PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of China Telecom (Americas) Corporation	GN Docket No. 20-109

REDACTED MOTION TO STAY ORDER REVOKING AND TERMINATING CHINA TELECOM (AMERICAS) CORPORATION'S SECTION 214 AUTHORIZATIONS

MORGAN, LEWIS & BOCKIUS LLP
Andrew D. Lipman
Russell M. Blau
Catherine Wang
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T: (202) 739-3000
F: (202) 739-3001

November 5, 2021

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of China Telecom (Americas) Corporation	GN Docket No. 20-109

MOTION TO STAY ORDER REVOKING AND TERMINATING CHINA TELECOM (AMERICAS) CORPORATION'S SECTION 214 AUTHORIZATIONS

Pursuant to 47 C.F.R. § 1.43, China Telecom (Americas) Corporation ("CTA") requests a stay pending judicial review of the Commission's November 2, 2021 Order ("Revocation Order")[1] revoking and terminating CTA's Section 214 authorizations.

As explained herein, the Commission's failure to designate the Section 214 revocation and termination proceedings for a hearing prior to issuance of the Order tramples on CTA's constitutionally protected property rights, violating the Due Process Clause of the U.S. Constitution, the Administrative Procedure Act, and the Commission's own precedent governing Section 214 authorization revocation proceedings. Separately, the evidence proffered does not adequately support the revocation of CTA's Section 214 authorizations. Absent a stay of the Commission's Order, CTA will be forced to cease large segments of its operations, causing massive irreparable harm to CTA's business, reputation, and its relationships with customers and other carriers. This irreparable harm to CTA without a stay far outweighs any conceivable harm to the public interest caused by a brief delay in the effective date of the revocation pending judicial review. That is especially

[1] *China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285, Order on Revocation and Termination, FCC 21-114 (rel. Nov. 2, 2021) ("Revocation Order").

true here, because (1) a stay would only preserve the status quo that has existed for decades, and (2) the Commission's own conduct of these proceedings undermines any claim of urgency in the implementation of the order revoking and terminating CTA's Section 214 authorization.

In support of its request, CTA states as follows.

I. PROCEDURAL HISTORY

A. CTA's Section 214 Authorizations

On July 20, 2001, the Commission granted China Telecommunications Corporation ("CT") authorization under Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, to provide global or limited global facilities-based and resale services between the United States and all permissible points, except China.[2] On June 7, 2002, CT assigned this authorization to China Telecom (USA) Corporation ("CTUSA") pursuant to the Commission's rules.[3] On August 21, 2002, the Commission granted CTUSA an additional Section 214 authorization permitting CTUSA to provide global or limited global facilities-based and resale services between the United States and China, subject to CTUSA's acceptance of dominant carrier regulation on the United States-China route.[4] In 2007, CTUSA changed its name to "China Telecom (Americas) Corporation" and notified the Commission of the name change by a letter dated July 20, 2007.

On July 12, 2007, a transaction was completed whereby all the stock in CTUSA was transferred from CT to China Telecom Corporation Limited ("CTCL"). In compliance with Section 63.24(f) of the Commission's rules, CTA notified the FCC of the *pro forma* transfer of control of

---

2 *See* File No. ITC-214-20010613-00346.

3 *See International Authorizations Granted; Section 214 Applications (47 C.F.R. § 63.18); Cable Landing License Applications (47 C.F.R. § 1.767); Requests to Authorize Switched Services over Private Lines (47 C.F.R. § 63.16); Section 310(b)(4) Requests*, Public Notice, DA 02-2234, Report No. TEL-00576 (Sept. 12, 2002).

4 *See* File No. ITC-214-20020716-00371.

its international Section 214 authorizations from CT to CTCL on July 25, 2007.[5] On August 9, 2007, the Department of Homeland Security, with the concurrence of the Department of Justice and the Federal Bureau of Investigation ("FBI"), filed a Petition to Adopt Conditions to Authorizations and Licenses ("Petition to Adopt Conditions") with the Commission stating that the agencies had no objection to the Commission's consent to the *pro forma* transfer of control subject to CTA's commitments in its July 17, 2007 letter of assurance ("LOA") to the agencies. The Commission granted the Petition to Adopt Conditions on August 15, 2007, making CTA's compliance with the LOA a condition to its international Section 214 authorizations.[6]

Further, CTA (as the successor to CTUSA) is authorized by Commission rules, 47 C.F.R. § 63.01, to provide interstate common carrier communications services from all points within the United States to all domestic points outside the state of origin.

B. NTIA's Recommendation of Revocation

On April 9, 2020, and on behalf of the Departments of Justice ("DOJ"), Homeland Security ("DHS"), Defense ("DoD"), State, Commerce, and the United States Trade Representative ("USTR") (collectively, the "Executive Branch Agencies"), the National Telecommunications and Information Administration ("NTIA")[7] submitted a recommendation that the Commission revoke

---

5 *See International Authorizations Granted; Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests*, File No. ITC-T/C-20070725-00285, Public Notice, DA No. 07-3632, Report No. TEL-01179 (Aug. 16, 2007).

6 *See* International Authorizations Granted; Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests, File No. ITC-T/C-20070725-00285, Public Notice, DA 07-3632, 22 FCC Rcd. 15266, 15268 (2007).

7 NTIA is an agency of the U.S. Department of Commerce.

and terminate CTA's international Section 214 common carrier authorizations (the "Recommendation").[8] The Recommendation alleged that "substantial and unacceptable national security and law enforcement risks [are] associated with [CTA's] continued access to U.S. telecommunications infrastructure pursuant to its international Section 214 authorizations."[9] The Executive Branch Agencies stated that their recommendation was based upon (1) national security concerns relating to the government of the People's Republic of China, (2) CTA's "status as a subsidiary of a Chinese state-owned enterprise under the ultimate ownership and control of the Chinese government," (3) alleged "inaccurate statements" made by CTA to U.S. government agencies and to its U.S. customers, and (4) "opportunities" for Chinese-sponsored "cyber activities" created by CTA's operations in the United States.[10] Further, the Executive Branch Agencies alleged that, "In the current environment, the national security and law enforcement risks associated with China Telecom's international Section 214 authorizations cannot be mitigated."[11]

C. The Order to Show Cause

On April 24, 2020, three bureaus of the FCC issued an Order to Show Cause to CTA, ordering it to show cause why the FCC should not "institute a proceeding" to revoke and terminate its domestic and international section 214 authorizations, and to reclaim CTA's International Signaling Point Codes ("ISPCs").[12] The Order to Show Cause directed CTA to file a response to the

---

8 Executive Branch Recommendation to the Federal Communications Commission to Revoke and Terminate China Telecom Americas' International Section 214 Common Carrier Authorizations, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285 (filed Apr. 9, 2020) ("Recommendation").

