IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION, *et al.*, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 15-1063 (and consolidated cases)

JOINT OPPOSITION OF USTELECOM AND ALAMO TO MOTION TO DISMISS

Although the Federal Communications Commission ("FCC") moves to dismiss the United States Telecom Association's ("USTelecom") and Alamo Broadband Inc.'s ("Alamo") initial petitions for review of the Order,[1] it concedes (at 6 n.2) that both have since filed timely supplemental petitions for review. Therefore, the Court need not decide the motion to dismiss now and can — and should — refer the motion to the merits panel, which may address it if necessary to resolve this case.

In any event, contrary to the FCC's claims, neither its regulations nor this Court's precedents clearly resolve the question of when a party may petition for

[1] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) ("Order").

review of a declaratory ruling that is included in an FCC document that also promulgates new regulations. That is why USTelecom and Alamo filed protective petitions for review on March 23, 2015 — ten days after the FCC released the Order — and supplemental petitions for review of the Order after the Order was published in the Federal Register, as this Court has repeatedly counseled.

BACKGROUND

In the Order under review, which the FCC issued on remand from this Court's decision in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the FCC reversed decades of precedent and reclassified broadband Internet access services as telecommunications services subject to common carrier regulation under Title II of the Communications Act of 1934 (the "Act"); asserted authority for the first time to regulate the terms on which broadband Internet access service providers interconnect with other Internet networks; reclassified mobile broadband Internet access as a commercial mobile service or its functional equivalent and, therefore, subject to common carrier regulation under Title II of the Act; and adopted a series of prophylactic rules, including an amorphous Internet "conduct standard." The FCC did all of this without sufficient notice and without meaningfully grappling

with its prior contrary rulings or the extensive investments made in reliance on those earlier rulings.[2]

On behalf of its members, which provide broadband Internet access service and enter into interconnection arrangements with other networks that carry Internet traffic, USTelecom filed a petition for review of the Order in this Court on March 23, 2015. By filing within ten days of the release of the Order, USTelecom ensured that its petition would be considered in any lottery conducted under 28 U.S.C. § 2112(a)(3). Alamo, which provides broadband Internet access service to customers in parts of Texas, also filed on March 23, but in the Fifth Circuit. On March 27, 2015, the FCC notified the Judicial Panel on Multidistrict Litigation ("JPML") of the two petitions and asked the JPML to hold a lottery, despite contending that both petitions are premature.

The JPML randomly selected this Court as the one in which to consolidate petitions for review of the Order. *See* Consolidation Order, MCP No. 128 (Mar. 27, 2015) (filed with this Court on Mar. 30, 2015) (Doc. #1544975). The Fifth Circuit transferred Alamo's petition to this Court, which, on April 2, 2015 consolidated that petition with USTelecom's petition. The FCC did not at that time move to dismiss either petition.

[2] USTelecom and other petitioners have jointly moved for a stay of the FCC's reclassification decisions and its related Internet conduct standard. Alamo did not join that petition but supports the requested relief.

On April 13, 2015, the Order was published in the Federal Register. *See* 80 Fed. Reg. 19,738. That same day, USTelecom filed a supplemental petition for review of the Order in this Court. *See United States Telecom Ass'n v. FCC*, No. 15-1086 (Apr. 13, 2015); *see also Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 296-97 (D.C. Cir. 2003) (holding that a petition for review filed on the same day as publication of an FCC rulemaking order in the Federal Register is timely). Seven other parties — including the National Cable & Telecommunications Association, CTIA – The Wireless Association®, the American Cable Association, the Wireless Internet Service Providers Association, AT&T Inc., CenturyLink, and Daniel Berninger — subsequently filed petitions for review in this Court. The Court has consolidated all of these petitions with USTelecom's initial petition.

Two other petitions for review of the Order have been filed. Alamo filed its supplemental petition for review in the Fifth Circuit. *See Alamo Broadband Inc. v. FCC*, No. 15-60263 (5th Cir.). And a group of competing local telephone companies — which complain that the FCC should have regulated the broadband Internet access service provider petitioners even more heavily — filed a petition for review in the Third Circuit. *See Full Serv. Network v. FCC*, No. 15-2007 (3d Cir.). On April 30, 2015, three days after filing the certified list of record items with this Court, the FCC moved to transfer both petitions to this Court under 28

U.S.C. § 2112(a)(5). On May 20, 2015, the Third Circuit granted the FCC's motion[3]; the FCC's motion remains pending in the Fifth Circuit but is unopposed.

