

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
CHINA MOBILE INTERNATIONAL (USA) INC.)	File No. ITC-214-20110901-00289
)	
Application for Global Facilities-Based and)	
Global Resale International Telecommunications)	
Authority Pursuant to Section 214 of the)	
Communications Act of 1934, as Amended)	

**REPLY OF THE
NATIONAL TELECOMMUNICATIONS
AND INFORMATION ADMINISTRATION**

On July 2, 2018, the Executive Branch¹ recommended that the Commission deny the above-captioned application of China Mobile International (USA) Inc. (China Mobile) for a certificate of public convenience and necessity under Section 214 of the Communications Act, as amended, to provide telecommunications services between the United States and foreign points.² On August 20, 2018, China Mobile filed a response in which it urged the Commission to disregard the Executive Branch’s detailed assessment of the substantial and unacceptable national security and law enforcement risks associated with China Mobile’s pending application.

¹ The Executive Branch includes the Departments of Justice, Homeland Security, Defense, State, and Commerce, as well as the Offices of Science and Technology Policy and the United States Trade Representative (collectively, the Executive Branch or Executive Branch Agencies, or individually, Executive Branch Agency).

² See Executive Branch Recommendation to the Federal Communications Commission to Deny China Mobile International (USA) Inc.’s Application for an International Section 214 Authorization, File No. ITC-214-20110901-00289 (filed July 2, 2018) (Executive Branch Recommendation to Deny). This recommendation, and the next two referenced document are available at http://licensing.fcc.gov/cgi-bin/ws.exe/prod/ib/forms/reports/related_filing.hts?f_key=-233159&f_number=ITC2142011090100289.

On behalf of the Executive Branch, and in accordance with a request from the Commission,³ the National Telecommunications and Information Administration (NTIA), respectfully replies to the opposition by China Mobile⁴ to the Executive Branch's recommendation (Executive Branch Recommendation to Deny).

China Mobile's application presents one fundamental question: Is it in the public interest for the Commission to issue an international section 214 authorization to a company owned and controlled by what China Mobile itself characterizes as "a country and government identified by the United States as engaging in actions, or possessing the intention to take actions, that could impair U.S. national security and law enforcement interests?"⁵ If granted, China Mobile's international section 214 authorization would afford it the ability to interconnect and have greater access to telephone lines, fiber-optic cables, cellular networks, and communication satellites throughout the United States' telecommunications network. After a thorough review of the concerns raised by the application, and China Mobile's proposals to mitigate them, the Executive Branch concluded that the answer to that question must be "No."

In its filing, China Mobile ascribes, without any factual support, ulterior motives behind the Executive Branch Recommendation to Deny, incorrectly states that the Commission's acceptance of the recommendation would run afoul of the United States' international trade obligations, and argues that China Mobile's status as a U.S. subsidiary indirectly owned by a Chinese state-owned enterprise (SOE) inoculates it from exploitation, influence, and control by the Chinese government.

³ Letter from Denise Coca, FCC, to Daniel Chen Xuan, China Mobile International (USA), July 6, 2018. A copy of the letter was sent on the same date to NTIA.

⁴ Opposition to Petition to Deny of China Mobile International (USA) Inc, File No. ITC-214-20110901-00289 (filed Aug. 20, 2018) (China Mobile Opposition).

⁵ *Id.* at 1.

China Mobile's arguments fail to overcome the national security and law enforcement risk factors associated with its receipt of an international section 214 authorization as set forth in the Executive Branch Recommendation to Deny and underscored by the classified appendix. As a result, the Executive Branch reiterates its recommendation that granting China Mobile's application would create unacceptable risks to U.S. national security and law enforcement and thus would not serve the public interest. The Commission should therefore give appropriate weight to the Executive Branch's recommendation and deny China Mobile's application.

I. China Mobile's Procedural Objections to the Executive Branch's Recommendation to Deny Are Meritless.

China Mobile paints the "Team Telecom" review⁶ – the process by which the Commission solicits and receives Executive Branch assessments of the national security and law enforcement issues raised by international section 214 applications with significant foreign ownership – as "based on an informal practice" and shrouded in mystery until very recently.⁷ In fact, it is neither. More than twenty years ago, the Commission recognized that foreign-affiliated section 214 and other applications may raise national security, law enforcement, and other issues; acknowledged that "other federal agencies have developed specific expertise" in such areas; and expressed "no desire to run afoul of any such legitimate concerns."⁸ Accordingly, it stated that, as part of its public interest analysis of foreign-affiliated applications, the

⁶ "Team Telecom" specifically refers to the Departments of Justice, Homeland Security, and Defense, which conduct reviews of certain applications referred by the Commission to evaluate those applications for national security and law enforcement concerns.

⁷ China Mobile Opposition at 3.

⁸ Market Entry and Regulation of Foreign-affiliated Entities, *Report and Order*, 11 FCC Rcd 3873, 3955, ¶¶ 216, 219 (1995) (*Foreign Participation Order*).