9 Recommendation at 1.

10 *Id.*

11 Recommendation at 2.

12 *China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285, Order to Show Cause,

specific allegations in the Recommendation, as well as to respond to numerous other questions, and to provide "evidence that it is not subject to the exploitation, influence, and control of the Chinese government, and of its ongoing qualifications to hold domestic and international section 214 authorizations and to hold ISPCs, thereby demonstrating that the public convenience and necessity would be served by its retention of the authorizations and assignments."[13]

D. CTA's Response to the Order to Show Cause

On June 8, 2020, CTA filed an extensive response to the Order to Show Cause (the "CTA Response").[14] In the CTA Response, CTA asserted that there are no legally sufficient grounds, and no cause in fact, for the Commission to initiate a proceeding to revoke CTA's authorizations, and that if the Commission did "initiate a proceeding" for revocation, such proceeding must be an adjudicatory hearing before an Administrative Law Judge. CTA noted that the Commission has afforded the subject carrier an opportunity for an evidentiary hearing in every previous case in which the Commission has considered revocation of a Section 214 authorization except for inactive carriers that failed to respond to notices from the Commission.

35 FCC Rcd. 3713 (IB, WCB, EB 2020) ("Order to Show Cause"). On November 18, 2020, the Chief, Telecommunications and Analysis Division, International Bureau sent a letter to CTA notifying it of the FCC's reclamation of CTA's three ISPCs. *See Reclamation of China Telecom (Americas) Corporation's International Signaling Point Codes*, DA 20-1368 (Nov. 18, 2020). CTA determined not to challenge the reclamation of the ISPCs, and so advised the Commission by letter dated December 2, 2020.

13 Order to Show Cause, 35 FCC Rcd. at 3718, ¶ 11.

14 *See China Telecom (Americas) Corporation Response to Order to Show Cause*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285 (filed Jun. 8, 2020) (filing with the Commission a public filing and a non-public business confidential filing) ("CTA Response").

In addition, CTA provided extensive evidence regarding its ownership and independent operations in the United States,[15] described the services that CTA provides in the United States,[16] identified the equipment used by CTA to provide telecommunications services,[17] provided detailed information regarding CTA's subscribers and other customers,[18] and identified CTA's physical points of interconnection[19] and interconnection agreements.[20] In Exhibit 6 to the CTA Response, CTA explained the variety of telecommunications and non-telecommunications services it provides in the United States, some of which are offered as common carrier services pursuant to domestic and/or international section 214 authorizations. CTA explained that its services provided in the United States include resold mobile service as a Mobile Virtual Network Operator ("MVNO"), international Ethernet private line and leased circuits, wavelength, MPLS VPN, SD-WAN, virtual private local area network services, data center and cloud services, and other managed services including Managed Security and Managed WAN.[21] CTA also identified its target customer bases in the United States, including U.S. and Chinese enterprises, other telecommunications carriers, and consumers that obtain CTA's common carrier resold mobile services.[22] CTA also explained its reliance upon the resale of other carriers' facilities and services (including U.S. carriers and other non-affiliated service providers) to meet its customers' needs.[23]

---

15 *See* CTA Response, Exhibits 1–5 & 15.

16 *See* CTA Response, Exhibit 6.

17 *See* CTA Response, Exhibit 7.

18 *See* CTA Response, Exhibit 8.

19 *See* CTA Response, Exhibit 12.

20 *See* CTA Response, Exhibit 13.

21 *See* CTA Response, Exhibit 6 at pp. 2–9.

22 *See* CTA Response, Exhibit 6 at pp. 1–2.

23 *See* CTA Response, Exhibit 6 at p. 2.

In Exhibit 16 to the CTA Response, CTA gave a detailed response to the allegations in the Recommendation.[24] CTA explained the legal standards that apply to the Commission's revocation of Section 214 authorizations which require a showing of egregious and adjudicated misconduct by the licensee.[25] CTA further explained that the Executive Branch Agencies' allegations as to the trustworthiness of CTA are inaccurate and misleading in that they misconstrue CTA's statements to Team Telecom regarding CTA's storage of its U.S. Records[26] and CTA's cybersecurity policies, as well as the timeliness of CTA's interactions with the Executive Branch Agencies.[27] CTA also provided further arguments and evidence that it is not subject to the exploitation, influence or control of the Chinese government and that its operations in the United States do not provide opportunities to disrupt or misroute U.S. communications traffic.[28] Finally, CTA reiterated that it has complied with its obligations under the LOA and its willingness to work cooperatively with Team Telecom to mitigate any of the Executive Branch Agencies' concerns.[29]

E. The Order Instituting Proceedings

On December 10, 2020, the Commission adopted an order (the "Order Instituting Proceedings") in which it "institute[d] proceedings to revoke the domestic [Section 214] authority and

---

24 *See* CTA Response, Exhibit 16.

25 *See* CTA Response, Exhibit 16, at pp. 8–11.

26 *See* CTA Response, Exhibit 16, at pp. 20–39.

27 *See* CTA Response, Exhibit 16, at pp. 39–45.

28 *See* CTA Response, Exhibit 16, at pp. 45–63.

29 *See* CTA Response, Exhibit 16, at pp. 63–72.

revoke and/or terminate the international authorizations issued to China Telecom (Americas) Corporation[.]"[30] The Order Instituting Proceedings largely recited the allegations in the Recommendation as the basis for the proposed revocation or termination, and rejected the objections raised in the CTA Response. In particular, the Order Instituting Proceedings rejected CTA's argument that it was entitled to an evidentiary hearing on the proposed revocation, and instead decided to conduct a revocation proceeding with limited opportunity for interested persons to file written comments and for CTA to file a written response to such comments.[31] Comments responding to the CTA Response were due to be filed with the Commission no later than January 19, 2021, and CTA was permitted until March 1, 2021, to respond and demonstrate why the Commission should not revoke and/or terminate its Section 214 authority.

