No. 20-2365

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CHINA TELECOM (AMERICAS) CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

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

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BRIEF FOR RESPONDENTS

INTRODUCTION

Petitioner China Telecom (Americas) Corporation ("China Telecom") seeks review of an *Order* in which the Federal Communications Commission initiated further proceedings to consider whether to revoke China Telecom's authorizations to operate domestic and international communications service within the United States. *In re China Telecom (Ams.) Corp.*, 35 FCC Rcd. 15006 (2020) (*Order*) (JA 820–65). The Court lacks jurisdiction to review the *Order* at this time, however, because an

order that merely initiates or governs further agency proceedings is neither judicially reviewable final agency action nor subject to immediate review under the collateral order doctrine. *See*, *e.g.*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n*, 680 F.2d 810 (D.C. Cir. 1982) (*NRDC*); *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951 (4th Cir. 1979). The Court should therefore dismiss the premature petition for review in this case for lack of final agency action.

China Telecom is authorized by the Commission under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), to operate domestic and international communications service within the United States. In April 2020, multiple Executive Branch agencies recommended that the Commission revoke China Telecom's authorizations due in part to "'substantial and unacceptable national security and law enforcement risks associated with [China Telecom's] continued access to U.S. telecommunications infrastructure.'" *Order* ¶ 9 (JA 825–26). The agency then issued an Order to Show Cause directing China Telecom to demonstrate why the Commission should not institute a revocation proceeding, and China Telecom filed a lengthy response. *Id.* ¶ 11 (JA 826–27).

In the *Order* challenged here, the Commission found that "sufficient cause exists to initiate a proceeding on whether to revoke and terminate China Telecom Americas' domestic and international section 214 authority," and therefore instituted a full revocation proceeding. *Order* ¶¶ 15–16 (JA 828–29); *see id.* ¶¶ 15–61 (JA 828–56). To inform that proceeding, the Commission invited the Executive Branch agencies and any other interested parties to submit comments on China Telecom's response to the Order to Show Cause, to be followed by a further opportunity for China Telecom to reply. *Id.* ¶¶ 1, 71 (JA 821, 859).

China Telecom challenges the Commission's decision to conduct the revocation proceeding through full written submissions before the Commission itself, rather than adopt more formal hearing procedures or hold an in-person hearing before an administrative law judge. But the decision whether and how to conduct a proceeding is not final agency action, so China Telecom must wait until the Commission issues a final order resolving whether or not to revoke its authorizations. At that point, China Telecom will have a full opportunity to pursue judicial review of its challenges here, together with any other challenges it might wish to raise.

In any event, the Commission's preliminary view that additional process appears unnecessary is reasonable based on the partial record before it. The Commission will be able to further address what process is appropriate when it reviews the full record and any additional arguments presented in the ongoing revocation proceeding, and it retains discretion to modify its procedures or to offer supplemental process if warranted.

China Telecom's petition for review should therefore be dismissed as premature, or in the alternative denied.

JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over the petition for review. Congress has provided for judicial review only of "final order[s]" of the Commission, 28 U.S.C. §§ 2342(1), 2344, a term that incorporates the Administrative Procedure Act's final agency action requirement. As explained below (and in Respondents' pending motion to dismiss), the *Order* challenged here contains only tentative views and represents only an interlocutory step in an ongoing agency proceeding, so it is not a final order subject to review at this time. China Telecom's petition for review is therefore premature and must be dismissed for lack of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether China Telecom's petition for review must be dismissed because the *Order* is not final agency action subject to review at this time.

2. If the Court were to reach the merits, whether the Commission reasonably determined based on the partial record before it that full written submissions will likely suffice to fairly decide whether to revoke China Telecom's Section 214 authorizations, and that more formal procedures or a live evidentiary hearing appear unnecessary, subject to the Commission's discretion to modify its procedures or to offer supplemental process if it warranted upon review of the full record and the parties' further submissions.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress established the Federal Communications Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. In doing so, Congress directed the Commission to use its regulatory authority to serve "the national defense" and to "promot[e] safety of life and property," among other things. *Ibid.* The "[p]romotion of national security" is thus "an integral part of the Commission's public interest responsibility" and

"one of the core purposes for which Congress created the Commission." *Order* ¶ 2 (JA 821).

Under Section 214 of the Communications Act, a carrier seeking to operate a transmission line used for interstate or foreign communications must obtain authorization from the Commission. 47 U.S.C. § 214(a). The Commission has granted blanket authority for any carrier to construct or operate domestic transmission lines, *see* 47 C.F.R. § 63.01(a), but may revoke that authority from any carrier if doing so is warranted to protect the public interest. *Order* ¶¶ 3 & nn.8–9, 8 n.28 (JA 821–22, 825). Any carrier seeking to construct or operate international transmission lines must obtain specific authorization from the Commission, *see* 47 C.F.R. § 63.18, and the Commission may revoke a carrier's international Section 214 authorizations when warranted to protect the public interest. *Order* ¶ 3 & n.10 (JA 822); *cf.* 5 U.S.C. § 558(c)(1)–(2). Carriers must also obtain Commission approval in order to transfer control of any domestic or international transmission lines. 47 C.F.R. §§ 63.04, 63.24.

One of the critical public-interest factors the Commission considers under Section 214 is whether a carrier's operation of domestic or international transmission lines raises national security, law enforcement, or foreign policy concerns due to the carrier's foreign ownership. *Order*

¶ 4 (JA 822–23). In addressing that issue, the Commission's longstanding practice has been to seek "the expertise of the relevant Executive Branch agencies"—including the Department of Justice, the Department of Homeland Security, and the Department of Defense—to help assess national security and other concerns arising from a carrier's foreign ownership. *Id.* ¶ 5 (JA 823); *see also Rules & Policies on Foreign Participation in the U.S. Telecomms. Mkt.*, 12 FCC Rcd. 23891, 23919–20 ¶¶ 62–63 (1997) (recognizing that "foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch").

To advise the Commission on these critical matters, the Executive Branch may at any time "review existing [authorizations] to identify any additional or new risks to national security or law enforcement interests." *Process Reform for Executive Branch Review of Certain FCC Appls. & Pets. Involving Foreign Ownership*, 35 FCC Rcd. 10927, 10962–63 ¶ 90 (2020) (quoting Executive Order No. 13913 § 6(a), 85 Fed. Reg. 19643, 19645 (Apr. 4, 2020)). If that review identifies unacceptable risks to national security or law enforcement, the Executive Branch may recommend that the Commission modify an authorization to require additional mitigation

measures or, if the risks cannot reasonably be mitigated, it may recommend that the Commission revoke the authorization. *Ibid.* (citing Executive Order No. 13913 § 9(b), 85 Fed. Reg. at 19646). If the Executive Branch recommends that an authorization be revoked, the Commission will initiate a proceeding to "provide the authorization holder such notice and an opportunity to respond as is required by due process and applicable law, and appropriate in light of the facts and circumstances." *Id.* at 10964 ¶ 92.

