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FCC Blocks China Mobile USA from Entering the U.S. Telecom Market

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On May 10, 2019, the U.S. Federal Communications Commission (FCC or Commission) released a Memorandum Opinion and Order (Order) denying an application by China Mobile International (USA) Inc. (China Mobile USA or company) for international Section 214 authority for the provision of international telecommunications services between the United States and foreign destinations. In denying the application, which had been pending since 2011, the FCC concluded that China Mobile USA's ownership and control by the Chinese government raises substantial and serious national security and law enforcement risks that cannot be addressed through a mitigation agreement.

A significant factor in the FCC's decision was the fact that the Executive Branch last year recommended that the Commission deny the application for national security and law enforcement reasons. The Order addresses three specific areas: (1) possible exploitation, influence and control by the Chinese government; (2) substantial and serious national security and law enforcement risks; and (3) the inability to address national security and law enforcement risks by mitigation. Below is a brief summary of these areas.

Concerns about Exploitation, Influence, and Control by the Chinese Government

In its application, China Mobile USA acknowledged that its indirect controlling parent, China Mobile, is 100 percent owned by the Chinese government, and that China Mobile is subject to the supervision of the State-Owned Assets Supervision and Administration Commission, a Chinese government agency that supervises and manages the government's state-owned assets. (¶¶ 15-16) China

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Mobile USA argued that, despite the ownership and supervision of its parent by the Chinese government, China Mobile USA itself should not be viewed as under its influence and control. Specifically, China Mobile USA argued that, as a Delaware-incorporated, California-based U.S. business, it is immune from such influence and control and would not be susceptible to requests or demands from a foreign government.

The FCC rejected the company's arguments for several reasons. First, it noted that the Executive Branch agencies were not persuaded that the company's status as a U.S. company would not diminish national security and law enforcement risks. In this regard, the Executive Branch agencies cited instances in which a U.S. subsidiary of a Chinese company owned and controlled by the Chinese government had invoked procedural and substantive bars to the service of legal process on the U.S. subsidiary to emphasize the difficulties of serving process in the United States in order to enforce U.S. law on Chinese companies. (¶ 16)

Second, the FCC noted that Chinese law requires citizens and organizations, including state-owned enterprises, to cooperate, assist, and support Chinese intelligence efforts wherever they are in the world. (¶ 17) Lastly, the FCC cited reports by the World Bank and the United States Trade Representative (USTR) that found that state-owned enterprises are vulnerable to control by the Chinese government. For instance, the *USTR 2018 Report to Congress on China's WTO Compliance Report* indicates that both state-owned enterprises and private Chinese companies are being pressured to amend their articles of association to ensure Communist Party representation on their boards of directors, and to ensure that they make important company decisions in consultation with internal Communist Party committees. (¶ 18) Thus, the FCC found China Mobile USA's arguments that it is not susceptible to exploitation, influence, and control by the Chinese government to be unpersuasive. (¶ 19)

Substantial and Serious National Security and Law Enforcement Risks

Over ten years ago, the FCC granted international section 214 authorizations to other Chinese state-owned companies. However, the FCC notes that the Executive Branch identified a change in circumstances since those authorizations were granted. (¶ 20) For instance, the Executive Branch agencies noted Chinese government involvement in computer intrusions and attacks and economic espionage against the United States. (¶ 21)

China Mobile USA argued that the reports and other evidence provided by the Executive Branch agencies do not specifically pertain to the company. (¶ 23) The agencies admitted that there was no specific mention of the company but replied that the reports highlight the Chinese government's policy of intertwining Chinese state-owned enterprise resources with intellectual property theft and economic espionage, as well as the Chinese government's ongoing intelligence activities targeting the United States. This, the Executive Branch agencies noted, presents too great of a risk in light of the fact that China Mobile and, by extension, China Mobile USA, cannot be expected to act against the interest of the Chinese government on any sensitive manner. (¶ 24). Due to these concerns, the Executive Branch agencies assert that grant of the application would produce substantial and unacceptable national security and law enforcement risks and these risks likely would increase over time. (¶ 25)

The Executive Branch agencies stated that if China Mobile USA were permitted to operate in the United States, it would be able to have greater access to telephone lines, fiber-optic cables, cellular networks, and communication satellites. The agencies expressed concern that an entity with such network access would have the ability to target, alter, block, and re-route traffic. (¶ 27) According to the agencies, the Chinese government could use China Mobile USA and its access to telecom networks to monitor, degrade, and disrupt U.S. government communications, and conduct espionage and intelligence activities against the United States. (¶¶ 28-29) The FCC was persuaded by the Executive Branch agencies that grant of the application would raise unacceptable national security and law enforcement concerns. (¶30) Furthermore, the FCC concluded that China Mobile USA did not rebut the assessment that it is susceptible to exploitation, influence, and control by the Chinese government. (¶32)

National Security and Law Enforcement Risks Cannot Be Resolved Through Mitigation

China Mobile USA argued that any national security and law enforcement concerns could be addressed through a voluntary mitigation agreement. (¶32) The Executive Branch agencies disagreed, stating that concerns raised by (a) China Mobile USA's status as a subsidiary of a prominent Chinese state-owned enterprise, (b) the size and technical and financial resources of China Mobile USA and its state-owned enterprise parent, (c) the depth of the company's potential access to the U.S. telecommunications network as a common carrier, and (d) the Chinese government's policy of utilizing state-owned enterprises to further its intelligence activities and espionage efforts, were too significant to be addressed through a mitigation agreement. (¶35)

Additionally, the Executive Branch agencies indicated that mitigation agreements are appropriate when there is a "baseline level of trust" that the carrier will adhere rigorously and scrupulously to mitigation agreement provisions and to self-report any non-compliance. In this case, the agencies indicated that because China Mobile USA is subject to exploitation, influence, and control by the Chinese government, the company could, at the behest of the Chinese government, violate the mitigation agreement and not self-report as required by the agreement. The agencies also stated that any breaches of the agreement, even if promptly discovered and resolved, very likely could not be remediated. (¶36)

Given the Executive Branch's established role in monitoring and enforcing compliance with mitigation agreements, the FCC concluded it was appropriate to defer to the agencies' conclusion that mitigation is not an adequate option. (¶38)

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