F. The Executive Branch Agencies' Comments to the Order Instituting Proceedings

On January 14, 2021, NTIA on behalf of the Executive Branch Agencies filed comments in response to the Order Instituting Proceedings (the "Agencies' Comments").[32] The Agencies' Comments advocated again for the revocation of CTA's authorizations largely based on the same grounds asserted in the Recommendation, with only two new factual allegations against CTA.[33]

---

30 *China Telecom (Americas) Corporation*, Order Instituting Proceedings on Revocation and Termination and Memorandum Opinion and Order, 35 FCC Rcd. 15006 (2020) ("Order Instituting Proceedings").

31 Order Instituting Proceedings, 35 FCC Rcd. at 15007, ¶ 1, 15015, ¶ 17, 15045, ¶ 71.

32 Executive Branch Response to December 10, 2020 Order Instituting Proceedings on Revocation and Termination and Memorandum Opinion and Order, GN Docket No. 20-109, ITC-214-20010613-00346, ITC-214-20020716-00371 & ITC-T/C-20070725-00285 (filed Jan. 14, 2021) ("Agencies' Comments"). On January 19, 2021, NTIA filed an errata correcting the Index of Exhibits appended to its January 14, 2021, comments.

33 *See* Agencies' Comments at pp. 2–3, 12–13.

G. CTA's Reply Comments to the Order Instituting Proceedings

On March 1, 2021, CTA filed reply comments to the Order Instituting Proceedings and Agencies' Comments.[34] Similar to the CTA Response, CTA's reply comments included substantial legal and evidentiary arguments as to why it would be inappropriate for the Commission to revoke or terminate CTA's authorizations and that that the Commission must, at a minimum, provide CTA an opportunity for an evidentiary hearing before any revocation or termination decision is made.

CTA explained at further length why Commission rules and precedent require the Commission to designate the revocation proceeding for a hearing before a neutral Administrative Law Judge and how the Commission has not attempted to explain or justify its departure from past practice or justify why its procedural rules should be ignored in this case.[35] CTA also explained in detail why the Due Process Clause of the U.S. Constitution requires that CTA be provided an opportunity for a hearing,[36] and why the Administrative Procedure Act ("APA") requires the Commission to provide CTA an opportunity to cure any alleged violation justifying license revocation.[37] Nor could the Commission avoid providing CTA a hearing before a neutral Administrative Law Judge by claiming that there are no material facts in dispute. CTA explained in detail the numerous material facts that remain in dispute and why, even if some facts were undisputed, the issue of revocation separately requires a hearing.[38]

---

34 *See* Reply Comments of China Telecom (Americas) Corporation to Order Instituting Proceedings, GN Docket No. 20-109 (file Mar. 1, 2021) ("CTA Reply Comments").

35 *See* CTA Reply Comments at pp. 4–13.

36 *See* CTA Reply Comments at pp. 13–23.

37 *See* CTA Reply Comments at pp. 23–29.

38 *See* CTA Reply Comments at pp. 19–37.

Moreover, CTA reiterated that none of the evidence cited by the Commission in the Order Instituting Proceedings justifies revocation or termination of CTA's Section 214 authorizations because they do not show relevant misconduct by CTA but instead were based solely on facts already known to the Commission when CTA obtained its authorizations, including allegations against CTA's corporate parent(s) and foreign policy considerations over which CTA has no control.[39] CTA also rebutted the Executive Branch Agencies' latest allegations against the company about CTA's purported influence over a third party researcher who had published information that substantively supported CTA's position and the Executive Branch Agencies' speculation regarding CTA's alleged support for the foreign policies of the Chinese government.[40]

CTA also filed a written ex parte letter in response to a June 4, 2021, filing by NTIA (on behalf of the Executive Branch Agencies) in the Commission's similar proceedings to revoke authorization of Pacific Networks Corp. and ComNet (USA) LLC, reiterating CTA's willingness to consider, and the Executive Branch Agencies' continued refusal to discuss, adopting additional conditions to its authorizations.[41]

H. The Order Revoking and Terminating CTA's Section 214 Authorizations

On October 26, 2021, the Commission adopted the Revocation Order, which it released on November 2. In that decision, the Commission found that CTA, as a U.S. subsidiary of a Chinese state-owned enterprise, is subject to exploitation, influence, and control by the Chinese government and is highly likely to be forced to comply with Chinese government requests without sufficient legal procedures subject to independent judicial oversight. Also, "given the changed national

---

39 *See* CTA Reply Comments at pp. 37–51.

40 *See* CTA Reply Comments at pp. 51–58.

41 *See* Letter from Andrew D. Lipman, Counsel to China Telecom (Americas) Corporation, to Marlene H. Dortch, FCC, Secretary, GN Docket No. 20-109 (filed Oct. 8, 2021).

security environment with respect to China" since 2001, it found that CTA's ownership and control by the Chinese government raise significant national security and law enforcement risks by providing opportunities for CTA, its parent entities, and the Chinese government to access, store, disrupt, and/or misroute U.S. communications, which in turn allow them to engage in espionage and other harmful activities against the United States. Further, it found that CTA's conduct and representations to the Commission and other U.S. government agencies demonstrate a lack of candor, 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. It concluded that further mitigation would not address these significant national security and law enforcement concerns. Based on these findings, the Commission revoked CTA's domestic and international section 214 authority. In addition, it terminated CTA's international section 214 authorizations based on its conclusion that CTA had willfully violated two of the five provisions of the 2007 Letter of Assurances with the Executive Branch agencies. Accordingly, the Commission directed CTA to discontinue any domestic or international services that it provides pursuant to its section 214 authority no later than sixty (60) days from the release of the Revocation Order.[42]

II. STANDARD OF REVIEW

In determining whether to grant a stay, the Commission applies the familiar four-factor test for a judicial stay or preliminary injunction:[43] "(1) whether the stay applicant has made a strong

---

42 Revocation Order, ¶ 3.

43 *E.g.*, *In re Service Electric Cablevision*, Order Granting Stay Petition, 28 FCC Rcd. 15901 ¶ 3 (2013). *See also Petit Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017); *Gomez v. Trump*, 485 F.Supp.3d 145, at 168 (D.C. Cir. 2020) (finding that requests for preliminary relief under the Administrative Procedure Act, 5 U.S.C. § 705, require the movant to satisfy each of the four factors.).

showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[44] No single factor is dispositive, and the Commission will weigh each factor against the others.[45] Thus, for example, a stay can be justified in the face of a lesser probability of success on the merits where the likelihood of irreparable harm is great.[46] Here, each of the four factors favors a stay of the Order and the magnitude of the irreparable harm CTA faces weighs strongly in favor of a stay pending judicial review.