B. Factual And Procedural Background

China Telecom provides communications service under the Commission's blanket authority for domestic transmission lines and under two international Section 214 authorizations granted by the Commission. *Order* ¶ 8 (JA 824–25). The company is a wholly owned subsidiary of China Telecom Corporation Limited, which is incorporated in the People's Republic of China. *Id.* ¶ 6 (JA 823). Approximately 71% of China Telecom Corporation Limited's stock is owned by China Telecommunications Corporation, a Chinese company that is wholly owned by an arm of the Chinese government, and around 12% of its stock is held by other entities registered or organized under Chinese law. *Id.* (JA 823–24); *see* JA 728–29. Because of China Telecom's significant

foreign ownership and other concerns, the company's international Section 214 authorizations were conditioned on its compliance with several commitments made in a 2007 Letter of Assurances to the Department of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security. *Id.* ¶ 8 & n.26 (JA 824–25).

In April 2020, several Executive Branch agencies—the Department of Justice, the Department of Homeland Security, the Department of Defense, the State Department, the Department of Commerce, and the United States Trade Representative—jointly recommended that the Commission revoke and terminate China Telecom's international Section 214 authorizations. JA 455–525 (Executive Branch Recommendation); *see Order* ¶ 9 (JA 825–26). The Executive Branch agencies warned of "substantial and unacceptable national security and law enforcement risks associated with China Telecom's continued access to U.S. telecommunications infrastructure." Executive Branch Recommendation at 1 (JA 457). Among other things, the Executive Branch agencies pointed to:

- China Telecom's ownership and control by the Chinese government, which has engaged in malicious cyber activities in the United States and could seek to use China Telecom's U.S.

operations to disrupt or misroute U.S. communications traffic or for economic espionage;

- China Telecom's failure to comply with the terms of its Letter of Assurances, including its failure to take all practicable measures to prevent unauthorized access to U.S. records, and its failure to timely respond to requests for evidence of compliance; and
- China Telecom's misrepresentations about its cybersecurity practices and its apparent failure to comply with federal and state cybersecurity and privacy laws.

Order ¶ 9 (JA 825–26); *see also id.* ¶¶ 20–61 (JA 830–56).

In addition, the Executive Branch agencies filed a separate classified appendix with additional information relevant to the recommendation, although they represented that "the unclassified information alone is sufficient" to support revocation of the authorizations.[1] Executive Branch Recommendation at 2 (JA 458); *see Order* ¶ 9 (JA 826). Pursuant to 50 U.S.C. § 1806(c), the Department of

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[1] We have arranged to lodge a copy of the classified appendix with the Court *ex parte* and under seal to permit *in camera* review. Although review of the classified appendix is unnecessary for the Court to resolve this case, the parties agree that it should be made available in case the Court wishes to view it.

Justice also filed an accompanying Notice of Intent to Use FISA Information indicating that the information was obtained or derived from electronic surveillance conducted under the Foreign Intelligence Surveillance Act of 1978 (FISA). JA 266–68. China Telecom then asked the government to supply it with a copy of the classified appendix and related information concerning the FISA surveillance at issue. *See Order* ¶ 10 & n.36 (JA 826).

In response to China Telecom's request for the classified material, the Department of Justice explained that the Commission lacks authority to disclose this classified information to China Telecom. *See* Dep't of Justice 5/19/20 Letter (JA 280–82). Instead, Congress has vested exclusive authority over "any motion or request * * * to discover, obtain, or suppress [FISA] information" in the district court where the request is made. 50 U.S.C. § 1806(f). Accordingly, the United States has filed an action in the U.S. District Court for the District of Columbia to determine whether the FISA information must be produced or suppressed. Dep't of Justice 12/8/20 Letter (JA 396–97); *see United States v. China Telecom (Ams.) Corp.*, No. 20-mc-116 (D.D.C. filed Nov. 24, 2020). Because that court has exclusive jurisdiction over any request to discover or suppress FISA information, the decision in that case will control whether the

classified material must be disclosed to China Telecom and whether it is admissible should the Commission wish to consider it.

After receiving the Executive Branch recommendation, the chiefs of the FCC's International, Wireline, and Enforcement Bureaus issued an Order to Show Cause directing China Telecom to demonstrate why the Commission should not initiate a proceeding to consider revoking its domestic and international Section 214 authorizations, and China Telecom filed a lengthy response. *Order* ¶ 11 (JA 826–27).

C. The *Order* Under Review

In the *Order* challenged here, the Commission found that "sufficient cause exists to initiate a proceeding on whether to revoke and terminate China Telecom Americas' domestic and international section 214 authority," and therefore instituted a proceeding to consider whether to revoke China Telecom's authorizations. *Order* ¶¶ 15–16 (JA 828–29); *see id.* ¶¶ 15–61 (JA 828–56). The Commission observed that the revocation proceeding will "afford[] China Telecom Americas additional * * * opportunity" to explain "why the Commission should not revoke and/or terminate its domestic and international section 214 authority" and to "respond to this Order and to any additional evidence or arguments that may be submitted." *Id.* ¶¶ 16–17 (JA 829). To inform that proceeding,

the Commission opened a new pleading cycle and invited the Executive Branch agencies and any other interested parties to submit comments on China Telecom's response to the Order to Show Cause, to be followed by an opportunity for China Telecom to reply. *Id.* ¶¶ 1, 71 (JA 821, 859).

The *Order* "establish[ed] procedures for the submission of additional filings" to ensure that all issues are thoroughly briefed and considered in the proceeding before the Commission. *Order* ¶¶ 16–17 (JA 829). In doing so, the Commission explained that it was exercising its "well-established authority to 'conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.'" *Id.* ¶ 16 (JA 829) (quoting 47 U.S.C. § 154(j)); *see id.* ¶ 16 n.51 (JA 829) (discussing agencies' broad discretion to fashion appropriate rules of procedure tailored to the tasks before them).

