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

METROPCS COMMUNICATIONS, INC., *et al.*,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 11-1016
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Appellee.	)	

REPLY OF THE FCC IN SUPPORT OF ITS MOTION TO DISMISS AND TO DEFER FILING OF THE RECORD

MetroPCS's notice of appeal is incurably premature and should be dismissed. Because MetroPCS will be free to file a timely request for judicial review in the future, it will suffer no prejudice from dismissal. MetroPCS's arguments about how a timely filed notice of appeal should be handled are irrelevant to the pending motion, and also incorrect.

As we explained in footnote 1 of our motion to dismiss, this case presents precisely the same question as that presented in our motion to dismiss in *Verizon v. FCC*, No. 11-1014. MetroPCS agrees that its case should be resolved in tandem with Verizon's. *See* MetroPCS Motion to Consolidate, filed Feb. 3, 2011.

1. It is undisputed that if FCC Rule 1.4(b)(1) governs this case, MetroPCS's notice of appeal was "incurably premature" because it was filed prior to publication of the *Open Internet Order* in the Federal Register. *Small Bus. in*

Telecomms. v. FCC, 251 F.3d 1015, 1024 (D.C. Cir. 2001). *See* FCC *Verizon* Reply at 1. Rule 1.4(b)(1) applies to "all documents in notice-and-comment … rulemaking proceedings," which includes the agency rulemaking order at issue here. The only question is whether this case is instead covered by Rule 1.4(b)(2), under the exception to Rule 1.4(b)(1), which applies to "[l]icensing and other *adjudicatory decisions with respect to specific parties*." *See* 47 C.F.R. § 1.4(b)(1), Note to Rule 1.4(b)(1) (emphasis added). The narrow exception does not apply.

Like Verizon, MetroPCS claims that the exception applies because the *Open Internet Order* modified licenses. Its arguments differ little from Verizon's and fare no better. MetroPCS's reading, under which the exception applies to any order, adjudicatory or not, that affects the use of licenses, reads the word "other" out of the exception. That word makes clear the Commission's intent that the exception applies only to adjudicatory licensing decisions issued with respect to specific parties. Moreover, when the Commission promulgated Rule 1.4(b)(1), it specifically stated in its explanatory decision that the exception applies to "adjudicatory matters" such as "individual licensing decisions" that are embedded within rulemaking documents. FCC *Verizon* Reply at 2, citing *Amendment of Section 1.4 of the Commission's Rules*, 15 FCC Rcd 9583, 9584 ¶4 (2000).

The exception does not apply here because the *Open Internet Order* is not in any respect an adjudicatory decision; it is entirely and solely an industry-wide

rulemaking order that was the product of a notice-and-comment rulemaking proceeding. *See* FCC *Verizon* Reply at 3.

MetroPCS argues that non-adjudicatory decisions affecting the use of licenses nevertheless fall within the exception to Rule 1.4(b)(1) if they affect a "subset" of license holders. Opp. 6. Ignoring the text and history of the rule as MetroPCS requests would eliminate the bright-line adjudicatory/non-adjudicatory distinction the Commission intended to establish. The result would be greater confusion and more litigation over the timing of judicial challenges to FCC orders. In addition, MetroPCS's reading would mean that every rulemaking decision that affects certain Commission licensees – such as satellite operators and radio or television broadcasters, among many others – would fall within the exception to Rule 1.4(b)(1). The exception described in the Note to the rule would swallow the rule itself.

MetroPCS's interpretation also would result in multiple deadlines for seeking judicial review of the same rulemaking order, even where, as here, the regulatory action at issue affects both Commission licensees and other regulated parties. MetroPCS's view is that, in this situation, the licensees would have to seek judicial review (if at all) after the Commission's release of the relevant order, while non-licensees who seek to litigate the same issues would have to wait until after the order was published in the Federal Register. The resulting situation

would make the management and coordination of appeals more confusing and complicated for the courts and the litigants alike. The Commission's bright-line distinction between adjudicatory and non-adjudicatory actions avoids such problems because it establishes one filing deadline unless a single Commission decision combines distinct types of regulatory action.