III. ARGUMENT

A. CTA is Likely to Prevail on the Merits.

As explained further below, CTA is likely to succeed on the merits because the Commission arbitrarily and capriciously deviated from its own precedent by failing to designate this proceeding for a hearing before an Administrative Law Judge. The Commission refused to acknowledge its departure from longstanding precedent and provided no rationale for doing so. The Commission's denial of CTA's right to a hearing also violated the Due Process Clause by depriving CTA of its protected property interests despite pre-deprivation process being appropriate under the *Mathews v. Eldridge* test. CTA is further likely to prevail because the Commission has

---

44 *Petit Clean Air Council*, 862 F.3d at 8.

45 *In re Protecting the Privacy of Customers of Broadband & Other Telecomm. Servs.*, Order Granting Stay Petition in Part, 32 FCC Rcd. 1793 ¶ 7 (2017).

46 *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.").

not identified any evidence (let alone any probative evidence) of misconduct by CTA that justifies revocation or termination of its authorizations. And, material facts upon which the Commission's revocation and termination rely are disputed and should have been designated for a hearing before an Administrative Law Judge rather than the Commission itself acting as judge, jury and executioner in this case. Finally, the APA required the Commission, before revoking CTA's authorizations, to provide CTA an opportunity to cure any alleged violations of the communications laws, Commission rules or orders, or the conditions of CTA's authorizations.

1. **The Commission arbitrarily and capriciously failed to designate this proceeding for a hearing before an Administrative Law Judge.**

Until now, the Commission has consistently interpreted its rules as requiring that issues in revocation proceedings be designated for a hearing.[47] It has done so precisely because revocation proceedings impact important, constitutionally protected property rights (namely Section 214 authorizations that can be issued and revoked pursuant to the Communications Act and the Commission's rules and for which holders have "more than a unilateral expectation" of their continued effect).[48] Here, CTA has not waived its opportunity for a hearing and instead has requested one at

---

[47] *See* CTA Reply Comments, Sec. II.A. *See also Procedural Streamlining of Administrative Hearings*, 35 FCC Rcd. 10729, 10733, ¶ 12 (2020) ("Administrative Hearings Order"). The Commission hand-waves away these precedents as "nothing more than the Commission's lawful exercise of its discretion to order a hearing in a particular dispute under section 214 of the Act." Revocation Order, ¶ 21. Nothing in any of the cited cases indicates that the Commission thought it was taking a discretionary step at the time, and significantly, the Commission cannot cite *even one instance* of a contested revocation proceeding before this one that proceeded *without* being designated for a hearing.

[48] *See 3883 Conn. LLC v. Dist. of Columbia*, 336 F.3d 1068 (D.C. Cir. 2003) (finding that a building permit was a property interest protected by the due process clause of the U.S. Constitution where the applicable city code limited the city's discretion to revoke issued permits). *See also Spinelli v. New York*, No. 07-1237-cv, 2009 WL 2413929 (2d Cir. Aug. 7, 2009) (holding that a business license, once granted, is a protected property interest).

every turn. Moreover, the Commission itself has acknowledged—while this proceeding was pending—that it is bound to apply the due process standard set out by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to determine when a hearing before a neutral Administrative Law Judge is required.[49] Yet, the Commission failed to apply the *Mathews v. Eldridge* test in its Order Instituting Proceedings, and it paid only lip service to that test in the Revocation Order. The Commission has neither acknowledged its binding precedent that requires designation of this proceeding and the issues raised therein for a hearing, nor has the Commission offered any rationale from departing from that precedent or its self-imposed procedural rules. Those failings violate the Commission's own precedents, the APA, and fundamental requirements of due process.

The Commission cannot ignore its duly established procedural rules when they do not suit it. When an agency fails to follow its own rules, regulations, or procedures, "its action cannot stand and courts will strike it down."[50] An administrative decision – such as the one in this proceeding – is invalid where there is: (1) "a violation," (2) "of a regulation intended for the [individual's] benefit," (3) "that causes prejudice to the [individual]."[51] The Commission violated its own rules requiring a hearing, which rules were intended to "[safeguard] the rights of parties to a full and fair hearing."[52] These rules are intended to benefit parties in administrative proceedings (like CTA)

---

49 *See* Administrative Hearings Order, 35 FCC Rcd. at 10733, ¶ 12 (providing that "[t]o determine whether due process requires live testimony in a particular case, the presiding officer will apply the three-part test the Supreme Court adopted in *Mathews v. Eldridge*").

50 *United States v. Heffner*, 420 F.2d 809, 911 (4th Cir. 1976) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); *see also Nader v. Blair*, 549 F.3d 953, 962 (4th Cir. 2008) ("[W]hen an agency fails to follow its own procedures or regulations, that agency's actions are generally invalid.").

51 *Yanez-Marquez v. Lynch*, 789 F.3d 434, 474 (4th Cir. 2015) (citing *United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999)).

52 Administrative Hearings Order, 35 FCC Rcd. at 10729, ¶ 2. The Commission makes much of the fact that the Administrative Hearings Order gives it flexibility to use procedures other than a live, in-person hearing, Revocation Order, ¶ 20–21, but even those alternative procedures require

by safeguarding their due process rights. The Commission's failure to designate this proceeding for a hearing prejudiced CTA by culminating in a Revocation Order that ignores material disputes of fact repeatedly brought to the Commission's attention by CTA and, in one instance, by an unrelated third party, and applies an improper legal standard for revocation.

2. The Commission's denial of a hearing violated the Due Process Clause.

The Commission's failure to designate this proceeding for a hearing also violated CTA's rights under the Due Process Clause of the U.S. Constitution. Not surprisingly, the Commission has not disputed that CTA's Section 214 authorizations are protected property interests. As protected property interests, the Commission was not permitted to revoke CTA's Section 214 authorizations without alleging and proving misconduct by CTA with reliable, probative, and substantial evidence. As explained further in Section III.A.3 below, the Commission has not shown, and the record contains no reliable nor substantial evidence of, misconduct by CTA.

The Commission also cannot say that pre-deprivation process was not possible in this case. The Commission has arranged for an evidentiary hearing before an Administrative Law Judge in every other contested revocation of a Section 214 authorization and it has not identified any reason that designating this proceeding for an evidentiary hearing would be impossible in this case. Rather, the Commission only claims that such a hearing was not necessary because "there are no substantial and material questions of fact in this case warranting an adjudicatory hearing"[53] and thus, only an opportunity to provide written responses to the Commission was required before revocation.[54] But, as explained below, there are ample disputed material factual issues, and the

---

that CTA be afforded an opportunity for discovery and other protections that were not granted in this case.