Under those procedures, further written comments and evidence from the Executive Branch and any other interested parties were due 40 days after the *Order* was adopted, and China Telecom's reply comments and additional evidence were due 40 days after that. *Order* ¶¶ 1, 71 (JA 821, 859). The *Order* did not grant China Telecom's request that any revocation proceeding be conducted in person or through more formal hearing procedures, such as those in Part 1, Subpart B of the

Commission's rules (47 C.F.R. §§ 1.201–.377). The *Order* also did not grant China Telecom's request that this matter be referred to an administrative law judge to preside in the first instance over all issues that might arise. Instead, the Commission expressed its preliminary view, based on the record before it at that time—pending further submissions by the parties and development of the full record—that the opportunity for full written submissions before the Commission should be "sufficient to ascertain whether revocation and/or termination would be consistent with the public interest, convenience, and necessity." *Order* ¶ 16–17 (JA 829). The Commission nevertheless postponed any decision, and requested further comment, on what standard of proof to employ when it reviews the full record and makes any final decisions in this proceeding. *Id.* ¶ 15 n.49 (JA 828).

D. Subsequent Developments

Immediately following the release of the *Order*, China Telecom filed a petition for review and moved to stay the Commission from providing the Executive Branch agencies with an unredacted copy of its response to the Order to Show Cause. *See Order* ¶¶ 62–70 (JA 856–59) (discussing this issue). A panel of this Court denied that stay request, and agency staff then supplied the unredacted filing to the requesting agencies.

China Telecom did not move to stay the *Order* or the ongoing proceedings before the agency in any other respect, so the administrative proceedings have continued under the procedures set forth in the *Order*.

After the Court denied a stay, Respondents moved to dismiss China Telecom's petition for review because the *Order* is not final agency action subject to review at this time. That motion, which has been fully briefed, remains pending before the Court.

On March 1—the day before it filed its opening brief in this Court—China Telecom filed its reply comments in the revocation proceeding.[2] Those reply comments include 35 additional pages of legal argument concerning the hearing procedures—arguments virtually identical to those it asks the Court to decide here, even as those arguments continue to be litigated before the agency. *See* China Telecom Reply Comments, *supra* note 2, at 3–37.

Last month, the Commission issued orders instituting revocation proceedings against two other Chinese-government-affiliated carriers based on similar concerns that those carriers are subject to exploitation,

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[2] Reply Comments of China Telecom (Ams.) Corp., GN Docket 20-109 (FCC filed Mar. 1, 2021) (China Telecom Reply Comments), *available at* https://go.usa.gov/xsH39.

influence, and control by the Chinese government.[3] Those orders adopt similar procedures providing for full written submissions, and they contain additional discussion of why such procedures comport with the Commission's rules, past practice, and principles of due process. *See*, *e.g.*, *China Unicom*, *supra* note 3, ¶¶ 16–23.

STANDARD OF REVIEW

If the Court determines that it has jurisdiction over the petition for review, it may overturn the *Order* only if the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "'Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid.'" *TCR Sports Broad. Holdings, L.L.P. v. FCC*, 679 F.3d 269, 274 (4th Cir. 2012). A court's task is "only * * * to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Ibid.* (internal quotation marks and citations omitted).

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[3] *In re China Unicom (Ams.) Operations Ltd.*, FCC 21-37, 36 FCC Rcd. ---, 2021 WL 1116575 (rel. Mar. 19, 2021), *available at* https://go.usa.gov/xsHt3; *In re Pac. Networks Corp.*, FCC 21-38, 36 FCC Rcd. ---, 2021 WL 1116616 (rel. Mar. 19, 2021), *available at* https://go.usa.gov/xs6c6.

The court's role is especially limited when it comes to agency procedures, where the "established principle" is that "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)); *see* 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

SUMMARY OF THE ARGUMENT

I. The petition for review in this case is premature and must be dismissed for lack of final agency action subject to review at this time. To be final and reviewable, an order must both mark the consummation of the agency's decisionmaking process and give rise to direct legal consequences. The *Order* challenged here, which merely initiates further proceedings that will enable the Commission to decide whether to revoke China Telecom's authorizations in a subsequent ruling, does neither. Review at this time also would be inappropriate because China Telecom's challenges are intertwined with, rather than wholly collateral to, the ongoing agency proceedings. China Telecom will have full opportunity to

challenge the agency's procedures (alongside any other challenges it wishes to raise) once the agency proceedings have concluded, but its petition for review of an interlocutory order at this juncture is premature and must be dismissed.

II. Because the Court lacks jurisdiction to review the *Order* at this time, China Telecom's petition for review must be dismissed without reaching the merits. But if the Court nevertheless finds that it has jurisdiction to review the merits, the Commission's preliminary view that additional process appears unnecessary for China Telecom to meaningfully present its case is reasonable based on the partial record before it. The Commission retains discretion to modify its procedures or to offer supplemental process if doing so is warranted based on the full record or further submissions by the parties, and it will be able to provide any additional justification that may be appropriate when reaching any final determination.

ARGUMENT

I. THE PETITION FOR REVIEW MUST BE DISMISSED FOR LACK OF FINAL AGENCY ACTION.

The petition for review in this case is premature and must be dismissed for lack of final agency action subject to review. Congress has

provided for judicial review of only "final order[s]" of the Commission. 28 U.S.C. §§ 2342(1), 2344. That language incorporates the Administrative Procedure Act's "final agency action" requirement in 5 U.S.C. § 704. *U.S. West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054–55 (9th Cir. 2000); *cf. Howard Cnty. v. FAA*, 970 F.3d 441, 448 (4th Cir. 2020) ("final order" means final agency action). Congress has required that judicial review await final agency action because allowing interlocutory review of agency proceedings "would tend to interfere with the proper functioning of the agency," "burden the courts," and "lead to piecemeal review which at least is inefficient, and may be unnecessary." *Eastman Kodak Co. v. Mossinghoff*, 704 F.2d 1319, 1325 (4th Cir. 1983).[4]

Agency action is final under this standard only when two conditions are met. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation and internal quotation marks omitted). And "second, the action must be one by which 'rights or obligations have been determined' or from

[4] *See also Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr., LLC*, 305 F.3d 253, 260–61 (4th Cir. 2002) (discussing the strong federal policy against interlocutory review).

which 'legal consequences will flow.'" *Id.* at 178. Both conditions must be satisfied for an agency order to be final and subject to review. *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 313 F.3d 852, 858 (4th Cir. 2002) ("'[A]n agency action may be considered 'final' only when the action signals the consummation of an agency's decisionmaking process *and* gives rise to legal rights or consequences.'") (emphasis in original).

