

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

*In the Matters of*

CHINA MOBILE INTERNATIONAL (USA) INC.

Application for Global Facilities-Based and  
Global Resale International Telecommunications  
Authority Pursuant to Section 214 of the  
Communications Act of 1934, as Amended

File No. ITC-214-20110901-00289

**OPPOSITION TO PETITION TO DENY**

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August 20, 2018

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The Commission should decline to claim China Mobile International (USA) Inc. (“CMIUSA”) as a casualty in the burgeoning trade war between the United States and China and also decline to accept the Executive Branch’s imputation of national security and law enforcement threats based solely on the corporate nationality and foreign-government ownership of CMIUSA’s indirect parent company or allegations against unrelated Chinese enterprises. It should therefore deny the request of the Executive Branch to deny CMIUSA’s application for international Section 214 authority on national security and law enforcement grounds.<sup>1</sup>

CMIUSA has long acknowledged that its ultimate foreign ownership involves 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. CMIUSA has also long noted, however, that its situation is not unique or lacking a remedy.

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<sup>1</sup> 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) (“Petition to Deny”).

CMIUSA continues to believe that any outstanding concerns that the Executive Branch might have regarding CMIUSA's direct and indirect ownership could and should be addressed fully through robust mitigation measures that Team Telecom has routinely adopted and enforced with respect to other foreign- and foreign-government-controlled carriers.

Extensive telecommunications services and infrastructure between the United States and China serve the public interest. China remains the largest trading partner of the United States (unless pre-Brexit European Union economies are treated as a bloc),<sup>2</sup> and investors from each country hold significant direct investments in the other.<sup>3</sup> That bilateral relationship generates significant demand for telecommunications services for businesses, consumers, and the governments themselves in order to support that economic relationship. Grant of international Section 214 authority to CMIUSA would serve that demand, and the public interest.

CMIUSA's opposition consists of four parts. In part I, CMIUSA provides background on its long-pending international Section 214 application and Team Telecom review. In part II, CMIUSA explains the standard of review that should govern the Commission's adjudication of CMIUSA's application and the Executive Branch's Petition to Deny. In part III, CMIUSA explains why the Commission should decline to defer to the Executive Branch—namely, because the Executive Branch's petition to deny fails to demonstrate that CMIUSA and its proposed service offerings pose specific and particular risks that cannot be mitigated. In part IV, CMIUSA notes how its treatment underscores the need for the Commission to reform the Team Telecom process—and why it is within the Commission's authority and interest to do so.

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<sup>2</sup> See, e.g., *Top Trading Partners—December 2017, Year-to-Date Total Trade*, United States Census Bureau, [www.census.gov/foreign-trade/statistics/highlights/top/top1712yr.html](http://www.census.gov/foreign-trade/statistics/highlights/top/top1712yr.html).

<sup>3</sup> See, e.g., *The U.S.-China FDI Project*, [https://rhodiumgroup.gistapp.com/us\\_china\\_foreign\\_direct\\_investments](https://rhodiumgroup.gistapp.com/us_china_foreign_direct_investments).

## **I. Background**

Almost seven years ago, on September 1, 2011, CMIUSA applied for global facilities-based and global resale international Section 214 authority. The Commission placed CMIUSA's application on public notice on September 16, 2011,<sup>4</sup> and then removed it from streamlined processing,<sup>5</sup> where it has remained in limbo ever since.

CMIUSA presumes that the application was removed from streamlined processing based on a request by Team Telecom or an expectation by the Commission staff that Team Telecom would make such a request. CMIUSA is unaware of any written Team Telecom request ever being made by those agencies, and none appears in the Commission's records.<sup>6</sup> Indeed, the first submission on the record by any Executive Branch agency in this proceeding came on July 2, 2018, when the National Telecommunications and Information Administration ("NTIA") filed the Petition to Deny on behalf of the Executive Branch.

Similarly, CMIUSA presumes that the Commission staff also sent a copy of CMIUSA's original application to Team Telecom based on an informal practice by the Commission staff of referring to Team Telecom applications. This referral practice is not codified anywhere in the Commission's rules or disclosed on its website.<sup>7</sup> It was first described publicly in 2016 in the Commission's rulemaking to reform the Team Telecom process.<sup>8</sup>

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<sup>4</sup> *Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-01519S, at 2 (rel. Sept. 16, 2011).