Commission would “coordinate with appropriate executive agencies to make sure that our actions are consistent with national policy.”⁹

The Commission also has informed the public about the Team Telecom process. For example, in March 2012, the Commission’s Homeland Security Bureau published a document summarizing the essential components of that process – referral of foreign-affiliated applications from the Commission’s International Bureau to Team Telecom; the Executive Branch Agencies comprising Team Telecom; the requirement, for problematic applications, for the applicant to accept national security agreements as a condition of approval; and the Commission’s practice of not acting on an application until completion of Team Telecom review.¹⁰

Additionally, the Executive Branch provided China Mobile with extensive notice and opportunities to respond during its thorough review of China Mobile’s application. China Mobile incorrectly states that it was unaware of the request by the Executive Branch Agencies to remove its application from streamlined processing.¹¹ On September 30, 2011, the Commission, through electronic mail, informed counsel of record and a representative for China Mobile that the Executive Branch Agencies had requested removal of the application from streamlined processing, and that pursuant to section 63.12(c)(3) of the Commission’s rules, the application

⁹ *Id.* ¶ 219 The Commission subsequently directed that “[a]ny such advice must occur only after coordination among Executive Branch agencies, must be communicated in writing, and will be part of the public file in the relevant proceeding.” Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23921, ¶ 66 (1997) (*Second Foreign Participation Order*).

¹⁰ See “FCC HOMELAND SECURITY LIAISON ACTIVITIES,” at 6-7 (Mar. 2012), available at <https://transition.fcc.gov/pshs/docs/liaison.pdf>. See also “Media Bureau Announces Filing of Request for Clarification of the Commission’s Policies and Procedures Under 47 U.S.C. § 310(b)(4) by the Coalition for Broadcast Investment,” 28 FCC Rcd 1469, 1486 (2013).

¹¹ See China Mobile Opposition at 3.

was being removed from streamlined processing.¹² The Commission subsequently published a public notice on September 30, 2011, informing the public that China Mobile's application was being removed from streamlined processing.¹³

Following the Commission's removal of the application from streamlined processing, on October 5, 2011, an Executive Branch Agency issued questions to China Mobile.¹⁴ China Mobile responded to these questions and several additional rounds of questions from 2011 to 2012 regarding its business and planned operations.¹⁵ In 2014, China Mobile provided the Commission and certain Executive Branch Agencies with additional information about its business and the types of services it intended to offer.¹⁶

The Executive Branch continued to engage with and respond to China Mobile's requests for more information regarding the ongoing review of its application. On May 14, 2015, in the interest of transparency, the Executive Branch sent China Mobile a letter outlining the considerations the Executive Branch takes into account when evaluating an application for an international section 214 authorization.¹⁷ The letter detailed the factors that Team Telecom considers in determining whether an application presents national security and law enforcement concerns.¹⁸ On June 12, 2015, China Mobile submitted a detailed mitigation proposal to Team Telecom, including a terms sheet and narrative response.¹⁹ During a November 16, 2016,

¹² See Email from Commission to Jennifer Kostyu and China Mobile titled "Removed from Streamline" (Sept. 30, 2011) [Exhibit 1].

¹³ *Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-01521S, at 2 (rel. Sept. 30, 2011) [Exhibit 2].

¹⁴ See Executive Branch Recommendation to Deny nn.10, 13, 22, 33, and 47.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7.

¹⁹ See China Mobile Opposition at 4.

meeting with China Mobile to discuss the mitigation proposal, the Executive Branch inquired whether China Mobile would be willing to modify its application to limit the authority it was seeking. China Mobile, in a December 2, 2016, email, stated [[REDACTED]]
[[REDACTED]].²⁰

II. The Burden of Proof Lies With China Mobile.

Section 63.18 of the Commission's rules, which explicitly applies to international section 214 applications, requires all applicants to provide "information demonstrating how the grant of [its] application will serve the public interest, convenience, and necessity."²¹ Because the rule plainly links grant of an application to the applicant's provision of such information, it necessarily imposes on the applicant the burden of proof. Per the Commission's long-standing practice, it requested the Executive Branch's assessment and recommendations about potential national security and law enforcement risks presented by China Mobile's application. The mere fact that the Executive Branch's response includes a recommendation that the application should be denied does not, and should not, alter China Mobile's threshold obligation under section 63.18 to show that grant of its application would serve the public interest.²²

Indeed, the burden of proof must stay with China Mobile, because the Commission not only solicits the Executive Branch's views on any national security, law enforcement, foreign policy, or trade policy concerns raised by foreign-affiliated applications, it "accord[s] deference"

²⁰ See Email from Kent Bressie to Executive Branch Agencies titled "CMIUSA" (Dec. 2, 2016) [Exhibit 3].

²¹ 47 C.F.R. § 63.18 (2017).

²² China Mobile cannot shift its burden of proof to the Executive Branch by incorrectly naming and describing the Executive Branch's filing as a "Petition to Deny" and invoking section 1.939 of the Commission's rules. See China Mobile Opposition at 6. By its terms, that rule applies only to challenges to radio license applications by outside parties. It thus has no relevance to the Team Telecom review of international section 214 applications covered by section 63.18.

to those views.²³ That deference, moreover, is given not as a matter of comity, but in recognition of “the expertise of the Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy.”²⁴ Thus, as China Mobile recognizes, it must carry the burden of proving that such deference is not warranted in this instance.²⁵ As demonstrated below, the company has failed to do so.