53 Revocation Order, ¶¶ 39–43, Order Instituting Proceedings, 35 FCC Rcd. at 15045, ¶ 17.

54 Order Instituting Proceedings, 35 FCC Rcd. at 15045, ¶ 18.

Commission may not deprive CTA of its constitutionally guaranteed procedural rights by claiming otherwise.

Moreover, the *Mathews v. Eldridge* test – which the Commission was required to but failed to apply[55] – clearly required the Commission to provide CTA an opportunity for a hearing before depriving it of its protected Section 214 authorizations. The *Mathews v. Eldridge* test requires considering: (1) "the private interest that will be affected by the official action;" (2) "the risk of erroneous deprivation of such interest through the procedures used as well as the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[56] When one faithfully applies the *Mathews* factors, they weigh strongly in favor of providing a live hearing in this case.

First, CTA's interest is harmed without an evidentiary hearing. Without its Section 214 authorizations, CTA must cease providing telecommunications services to U.S. customers on a common carrier basis. That includes the tens of thousands of customers who subscribe to CTA's mobile virtual network operator ("MVNO") service. As discussed above, CTA's Section 214 authorizations are constitutionally protected property interests for which due process is required before the authorizations are revoked and harm is suffered by CTA or its customers.[57]

Second, denying CTA a hearing created an unacceptable risk of erroneous deprivation of CTA's constitutionally protected property interests. In assessing the risk of erroneous deprivation,

---

55 Administrative Hearings Order, 35 FCC Rcd. at 10733, ¶ 12.

56 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

57 *See* note 48, *supra*.

Mathews directs the court to consider "the probable value, if any, of additional or substitute procedural safeguards."[58] "[T]he Supreme Court has indicated that the risk of an erroneous deprivation is too high where an individual is not provided 'notice of the factual basis' for a material government finding and 'a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.'"[59] "Indeed, the Supreme Court has 'consistently observed that these [safeguards] are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.'"[60]

Here, CTA was denied all three safeguards identified by the Supreme Court. First, CTA was denied notice of the factual basis of material government findings against it because the Commission's decisions in this proceeding have largely been based on undisclosed information that CTA has had no meaningful opportunity to probe or cross-examine. Second, CTA was denied a fair opportunity to rebut the factual assertions against it by being deprived of a live evidentiary hearing that is required under Supreme Court precedent,[61] the value of which the Commission has implicitly acknowledged in adopting procedures that permit a live hearing where due process requires.[62] Although the Commission claims that CTA has not shown any specific issue that would be elucidated by "additional process,"[63] the Commission's own findings with respect to alleged

---

58 *Mathews*, 424 U.S. at 335.

59 *Kirk v. Comm'r of Soc. Sec. Admin*., 987 F.3d 314, 325 (4th Cir. 2021) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

60 *Id.*

61 *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

62 Administrative Hearings Order, 35 FCC Rcd. at 10733, ¶ 12 (acknowledging) the value of a live hearing by providing a procedural rule that allows for a live hearing where due process requires).

63 Revocation Order, ¶ 26.

violations of the LOA are heavily based on contentious, disputed interpretations both of what the LOA required and whether CTA actually violated those requirements, and these issues cannot be resolved merely by reference to documents but require probing the intentions of the persons involved through discovery and cross-examination. Third, CTA was provided no opportunity to be heard by a neutral (*i.e.*, impartial) decision maker (*e.g.*, an Administrative Law Judge).[64] Before and during the pendency of this proceeding, past and present Commissioners have spoken publicly about their desire to strip CTA of its ability to operate in the United States and the Commission's orders demonstrate a willful blindness to the many material disputed factual issues raised.[65]

Finally, the opportunity for CTA to be meaningfully heard at a hearing outweighed the burden that a live hearing would have placed on the Commission. The Commission's procedural rules acknowledge that while conducting live hearings can impose some costs and burdens on the agency, due process is important enough to require a live hearing—especially when there are disputed facts—based on "the subject matter or circumstances of a particular proceeding, or the parties involved."[66] A live hearing would have advanced the Commission's interest in accurately determining whether CTA's authorizations should have been revoked or terminated, and would

---

64 *See* 5 U.S.C. § 556(b) (providing that "the taking of evidence … shall be conducted in an impartial manner"). *See also Goldberg*, 397 U.S. at 271 (stating that "of course, an impartial decisionmaker is essential"); *Hamdi*, 542 U.S. at 575 (holding that one "must receive notice … and a fair opportunity to rebut the government's factual assertions before a neutral decision maker"); Administrative Hearings Order, 35 FCC Rcd at 10736, ¶ 18 (adopting the conclusion that "the selection of a presiding officer should take into consideration who would most fairly and reasonably accommodate the proper dispatch of the Commission's business and the ends of justice in each case") (internal quotations omitted); 47 C.F.R. § 1.245(b) (permitting any party to request withdrawal of the presiding officer "on the grounds of personal bias or other disqualification").

65 The Commission's rejoinder that its procedural rules do not require that all hearings be conducted by an ALJ, Revocation Order, ¶ 29, is insufficient, since compliance with the agency's procedural rules does not necessarily equate to compliance with all constitutional obligations.

66 Administrative Hearings Order, 35 FCC Rcd. at 10731, 10733, ¶¶ 7, 12.

have protected CTA from the high risk of erroneous deprivation of CTA's rights based on undisclosed information and misrepresentations that constitute circumstances where due process requires a live hearing.

3. The evidence does not support revocation or termination of CTA's Section 214 authorizations.

As CTA explained at length in the CTA Response and its reply comments to the Order Instituting Proceedings, the evidence simply does not support revocation or termination of CTA's authorizations.