<sup>5</sup> *Streamlined International Applications Accepted for Filing*, Public Notice, Report No. TEL-01521S, at 2 (rel. Sept. 30, 2011).

<sup>6</sup> See File No. ITC-214-20110901-00289.

<sup>7</sup> The sole "Team Telecom" reference on the Commission's website is contained in a blog post by Commissioner Michael O'Rielly noting the shortcomings of the Team Telecom process. See Commissioner Michael O'Rielly, *Team Telecom Reviews Need More Structure* (Sept. 18,

The Commission has stated that it “recognize[s] that certainty and predictability are vitally important for telecommunications businesses.”<sup>9</sup> To that end, its rules provide for transparency and timelines:

Within 90 days of the public notice [removing the application from streamlined processing], the Commission will take action upon the application or provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed.<sup>10</sup>

Here, however, the Commission issued no subsequent public notices and provided no explanation of the basis for the delay or any timeframe for action on the application.

Following extensive engagement with Team Telecom and the broader group of Executive Branch agencies over the next three-and-a-half years, including factual submissions, other correspondence, and meetings, on June 12, 2015, CMIUSA submitted a detailed mitigation proposal to Team Telecom, including a terms sheet and narrative response. CMIUSA never received a formal or substantive response to that proposal. Counsel for CMIUSA last met with Team Telecom on November 18, 2016, at which time the Team Telecom agencies appeared to indicate that they could not support a grant of the international Section 214 authorization subject

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2015), [www.fcc.gov/news-events/blog/2015/09/18/team-telecom-reviews-need-more-structure](http://www.fcc.gov/news-events/blog/2015/09/18/team-telecom-reviews-need-more-structure).

<sup>8</sup> *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, 31 FCC Rcd. 7456, 7458 ¶ 6 (2016) (stating that “the Commission refers certain applications to the Executive Branch when there is reportable foreign ownership in the applicant. Specifically, where an applicant has a ten percent or greater direct or indirect owner that is not a U.S. citizen, Commission practice has been to refer an application for . . . international section 214 authority”).

<sup>9</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, 23,915 ¶ 54 (1997) (“*Foreign Participation Order*”).

<sup>10</sup> 47 C.F.R. § 63.12(d).

to mitigation conditions. At that time, it was unclear whether the other Executive Branch agencies were aware of or concurred in such a view.

On July 2, 2018, without any prior communication with CMIUSA or its counsel to indicate a change in status or position, the Executive Branch filed with the Commission its Petition to Deny. Given the current panoply of trade disputes between the United States and China, the timing of the Petition to Deny seems less than coincidental.

## **II. Standard of Review**

The Communications Act of 1934, as amended (the “Act”), authorizes the Commission to grant, deny, or condition Section 214 authorizations,<sup>11</sup> applying the “necessary or desirable in the public interest” standard,<sup>12</sup> consistent with U.S. commitments in basic telecommunications made to other World Trade Organization (“WTO”) members.<sup>13</sup> The Commission adopted as a factor in its public-interest analysis “a rebuttable presumption that applications for Section 214 authority from carriers from WTO Members do not pose concerns that would justify denial of an application on competition grounds.”<sup>14</sup> The Commission “do[es] not, however, presume that an application poses no national security, law enforcement, foreign policy or trade concerns” and considers such concerns independent of its competition analysis.<sup>15</sup> The Commission stated instead that it would:

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<sup>11</sup> 47 U.S.C. § 214(c).

<sup>12</sup> *Id.* § 201(a).

<sup>13</sup> *Foreign Participation Order*, 12 FCC Rcd. at 23,891 ¶ 2.

<sup>14</sup> *Id.* at 23,912-13 ¶ 50.