The *Order* is not final agency action under this standard, as we explain in more detail below. An order that merely initiates and governs further proceedings, and neither marks the consummation of the agency's decisionmaking process nor has any conclusive legal consequences, is not final agency action subject to review. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n*, 680 F.2d 810 (D.C. Cir. 1982) (*NRDC*); *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951 (4th Cir. 1979).

Nor is the *Order* subject to review under the collateral order doctrine. That doctrine does not allow a court to review non-final agency orders; instead, it "is best understood not as an exception to the 'final decision' rule * * * but as a 'practical construction' of it." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The collateral order doctrine applies to only a "'narrow class of decisions,'" *Carefirst*,

supra note 4, 305 F.3d at 255, and requires that the challenged order "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 742 F.3d 82, 86 (4th Cir. 2014) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)). Those "'necessarily stringent'" requirements, *ibid.*, are not satisfied here.

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

The *Order* challenged here is not subject to review at this time because it is not the consummation of the agency's decisionmaking process and because it does not impose any direct and immediate legal consequences on China Telecom.

1. The *Order* marks the beginning of the Commission's decisionmaking process, not its end or consummation. In *Standard Oil*, the Supreme Court refused to allow judicial review of an administrative complaint that found "reason to believe" several companies were violating the FTC Act and that initiated further "adjudicatory proceedings" to decide whether to enjoin the challenged practices. 449 U.S. at 234, 241. The Court held that this "threshold determination that

[the agency] should initiate proceedings" was not reviewable final agency action, *id.* at 239–45, nor was it reviewable under the collateral order doctrine, *id.* at 246; *accord NRDC*, 680 F.2d at 815–17 & n.16.

Like the administrative complaint in *Standard Oil*, the *Order* here merely initiates further proceedings that will enable the Commission to decide whether to revoke China Telecom's authorizations in a subsequent order. At most, the *Order* represents only a "tentative or interlocutory" step pending review of further arguments and evidence submitted in the revocation proceeding. *Bennett*, 520 U.S. at 178. The *Order* does not purport to reach any final decision, and it is possible the Commission may conclude that China Telecom's authorizations should not be revoked or modified, leaving nothing for the Court to review. *See Standard Oil*, 449 U.S. at 244 n.11; *NRDC*, 680 F.2d at 816–17.

China Telecom appears to assume (Br. 1–2; Opp. 13–14, 16) that determinations about what administrative procedures to employ may be treated as final and reviewed separately from the ultimate decision whether or not to revoke China Telecom's authorizations.[5] But even if

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[5] Citations to "Opp." refer to China Telecom's Opposition to Respondents' Motion to Dismiss that was filed in this case on February 12, 2021 (Doc. No. 34).

such piecemeal review of procedural rulings were available, the preliminary views expressed in the *Order* are not yet conclusive. On the contrary, the *Order* invited further submissions from the parties, and China Telecom's subsequent comments press the same arguments it is seeking to raise in this Court—including the arguments it contends the Commission has not yet fully addressed—for why it should be afforded additional process. China Telecom Reply Comments, *supra* note 2, at 3–37. The Commission is considering that submission, and if it finds the arguments persuasive, it retains discretion to modify the procedures employed in its ongoing proceeding or to offer supplemental process. *Cf. Standard Oil*, 449 U.S. at 242 (awaiting final agency action allows "the agency an opportunity to correct its own mistakes"). That the Commission has not reached a final determination as to these procedural issues is further demonstrated by the fact that the *Order* expressly postponed any decision, and requested further comment, on the interrelated issue of what standard of proof to employ when the Commission reviews the full record and makes any final decisions in this proceeding. *See Order* ¶ 15 n.49 (JA 828).

Even if the Commission were unlikely to decide to modify its procedures, awaiting the conclusion of the underlying proceeding would

still be the proper course. For one thing, the resulting order may aid this Court's review by offering further explanation or support for the Commission's procedural determinations. For another, the Commission's analysis in reaching a final determination on whether to revoke the company's authorizations may shed light on the appropriateness of the procedures the agency employed, the adequacy of the record it compiled, and whether any alleged error was prejudicial. *Cf. NRDC*, 680 F.2d at 817 ("waiting until the administrative proceedings have been completed" will "give the court the benefit of a fully developed factual record" to decide any issues, including "whether the limited, [paper] hearing offered * * * in fact substantially prejudiced" the petitioner).

Finally, as the Supreme Court admonished in *Standard Oil*, allowing interlocutory review would be improvident because it could "lead[] to piecemeal review," 449 U.S. at 242, which "would tend to interfere with the proper functioning of the agency," "burden the courts," and "at least is inefficient, and may be unnecessary." *Eastman Kodak*, 704 F.2d at 1325; *see also Carefirst*, 305 F.3d at 260–61. "By deferring review now," on the other hand, "the court may be able to consider all such issues in a single review proceeding." *NRDC*, 680 F.2d at 817.

2. The *Order* also does not have any direct legal consequences or alter China Telecom's legal status—so even if the Commission's procedural rulings were not open to reconsideration, they still would not be subject to review at this time. The Supreme Court explained in *Standard Oil* that interlocutory rulings ordinarily are not reviewable even if they are definitive, because this would "mistake[] exhaustion for finality." 449 U.S. at 243; *accord Eastman Kodak*, 704 F.2d at 1324.

Agency orders are not final and reviewable until the agency takes "action * * * by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178. As this Court has put it, "[N]o court, having the power of review of the actions of an administrative agency, should exercise that power to review mere preliminary or procedural orders or orders which do not finally determine some substantive rights of the parties." *Consol. Gas*, 611 F.2d at 958 (internal quotation marks and brackets omitted). When an order merely "provide[s] the basis for a hearing" and "resolves no claims" against any party, judicial review "must await the hearing itself." *Id.* at 960.

Nothing in the *Order* revokes or modifies China Telecom's authorizations or restricts its right to provide service. Any such action by the Commission would require a further order, which would have to

take account of the parties' further submissions in the revocation proceeding and the more extensive record now before the agency. "[R]esort to the courts in th[is] situation[] is either premature or wholly beyond their province," because the *Order* "does not of itself adversely affect [China Telecom] but only affects [its] rights adversely on the contingency of future administrative action." *Consol. Gas*, 611 F.2d at 960 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)). Indeed, it is possible that the Commission may ultimately decline to revoke China Telecom's licenses, and "the possibility that [any] challenge may be mooted in adjudication" provides "reason[] to await the termination of agency proceedings." *Standard Oil*, 449 U.S. at 244 n.11; *accord NRDC*, 680 F.2d 816–17.