Even if the Executive Branch held the burden to show why a grant of China Mobile’s application would be inconsistent with the public interest, the Executive Branch Recommendation to Deny certainly meets that threshold. The Executive Branch provided sufficient unclassified evidence in its recommendation to show that the risks to national security and law enforcement posed by China Mobile’s application are not in the public interest. China Mobile was given an opportunity to respond and has not shown that the Executive Branch’s recommendation is inaccurate.

III. Deference to the Executive Branch’s Recommendation to Deny Does Not Violate the United States’ International Commitments.

China Mobile appears to believe that the Executive Branch review of foreign-affiliated applications and/or the Commission receiving and giving weight to Executive Branch review violates U.S. commitments, as a member of the World Trade Organization (WTO), under the General Agreement on Trade in Services (GATS).²⁶ The Executive Branch, however, has carefully considered U.S. obligations under GATS and the WTO and has concluded that nothing in those agreements prevents the Commission from soliciting, or deferring to, an Executive

²³ *Foreign Participation Order*, 11 FCC Rcd at 3955-56, ¶ 219.

²⁴ *Second Foreign Participation Order*, 12 FCC Rcd at 23920, ¶ 63.

²⁵ See China Mobile Opposition at 8.

²⁶ *Id.* at 6-8.

Branch assessment of whether a foreign-affiliated application raises serious national security or law enforcement related concerns.

The Commission, moreover, has reached a similar conclusion. In its *Second Foreign Participation Order*, the Commission considered and dismissed claims that provisions of the GATS precluded it from considering national security and law enforcement issues in determining whether to grant international section 214 and other applications.²⁷ In particular, it rejected the notion (as suggested by China Mobile here) that GATS “Article XIV *bis* is not broad enough to enable the Commission to review any national security concerns raised by the Executive Branch.”²⁸

IV. China Mobile’s Vulnerability to Exploitation, Influence, and Control by the Chinese Government is Without Dispute.

China Mobile acknowledges that it cannot and does not take issue with the Executive Branch’s serious concerns regarding the Chinese government’s intelligence activities and economic espionage as they relate to the United States.²⁹ Further, the Executive Branch Recommendation to Deny does not conflate the risk posed by China Mobile with that posed by the Chinese government and it clearly recognizes that “state ownership or control does not, standing alone, necessarily pose a threat to U.S. national security and law enforcement interests”³⁰ Instead, the Executive Branch articulated that its assessment was driven in part by the threat emanating from a combination of the Chinese government’s history of intelligence

²⁷ See *Second Foreign Participation Order*, at 24048-49, ¶¶ 362-365.

²⁸ *Id.* at 24049, ¶ 365.

²⁹ See China Mobile Opposition at 8.

³⁰ See Executive Branch Recommendation to Deny at 8.

activities and economic espionage targeting the United States and China Mobile's size, financial resources, and technical capabilities.³¹

Given the national security and law enforcement concerns expressed in the Executive Branch Recommendation to Deny, there is no basis to grant China Mobile access to the United States' telecommunications networks under these circumstances. As public documents, including those cited in the Executive Branch Recommendation to Deny, have consistently explained, there has been no clear distinction in practice between the Chinese government's efforts to undermine U.S. national security, including by unlawfully acquiring intellectual property and committing economic espionage in order to provide competitive advantages to Chinese SOEs, and the Chinese government's use of SOEs' resources to achieve those efforts.³²

A. China Mobile's Status as a U.S. Subsidiary Does Not Mitigate the National Security and Law Enforcement Risks Associated with Its Indirect Ownership by a Chinese SOE.

As an initial matter, being a Delaware-incorporated, California-based U.S. business does not, standing alone, diminish the national security and law enforcements risks associated with China Mobile, the indirect subsidiary of a Chinese SOE, receiving an international section 214 authorization.³³ If the Commission accepts China Mobile's argument that its U.S. incorporation mitigates the national security and law enforcement risks articulated in the Executive Branch Recommendation to Deny, then the need for a national security and law enforcement review

³¹ *See id.*

³² *See id.* at 11-13. *See also* Office of U.S. Trade Rep., *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974*, at 164 (Mar. 22, 2018) (hereinafter the USTR Report), available at <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>; Mandiant, *APT1: Exposing One of China's Cyber Espionage Units* at 7 (2013) (hereinafter the Mandiant Report), available at <https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf>.

³³ *See* China Mobile Opposition at 9.

would be unnecessary and any hostile foreign actor could simply operate within the United States by incorporating a subsidiary. China Mobile's decision to incorporate in Delaware should not serve as a basis for the Commission to disregard the Executive Branch's expert assessment regarding risks to the United States' national security and law enforcement equities.

As stated above and in the Executive Branch Recommendation to Deny, an international section 214 authorization would allow China Mobile to become a common carrier and increase its, and potentially and indirectly the Chinese government's, ability to interconnect and have greater access to telephone lines, fiber-optic cables, cellular networks, and communication satellites throughout the United States' telecommunications network.³⁴ Given the capabilities an international section 214 authorization would provide China Mobile to provide international telecommunications services, as well as the transitory nature of the data that would be transmitted, for example, from the United States to China or from China to the United States, its argument that it is subject to U.S. laws only becomes significantly less compelling. Information transmitted through the telecommunications network, and the risk associated with maintaining its integrity from hostile foreign actors, is not confined to geographical boundaries or local U.S. corporate laws.