<sup>15</sup> *Id.* at 23,920-21 ¶ 65.

continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy *that are relevant to an application* pending before [the Commission].<sup>16</sup>

The Commission has consistently emphasized that it makes an independent determination.<sup>17</sup>

Contrary to the Petition to Deny, which misapplies the Commission’s merger-review standard to the review of an application for initial authority under Section 214, the Commission does not require the applicant to prove by the preponderance of evidence that the public interest would be served—an approach that would be inconsistent with the rebuttable presumption of market entry by foreign carriers from WTO member states.<sup>18</sup> CMIUSA’s application does not involve a merger or acquisition. To the contrary, it is the Executive Branch that must make “specific allegations of fact” as part of “a prima facie showing that . . . a grant of the application would be inconsistent with the public interest, convenience and necessity.”<sup>19</sup>

U.S. WTO commitments in basic telecommunications obligate the United States to permit market entry for the provision of voice, packet- and circuit-switched data, and private

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<sup>16</sup> *Id.* at 23,920 ¶ 63 (emphasis added).

<sup>17</sup> *See id.* at 23,921 ¶ 66 (stating that “we emphasize that the Commission will make an independent decision on applications to be considered and will evaluate concerns raised by the Executive Branch agencies in light of all the issues raised (and comments in response) in the context of a particular application”); *id.* at 23,919 ¶ 62 (stating that “[t]he Commission will consider any such legitimate concerns as we undertake our own independent analyses of whether grant of a particular authorization is in the public interest.”).

<sup>18</sup> *See* Petition to Deny at 2 (citing *Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17,444 (2008)). 47 C.F.R. § 63.18, also cited by the Executive Branch, does address any burden of proof, requiring instead that the applicant demonstrate “how the grant of the application will serve the public interest, convenience, and necessity.”

<sup>19</sup> 47 C.F.R. § 1.939(d).



leased circuits for modes of supply including cross-border supply and commercial presence.<sup>20</sup>

Those commitments also obligate the United States to ensure a transparent licensing process.

The United States adopted the Reference Paper as part of its schedule of specific commitments in basic telecommunications under the General Agreement on Trade in Services,<sup>21</sup> which provides that where a license is required, the United States will make publicly available “all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence.”<sup>22</sup>

The GATS provides that WTO member states may adopt and enforce measures (a) “necessary to protect public morals or to maintain public order” (to be invoked “only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”), (b) “necessary to protect human, animal or plant life or health,” or (c) “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS],” so long as such measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”<sup>23</sup> The GATS further provides that nothing in the GATS shall be construed “to prevent any Member from taking any action which it considers necessary for the protection of its

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<sup>20</sup> *United States of America, Schedule of Specific Commitments, Supp 2*, Fourth Protocol to the General Agreement on Trade in Services, GATS/SC/90/Suppl.2 (Apr. 11, 1997) (“U.S. Schedule of Specific Commitments in Basic Telecommunications”).

<sup>21</sup> General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (“GATS”).

<sup>22</sup> U.S. Schedule of Specific Commitments in Basic Telecommunications, Reference Paper, at 6.

<sup>23</sup> GATS art. XIV.

essential security interests.”<sup>24</sup> Invocation of the “essential security interests” exception requires notification to the WTO Council for Trade in Services.<sup>25</sup>

### **III. The Commission Should Decline to Defer to the Executive Branch Because Its Petition to Deny Fails to Demonstrate that CMIUSA and Its Proposed Service Offerings Pose Particular Risks that Cannot Be Mitigated**

The FCC should decline to defer to the Executive Branch because it has failed to demonstrate that CMIUSA and its proposed service offerings pose particular national security, law enforcement, or other foreign policy risks that cannot be mitigated. As noted in part II above, the Commission affords “deference to [Executive Branch] expertise ... in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy *that are relevant to an application pending before [it]*.”<sup>26</sup> Here, however, the Petition to Deny conflates CMIUSA with the Chinese Government, imputes unrelated threat assessments to CMIUSA, and fails to explain why CMIUSA’s proposed mitigation was inadequate.

#### **A. The Petition to Deny Inappropriately Conflates CMIUSA with the Chinese Government**

The Petition to Deny asserts serious concerns with respect to the Chinese Government’s intelligence activities and its economic and strategic actions vis-a-vis the United States, concerns based in part on U.S. intelligence or other classified assessments to which CMIUSA has no insight or knowledge. CMIUSA cannot and does not take issue with those concerns here. It does, however, take issue with the Petition to Deny’s conflation of CMIUSA with the Chinese Government and other Chinese enterprises based on the proposition that they are all one, undifferentiated Chinese amalgam. The Commission should not accord deference to such a

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<sup>24</sup> *Id.* art. XIV *bis* ¶ 1(b).