As a practical matter, of course, the *Order* may expose China Telecom to "the expense and disruption of defending itself" in the revocation proceeding. *Standard Oil*, 449 U.S. at 244. But the Supreme Court has held that those practical (rather than legal) consequences do not entitle a party to immediate review, because "the expense and annoyance of litigation is part of the social burden of living under government"—especially for entities that have sought license to do business in a closely regulated industry—and is not a sufficient basis to

allow interlocutory challenges to ongoing agency proceedings. *Standard Oil*, 449 U.S. at 244 (internal quotation marks omitted); *accord Eastman Kodak*, 704 F.2d at 1324–25; *see also Consol. Gas*, 611 F.2d at 960 ("the inconvenience of a hearing will not impose such irreparable injury as to support interlocutory review"). Instead, final agency action requires "a definitive ruling that had some immediate 'legal force or practical effect' * * * *other than* 'the disruptions that accompany any major litigation.'" *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 237 n.13 (4th Cir. 2008) (emphasis added; quoting *Standard Oil*, 449 U.S. at 243).

In other words, "[t]he burden of defending oneself in an [allegedly] unlawful administrative proceeding" does not excuse a party from "proceeding in the administrative forum" and awaiting a final decision before "raising [its] claims * * * in due course." *Bennett v. U.S. SEC*, 844 F.3d 174, 184–86 (4th Cir. 2016); *see also S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006). Indeed, to hold otherwise would improperly "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Cobra Nat. Res.*, 742 F.3d at 86 (quoting *Digital Equip. Corp.*, 511 U.S. at 868). Instead, this Court has regularly required parties to await full adjudication before they can seek judicial review of challenges to the

lawfulness of the underlying proceedings.[6]

China Telecom is thus incorrect in suggesting (Opp. 18) that its due process rights are violated simply by allowing the agency proceeding to go forward. The Due Process Clause may be violated when a party is deprived of liberty or property to which it is entitled, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999), but China Telecom has not yet been—and might never be—deprived of anything. If the Commission decides to revoke China Telecom's authorizations, that decision can be reviewed (and, if necessary, remedied) through normal appellate review following a final order. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009); *see also infra* Part I.C. In the meantime, the ordinary burdens of having to participate in an administrative proceeding—even one alleged to be unlawful—are not a legally cognizable injury. *Bennett*,

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[6] *See*, *e.g.*, *Bennett*, 844 F.3d 174 (no interlocutory review of argument that administrative proceeding was unconstitutional because the administrative law judge's appointment and removal protections violated the Appointments Clause); *S.C. State Bd.*, 455 F.3d 436 (no interlocutory review of argument that defendant was immune from suit under state-action antitrust immunity); *Long Term Care*, 516 F.3d 225 (no interlocutory review of argument that the EEOC lacked jurisdiction over the appellant); *Carefirst*, 305 F.3d 253 (no interlocutory review of argument that matter was being litigated in the wrong court); *Carolina Power & Light Co. v. U.S. Dep't of Labor*, 43 F.3d 912 (4th Cir. 1995) (no interlocutory review of argument that administrative law judge unlawfully rejected a private settlement).

844 F.3d at 184–86 (citing *Standard Oil*, 449 U.S. at 244). China Telecom has never claimed that it will suffer any other tangible harm during the pendency of the agency proceeding, and it can continue within that proceeding to pursue effective relief against any possibility of future harm. There is accordingly no reason to allow it to bypass the as-yet uncompleted agency proceeding.

3. This case is indistinguishable from *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*, 680 F.2d 810 (D.C. Cir. 1982) (*NRDC*), in which the court held that an essentially identical procedural determination was not final agency action and that it therefore lacked jurisdiction under 28 U.S.C. § 2342. Like China Telecom, the petitioner in *NRDC* sought to challenge the agency's decision to conduct a licensing proceeding through a "'legislative' type" paper hearing, rather than through formal adjudication with adversarial discovery and a live evidentiary hearing, and petitioned for review while that proceeding was still ongoing. *Id.* at 812–13. The court dismissed the petition for review because the petitioner's "arguments challeng[ing] the decision of the Commission to limit the procedures available" in the licensing proceeding "concern interlocutory actions by the Commission that are not yet subject to judicial review." *Id.* at 812, 816; *see id.* at 815–

17. "Ordinarily," the court explained, "'[a]n agency's procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review,'" and "the availability of relief on review of a final order * * * dictates against judicial review at this time." *Id.* at 816. That decision applies in full measure to the essentially identical challenge that China Telecom seeks to raise here.

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

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

Review at this time also would be inappropriate because China Telecom's challenges are intertwined with, rather than wholly collateral to, the ongoing agency proceedings. This Court has held that "claims are

not wholly collateral when they are 'the vehicle by which [petitioners] seek to reverse' agency action." *Bennett*, 844 F.3d at 186. That is the case here: China Telecom's petition for review "appears to be the 'vehicle by which [it] seeks' to vacate" any forthcoming order that might conclude that its authorizations should be revoked. *Id.* at 186–87.

China Telecom's procedural challenges are also intertwined with the merits in other respects. China Telecom contends (Br. 24, 41–48) that, weighing all of the relevant considerations, the potential benefit of additional procedures in guarding against an erroneous outcome in the revocation proceeding exceeds the fiscal and administrative burdens those procedures would entail. But that comprehensive case-specific inquiry would benefit from a full understanding of the matters in dispute. At this interim stage—with parties continuing after the *Order* to further develop the record and file new pleadings in the revocation proceeding—the precise disputes that must be resolved, the nature of the evidence to be considered, and how these matters will play into the Commission's ultimate analysis all remain in flux.

China Telecom attempts to liken this case to cases involving involuntary medication of criminal defendants (Opp. 20, 21 n.78; *see also* Br. 26 n.80), but that comparison only underscores the flaws in its

argument. Involuntary medication has palpable physiological and psychological effects separate and apart from facilitating further adjudicatory proceedings. And unlike the inquiry into whether a defendant should be medicated, assessing the adequacy of agency procedures is closely intertwined with matters that will be further developed and potentially illuminated by the agency's analysis in reaching any final determination.

C. China Telecom Will Have Full Opportunity To Raise Its Procedural Challenges Once The Commission Issues A Final Decision.