Additionally, significant concerns exist that China Mobile's U.S. status would not preclude its Chinese SOE parent entities, or the Chinese government, from invoking when convenient procedural or substantive bars to legal process for information about China Mobile's telecommunication services that might be relevant for law enforcement purposes. For example, following a February 2012 federal indictment for charges of conspiracy to commit economic espionage, conspiracy to commit theft of trade secrets, and attempted economic espionage, the

³⁴ See Executive Branch Recommendation to Deny at 10.

Chinese SOE Pangang Group Company, Ltd., and its subsidiaries (collectively, the Pangang Companies) have engaged in litigation to vigorously defend against criminal summonses to appear in district court that has lasted over six years.³⁵ Attorneys made special appearances on behalf of the Pangang Companies to challenge the delivery requirements for summonses served on the New Jersey offices of a U.S. subsidiary of one of the Pangang Companies.³⁶ The Chinese government also rejected the U.S. government's formal request to serve the Pangang Companies.³⁷

Similarly, in 2013, Sinovent Wind Group Company (Sinovent), a Chinese corporation, challenged a criminal summons delivered to the office of Sinovent Wind Group (USA) Company (Sinovent USA).³⁸ A federal grand jury returned an indictment against Sinovent on multiple charges, including conspiracy to commit trade secret theft and theft of trade secrets.³⁹ Sinovent argued that the U.S. government's service of process on Sinovent USA was not equivalent to service on Sinovent itself.⁴⁰ When the district court rejected Sinovent's argument and refused to quash the criminal service of process, Sinovent, facing limited options for appellate review of the

³⁵ See *In Re Pangang Group Company, Ltd.*, No. 17-72370, 2018 U.S. App. LEXIS 23586 (9th Cir. Aug. 22, 2018); see also Press Release, Office of Public Affairs, U.S. Dep't of Justice, U.S. and Chinese Defendants Charged with Economic Espionage and Theft of Trade Secrets in Connection with Conspiracy to Sell Trade Secrets to Chinese Companies – U.S. Citizens Alleged to Have Conveyed Valuable DuPont Technology to Companies Controlled by the Government of the People's Republic of China (Feb. 8, 2012), available at <https://www.justice.gov/opa/pr/us-and-chinese-defendants-charged-economic-espionage-and-theft-trade-secrets-connection>.

³⁶ See *In Re Pangang Group Company, Ltd.*, 2018 U.S. App. LEXIS 23586 at *4-5.

³⁷ See *id.* at *5.

³⁸ See *United States v. Sinovent Wind Grp. Co., Ltd.*, 794 F.3d 787 (7th Cir. 2015).

³⁹ See *id.* at 789; see also Press Release, Office of Public Affairs, U.S. Dep't of Justice, Sinovent Corporation and Three Individuals Charged in Wisconsin with Theft of Amsc Trade Secrets – Theft of Trade Secrets Allegedly Cheated Amsc of More Than \$800 Million (June 27, 2013), available at <https://www.justice.gov/opa/pr/sinovent-corporation-and-three-individuals-charged-wisconsin-theft-amsc-trade-secrets>.

⁴⁰ See *United States v. Sinovent Wind Grp. Co., Ltd.*, 794 F.3d at 789.

district court's order at that juncture, argued that its status as a partially state-owned corporation conferred the appellate court with jurisdiction to hear an interlocutory appeal and consider a writ of mandamus directing the district court to vacate its order.⁴¹

The foregoing examples involved U.S. subsidiaries, like China Mobile, that were subject to U.S. law; however, these examples highlight the difficulties faced when serving process, in order to enforce U.S. law, on Chinese companies, including SOEs, operating within the United States. This is especially concerning when applied in the context of an international telecommunications provider like China Mobile, which will have access to a significant amount of information, such as the contents of wire and electronic communications, that traverses its networks from or to the United States and has a very strong likelihood of being relevant to law enforcement and national security investigations. In certain instances, China Mobile's indirect Chinese SOE parent may have particular sensitivities that will inform China Mobile's compliance with lawful process that seeks information transmitted using networks connected to China.

In other instances, U.S. authorities may have particular sensitivities related to China Mobile's indirect SOE parent becoming aware of an investigative interest in information related to China Mobile's services. The Executive Branch has assigned responsibility for a significant amount of unlawful activity to the Chinese government.⁴² Therefore, the U.S. government cannot trust China Mobile to identify, disrupt, or provide assistance for investigations into unlawful activity that may involve or relate to the Chinese government given its status as a U.S. subsidiary with an indirect Chinese SOE parent. Thus, China Mobile's status as a U.S. company

⁴¹ *See id.* at 789-91.

⁴² *See, e.g.*, Executive Branch Recommendation to Deny at 11-14; USTR Report at 166-69.

in and of itself does not assuage the national security and law enforcement concerns set forth in the Executive Branch Recommendation to Deny.

B. Each of the National Security and Law Enforcement Concerns Cited in the Executive Branch’s Recommendation Apply to China Mobile’s Application.