<sup>25</sup> *Id.* art. XIV *bis* ¶ 2.

<sup>26</sup> *Foreign Participation Order*, 12 FCC Rcd. at 23,920 ¶ 63 (emphasis added).

proposition, as the Petition to Deny has failed to offer concrete information or analysis that links the actions of the Chinese Government and those of CMIUSA, or that persuasively argues that any national security or law enforcement concerns identified in connection with other Chinese entities can be attributed to CMIUSA.

First, the Petition to Deny asserts without any supporting evidence that CMIUSA is vulnerable to exploitation and influence via its indirect parent company, the state-owned China Mobile Communications Corporation (which holds an approximate indirect interest of 72.72 percent in CMIUSA), and that the China Mobile group's technical and financial resources compound the risks associated with such exploitation.<sup>27</sup> The Petition to Deny relies on prior assessments regarding the Chinese Government's intelligence activities and economic espionage of the Chinese Government, not CMIUSA or the China Mobile group. The Petition to Deny notes that "state ownership or control does not, standing alone, necessarily pose a threat to U.S. national security and law enforcement interests,"<sup>28</sup> but the argumentation in its Petition to Deny asserts that very position. As a Delaware-incorporated, California-based U.S. business, CMIUSA is subject to U.S. law and would not be required, by virtue of its direct or indirect foreign ownership, to comply with foreign government requests relating to its operations within the United States. CMIUSA does not believe that it would be otherwise susceptible to such requests and/or demands made by any foreign government or other actors.

Second, the Petition to Deny indicates that the size, resources, and success of the China Mobile group are themselves a threat to U.S. national security and law enforcement interests. CMIUSA finds it difficult to differentiate this argument from economic protectionism—the very

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<sup>27</sup> Petition to Deny at 8.

<sup>28</sup> *Id.* at 8.

unjustifiable discrimination disguised restriction on trade in services that the GATS seeks to prevent.<sup>29</sup>

**B. The Other National Security and Law Enforcement Risks Identified in the Petition to Deny Do Not Pertain to CMIUSA**

Not only does the Petition to Deny inappropriately conflate the Chinese Government with all Chinese enterprises as a conceptual matter, it cites national security and law enforcement risks that do not pertain specifically to CMIUSA. The Petition to Deny states that, in reaching its assessment, the Executive Branch “relied on its experience in national security and law enforcement and significant reporting and analysis by the Intelligence Community.”<sup>30</sup> The Petition to Deny cites to a number of aging reports to substantiate the alleged national security and law enforcement risks, all of which are either inapposite as applied to CMIUSA or would be addressed as part of standard mitigation measures such as those proposed by CMIUSA in June 2015. Based on the full range of public sources referenced in the Petition to Deny, the Executive Branch failed to make a particularized showing regarding the applicability of the stated risks to CMIUSA, and as stated in part III.A.4 below, CMIUSA has concerns that the classified assessment likely does the same.

First, the Petition to Deny relies heavily on a 2012 report from the Permanent Select Committee on Intelligence of the U.S. House of Representatives that investigated national security issues posed by Chinese telecommunications equipment suppliers Huawei Technologies Co. Ltd. (“Huawei”) and ZTE Corporation (“ZTE”).<sup>31</sup> That report, however, makes no mention

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<sup>29</sup> GATS art. XIV.

<sup>30</sup> Petition to Deny at 8.

<sup>31</sup> *Id.* at 9 (citing 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),

of CMIUSA or its parent entities. CMIUSA has no common ownership, governance, management, operational, or other coordination arrangements with either Huawei or ZTE.<sup>32</sup>

The House Report also does not identify any threats associated with business activities in which CMIUSA engages or proposes to engage in the United States. To the contrary, it concluded that “the risks associated with Huawei’s and ZTE’s provision of equipment to U.S. critical infrastructure could undermine core U.S. national security interests.”<sup>33</sup> CMIUSA and its parent entities, however, do not manufacture network equipment or handsets. CMIUSA is well-aware of the U.S. Government’s sensitivities regarding Huawei, a closely-held private business in China that has no ownership or management in common with CMIUSA. CMIUSA and its parent entities have significant partnerships with many global carriers, rely significantly on U.S.- and European-manufactured network equipment, and have a proven record in the areas of infrastructure security and information security. CMIUSA, however, already voluntarily

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[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) ) (“House Report”).

