone numbers called” and “the frequency of calls, their duration, and the timing of such calls.” *Id.* ¶ 82; *accord id.* ¶¶ 83–84, 86. It also often has access to those customers’ personal identifying information, including names, addresses, and credit card information, and can link that information to the customers’ calling records. *Id.* ¶¶ 84, 86. And when “customer calls traverse ComNet’s calling card platform,” it “can access the voice conversations of its customers” and can potentially intercept or misroute those communications. *Id.* ¶ 85.

“Unauthorized access to such sensitive information can result in serious harms and represents a threat to U.S. national security and law enforcement interests.” *Revocation Order* ¶ 82. Congress has recognized that “call logs may include a wealth of personal data” that “may reveal the names of telephone users’ doctors, public and private relationships, business associates, and more,” and can, for instance, “compromise * * * law enforcement * * * and undermine the integrity of law enforcement investigations.” Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, § 2, 120 Stat. 3568, 3568; *cf.* 47 U.S.C. § 222 (requiring carriers to protect customer information). In the hands of a foreign intelligence service, this information could be leveraged to the foreign country’s advantage, including in some cases for use as blackmail.

Revocation Order ¶¶ 86, 89. These risks are amplified by the potential to intercept or misroute the underlying communications. *See id.* ¶¶ 85, 93, 111. And the Executive Branch agencies warned that the Companies could even intercept calls by non-customers that pass through their networks due to least-cost routing, including U.S. government communications. *Id.* ¶¶ 79 & n.445, 101.

The Companies claim (Mot. 11–12) to pose somewhat less of a threat than larger carriers due to their smaller size, but an ostensibly smaller national security threat remains a national security threat.⁴ And while the Companies insist (Mot. 8) that they have not yet engaged in any malicious conduct, the government need not wait for national security threats to be exploited before it can act to protect against them. *See MacWade v. Kelly*, 460 F.3d 260, 271–72 (2d Cir. 2006) (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 835–36 (2002)); *see also Connick v. Myers*, 461 U.S. 138, 151–52 (1983). On such issues of national security, where

⁴ The Companies’ claims about their small size are in any event misleading. The Companies repeatedly profess (Mot. 1, 4, 12) to have only six employees in the United States, but they neglect to mention that much of their operations are handled by their affiliates, which are much larger and are less susceptible to oversight. *See, e.g., Revocation Order* ¶¶ 51–57, 97–98, 124–129.

the government must “confront evolving threats in an area where information can be difficult to obtain,” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34–36 (2010), courts should not “second-guess [the Commission’s] judgment” that allowing the Companies to retain their Section 214 authorizations would pose unacceptable risks. *Olivares v. TSA*, 819 F.3d 454, 466 (D.C. Cir. 2016).

3. The Companies’ inaccurate and incomplete representations to the government show a lack of trustworthiness and reliability.

The *Revocation Order* also explains that “the Companies’ conduct and representations to the Commission and Congress demonstrate a lack of trustworthiness and reliability that erodes the baseline level of trust * * * require[d] of telecommunications carriers.” *Revocation Order* ¶ 44; *see id.* ¶¶ 114–151. “[T]rust is paramount” for Section 214 authorizations “given that carriers sit at a privileged position to provide critical telecommunications services” and have “opportunity to engage in the harmful activities described above.” *Id.* ¶¶ 111, 115. The Commission found, however, that “the Companies’ omission of crucial information[] [and] failure to provide accurate and true statements to the Commission * * * provide evidence that the Companies cannot be trusted to comply with the Communications Act and the Commission’s rules.” *Id.* ¶ 137.