Finally, China Telecom will have a full opportunity to challenge the agency's procedures (alongside any other challenges it wishes to raise) on review from any final decision on whether to revoke the company's authorizations. The challenged procedural determinations, and any further or reconsidered procedural rulings the Commission might make, "will merge in[] the Commission's decision on the merits" and be subject to review at that time. *Standard Oil*, 449 U.S. at 246. If the hearing procedures were then found unlawful, and if China Telecom could show it was prejudiced as a result, the Court could offer effective relief by ordering a new hearing. *NRDC*, 680 F.2d at 816. "[T]he availability of relief on review of a final order" therefore "dictates against judicial review

at this time." *Ibid.*; *accord Standard Oil*, 449 U.S. at 246 ("review of this preliminary step should abide review of the final order").

China Telecom thus need only allow the Commission to complete the underlying proceeding to then have a full opportunity to pursue any judicial challenges. *NRDC*, 680 F.2d at 816. Indeed, the Court will be *better* able to review China Telecom's challenges after the revocation proceeding has concluded, with "the benefit of a fully developed factual record" and the Commission's explanation and analysis of the matters it deems dispositive. *See id.* at 817.

It is true that "deferring review until there has been a final agency decision" could entail the effort and expense of "additional administrative proceedings" if the initial hearing is invalidated. *NRDC*, 680 F.2d at 816. "That risk, however, is inherent in a system of judicial review that is limited to final orders" and "cannot justify reviewing agency action that is otherwise interlocutory." *Ibid.*; *accord Cobra Nat. Res.*, 742 F.3d at 92 (although "economic harm * * * may sometimes be 'imperfectly reparable' on final order review," it is not sufficient to support interlocutory review); *S.C. State Bd.*, 455 F.3d at 445 ("Although it is undoubtedly less convenient for a party * * * to have to wait until after trial to press its legal arguments, no protection * * * will be lost in the delay.").

China Telecom cannot avoid this conclusion by attempting (Opp. 22–23) to characterize its challenges as asserting a sort of "right not to stand trial" under allegedly unlawful procedures. *See Digital Equip. Corp.*, 511 U.S. at 871–73. As the Supreme Court has explained in rejecting similar arguments, if that were enough, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'" and be subject to disruptive interlocutory appeals, undermining "the efficient and congressionally mandated allocation of judicial responsibility." *Id.* at 873. That approach would improperly "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Cobra Nat. Res.*, 742 F.3d at 86 (quoting *Digital Equip. Corp.*, 511 U.S. at 868). Instead, the Supreme Court and this Court have required parties to await full adjudication before seeking judicial review, even when a party alleges that the underlying proceeding is unlawful or when a successful challenge might require the entire proceeding to be redone.[7]

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[7] *See, e.g.*, *Rochester Tel. Corp.*, 307 U.S. at 130 (agency orders "setting a case for hearing despite a challenge to its jurisdiction * * * are not reviewable"); *Bennett*, 844 F.3d at 184 & n.10 (parties seeking to "attack the legitimacy of the forum" must still "endure the proceeding

Although China Telecom dresses some of its procedural challenges in the language of "due process," its challenges here are not meaningfully different from the essentially identical challenge to agency hearing procedures in *NRDC* or from any other case in which a party purports to assert a right not to stand trial under allegedly unlawful circumstances. That China Telecom frames some of its arguments in constitutional terms makes no difference, as "[t]he Supreme Court has rejected analogous arguments" that "constitutional claims" automatically qualify for interlocutory review. *Bennett*, 844 F.3d at 184. And many of the procedural arguments China Telecom raises are not actually constitutional or due process claims at all, such as its mine-run APA arguments (Br. 16–26) contending merely that the agency was insufficiently heedful of its own precedent.

China Telecom will have a full opportunity to pursue these challenges if it is dissatisfied by any final decision in the revocation proceeding. But the availability of full judicial review upon completion

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and await possible vindication on appeal"); *Carefirst*, 305 F.3d at 260–61 (no interlocutory review of argument that matter was being litigated in the wrong court); *Long Term Care*, 516 F.3d 225 (no interlocutory review of argument that the EEOC lacked jurisdiction over the appellant).

of the administrative proceedings means that China Telecom cannot raise its challenges at this interlocutory stage and improperly "turn[] prosecutor into defendant before adjudication concludes." *Standard Oil*, 449 U.S. at 243.

II. THE COMMISSION'S PRELIMINARY VIEW THAT ADDITIONAL PROCESS APPEARS UNNECESSARY IS REASONABLE, AND IT WILL BE ABLE TO JUSTIFY THE PROCESS EMPLOYED WHEN REACHING ANY FINAL DETERMINATION.

Because the *Order* is not final agency action subject to review at this time, the Court must dismiss China Telecom's premature petition for review without reaching the merits. This Court has held that the final agency action requirement is "a question of subject matter jurisdiction," so the Court "must address this issue before evaluating" the merits of any challenge. *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 454, 458 (4th Cir. 2004) (citing *Flue-Cured Tobacco*, 313 F.3d at 857); *see also* 28 U.S.C. § 2342(1) (conferring "[j]urisdiction [on the] courts of appeals" to review "final orders of" the Commission). And even if this requirement were not jurisdictional, it is at least a mandatory claims-processing rule that Respondents have properly raised and that the Court therefore must first address as a threshold issue. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Long Term Care*, 516 F.3d at 232–33.

If the Court were nevertheless were to reach the merits of the *Order*, the Commission's preliminary view that additional process appears unnecessary is reasonable, and the Commission will be able to provide any additional justification that may be appropriate when reaching any final determination. Congress has granted the Commission broad power to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). This broad power, the Supreme Court has explained, embodies "the established principle that administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)); *see Order* ¶ 16 n.51 (JA 829). China Telecom has not shown that the Commission is exceeding the bounds of that authority here.

1. As a preliminary matter, many of the arguments China Telecom seeks to advance cannot be considered at this time because it did not present them to the Commission prior to the *Order*. The Communications Act prohibits judicial review of any "questions of fact or law upon which the Commission * * * has been afforded no opportunity

to pass." 47 U.S.C. § 405(a); *see, e.g.*, *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696–97 (D.C. Cir. 2015). The arguments in China Telecom's brief, however, far exceed the two pages (JA 269–70) and one footnote (JA 725 n.5) of procedural arguments that it presented to the Commission before the *Order* was adopted.