<sup>32</sup> See, e.g., China Mobile Exhibits (describing the ownership structure of China Mobile and noting that it is governed by a seven-member board of directors and its shares are traded publicly on the Hong Kong and New York stock exchanges); Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc. at 4, 6, WC Docket No. 18-89 (filed June 1, 2018) (noting that Huawei is a private company wholly owned by its founder and its employees through an Employee Stock Ownership Plan, in which 80,818 employees participated at the end of 2017, and governed by a Board of Directors comprised of 17 private individuals and led by an Executive Committee); *Company Overview*, ZTE, [https://www.zte.com.cn/global/about/corporate\\_information](https://www.zte.com.cn/global/about/corporate_information) (last visited Aug. 20, 2018) (noting that ZTE is a joint stock limited company governed by a Board of Directors comprised of eight individuals and led by two Executive Directors, with shares listed on both the Hong Kong and Shenzhen stock exchanges); *List of Directors and Their Role and Function*, ZTE, <https://res-www.zte.com.cn/mediares/zte/Investor/20180727/E5.pdf> (last visited Aug. 20, 2018) (noting that ZTE is governed by a Board of Directors comprised of eight individuals and led by two Executive Directors).

<sup>33</sup> House Report at vi.

removed Huawei equipment from its U.S. network and committed not to use such equipment in the future.

Second, the Petition to Deny relies on the 2014 report from the U.S.-China Economic and Security Review Commission and focused on the findings regarding Chinese Government's economic espionage activities.<sup>34</sup> The 2014 USCC Report, however, is not specific to the telecommunications sector and makes no mention whatsoever of CMIUSA, or its parent entities. In fact, the report discusses telecommunications only in connection to the investment climate in China.<sup>35</sup>

Third, the Petition to Deny relies on a U.S. Department of Defense annual report to the U.S. Congress regarding military and security developments involving China.<sup>36</sup> That report addresses the current and probable future course of military-technological development of the People's Liberation Army and the tenets and probable development of Chinese security strategy and military strategy, and of the military organizations and operational concepts supporting such development over the next 20 years. It is not specific to the telecommunications industry and makes no mention of CMIUSA or the China Mobile group, even though it does specifically identify other Chinese companies.

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<sup>34</sup> See U.S.-China Economic and Security Review Commission, 2014 Report to Congress of the U.S.-China Economic and Security Review Commission (2014), ("USCC 2014 Report"), [www.uscc.gov/sites/default/files/annual\\_reports/Complete%20Report.pdf](http://www.uscc.gov/sites/default/files/annual_reports/Complete%20Report.pdf).

<sup>35</sup> *Id.* at 60.

<sup>36</sup> See U.S. Department of Defense, Annual Report to Congress: Military and Security Developments Involving the People's Republic of China (2013), [http://archive.defense.gov/pubs/2013\\_china\\_report\\_final.pdf](http://archive.defense.gov/pubs/2013_china_report_final.pdf).

Fourth, the Petition to Deny cites to a report about intellectual property theft.<sup>37</sup> This report is similarly devoid of references either to CMIUSA and the China Mobile group or the telecommunications industry more broadly.

Finally, the Petition to Deny cites to the records of several prosecutions of Chinese individuals to underscore the seriousness of its Chinese cyberespionage concerns and to demonstrate that its Petition to Deny is consistent with a broader law enforcement and national security effort to counter Chinese influence.<sup>38</sup> Like its arguments conflating the Chinese Government with CMIUSA, the Petition to Deny seeks to impute to CMIUSA alleged Chinese cyberespionage efforts—whether perpetrated by individuals or entities—based on nationality and the citizenship of its ultimate corporate parent.