As an initial matter, it was the Commission – not CTA – that bore the burden of proof in this proceeding of justifying revocation or termination of CTA's authorizations. In order to bear its burden, the Commission was required to show misconduct by CTA to justify revocation. Section 312(a)(2) of the Communications Act, as amended, implies that some act or omission on the part of the licensee is required to justify revocation of a license. This implication is confirmed by binding Commission precedent that the Commission was obligated (but failed) to follow. The Commission was not permitted to revoke CTA's authorizations based solely on speculation or attenuated and nebulous changes in circumstance or foreign policy considerations that are beyond CTA's control. Nor could the Commission justify revocation of CTA's authorizations based on a fact known to the Commission and presented in an original application for a Commission license, namely CTA's foreign ownership.[67]

The Commission failed to identify *any* act of misconduct by CTA that justifies revocation or termination of its Section 214 authorizations. Rather, the Revocation Order repeatedly refers to

---

[67] *See Trans Video Communications, Inc.*, 22 FCC Rcd. 855, ¶ 16 (WTB 2007); *Theodore E. Sousa*, 92 FCC 2d 173 (1982) (distinguishing between facts presented in an application and facts otherwise known to some branch of Commission staff).

the "potential" or "opportunity" for (presumably future) harm to national security. In essence, the Commission has sought to hold CTA responsible for allegations against CTA's corporate parent(s) and for attenuated and nebulous changes in the national security environment and foreign policy considerations that are untethered to anything under CTA's control.

Moreover, many of the material factual bases upon which the Revocation Order (and the Order to Show Cause and Order Instituting Proceedings before it) relies are disputed and should have been designated for an evidentiary hearing rather than decided solely on the basis of written documents and pleadings. For example, as is apparent from the filings in this proceeding, CTA and the Executive Branch Agencies appear to disagree as to what CTA's LOA actually required of the company. The Commission is not a party to the LOA, and only the parties thereto know what was intended or required by its provisions. Despite this disagreement that is evident by even a cursory review of the record, the Commission has unilaterally decided to accept the Executive Branch's claims without acknowledging the dispute. And, even an unrelated third party has filed statements in the record contradicting assertions advanced by the Executive Branch Agencies that CTA's arguments cannot be trusted.[68] The D.C. Circuit has required an evidentiary hearing in cases where the only conflicting facts centered around statements made to third parties.[69] The Commission should not have relied on assertions about CTA's interactions with third parties, at least in part, to revoke (and terminate) its Section 214 authorizations when CTA put forward substantial evidence that the picture presented by the Executive Branch was not accurate or, in other cases, lacked context.

---

[68] *See* Ex Parte Comments of the Internet Governance Project, GN Docket No. 20-109 (filed Mar. 8, 2021) (correcting the record about Mr. Kuerbis' publications and NTIA's framing thereof).

[69] *See Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 166 (D.C. Cir. 1974) (en banc).

Certain other disputed material facts could only have been addressed through an evidentiary hearing rather than mere submission of written documents and pleadings.[70] For example, the Revocation Order claims that CTA was "willful" in making alleged misrepresentations to the Executive Branch.[71] But, the separate questions of (a) whether CTA actually misrepresented any fact and (b) whether, if any such misrepresentation occurred, it was made with an intention to mislead – both of which CTA disputed – are questions of fact requiring investigation into the context of the statements, the nature of the facts alleged, and the intentions of the parties. Only an evidentiary hearing can appropriately delve into the issue of intent, particularly where the proof of a disputed fact may turn on inferences to be drawn from other facts.[72]

With such clear disagreements in the record between which version of facts is true, it was improper for the Commission to "in effect obviate[] the need for a hearing by finding itself that one factual version was the true and correct one."[73] Rather, "the determination of which factual version is indeed accurate is precisely the function of an evidentiary hearing."[74]

4. **The Commission was required to give CTA an opportunity to cure any alleged violations before revoking its authorizations.**

Even if the evidence did support potential revocation of CTA's Section 214 authorizations, Section 558(c) of the APA required the Commission to give CTA an opportunity to cure the alleged misconduct that the Commission sought to rely upon to justify revocation. Section 558(c)

---

70 *See* CTA Reply Comments at pp. 29–33.

71 Revocation Order, ¶¶ 118–119.

72 *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985) ("*California Broadcasting*") (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 278 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.")).

73 *California Broadcasting*, 752 F.2d at 680.

74 *Id.*

specifies the conditions under which an agency may withdraw, suspend, revoke or annul a license. Such actions are "lawful *only if*, before the institution of agency proceedings therefor, the licensee has been given—(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." Section 558(c) provides limited exceptions to the requirement for an agency to provide notice and opportunity in "cases of willfulness or those in which public health, interest, or safety requires otherwise[.]" Neither exception applies here.

The "willfulness" exception does not apply because the Commission has not identified any prohibited act by CTA that would exempt the Commission from following the requirements of Section 558(c). As the D.C. Circuit explained, "[i]n this context, 'an action is willful if a *prohibited act* is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.'"[75] In other words, "[w]illfulness" for purposes of the exception "must be manifest."[76] Although the Commission attempts to invoke this exception by claiming that CTA "willfully" misrepresented facts to the Executive Branch agencies, CTA denies that any of the statements it made to those agencies were either false or misleading. At a minimum, the contention

---

[75] *Coosemans Specialties, Inc. v. Dep't of Agriculture*, 482 F.3d 560, 567 (D.C. Cir. 2007) (citing *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983)) (emphasis added). *See also Hutto Stockyard, Inc. v. U.S. Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990) (an action is willful if it is "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.").

[76] H.R. Rep. No. 1980, 79th Cong., 2d Sess. 275 (1946).

that CTA acted willfully is disputed, and there is a material issue of fact as to whether CTA committed any prohibited act at all, or if so whether it did it intentionally, knowingly or with disregard of statutory requirements.[77] That issue should have been designated for hearing but was not.

And, the Commission has identified no "emergency" or "clear and immediate necessity" that would support a departure from the requirements of Section 558(c). The "public interest" exception to Section 558(c) only applies when an emergency requires revocation *without* prior notice, not where, as here, the agency merely claims that the "public interest" "requires" revocation.

The Ninth Circuit squarely rejected an argument virtually identical to the Commission's position here, that the revocation of an airline's operating certificate was exempt from Section 558(c) because the Department of Transportation had found by rulemaking that automatic revocation in certain cases was in the public interest.[78] The court explained,

> The Department's proposed interpretation would render section 558(c) nonsensical. The Department would limit section 558(c) to cases in which the agency revoked a license though it did not believe the revocation to be in the public interest. Yet every agency action is taken because the agency believes the action to be in the public interest, at least in theory. Thus, to read section 558(c) as the Department proposes would nullify every word of that section except the "public interest" exception, and the "public interest" clause would swallow the section. A number of courts have had occasion to address the meaning of exception clauses like that in section 558(c). Not surprisingly, these courts have uniformly concluded that such exceptions are directed to unusual, emergency, situations. *See Air East, Inc. v. National Transportation Safety Board*, 512 F.2d 1227 (3d Cir.), *cert. denied*, 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975); *Nader v. FAA*, 440 F.2d 292 (D.C. Cir. 1971); *New England Air Express v. CAB*, 194 F.2d 894 (D.C. Cir. 1952). *Cf. United States v.*

---

77 In *Hutto Stockyard*, *supra*, the Fourth Circuit vacated a license suspension without notice based on willfulness, where an administrative law judge initially had ruled that there was no evidence to support a finding of willfulness, but a reviewing official had "inferred" willfulness from the licensee's conduct. The court held that this inference was not supported by substantial evidence in the record, which necessarily implies that it considered the claim of willfulness to raise an issue of fact. 903 F.2d at 304-305.