To be sure, *after* the *Order* was issued, China Telecom presented the Commission in its reply comments with an additional 35 pages of procedural arguments that closely track those set forth in its brief. *See* China Telecom Reply Comments, *supra* note 2, at 3–37. The Commission will consider those arguments in the ongoing proceeding, and it will address them when making any final determination about whether additional process is needed or warranted. But because those arguments were not fairly presented to the Commission at the time of the *Order* being challenged, they are not properly before the Court now.

2. The Supreme Court has held that "the ordinary principle [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). The procedural requirements for informal adjudications under the Administrative Procedure Act are modest, *see* 5 U.S.C. §§ 555, 558(c)(1)–(2), and live evidentiary hearings are the rare exception rather

than the norm.[8] The proceedings here, including the Executive Branch Recommendation and the response to the Order to Show Cause, have already produced an "extensive" written record. *Order* ¶ 17 (JA 829). The *Order* then provides China Telecom with a "further opportunity" to explain why "the public interest, convenience and necessity are served by its retention of its domestic and international section 214 authorizations." *Id.* ¶¶ 15–17 (JA 828–29).

The bedrock requirements of due process—notice and the opportunity to be heard "at a meaningful time and in a meaningful manner"—have thus been satisfied. *See*, *e.g.*, *Mathews*, 424 U.S. at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *cf.* 5 U.S.C. § 558(c)(1)–(2) (permitting "revocation * * * of a license" following "notice by the agency in writing" of any basis for revocation and an "opportunity to demonstrate compliance"). Nowhere does China Telecom explain why

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[8] Consistent with this approach, this Court's recent decision in *Kirk v. Commissioner of Social Security Administration*, 987 F.3d 314 (4th Cir. 2021)—on which China Telecom seeks to rely—held that even social security claimants who are entirely dependent on their disability benefits are not entitled to "complex evidentiary hearings or mini-trials," and that it instead "would suffice [for] each side [to] argu[e] * * * through briefs." *Id.* at 327–28 (citing *Jaxson v. Saul*, 970 F.3d 775 (7th Cir. 2020), in which the Seventh Circuit held that such matters "may be handled on the papers," *id.* at 778).

the process afforded to it so far, which has allowed it to submit two full rounds of written comments on whether its authorizations should be revoked, does not provide it a meaningful opportunity to present its case. *Cf. China Unicom*, *supra* note 3, ¶ 19 (observing that a company afforded similar procedures had "provide[d] no reason to believe that any particular additional process would provide any additional benefit" and was unable to "explain[] with any specificity * * * why [additional] process is essential to reaching a fair decision in this matter").[9]

3. China Telecom asserts (Br. 27–31) that it nonetheless requires a more extensive evidentiary hearing based on various "material facts in dispute" regarding whether its conduct complied with its obligations under its Letter of Assurance and applicable cybersecurity and privacy laws and whether its ownership structure makes it susceptible to exploitation, influence, or control by the Chinese government. But China

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[9] Indeed, the process here potentially *exceeds* what is required, because "it appears from the record that 'the public * * * interest, or safety'" could have allowed the Commission to proceed immediately to a decision on whether to revoke China Telecom's authorizations on the existing record, without undertaking the additional process it has afforded here. *Order* ¶ 18 (JA 829) (quoting 5 U.S.C. § 558(c)); *cf. China Unicom*, *supra* note 3, ¶ 19 (observing that, especially "given the national-security issues at stake," the "fiscal and administrative burden" of additional procedures and the risk of "unwarranted delay" would support forgoing any unnecessary process).

Telecom's "disputes" are largely a summary of its ultimate legal contentions in this case; the underlying facts for the most part are undisputed or can be developed through a written record. The disputes here, as the Commission observed in a recent similar case, "do not turn on witnesses testifying to their personal knowledge or observations or on individual credibility determinations, for example, but instead on facts that can be fully ascertained through written evidence." *China Unicom*, *supra* note 3, ¶ 21. None of China Telecom's contentions calls into question the Commission's preliminary view, based on the partial record then before it, that these matters do not "warrant[] an adjudicatory hearing before an Administrative Law Judge or other presiding officer." *Order* ¶ 17 (JA 829). Again, China Telecom points to nothing that required the Commission to find that China Telecom would be unable meaningfully present its case through its written submissions.

China Telecom's belief that it can nonetheless prevail on its procedural challenges without any specific factual showing of concrete harm or prejudice (Br. 25–26) is incorrect. It supports that suggestion by citing a single case from this Court, but the cited case in fact "decline[d]" to adopt that position. *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999). The Court instead identified the controlling authority as

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), in which the Supreme Court reiterated the "general rule" that an agency may "'relax or modify its procedural rules * * * when in a given case the ends of justice require it'" and stated that such an action "'is not reviewable except upon a showing of substantial prejudice to the complaining party'"—precisely the opposite of China Telecom's position. *Id.* at 539 (quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (1953)). That requirement comports with the APA's overarching command that courts must give "due account [to] the rule of prejudicial error." 5 U.S.C. § 706. And this Court has subsequently confirmed that agency action alleged to be procedurally defective "will not be invalidated unless there is * * * prejudice." *Yanez-Marquez v. Lynch*, 789 F.3d 434, 474 (4th Cir. 2015). China Telecom has not seriously attempted to show that it has experienced or will inevitably experience any concrete harm attributable to any choice of procedures here, nor can it possibly do so at this interlocutory stage.

4. China Telecom is also incorrect that anything in the Commission's rules or practices requires a more formal hearing under Part 1, Subpart B of the Commission's rules (*see* Pet. Br. 16–26), let alone a "live hearing" (Pet. Br. 24–26), for all Section 214 revocations. Section

1.91 of the Commission's rules, on which China Telecom purports to rely, requires a Subpart B hearing for revocations of "a station license or construction permit." 47 C.F.R. § 1.91(a) & (d). It does not speak to Section 214 authorizations—unlike an immediately adjacent provision that specifically addresses licenses, permits, *and* "authorization[s]," *id.* § 1.89(a). "Station licenses" and "construction permits" are terms that refer to spectrum licenses under Title III of the Communications Act, whereas China Telecom holds authorizations under Title II of the Act to transmit communications by wire, not by radio spectrum. *See China Unicom*, *supra* note 3, ¶ 17 & n.67.