**C. The Petition to Deny Neglects to Explain Why the Significant Mitigation Measures Proposed by CMIUSA Were Deficient**

The Petition to Deny highlights the Commission’s reliance “on the expertise of the Executive Branch Agencies to identify and evaluate—and when appropriate, to reduce and manage—[national security, law enforcement, foreign policy, or trade] concerns.”<sup>39</sup> CMIUSA takes seriously the institutional competencies of expert federal agencies to manage and mitigate any risks identified in the Team Telecom review process and, accordingly, offered a broad and robust range of options to allay any and all identified concerns. Unfortunately, the Petition to Deny has not demonstrated that the significant measures proposed by CMIUSA to mitigate any

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<sup>37</sup> See Commission on the Theft of American Intellectual Property, The Report of the Commission on the Theft of American Intellectual Property (2013), [www.ipcommission.org/report/ip\\_commission\\_report\\_052213.pdf](http://www.ipcommission.org/report/ip_commission_report_052213.pdf).

<sup>38</sup> Petition to Deny at 9, 12.

<sup>39</sup> *Id.* at 2.

extant national security and law enforcement concerns regarding its offering of common-carrier services in the United States are inadequate.

Although the Petition to Deny asserts that CMIUSA's mitigation proposals were "carefully considered, analyzed, and discussed within the Executive Branch over the course of dozens of meetings,"<sup>40</sup> it fails to provide particularized rationale for why CMIUSA's proposed measures fall short. Team Telecom has long negotiated network security agreements and letters of assurances to address specific security mitigation concerns, including entities with direct and indirect foreign government ownership, but the Petition to Deny fails to explain why such measures would not work with CMIUSA. Instead, the Petition to Deny summarily asserts that "so long as [CMIUSA] controls its network, however, the security of the equipment it uses does not mitigate the risk [CMIUSA] would pose as the operator of that equipment,"<sup>41</sup> and "no combination of mitigation measures would adequately address law enforcement and national security concerns in the current national security environment."<sup>42</sup> It also asserts that the U.S. Government would not be able to work with or trust CMIUSA to identify and disrupt unlawful activities such as computer intrusions, or to assist in investigations of other unlawful conduct.<sup>43</sup> Finally, the Petition to Deny asserts that CMIUSA would be more likely than other counterparties to violate the terms of a mitigation agreement with the U.S. Government.<sup>44</sup> The Petition to Deny offers no basis whatsoever for its assertion, other than the assumption that CMIUSA is susceptible to exploitation, influence, and control by the Chinese Government.

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<sup>40</sup> *Id.* at 14.

<sup>41</sup> *Id.* at 15.

<sup>42</sup> *Id.* at 17.

<sup>43</sup> *Id.* at 13.

<sup>44</sup> *Id.* at 16.



CMIUSA vigorously disputes these assertions, but nevertheless proposed mitigation measures that would insulate sensitive activities and information from CMIUSA's direct and indirect owners. Team Telecom has long entered into such mitigation arrangements with foreign government-controlled carriers ranging from Telin USA to OPT French Polynesia.<sup>45</sup> CMIUSA remains ready, willing, and able to commit to a variety of mitigation measures that would ensure protection of U.S. national security, law enforcement, and public safety interests while ensuring CMIUSA the ability to pursue its commercial objectives in the U.S. market.

**D. The Commission Should Scrutinize Any Classified Assessment to Ensure that It Is Relevant to CMIUSA's Application**

CMIUSA recognizes that the Executive Branch has provided a classified assessment to the Commission, and that the classified nature of that assessment precludes CMIUSA from reviewing, commenting on, or rebutting any elements of that assessment. Nevertheless, CMIUSA calls the Commission's attention to the fact that the Petition to Deny characterized the Executive Branch's classified submission as containing "assessments of cybersecurity breaches and economic espionage and theft involving the *Chinese government*"<sup>46</sup> and not CMIUSA or the China Mobile group.

Nevertheless, CMIUSA finds it noteworthy that the Petition to Deny offered no specific unclassified information identifying CMIUSA itself as a threat. Instead, the Petition to Deny cites to a set of aging reports that identify general concerns about China or very specific concerns about Chinese enterprises other than CMIUSA or the China Mobile group. CMIUSA therefore

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<sup>45</sup> File Nos. ITC-214-20140918-00265 (Telin USA) and ITC-214-20081008-00453 (OPT French Polynesia).