78 *See Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, n.8 (9th Cir. 1991).

> *Vertol H21C*, 545 F.2d 648 (9th Cir. 1976) (considering Fifth Amendment due process). It is apparent that there was no such emergency in this case. As such, section 558(c)'s "public interest" exception is inapplicable.[79]

The legislative history of the APA confirms this interpretation, with the Senate Judiciary Committee's report emphasizing that this provision "is designed to preclude the withdrawal of licensees, except in cases of willfulness or *the stated cases of emergency*, without affording the licensee an opportunity for the correction of conduct questioned by the agency"[80] and the House Judiciary Committee's report explaining that the exception is intended for "a situation where *clear and immediate necessity* for the due execution of the laws overrides the equities or the injury to the licensee; the term does not confer upon agencies authority at will to ignore the requirement of notice and an opportunity to demonstrate compliance."[81]

This statute also precludes the Commission from revoking CTA's authorizations based solely on foreign policy concerns that an individual licensee has no capability to cure. The Commission interprets Section 214 of the Act as permitting it to revoke an authorization whenever it decides that the exercise of that authorization prospectively would not serve the public interest. That interpretation, however, is impossible to square with APA Section 558(c), which only permits revocation (except in an emergency) if a licensee is unable or unwilling to "compl[y] with all lawful requirements[.]"[82] The Commission's belief that CTA's authorization is no longer desirable

---

79 *Id.* In *Nader v. FAA*, *supra*, the court agreed that "the claim that smoking annoys and discomforts non-smoking passengers does not justify the exercise of … emergency power" and declined to overturn the Federal Aviation Administrator's determination that no emergency existed with respect to smoking on commercial aircraft.

80 S. Rep. No. 248, 79th Cong., 2d Sess. 35 (1946).

81 H.R. Rep. No. 1980, 79th Cong., 2d Sess. 275 (1946) (emphasis added).

82 The willfulness exception clearly does not undercut this conclusion, because the agency would have to find that the licensee had willfully acted contrary to "lawful requirements" for the exception to apply.

because of changes in U.S. foreign policy towards China does not identify any "lawful requirement" that CTA has breached, nor with which it could conceivably come into compliance. Therefore, it cannot be a permissible basis for revocation under Section 558(c).

The Commission gave CTA no notice of any actions that CTA could take to "demonstrate or achieve compliance with all lawful requirements," nor did it provide CTA any opportunity to take such actions. Instead, the Commission's conclusions in this proceeding were foregone, as was the outcome.

B. CTA will be Irreparably Harmed Absent a Stay.

While "[t]he destruction of a business is, of course, an essentially economic injury,"[83] such injury is irreparable.[84] Moreover, "the threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm."[85] A petitioner may satisfy the irreparable injury prong by adequately demonstrating that an FCC order would result in "substantial, unrecoverable losses in revenue that may indeed threaten the future existence of their business."[86] Absent a stay of the Revocation Order, CTA's business, goodwill and relationships with its customers and other carriers will be irreparably harmed.

If the revocation is permitted to take effect before judicial review is completed, CTA will be required to cease large segments of its business. In particular, CTA will be forced to end its entire resold MVNO service in the United States – which accounts for the vast majority of the

---

83 *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C. Cir. 1977).

84 *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 196–97 (4th Cir. 1977).

85 *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 22 F.3d 546, 552 (4th Cir. 1994).

86 *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, No. 18-1026, 2018 WL 4154794, at *1 (D.C. Cir. Aug. 10, 2018) (per curiam).

number of CTA customers in the U.S.[87] – and, as a result, cease providing those services to approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** consumers and **[BEGIN HIGHLY CONFIDENTIAL]** several hundred **[END HIGHLY CONFIDENTIAL]** individual business users in the U.S.[88] Shutting down such a large segment of CTA's business will have an immediate, direct and substantial financial impact on CTA, an impact from which CTA likely would never be able to recover, even if the Order were later vacated on judicial review. CTA estimates that immediate cessation and discontinuance of services to its MVNO customers will result in net revenue loss of at least **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** per year. These monetary and business impacts are substantial and would be irreparable, as it is unlikely that CTA would be able to regain its customer base following judicial review.

Beyond the direct and permanent monetary and practical business consequences resulting from an immediate halt to CTA's MVNO business, forcing CTA to suddenly shut down its services will irreparably harm its relationships with customers and carrier partners by fostering a lack of trust between CTA's customers and the company and calling CTA's goodwill into substantial and permanent doubt. Providing stable and continuous telecommunications services is a basic and important component of operating in the U.S. telecommunications market, and customers do not expect sudden disruptions or discontinuations of service. Demonstrating this principle, the Commission has established obligations for carriers in cases of unexpected network outages and discontinuation, reduction or impairment of services to protect the interests of customers.[89]

---

87 *See* Declaration of Luis Fiallo, ¶ 4 ("Fiallo Decl.").

88 *See* Fiallo Decl., ¶ 7.

89 *See* 47 C.F.R. § 4.9 (requiring providers to notify the Commission in the event of network outages); 47 C.F.R. § 63.71 (requiring domestic carriers to (a) notify affected customers, state

CTA's MVNO customers trust CTA to provide reliable service and this trust will be shattered overnight. CTA will have to notify all of its MVNO customers of the revocation, and that the company is no longer permitted to provide the MVNO service under U.S. law.[90] CTA will have to provide its MVNO customers an opportunity to transfer their service to a substitute provider or to find alternative service on their own.[91] And once CTA advises its customers that it can no longer provide its service, CTA's reputation with those customers will be irreparably damaged.[92]

After a customer has transferred to another carrier, it will be difficult to persuade them to return to CTA's service.[93] As a result, it is unlikely that CTA would be able to make its MVNO service economically viable even if it were to prevail following judicial review.[94] The irreparable harm to CTA's relationships with customers is further exacerbated by the Commission's failure to provide an appropriate transition period for CTA's MVNO customers to transition to alternative service providers.