- The Companies failed to provide complete and accurate information on the leadership of entities holding a 10% or greater interest in the Companies. *Id.* ¶¶ 117–118. When the Commission pointed out the omissions and directed the Companies to correct them, the Companies instead provided only links to various websites. *Id.* ¶ 119. They did not certify that those websites were complete and accurate, and the websites appear to lack important information that the Commission (twice) requested. *Ibid.*
- The Companies initially failed to identify the Chinese government’s ultimate ownership of the Companies, and at other times provided conflicting information on which arm of the Chinese government is their ultimate owner. *Id.* ¶¶ 7, 121–122.
- The Companies failed to disclose the extensive involvement of CITIC Tel in their management and operations, and made inaccurate and incomplete statements seeking to downplay its involvement. *Id.* ¶¶ 124–129.

- The Companies failed to provide complete and accurate information about the location of and persons having access to their U.S. records. *Id.* ¶¶ 130–134.
- The Companies apparently failed to file required notifications of changes in ownership, and failed to take timely corrective action after being alerted to their noncompliance. *Id.* ¶¶ 123, 135–136.
- The Companies failed in numerous respects to take all practicable measures to protect U.S. records and communications, contrary to commitments they made in their Letter of Assurances. *Id.* ¶¶ 140–151.

None of the authorities the Companies cite (Mot. 20–21) holds that Section 214 authorizations cannot be revoked for repeatedly making inaccurate and incomplete representations to government agencies. Even if a lesser sanction might be available in other cases, the Companies make no persuasive showing why revocation is not permissible and appropriate here.

4. Further mitigation efforts would not suffice.

The Commission reasonably concluded that “mitigation would not address the significant national security and law enforcement concerns

identified.” *Revocation Order* ¶ 152. The Companies conceded below that no mitigation measures could fully address all the risks posed by their ownership and control by the Chinese government. *Id.* ¶ 155. And the evidence before the Commission was “overwhelming” that the government “cannot trust or rely on the Companies to adhere to * * * stricter mitigation measures[] or to report any mitigation violations.” *Id.* ¶ 152.

The government does not have the resources to comprehensively monitor the day-to-day operations of each telecommunications carrier that provides services under Section 214. Instead, it “relies on parties to mitigation agreements to adhere to mitigation agreement provisions, and self-report any problems or issues of non-compliance.” Executive Branch Response at 11; see *Revocation Order* ¶ 152 (mitigation “requires a baseline level of trust” because ordinary “oversight * * * would not necessarily be adequate to detect intentional, and possibly state-sponsored, efforts to surreptitiously violate mitigation measures”).⁵

⁵ The Companies are therefore incorrect (Mot. 11–12, 13) that the Letter of Assurances and Commission rules will always prevent any misconduct, because those requirements are not self-enforcing. The government relies on carriers to certify their compliance with these requirements, but the Companies lack the trustworthiness and reliability to do so here.

Thus, even if the Companies could identify mitigation measures that could address all pertinent risks in the abstract, there could be no assurance they would be effective here because “the Companies cannot be trusted to adhere to any Executive Branch mitigation agreement in good faith and with transparency.” *Revocation Order* ¶ 156. And the Companies conceded below, moreover, that even the additional mitigation measures they did propose “would ‘not explicitly address every conceivable risk.’” *Id.* ¶ 155.

B. The Companies Received Due Process.

The Commission provided “more than sufficient due process” by affording the Companies multiple rounds of notice and opportunity to respond, *Revocation Order* ¶ 28, and the Companies vigorously availed themselves of those opportunities to present their arguments and submit their evidence. Though the Companies maintain (Mot. 14–19) that they should have received some sort of further evidentiary hearing, “the ordinary principle [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action.”⁶ *Mathews v. Eldridge*,

⁶ The Companies’ passing claim that the Commission was bound by agency precedent to order an evidentiary hearing before an administrative law judge (Mot. 16–17) is incorrect. See *Revocation Order* ¶¶ 36–40; *China Telecom Gov’t Br.* at 43–46.

424 U.S. 319, 343 (1976). The Commission carefully explained why the *Mathews* factors do not require any additional process here, see *Revocation Order* ¶¶ 23–29, and the *China Telecom* motions panel rejected the Companies’ position in denying a stay in that case.