China Telecom contends (Br. 18–21) that the Commission has employed a Subpart B hearing for Section 214 revocations on some past occasions. It then acknowledges (Br. 21–22 nn.66–67), however, that on several other occasions the agency has revoked Section 214 authorizations without a Subpart B hearing. And all of the cases it discusses predate the Commission's recent proceeding revising its Subpart B rules, in which the Commission explained that "'the hearing requirements applicable to Title III radio applications do not apply to Title II section 214 applications'" and that "hearing rights for common carriers under section 214 are comparatively limited," even though the Commission has

"discretion to designate for [Subpart B] hearing issues raised in a Section 214 application" on a case-by-case basis. *Procedural Streamlining of Admin. Hr'gs*, 34 FCC Rcd. 8341, 8343 ¶ 4 & n.16 (2019).

In any event, the Commission recently clarified that it has never had an established policy of requiring Subpart B hearings for all Section 214 authorizations, and it further explained why, even if it were thought to have had such a practice in the past, it would no longer be appropriate to follow that policy. *See China Unicom*, *supra* note 3, ¶¶ 17–21.[10] The Commission will have further opportunity in any revocation order to address the applicability of those determinations to this proceeding.

5. China Telecom's request for a court order requiring the Commission to refer this matter to an administrative law judge (Br. 17, 40, 47) is meritless. *See China Unicom*, *supra* note 3, ¶ 22. Even under the Subpart B rules that China Telecom would have the Commission

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[10] *See*, *e.g.*, *China Unicom*, *supra* note 3, ¶ 18 ("the handful of cases [cited] simply reflect the tailoring of procedures according to the circumstances of each case" and "demonstrat[e] that the subpart B rules have never been applied to all section 214 revocation proceedings"); *id.* ¶ 19 (even if there were such a policy, "we no longer believe that such a policy is appropriate—and certainly not in cases [involving] national security issues" and "where [the record] do[es] not identify any need for additional procedures and the public interest warrants prompt response").

apply, a hearing may be presided over by "an administrative law judge," "one or more commissioners," *or "the Commission" itself*. 47 C.F.R. § 1.241(a); *cf.* 5 U.S.C. § 556(b) (stating that a formal adjudication under the APA may be presided over by an administrative law judge, one or more members of the agency, or the "the agency" itself).

Moreover, if the Commission were to delegate initial responsibility to an administrative law judge, the resulting decision would then be appealed to the full Commission—which would be required to review the record independently and would not owe any deference to the administrative law judge's determinations. *See Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) (explaining how "an agency reviewing an ALJ decision is not in a position analogous to a court of appeals reviewing a case tried to a district court"). China Telecom fails to explain why the extra step of appointing an administrative law judge to preside prior to the Commission's independent review, rather than simply proceeding directly before the Commission, is necessary for the Commission to decide any matter here.

China Telecom makes several passing references to the need for a "neutral adjudicator" (Br. 40, 43, 46–47), but it fails to show why the Commission or any individual Commissioner would not be able to serve

as a neutral decisionmaker in this case—and it has never moved for the recusal of any Commissioner. *Cf.* 47 U.S.C. § 405(a) (precluding judicial review of any "questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass").

6. Finally, China Telecom overstates (Br. 43–46) the potential role of any classified information in this proceeding. The *Order* took official notice of the Executive Branch Recommendation and the classified appendix, *Order* ¶¶ 9, 15 n.48 (JA 826, 828), but did not rely on or make use of any classified information. In fact, as the *Order* notes, the Executive Branch agencies represented to the Commission that "the unclassified information alone"—all of which is available to China Telecom in full—"is sufficient to support [their] recommendation" to revoke the company's authorizations. *Id.* ¶ 9 (JA 826) (quoting Executive Branch Recommendation at 2 (JA 458)). At this stage, moreover, a decision on whether the classified material must be disclosed to China Telecom, and whether it is admissible should the Commission wish to consider it, is still forthcoming from the D.C. district court that is responsible for making that determination under 50 U.S.C. § 1806(f). *See* Dep't of Justice 12/8/20 Letter (JA 396–97). And most importantly, the Commission has not yet decided whether or to what extent it will consider

or rely on any classified information when reaching a decision in the revocation proceeding.

In any event, if the Commission does proceed to consider the classified information when making a decision on whether to revoke China Telecom's authorizations, it is well established (as China Telecom concedes, *see* Br. 45) that under appropriate circumstances—such as the availability of *in camera*, *ex parte* review by a federal district court under 50 U.S.C. § 1806(f)—the Due Process Clause permits an agency to "rel[y] on classified information" in administrative proceedings involving national security while requiring the government "only to disclose the unclassified portions of the record." *See, e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1183–84 (D.C. Cir. 2004) (collecting cases). Consistent with the procedures followed in those cases, Respondents are moving for leave to lodge a copy of the classified appendix *ex parte* and under seal (subject to all limits on access to classified information and expressly reserving all applicable rights, privileges, and immunities) to permit this Court to review that material *in camera*.

CONCLUSION

China Telecom's petition for review of the *Order* should be dismissed for lack of jurisdiction, or in the alternative denied.

Dated: April 1, 2021

Respectfully submitted,

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/s/ *Scott M. Noveck*
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STATUTORY ADDENDUM

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28 U.S.C. § 2342 provides in pertinent part:

§2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

* * *

47 U.S.C. § 154 provides in pertinent part:

§154. Federal Communications Commission

* * *

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * *

47 U.S.C. § 214 provides in pertinent part:

§214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) * * *

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line[.] * * *

* * *

47 U.S.C. § 405 provides in pertinent part:

§405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) * * * The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. * * *

* * *

50 U.S.C. § 1806 provides in pertinent part:

§1806. Use of information

* * *

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved

person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

* * *

47 C.F.R. § 1.91 provides in pertinent part:

§ 1.91 Revocation and/or cease and desist proceedings; hearings.

(a) If it appears that a station license or construction permit should be revoked and/or that a cease and desist order should be issued, the Commission will issue an order directing the person to show cause why an order of revocation and/or a cease and desist order, as the facts may warrant, should not be issued.

* * *

(d) Hearing proceedings on the matters specified in such orders to show cause shall accord with the practice and procedure prescribed in this subpart and subpart B of this part * * *

* * *

47 C.F.R. § 1.241 provides:

§ 1.241 Designation of presiding officer.

(a) Hearing proceedings will be conducted by a presiding officer. The designated presiding officer will be identified in the order designating a matter for hearing. Only the Commission, one or more commissioners, or an administrative law judge designated pursuant to 5 U.S.C. 3105 may be designated as a presiding officer. Unless otherwise stated, the term *presiding officer* will include the Commission when the Commission designates itself to preside over a hearing proceeding.

(b) If a presiding officer becomes unavailable during the course of a hearing proceeding, another presiding officer will be designated.