ARGUMENT

In filing their petitions for review, USTelecom and Alamo followed this Court's admonition that, where there is uncertainty about when to petition for review, a party should "supplement[ ] its [potentially] premature petition with a later protective petition." *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 380 (D.C. Cir. 1985) ("[W]e have repeatedly urged petitioners to [file a later protective petition] in analogous situations."); *accord Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1095 (D.C. Cir. 1997) (same); *Brotherhood of Ry. Carmen Div., Transp. Communications Int'l Union v. Peña*, 64 F.3d 702, 704-05 (D.C. Cir. 1995) (same). As the FCC concedes (at 6 n.2), at least one of USTelecom's and Alamo's petitions for review is timely, and, therefore, this Court has jurisdiction over their challenges to the Order. Indeed, the FCC recognizes (at 6 n.3) that this Court is the proper forum to hear all challenges to the Order, which the FCC issued on remand from this Court's decision in *Verizon*.

Therefore, the question whether USTelecom's and Alamo's initial petitions were timely filed presents an issue that this Court need not resolve in order to adjudicate the challenges to the FCC's Order. Indeed, as the FCC notes (at 6 n.3),

[3] *See* Order, *Full Serv. Network v. FCC*, No. 15-2007 (3d Cir. May 20, 2015).

dismissing those initial petitions would not alter this Court's jurisdiction over the many other petitions challenging the Order. "Once a valid transfer pursuant to 28 U.S.C. § 2112(a) (1970) has been accomplished, its validity ordinarily should not be impaired by the subsequent fate of the proceeding 'first instituted.'" *ACLU v. FCC*, 523 F.2d 1344, 1346 (9th Cir. 1975). Therefore, this Court can, and should, refer this motion to the merits panel, which can address it if necessary in resolving the challenges to the FCC's Order.[4]

The Court took a similar approach in *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010). There, Core filed a petition for review shortly after the FCC released an order on remand from this Court's decision in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The FCC took the position that Core's petition for review was incurably premature, because Core filed before the FCC's order was published in the Federal Register.[5] Core disagreed — noting that the

[4] Moreover, even if these petitions had initially been consolidated in another circuit pursuant to § 2112, courts of appeals routinely transfer such cases to this Court where, as here, they challenge an FCC order that "was entered, in part, on remand from the D.C. Circuit." *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003) (per curiam); *see* Order, *AT&T Corp. v. FCC*, No. 04-5847 (2d Cir. Jan. 12, 2005) (Exh. 1 hereto) (transferring petitions for review to this Court because "the FCC order which is the subject of the petition for review was issued on remand from the D.C. Circuit, and that Circuit has familiarity with this case and its procedural history").

[5] *See* Opposition of Federal Communications Commission to Motion for Expedited Consideration Filed by Core Communications, Inc. at 2, *Core Communications, Inc. v. FCC*, No. 08-1365 (D.C. Cir. filed Dec. 19, 2008)

FCC's order included both a declaratory ruling and new rules — but also filed a supplemental protective petition for review after the order was published in the Federal Register. A motions panel granted Core's motion to consolidate its two petitions for review, without addressing the question whether Core's first petition was premature.[6] The merits panel then ruled on Core's substantive challenges to the FCC's order, also without addressing the question whether Core's initial petition for review was premature. *See generally Core*, 592 F.3d at 140-46.

Following that practice is appropriate here because the same uncertainty at issue in *Core* is present in this case. In separately captioned sections of the Order, the FCC (1) declares that certain broadband Internet access services are telecommunications services subject to common carrier regulation and (2) adopts new rules governing providers of those broadband Internet access services.[7]

The governing statute and the FCC's rules do not definitively address a decision, like the Order, that both includes a declaratory ruling and promulgates new rules. Most FCC decisions, including the Order, are subject to judicial review

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(asserting that the challenged FCC order was "issued in a notice and comment rulemaking proceeding," so Core's petition for review "filed *before* Federal Register publication [was] 'incurably premature' and must be dismissed").

[6] *See* Order, *Core Communications, Inc. v. FCC*, Nos. 08-1365 & 08-1393 (D.C. Cir. Jan. 14, 2009).

[7] The declaratory ruling appears in Part IV of the Order, *see* Order ¶¶ 306-433, while the justification for the new rules appears in Part III of the Order, *see id.* ¶¶ 60-305.

under 28 U.S.C. § 2344, which permits "[a]ny party aggrieved by [a] final order" to petition for review "within 60 days after its entry." 28 U.S.C. § 2344; *see* 47 U.S.C. § 402(a). That 60-day period is "computed from the date upon which the [FCC] gives public notice of the order." 47 U.S.C. § 405(a)(2); *see Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001).