China Mobile provides no factual support for its argument that the Executive Branch Recommendation to Deny – which took into consideration, among other things, China Mobile’s status as a Chinese SOE, a sustained pattern of computer intrusions and economic espionage attributable to the Chinese Government and Chinese nationals, and China Mobile’s capabilities should it acquire an international 214 authorization – was based on economic protectionism.⁴³ Protecting U.S. companies from becoming victims of economic espionage cannot be equated with restricting market access in order to provide a competitive commercial advantage to domestic companies. The Executive Branch Recommendation to Deny explained that the Chinese government’s policy of intertwining Chinese SOE resources with intellectual property theft and economic espionage, along with the Chinese government’s ongoing intelligence activities targeting the United States, presented too great of a risk in light of the fact that “China Mobile Communications Company – and by extension, its subsidiary China Mobile – as a prominent Chinese [SOE], cannot be expected to act against the interest of the Chinese government on any sensitive manner.”⁴⁴ For example, the USTR Report cited in the Executive Branch Recommendation to Deny set forth the Chinese government’s “military-civil fusion” policy of integrating platforms for information sharing between, among others, the People’s Liberation Army (PLA) and Chinese enterprises in order to provide competitive intelligence to

⁴³ See China Mobile Opposition at 8-9.

⁴⁴ Executive Branch Recommendation to Deny at 8-9.

Chinese SOEs through the use of cyber intrusions.⁴⁵ In addition, the Mandiant Report, which also was cited in the Executive Branch Recommendation to Deny, stated that “[t]he PLA’s cyber command is fully institutionalized within the CPC [Communist Party of China] and able to draw upon the resources of China’s state-owned enterprises to support its operations.”⁴⁶ In fact, during the November 16, 2016, meeting, China Mobile was asked to assess whether it would be subject to China’s legal framework for surveillance, and whether China Mobile could challenge the Chinese government’s surveillance requests. On December 2, 2016, China Mobile informed the Executive Branch that [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]].⁴⁷

China Mobile concedes that its foreign ownership involves a country suspected of engaging in actions, or possessing the intention to take actions, that could impair U.S. national security.⁴⁸ China Mobile argues that the reports upon which the Executive Branch Recommendation to Deny relies do not substantiate national security and law enforcement risks because the reports are “aging.”⁴⁹ The Executive Branch Recommendation to Deny included a classified submission that provided more recent and detailed assessments of similar behavior

⁴⁵ See USTR Report at 164 (stating that “the U.S. government has evidence that the Chinese government provides competitive intelligence through cyber intrusions to Chinese state-owned enterprises through a process that includes a formal request and feedback loop, as well as a mechanism for information exchange via a classified communication system.”).

⁴⁶ Mandiant Report at 7.

⁴⁷ See Email from Kent Bressie to Executive Branch Agencies titled “CMIUSA” (Dec. 2, 2016) [Exhibit 3].

⁴⁸ See China Mobile Opposition at 1.

⁴⁹ *Id.* at 10.

involving the Chinese government that threaten the United States' national security and telecommunications network infrastructure. The cited reports in the Executive Branch Recommendation to Deny, in addition to providing examples of illicit activity from as recently as 2017,⁵⁰ provided unclassified evidence of the type of information included in the classified submission. Additionally, while the reports do not mention China Mobile specifically, they highlight national security and law enforcement factors the Executive Branch provided to China Mobile, including whether operations within the United States provide opportunities for Chinese actors, including Chinese SOEs, to engage in economic espionage, or other activities that threaten national security.⁵¹

C. The Executive Branch's Recommendation Clearly Explains Why China Mobile's Proposed Mitigation Measures Are Not Sufficient.

China Mobile's planned interconnection arrangements, as well as connections to China Mobile's anticipated customers, represent an unacceptable risk to national security and law enforcement.⁵² In addition, so long as China Mobile controls its own network, the security of the equipment it uses does not mitigate the risk China Mobile would pose as the operator of that equipment. China Mobile argues that the Executive Branch fails to provide a particularized rationale for why China Mobile's proposed measures fall short.⁵³ But the Executive Branch

⁵⁰ See USTR Report at 167-69.

⁵¹ See U.S.-China Econ. and Sec. Review Comm'n, *2014 Report to Congress of the U.S.-China Economic and Security Review Commission* (2014), available at https://www.uscc.gov/sites/default/files/annual_reports/Complete%20Report.PDF. See also H.R. Permanent Select Comm. On Intelligence, 112th Cong., *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE* (2012) (hereinafter, "House Report on Huawei & ZTE"), available at [https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20\(final\).pdf](https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf).)

⁵² Executive Branch Recommendation to Deny at 15.

⁵³ See China Mobile Opposition at 14.

Recommendation to Deny explained why the national security and law enforcement risks here cannot be mitigated in the circumstances specific to this application, and the reasons underlying this conclusion apply to each of China Mobile's proposed measures.

