Updates
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FCC Seeks Unprecedented License Revocations from Chinese Telecoms

International trade and cyber security issues, compounded by the coronavirus pandemic, have increased existing tensions and distrust between the United States and China. At the same time, the Federal Communications Commission (FCC) has been applying increased scrutiny to Chinese telecom service providers and manufacturers. Marking a new level of escalation, the FCC recently issued unprecedented Orders to Show Cause against four Chinese telecoms that are owned and controlled by the Chinese government: China Telecom Americas, China Unicom Americas, Pacific Networks, and ComNet. The show cause orders require the companies to explain why the commission should not revoke their domestic and international section 214 authorizations that enable them to operate in the United States.

A Shift in FCC and Executive Branch Policy

Section 214 of the Communications Act of 1934 requires telecom carriers to obtain authorization from the FCC before commencing international telecom services. The language of the statutory provision requires the FCC to broadly consider whether grant of the authorization will serve the "public interest, convenience and necessity." Traditionally, however, the FCC's analysis of applications from foreign carriers seeking to do business in the U.S. market focused primarily on whether the foreign carrier's home market was sufficiently open to competition from U.S. carriers, and did not interpret foreign governmental control as disqualifying. After all, for most of the 20th century, foreign governments treated telecom services as a government ministry typically referred to as "post, telegraph and telephone" departments or PTTs. While sometimes these foreign PTTs seeking 214 authorizations were owned and controlled by allied nations with democratic traditions, such as France, Italy, and Germany, there were many instances where foreign PTTs were owned by foreign governments lacking strong democratic traditions or alliances with the United States. But the FCC's fairly narrow international 214 analysis never strayed into the geopolitical considerations of such foreign governmental ownership, largely due to the inherently international nature of telecommunications and the broader view that common carrier telecom services are simply a transmission pipe for end-user voice communications.

At least this was the agency's practice until last year. The China Mobile Order was the first instance in the FCC's long history of exercising 214 authority where the executive branch recommended the denial of an international 214 application due to national security and law enforcement concerns associated with China's governmental ownership and control of the applicant. In the China Mobile Order, the FCC denied a section 214 authorization application from China Mobile International (USA) Inc., which is owned and controlled by the Chinese government. China Mobile filed its application in 2011, planning to provide international facilities-based and resale services in the U.S. market. In 2018, "Team Telecom," an interagency executive branch consortium focused primarily on national security matters, recommended that the FCC deny the application. The FCC, in turn, relied on Team Telecom's recommendation as the basis for its own determination that grant of the authorization would not serve the public interest, convenience, and necessity.

FCC concluded that China Mobile is "vulnerable to exploitation, influence, and control by the Chinese government" and that there is a significant risk that the Chinese government would use the authorization in ways that would "seriously jeopardize the national security and law enforcement interests of the United States." The FCC acknowledged that although foreign government control of a U.S. carrier is not, by itself, a grounds for denial of the application, the section 214 authorization process requires an examination of: (1) the current national security environment with respect to a particular foreign government's activities, (2) the link between those government activities and the security and integrity of telecommunications, and (3) whether the activities raise national security concerns. Applying this standard, the FCC found that the executive branch agencies identified significant national security and law enforcement risks linked to the Chinese government and that China Mobile, as a prominent Chinese state-owned enterprise, could not be expected to act against the interest of the Chinese government on any sensitive manner.

The China Mobile Order led to new scrutiny of existing authorizations previously granted to state-owned Chinese telecom companies. In September 2019, Senators Chuck Schumer (D-NY) and Tom Cotton (R-AR) wrote a joint letter urging FCC Chairman Ajit Pai to look into China Telecom and China Unicom, and specifically, "whether and to what extent these same concerns [from China Mobile] apply to legacy authorizations granted by the FCC to other Chinese state-owned telecommunications companies currently operating in the United States." The senators asserted that China Telecom and China Unicom, along with China Mobile, are referred to as the "big three" of the Chinese communications industry and are "equally beholden" to the Chinese government.

Recent U.S. Government Scrutiny of Chinese Companies

On April 4, 2020, President Donald Trump signed an executive order reorganizing Team Telecom and establishing a process to assist the FCC in reviewing national security and law enforcement concerns resulting from foreign participation in telecom companies. The executive order mandates that the committee include the secretary of defense, the secretary of homeland security, and the U.S. attorney general. Team Telecom has traditionally supported the FCC with review of pending merger transactions or other pending applications before the agency, but the executive order broadens its role to review to existing licenses and authorizations, including the existing authorizations held by telecom companies owned by the Chinese government.

Only five days after the issuance of the executive order, Team Telecom submitted a recommendation to the FCC to revoke China Telecom's section 214 authorization. Team Telecom's recommendation was based on the "changed circumstances" in the national security environment resulting from China's recent malicious cyber activities, China Telecom being a state-owned enterprise controlled by the Chinese government, and that the company's operations could allow for the opportunity of increased Chinese state-sponsored cyber activities.

In response to this recommendation, the FCC issued Orders to Show Cause not only to China Telecom, but to three other companies owned by the Chinese government. The Orders to Show Cause is a clear outgrowth of the China Mobile Order, and the commission is deliberating whether it is possible for any state-owned Chinese telecom companies to hold a section 214 authorizations and not pose a great national security risk. The FCC has put the burden on these telecom companies to explain why the agency should not revoke their authorizations, requiring them to submit detailed responses to questions about ownership, control, and operations.

The FCC provided the companies 30 days to respond, but China Telecom has already requested an extension to respond on June 23, 2020.

Potential Broader Consequences

The FCC's Show Cause Orders come as broader tensions between the U.S. and China have risen to the point where some fear that the countries are at a start of a new Cold War. The FCC's action represents an escalation because while the China Mobile Order involved the denial of a new application, the four show cause orders were issued against telecoms already holding international 214 authorizations. A spokesman at China's Ministry of Commerce referred to the show cause orders as "discrimination against Chinese state-owned enterprises" that will adversely affect Chinese investment in the U.S. Additionally, there is concern that China may retaliate against U.S. telecoms which currently hold the equivalent of 214 authorizations from the Chinese government. If there are retaliatory actions by China, it remains to be seen whether such actions would be symmetrical in scope.

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