Public notice, in turn, is determined under the FCC's rules. In particular, Rule 1.4(b)(1) states that, "[f]or all documents in . . . rulemaking proceedings" that are required "to be published in the Federal Register," public notice occurs on "the date of publication in the Federal Register." 47 C.F.R. § 1.4(b)(1). Because the Order is a "document[] in [a] . . . rulemaking proceeding[]," it would appear to be governed by this regulation. But the FCC's rules go on to clarify that the phrase "all documents" in Rule 1.4(b)(1) does not, in fact, mean *all* documents. A note immediately following the rule states that, for "adjudicatory decisions with respect to specific parties," public notice occurs on "the release date" of the decision, even where that decision is "contained in [a] rulemaking document[]." *Id.* § 1.4(b)(1) note, (b)(2).[8]

[8] In adopting this exception, the FCC noted that "adjudicatory matters" include, "e.g. individual licensing decisions and waivers as to specific parties." Memorandum Opinion and Order, *Amendment of Section 1.4 of the Commission's Rules Relating to Computation of Time*, 15 FCC Rcd 9583, ¶ 4 (2000). But these are expressly identified as examples and not as an exhaustive list. Indeed, the category of "adjudicatory decisions with respect to specific parties" is far broader than licensing decisions and waivers.

As this Court has explained and the FCC concedes (at 5), "there is no question that a declaratory ruling can be a form of adjudication." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007). And the Order's declaratory ruling is directed at specific parties — namely, providers of "mass-market retail" broadband Internet access service, and only those providers. *E.g.*, Order ¶ 336 (footnote omitted). Indeed, the FCC takes pains in the Order to exclude from its declaratory ruling a wide variety of providers of broadband Internet access service, including providers of "virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services," along with "coffee shops, bookstores, airlines, . . . and other businesses . . . [that] enable patrons to access the Internet from their respective establishments" through broadband connections. *Id.* ¶ 340.

Therefore, it was reasonable for USTelecom and Alamo to conclude that the declaratory ruling portion of the Order could be found to be an "adjudicatory decision[ ] with respect to specific parties," including USTelecom's member companies and Alamo. 47 C.F.R. § 1.4(b)(1) note. If so, public notice as to the declaratory ruling occurred on "the release date" of the Order, even though the Order itself is a "rulemaking document[ ]." *Id.* § 1.4(b)(1) note, (b)(2).

The FCC is wrong in asserting (at 5) that this Court's ruling in *Verizon* answers that question and holds that the declaratory ruling in the Order is not an

adjudicatory decision as to specific parties. In that case, Verizon filed a notice of appeal before the FCC's prior decision attempting to regulate broadband Internet access service providers was published in the Federal Register. Verizon argued that the FCC's decision, in part, modified the terms of wireless providers' licenses and, therefore, was appealable upon release of the order under 47 U.S.C. § 402(b). This Court stated in an unpublished decision that the FCC's order was "not a licensing decision 'with respect to specific parties'" and, therefore, public notice as to the entire order occurred upon Federal Register publication. *Verizon v. FCC*, 2011 WL 1235523, at *1 (D.C. Cir. Apr. 4, 2011) (per curiam) (quoting 47 C.F.R. § 1.4(b)(1) note).

Verizon did not present the question whether a declaratory ruling contained within a document in a rulemaking proceeding qualifies as an "adjudicatory decision[] with respect to specific parties," for which public notice occurs upon release of the decision. 47 C.F.R. § 1.4(b)(1) note.[9] Nor does *Verizon* set forth reasoning that would allow regulated entities to identify when a decision is one "with respect to specific parties" within the meaning of the FCC's public notice rule. Similarly, the FCC here simply asserts without explanation (at 5) that the

[9] In fact, the FCC argued that the order challenged in *Verizon* was a "pure rulemaking decision." Motion of the FCC To Dismiss at 6, *Verizon v. FCC*, No. 11-1014 (D.C. Cir. filed Jan. 28, 2011). That is not the case here. As shown above, the Order contains a discrete part in which the FCC rendered a declaratory ruling applicable to some, but not all, providers of broadband Internet access service.

declaratory ruling in the Order is "a ruling of general applicability, not an adjudicatory decision 'with respect to specific parties.'" Nothing in the text of the FCC's rule or *Verizon* limits the exception for adjudicatory decisions to cases where the agency identifies specific parties by name.

Even if the better reading of the FCC's rules is that the declaratory ruling in the Order does not qualify for that exception,[10] the Court need not address that question in order to resolve the challenges to the FCC's Order. For these reasons, the Court should refer this motion to the merits panel, which can determine whether it needs to rule on the motion in order to issue its decision in these consolidated cases.

[10] Because this question goes to the Court's jurisdiction, the FCC does not receive deference for its interpretation of its public notice regulation. *See NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) ("we accord no deference to the executive branch in construing our jurisdiction").

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Respectfully submitted,

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RULE ECF-3(B) ATTESTATION

In accordance with D.C. Circuit Rule ECF-3(B), I hereby attest that all other parties on whose behalf this joint opposition is submitted concur in its content.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

May 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on May 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*
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