CTA also will be forced to terminate arrangements with its carrier partners and other service providers who support the MVNO service. Currently, CTA has relationships with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** carrier partners and multiple other vendors that will need to be terminated if the Revocation Order is permitted to stand

public utility commissions, and the Secretary of Defense of and (b) seek Commission approval for planned discontinuance, reduction, or impairment of service); 47 C.F.R. § 63.19 (outlining the discontinuance requirements for international carriers).

90 *See* Fiallo Decl., ¶ 9.

91 *See* Fiallo Decl., ¶ 9.

92 *See* Fiallo Decl., ¶ 13.

93 *See* Fiallo Decl., ¶ 12.

94 *See* Fiallo Decl., ¶ 12.

pending judicial review.[95] It may be difficult, if not impossible, for CTA to reinstate those arrangements if the Revocation Order is later vacated, as its carrier partners may view CTA as an unreliable and unstable business partner.[96] CTA's vendors could also demand terms that are less favorable for CTA than current arrangements.[97]

In sum, the Revocation Order (if effective before judicial review is complete) will destroy CTA's reputation among customers and carrier partners, thus deterring any future customers and carriers from working with CTA. Such distrust and loss of goodwill between CTA and its customers and partners will likely remain even if the court ultimately finds for CTA. In other words, the damage from the Revocation Order will be immediate – and likely permanent – regardless of how the court rules on appeal.

C. CTA's Customers will be Irreparably Harmed Absent a Stay.

CTA's customers will face direct and substantial harm absent a stay, separate from and in addition to the significant harm to CTA. The MVNO service accounts for the vast majority of the number of customers served by CTA.[98] Many of these customers have limited English-language skills and have subscribed to CTA's service *because of* its Chinese-language customer service options. Relatively few other carriers offer this service to Chinese speakers, and it will likely be more difficult for CTA's subscribers to locate and subscribe to replacement services than it would be for the average customer, especially in the abbreviated timetables presently required here.

---

95 *See* Fiallo Decl., ¶ 10.

96 *See* Fiallo Decl., ¶ 12.

97 *See* Fiallo Decl., ¶ 12.

98 *See* Fiallo Decl., ¶ 4.

D. Neither the Commission, the Executive Branch Agencies, nor the Public Interest will be Harmed by a Stay.

Once the petitioner has satisfied the first two factors, the stay inquiry then assesses the potential harm to the opposing party and the public interest. These last two factors are merged when, as here, the Government is the opposing party.[99] "The interest of the Commission and [general public] is largely the same … in having legal questions decided on the merits, as correctly and expeditiously as possible."[100] However, "when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant," maintaining the status quo is the most appropriate decision.[101] As described above, a denial of a stay in this case would inflict substantial, irreparable harm on CTA, as well as its customers and partners, while granting the stay and preserving the status quo that has existed for decades would result in "little if any harm" to the Government or the public. Sudden disruption and discontinuance of service to customers as a result of the revocation of CTA's Section 214 authorizations will affect not only CTA's business but also affirmatively will harm consumers and the public interest.

Should the Commission ultimately prevail following judicial review, its only harm would be a slight delay in the effective date of the revocation. As of the date of this filing, this proceeding has been ongoing for 18 months, during which time CTA has continued to operate pursuant to its Section 214 authorizations without incident and consistent with its longstanding business arrangements with CTA's customers and carrier partners. Any delay in the effective date of the revocation

---

99 *Nken*, 566 U.S. at 435.

100 *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

101 *Id*. at 844.

(*i.e.*, further maintenance of the status quo) would likely be less than the time the Commission has already spent conducting this proceeding. This delay is inadequate to outweigh the substantial and irreparable harm to CTA that would arise if the Revocation Order were to take full effect.[102]

Moreover, the notion that a minor additional delay pending judicial review would cause substantial harm is unsupportable. CTA and its predecessors have held Section 214 authorization for nearly two decades, and none of the filings in this case have shown that even one person has suffered any harm whatsoever as a result of their operations. At most, the Executive Branch Agencies have purported to show a risk of some potential harm at some indefinite time in the future, but it has offered no evidence of any imminent threat.

Furthermore, the Commission has not treated this proceeding as unusually urgent to date. The Executive Branch Agencies filed their initial recommendation over a year and a half ago (in April 2020). Although the Commission issued an Order to Show Cause later that month, it did not institute this revocation proceeding until months later in December 2020. Given the time that has elapsed since the recommendation without any evidence of intervening harm, it is implausible that the effective date of this Order is so urgent that a delay of a few months for appellate review would outweigh the substantial, immediate and irreparable harm to CTA.

In light of the serious harm the revocation would have on CTA's business and the relative lack of injury maintaining the status quo would have on the Commission, granting a stay in this instance is appropriate.

---

[102] *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007) (desire to have case decided expeditiously, without more, is insufficient to constitute sufficient harm to public interest, especially if prevailing party would end up with same result).

IV. ALTERNATIVE REQUEST FOR INTERIM RELIEF

In the alternative, if the Commission is not inclined to grant a stay pending the completion of judicial review, CTA requests that it grant an interim stay of the effective date of the Order to permit CTA to file a motion for stay with a United States Court of Appeals. Such an interim stay would expire (a) 14 days after issuance, unless CTA has filed a motion for stay with a Court of Appeals by such time; or (b) upon the entry by the Court of Appeals of an order disposing of CTA's motion. Such interim relief would preserve the *status quo* until the Court of Appeals has an opportunity to act on CTA's motion. Absent a stay or other interim relief, CTA must immediately begin taking steps to notify customers of discontinuance or transfer them to alternative service providers, and those steps may be difficult to unwind if a Court subsequently stays the Order.

V. CONCLUSION

For the foregoing reasons, CTA respectfully requests that the Commission enter an order staying the revocation of CTA's Section 214 authorizations pending a final order on appeal, and any other and further relief as deemed just and proper.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

s/ Andrew D. Lipman

Andrew D. Lipman
Russell M. Blau
Catherine Wang
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T: (202) 739-3000
F: (202) 739-3001
andrew.lipman@morganlewis.com
russell.blau@morganlewis.com
catherine.wang@morganlewis.com

Counsel for China Telecom (Americas) Corporation