China Mobile also states that the Executive Branch Recommendation to Deny fails to explain why terms used in other mitigation agreements with direct and indirect foreign government ownership will not work with China Mobile.⁵⁴ Each applicant is evaluated based on the facts and circumstances relevant to its specific application. So, for example, when China Mobile informed the Executive Branch that [[REDACTED]

REDACTED],⁵⁵ its response was considered against the backdrop of China Mobile's status as the subsidiary of a prominent Chinese SOE, its size and technical and financial resources, the depth of its potential access to the U.S. telecommunications network as a common carrier, and the Chinese government's policy of utilizing SOEs and other enterprises to further its intelligence activities and economic espionage efforts.⁵⁶ Moreover, the national security and law enforcement factors provided to China Mobile represent an assessment based on the totality of the circumstances and the current national security environment.

Mitigation terms and agreements that may have adequately protected national security five years ago may not address newly discovered risk in today's rapidly evolving threat environment.

Additionally, mitigation agreements are only as strong as the U.S. government's ability to enforce their terms. Although mitigation agreements and possible license termination or

⁵⁴ See *id.*

⁵⁵ See Email from Kent Bressie to Executive Branch Agencies titled "CMIUSA" (Dec. 2, 2016) [Exhibit 3].

⁵⁶ See House Report on Huawei & ZTE at 2.

revocation are designed to deter actions that may create risk to national security or law enforcement equities, China Mobile, as the indirect subsidiary of a Chinese SOE, could be required under Chinese law to violate a mitigation agreement willfully and not report its violation to the Commission or relevant Executive Branch Agencies. China Mobile rejects this assessment and states that China Mobile is subject to U.S. laws.⁵⁷ If at the direction of its indirect parent SOE China Mobile willfully violated the terms of the mitigation agreement, any attempts to assess the origin, purpose, and extent of the violation could be obstructed by China Mobile's indirect parent SOE asserting immunity from jurisdiction under the Foreign Sovereign Immunities Act (FSIA).⁵⁸ Multiple Chinese SOEs have claimed immunity from suit under the FSIA in civil suits in the United States.⁵⁹ China Mobile's distinct status could be used as both a shield and a sword, as China Mobile may attempt to avail itself of its SOE subsidiary status to avoid the jurisdiction of a U.S. court while, as it does in this instance, also choosing to use its U.S. incorporation to challenge the Executive Branch's recommendation.

Moreover, effective mitigation requires prompt cooperation from companies. China Mobile's parent SOE could resist investigation and enforcement efforts arising from violations of a mitigation agreement through other means. In connection with a regulatory investigation into allegations of accounting fraud against U.S. investors, multiple China-based accounting firms refused to turn over relevant documents to the Securities and Exchange Commission.⁶⁰ The

⁵⁷ See China Mobile Opposition at 9, 14.

⁵⁸ 28 U.S.C. §§ 1602 *et seq.*

⁵⁹ See Matthew Miller and Michael Martina, "Chinese state entities argue they have 'sovereign immunity' in U.S. courts," *Reuters* (May 11, 2016), available at <https://www.reuters.com/article/us-china-usa-companies-lawsuits/chinese-state-entities-argue-they-have-sovereign-immunity-in-u-s-courts-idUSKCN0Y2131>.

⁶⁰ See Press Release, U.S. Sec. & Exch. Comm'n, SEC Imposes Sanctions Against China-Based Members of Big Four Accounting Networks for Refusing to Produce Documents (Feb. 6, 2015),

audit firms argued that turning over the papers would violate China's state secrets laws.⁶¹ In fact, Chinese companies routinely invoke Chinese law to challenge discovery requests.⁶² It is not uncommon for mitigation agreements related to international Section 214 authorizations to require audit work papers, including relevant information in the custody of a Commission license holder's parent organization. This is especially true when the information may touch upon the U.S. government's national security and law enforcement equities. The Executive Branch's assessment that China Mobile is more likely to violate a mitigation agreement gives rise to greater national security and law enforcement risks when the types of obstacles described above, including the prolonged delays and tremendous costs associated with litigating these obstacles, can impede the U.S. government's ability to investigate potential violations and enforce the terms of an agreement, thus causing potentially irreparable harm.

Finally, China Mobile takes exception to the Executive Branch's conclusion that the U.S. government would not be able to work effectively with China Mobile to investigate and disrupt unlawful activities in the same manner that it does with trusted telecommunications service providers.⁶³ The Executive Branch relies on a baseline level of trust when working with telecommunications carriers due to the sensitivity to national security and law enforcement investigations.⁶⁴ As stated in the Executive Branch Recommendation to Deny, the Executive Branch Agencies do not place the same trust in China Mobile that they do with other

available at <https://www.sec.gov/news/pressrelease/2015-25.html>.

⁶¹ See Dena Aubin and Sarah N. Lynch, "U.S. audit regulator reaches deal with China on document access," *Reuters* (May 24, 2013), available at <https://www.reuters.com/article/us-usa-auditing-china/u-s-audit-regulator-reaches-deal-with-china-on-document-access-idUSBRE94NOVO20130524>.

⁶² See *Vring Inc. v. ZTE Corp.*, No. 14-CV-4988 LAK, (S.D.N.Y. May 14, 2015); see also *Gucci America, Inc. v. Weixing Li*, 135 F. Supp. 3d 87 (S.D.N.Y. 2015).

⁶³ China Mobile Opposition at 14.