First, even if the Companies may have some interest in retaining their authorizations, that interest is significantly diminished because their authorizations were acquired “conditioned [on] the ‘public convenience and necessity’” and because “[i]t is especially unlikely that [entities] majority-owned and controlled by a foreign government” can establish a compelling interest in operating communications networks here in the United States. *Revocation Order* ¶ 27 & n.121; see *China Telecom Gov’t Br.* at 52–53.

Second, and most significant, “the Companies have not shown the value of any additional process or how it would prevent erroneous deprivation” and “have not explained why the process the Commission afforded them, in which the Companies submitted several rounds of written comments * * *, does not provide them a meaningful opportunity to present their case.” *Revocation Order* ¶ 28. “The disputes identified by the Companies * * * ‘do not turn on witnesses testifying to their personal knowledge or observations or on individual credibility

determinations, for example, but instead on facts that can be fully ascertained through written evidence * * *.” *Id.* ¶ 35; *see id.* ¶¶ 33–35.⁷

Third, “the fiscal and administrative burden on the Government” of any further measures “weighs heavily” against requiring additional process here. *Revocation Order* ¶ 29; *see China Telecom Gov’t Br.* at 54–55. The Companies do not deny that those burdens “would be especially heavy in this case” because further hearings “could require national security officials to take time away from their essential duties to participate” and because “given the national security issues at stake, any resulting unwarranted delay could be harmful.” *Revocation Order* ¶ 29. Even if a live evidentiary hearing could be useful in certain other cases, any minimal value it might have here “is substantially outweighed” by “the fiscal, administrative, and national security interests that would be harmed” by requiring unnecessary additional process. *Ibid.*

⁷ The Companies object (Mot. 17) to the Commission’s citations to public portions of a congressional report that they say they could not fully address (even though the Companies actively participated in that congressional investigation). But those citations relate only to whether the Companies are susceptible to Chinese government control, an issue they do not challenge here and on which there was overwhelming independent evidence in the record.

II. THE REMAINING FACTORS ALSO FAIL TO WARRANT A STAY.

1. The Companies' cursory discussion of economic harm (Mot. 22) fails to meet this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The Companies must show an injury "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, however, the Companies' stay motion presents no evidence that the loss of their authorizations threatens their viability or will cause extreme hardship, especially when they can continue providing their non-Section 214 services. *See Mylan Labs., Inc. v. Leavitt*, 484 F. Supp. 2d 109, 123 (D.D.C. 2007). In fact, their motion contains no financial information at all. *Cf. Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011).

The Companies also complain (Mot. 22) about "harm to their reputations." But they acknowledge (*ibid.*) that their business customers are likely already aware of the *Revocation Order's* findings, and a temporary stay would not make that knowledge vanish. As to their retail customers, the Companies stated that ComNet "sells calling cards via consignment at outlets such as bookstores, newsstands and supermarkets," *Revocation Order* ¶ 86, and offered no evidence that

these customers take the Companies' reputation into account in making those purchases. And if the Companies do ultimately prevail, they can presumably win back lost customers by offering superior service, pricing, or whatever other aspects attracted those customers in the first place.

2. The public interest weighs decidedly against any stay given the Commission's finding, based on an extensive record, that allowing the Companies to retain their authorizations would pose serious national security and law enforcement risks. The Companies attempt (Mot. 23) to dismiss the risk of delaying revocation because "[t]his proceeding has been pending for nearly two years." But it took time to complete the revocation proceeding precisely because of the Commission's efforts to provide much of the process that the Companies claimed they were due. Now that the Commission has confirmed that the Companies' authorizations pose a serious risk to national security, the harm of allowing that known and present risk to continue for months pending review outweighs any effect on the Companies in the meantime.

CONCLUSION

The motion for stay should be denied.

Dated: April 15, 2022

Respectfully submitted,

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