<sup>46</sup> Petition to Deny at 9 (emphasis added).

requests that the Commission, in reviewing that assessment, examine whether any of it relates to CMIUSA specifically.

#### **IV. The CMIUSA Application Highlights the Need for Commission Reform of the Team Telecom Review Process**

The lack of transparency and regulatory certainty of, and Commission control over, CMIUSA's license review highlights the continuing need for Commission reform of the Team Telecom process. No statute or Executive Order establishes or authorizes the Team Telecom review process, much less requires the Commission to grant unlimited deference to Team Telecom. That fact does not mean that Team Telecom's objectives are illegitimate, but it does mean that but for actions by the Commission under the Act and the Cable Landing License Act, Team Telecom could not conduct the reviews or impose the mitigation conditions that it does.

It is for this reason that every Team Telecom action piggybacks on an action by the Commission:

- Team Telecom initiates reviews only after applicants file applications and petitions with the Commission. Team Telecom does not review matters that do not involve Commission licenses or applications pending before the Commission.
- The Commission acquiesces to Team Telecom's requests to refer certain applications to Team Telecom for review, although the practice is nowhere required by the Act, the Cable Landing License Act, or Executive Order 10530, nor is it codified in the Commission's rules.
- Team Telecom asks the Commission to defer action on particular applications pending completion of national security reviews (although not always in writing or on the record). The Commission acquiesces to these requests, consequently denying applicants the

benefits of the Commission's streamlining procedures and other application processing timeframes.

- The Commission defers action until it receives either a letter from Team Telecom stating that there are no unresolved national security, law enforcement, or public safety issues or a petition to adopt with conditions, asking the Commission to include in the license, declaratory ruling, or transaction consent a condition requiring compliance with a letter of assurances or network security agreement. This condition permits Team Telecom to demand revocation of the license or withdrawal of the declaratory ruling or transaction consent in the event of non-compliance.

Because Team Telecom lacks legal authority of its own, it has sought to harness the Commission's authority. Indeed, the Executive Branch has proposed to expand the scope of piggybacking by having the Commission require new certifications from applicants and gather triage questionnaire data that Team Telecom currently gathers directly from the applicants.<sup>47</sup>

Over time, Team Telecom piggybacking on Commission processes has significantly eroded the timeframes, transparency, and regulatory certainty of the licensing and transaction review processes that the Commission has implemented pursuant to the Act, the Cable Landing License Act, and Executive Order 10,530. This piggybacking has also produced a process that systematically discriminates against foreign ownership in U.S. telecommunications businesses, including that of CMIUSA.

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<sup>47</sup> See Letter from The Honorable Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to FCC Secretary Marlene H. Dortch, IB Docket No. 16-155 (filed May 10, 2016).

To reset this process—and ensure compliance with U.S. trade commitments, which require transparency of licensing criteria and a licensing timeframe<sup>48</sup>—the Commission should step back and consider anew the statutory frameworks for review of license applications, foreign ownership petitions, and requests for transaction consents. It is the Commission that is empowered to interpret and implement those requirements and to determine the limits of any deference it decides to afford to the Executive Branch, and to factor in Executive Branch views as the Commission “undertake[s its] own independent analyses of whether grant of a particular authorization is in the public interest.”<sup>49</sup>

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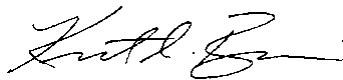
<sup>48</sup> U.S. Schedule of Specific Commitments in Basic Telecommunications.

<sup>49</sup> *Foreign Participation Order*, 12 FCC Rcd. at 23,919 ¶ 62.

## CONCLUSION

For the foregoing reasons, CMIUSA requests that the Commission deny the Executive Branch's Petition to Deny CMIUSA's application on national-security grounds.

Respectfully submitted,



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August 20, 2018

## **CERTIFICATE OF SERVICE**

I, Kent Bressie, hereby certify that consistent with 47 C.F.R. §§ 1.47 and 1.939(c), I have served a copy of the foregoing Opposition to Petition to Deny by mail and electronic mail this 20th day of August, 2018 to the following:

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