⁶⁴ See Executive Branch Recommendation to Deny at 13.

telecommunications carriers. Because of the Executive Branch's investigative and enforcement responsibilities, this factor is uniquely within the expertise and judgment of the Executive Branch. Thus, this factor alone carries significant weight based on the reasons articulated in the Executive Branch's Recommendation to Deny, as well as in this submission, and strongly supports the Executive Branch's determination that mitigation cannot address the risk to national security and law enforcement in particular.

V. Conclusion

For the foregoing reasons, NTIA, on behalf of the Executive Branch, respectfully requests that the Commission give appropriate weight to the Executive Branch's July 2 recommendation and deny the above-captioned application.

Respectfully submitted,



Kathy Smith
Chief Counsel

David J. Redl
Assistant Secretary for
Communications & Information

John B. Morris, Jr.
Associate Administrator
Evelyn Remaley
Deputy Associate Administrator
Office of Policy Analysis
and Development

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 482-1816

September 19, 2018

EXHIBITS

- 1 Email from Commission to Jennifer Kostyu and China Mobile titled “Removed from Streamline” (Sept. 30, 2011)
- 2 Streamlined International Applications Accepted for Filing, Public Notice, Report No. TEL-01521S (rel. Sept. 30, 2011)
- 3 Email from Kent Bressie to Executive Branch Agencies titled “CMIUSA” (Dec. 2, 2016)

EXHIBIT 1

From: Adrienne Downs
To: tlynch@telecomlawyers.com; jkostyu@wbklaw.com; xietao@cmi.chinamobile.com; asilvestre@telecomargentina.us; sgoodman@bltplaw.com
Cc: robert.spivey@usdoj.gov; edward.hand@usdoj.gov; hillary.Morgan@usdoj.gov; jarnold@ntia.doc.gov; ybarrisl@state.gov; maydc@state.gov; Christopher.Siefker@usdoj.gov; Marilyn.Shaifer@usdoj.gov; Tyrone.brown@usdoj.gov; Brian.williams@associates.dhs.gov; shawn.cooley@dhs.gov; Telecom@usdoj.gov; Siobhan.Dupuy@usdoj.gov; alex.daman@dhs.gov; Joanne.Ongman@usdoj.gov; Jennifer.Rockoff@usdoj.gov; imchale@ustr.gov; Richard.Sofield2@usdoj.gov; glenn.kaminsky@hq.dhs.gov; dale.barr@hq.dhs.gov; scott.m.deutchman@ostp.eop.gov; IP-FCC@dhs.gov; john.delmore@usdoj.gov; ttw@usdoj.gov; Kimberly.Schmid@usdoj.gov; George.Li@fcc.gov; David.Krech@fcc.gov; Susan.OConnell@fcc.gov; Howard.Griboli@fcc.gov; James.Ball@fcc.gov
Subject: Removed from Streamline
Date: Friday, September 30, 2011 1:52:41 PM
Attachments: [TEL01521S.pdf](#)

Numbridge, Inc. -- ITC-214-20110830-00285
China Mobile International (USA) Inc. -- ITC-214-20110901-00289
Telecom Argentina USA, Inc. -- ITC-T/C-20110715-00203

The above referenced applications were placed on Public Notice on September 16, 2011 for streamlined processing. Since the Public Notice was released, the Commission has been requested by the Executive Branch agencies of the United States that we remove the subject applications from streamlined processing because of foreign ownership issues. Therefore, pursuant to Section 63.12(c)(3) of the Commission's Rules, we have removed these applications from streamlined processing.

Please be advised that your company may not commence operations until the Section 214 authorization is granted. See Section 63.12(d) of the rules, 47 C.F.R. Section 63.12(d). The Executive Branch will contact you or the "Contact" listed on your application directly for further information. You can be assured that your application will be processed expeditiously upon completion of Executive Branch's review. We will notify you by e-mail when your application is granted.

Attached is a copy of the Public Notice indicating that the application has been removed from streamlined processing which was released on September 30, 2011. If you have any questions, please email: Susan.OConnell@fcc.gov, David.Krech@fcc.gov, and George.Li@fcc.gov.

<<TEL01521S.pdf>>

Adrienne Downs
International Bureau, FCC
(202) 418-0412
Adrienne.Downs@fcc.gov

EXHIBIT 2



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET S.W.
WASHINGTON D.C. 20554

News media information 202-418-0500
Internet: <http://www.fcc.gov> (or <ftp.fcc.gov>)
TTY (202) 418-2555

Report No. TEL-01521S

Friday September 30, 2011

Streamlined International Applications Accepted For Filing

Section 214 Applications (47 C.F.R. § 63.18); Section 310(B)(4) Requests

Unless otherwise specified, the following procedures apply to the applications listed below:

The international Section 214 applications listed below have been found, upon initial review, to be acceptable for filing and subject to the streamlined processing procedures set forth in Section 63.12 of the Commission's rules, 47 C.F.R. § 63.12. These applications are for authority under Section 214 of the Communications Act, 47 U.S.C. § 214, (a) to transfer control of an authorized carrier or to assign a carrier's existing authorization; and/or (b) to become a facilities-based international common carrier; and/or (c) to become a resale-based international common carrier.

Pursuant to Section 63.12 of the rules, these Section 214 applications will be granted 14 days after the date of this public notice (see 47 C.F.R. § 1.4 regarding computation of time), and the applicant may commence operations on the 15th day, unless the Commission has informed the applicant in writing, within 14 days after the date of this public notice, that the application, on further examination, has been deemed ineligible for streamlined processing.

Communications between outside parties and Commission staff concerning these applications are permitted subject to the Commission's rules for "permit-but-disclose proceedings." See 47 C.F.R. § 1.1206. An application can be removed from streamlined processing only in the sound discretion of Commission staff. The filing of comments or a petition to deny will not necessarily result in an application being deemed ineligible for streamlined processing.

The petitions for declaratory ruling listed below are for authority under Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4), to exceed the 25 percent foreign ownership benchmark applicable to common carrier radio licensees. The requested rulings will be granted 14 days after the date of this public notice, effective the next day, unless the application is formally opposed or the Commission has informed the applicant in writing, within 14 days of the date of this public notice, that the application, on further examination, has been deemed ineligible for streamlined processing. For this purpose, a formal opposition shall be sufficient only if it is received by the Commission and by the applicant within 14 days of the date of this public notice and its caption and text make it unmistakably clear that it is intended to be a formal opposition.

Copies of all applications listed here are available for public inspection in the FCC Office of Public Affairs Reference and Information Center, located in room CY-A257 at the Portals 2 building, 445 12th Street SW, Washington DC 20554. The center can be contacted at (202) 418-0270. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). All applications listed are subject to further consideration and review, and may be returned and/or dismissed if not found to be in accordance with the Commission's rules, regulations, and other requirements.

We request that comments on any of these applications refer to the application file number shown below.

ITC-214-20110915-00300 E New Telecom Solutions Inc

International Telecommunications Certificate

Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20110915-00301 E EUSA WHOLESale INC.

International Telecommunications Certificate

Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20110915-00302 E Global Dial Solutions, Inc.

International Telecommunications Certificate

Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20110919-00298 E Woodstock Telephone Company

International Telecommunications Certificate

Service(s): Global or Limited Global Resale Service

Application for authority to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(2).

ITC-T/C-20110902-00287 E OnWav, Inc

Transfer of Control

Current Licensee: OnWav, Inc

FROM: OnWav, Inc

TO: Twin Lakes Telephone Cooperative Corporation

Application filed for consent to the transfer of control of international section 214 authorization, ITC-214-20110728-00214, held by OnWav, Inc. (OnWav), from its current shareholders to Twin Lakes Telephone Cooperative Corporation (Twin Lakes). Pursuant to a proposed stock purchase agreement, Twin Lakes will purchase 100% of the issued and outstanding stock of OnWav. Upon closing, OnWav will become a wholly-owned direct subsidiary of Twin Lakes. Twin Lakes is a member owned cooperative telephone company, in which no individual or entity holds 5% or greater ownership interest.

INFORMATIVE

ITC-214-20110830-00285 Numbridge, Inc.

This application has been removed from Streamlined processing pursuant to Section 63.12(c)(3) of the Commission's rules.

ITC-214-20110901-00289 China Mobile International (USA) Inc.

This application has been removed from Streamlined processing pursuant to Section 63.12(c)(3) of the Commission's rules.

ITC-T/C-20110715-00203 Telecom Argentina USA, Inc.

This application has been removed from Streamlined processing pursuant to Section 63.12(c)(3) of the Commission's rules.

REMINDERS:

Applicants must certify that neither the applicant nor any party to the application is subject to a denial of federal benefits by federal and/or state courts under authority granted in 21 U.S.C. § 862. See 47 C.F.R. §§ 1.2001-.2003.

A current version of Section 63.09-.24 of the rules, and other related sections, is available at <http://www.fcc.gov/ib/pd/pf/telecomrules.html>.

EXHIBIT 3

From: Kent Bressie
To: [Juricic, Harry CIV NSA DSAW \(US\)](#); [Shawn Cooley](#); [Sofield, Richard \(NSD\)](#); [Brown, Tyrone \(NSD\)](#); [Deeley, Hunter \(NSD\)](#); [Gault, Richard W CTR \(US\)](#); [Janine Slade \(janine.slade@hq.dhs.gov\)](mailto:Janine.Slade@hq.dhs.gov)
Subject: CMIUSA
Date: Friday, December 02, 2016 12:44:21 PM

All,

[REDACTED]

[REDACTED]

Should you need further details, please don't hesitate to contact me.

All the best,

Kent

Kent Bressie

HARRIS, WILTSHIRE & GRANNIS LLP

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kbressie@hwglaw.com | www.hwglaw.com | [Bio](#)

[[BUSINESS CONFIDENTIAL INFORMATION REDACTED]]

CERTIFICATE OF SERVICE

I, Kathy Smith, hereby certify that consistent with 47 C.F.R. §§ 1.47 and 1.939(c), I have served a copy of the foregoing Reply by certified mail and electronic mail this 19th day of September, 2018 to the following:

Kent Bressie
Harris, Wiltshire & Grannis LLP
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Washington, DC 20036-3537
KBressie@hwglaw.com

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Suite 440
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chenxuan@cmi.chinamobile.com


Kathy Smith