2. MetroPCS suggests that the jurisdictional defect inherent in its premature filing can be overlooked because MetroPCS intends to file another notice of appeal after publication of the *Open Internet Order* in the Federal Register. Opp. 8. The law is clear, however, that appeals filed prior to publication are *incurably* premature. *Small Bus. in Telecomms.*, 251 F.3d at 1024. A subsequent filing cannot cure a current lack of jurisdiction. Contrary to MetroPCS's claim, Opp. 8, *Tidler v. Eli Lilly & Co.*, 824 F.2d 84 (D.C. Cir. 1987), did not hold to the contrary. There, the jurisdictional defect (filing a notice of appeal before the district court had certified its final judgment) was curable. *Id*. at 85 (citing cases). Here, by contrast, the Court has held in *Small Business in Telecommunications* that the jurisdictional defect of prematurity is not curable.

As we made clear in the *Verizon* case, the FCC will not argue that an appeal filed subsequent to Federal Register publication is untimely because it should have been filed on release of the *Open Internet Order*. *See* FCC *Verizon* Reply at 4.

Thus, if the Court dismisses this appeal, MetroPCS's right to appeal will not be "cut off," as it incorrectly claims. Opp. 7-8.

3. MetroPCS argues that the Court should reach a decision on the merits of its case "sooner rather than later" and asks that the Court proceed "expeditiously" without waiting for Federal Register publication of the Order or for related cases to be filed by other expected litigants. Opp. 9-10. But aside from dismissing the case without prejudice to timely refiling, reaching any decision on the merits of this case before other litigants can exercise their own rights to judicial review would compromise those parties' rights. A judgment entered by this Court could have significant effects on any subsequent litigation brought by would-be litigants who properly waited for Federal Register publication before seeking judicial review.

Furthermore, significant proceedings in this case could interfere with the rights of other would-be challengers to have a say in the forum for resolution of the dispute. If challenges to the *Open Internet Order* are filed in other circuits, MetroPCS's approach would defeat the judicial lottery procedure of 28 U.S.C. § 2112(a). That procedure contemplates review of agency orders in a court chosen fairly by random selection, not necessarily in the court chosen by the first filer.

In an effort to downplay this unfairness to other parties, MetroPCS speculates that the FCC might delay Federal Register publication of the *Open Internet Order* in an attempt to "shield" the order from judicial review. Opp. 9.

To the contrary, the Commission is working actively with the staff of the Federal Register to effectuate timely publication of all notices required in connection with the *Open Internet Order*. Indeed, as MetroPCS acknowledges (Opp. 9), on February 9, 2011, the FCC solicited public comment under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520, on the information collection requirements and complaint procedures of the *Open Internet Order*. *See Notice of Public Information Collection Being Reviewed by the Federal Communications Commission*, 76 Fed. Reg. 7206, 7206-7208 (Feb. 9, 2011). As stated in paragraph 173 of the *Open Internet Order*, the Office of Management and Budget must approve these provisions before the open Internet rules can take effect.

In the meantime, the rules impose no obligation on MetroPCS or any other Internet service provider. MetroPCS claims that it is being "attacked" by consumer and public interest groups, who have argued to the Commission that a recently announced MetroPCS business practice would violate the not-yet-effective rules. Opp. 9. In fact, the pleadings filed with the FCC on which MetroPCS relies simply request that the Commission scrutinize MetroPCS's practices to see if action is warranted *after* the rules go into effect.[1] MetroPCS likely would face similar scrutiny even in the absence of the open Internet rulemaking. Indeed, Comcast faced complaints that it violated open Internet

[1] The documents are available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7021026387 and http://fjallfoss.fcc.gov/ecfs/document/view?id=7021025487.

policies before the Commission adopted rules, *see Comcast Corp. v. FCC*, 600 F.3d 642, 644-645 (D.C. Cir. 2010), and members of the public have complained for years about various conduct by Internet service providers. *Open Internet Order* ¶¶ 35-36.

4. MetroPCS repeats Verizon's false assertion that the FCC has conceded that challenges to the *Open Internet Order* are within the exclusive jurisdiction of this Court under 47 U.S.C. § 402(b)(5). Opp. 10. As pages 5-7 of our *Verizon* Reply explain, and MetroPCS thus knew full well when it filed its Opposition, the Commission's position is that the Court need not address the question of exclusive jurisdiction at this time. The only question before the Court – a dispositive one – is whether MetroPCS's notice of appeal is incurably premature.

Deferring consideration of the exclusive-jurisdiction question is, moreover, consistent with this Court's precedent. The Court held less than three years ago in transferring a Section 402(b) case to another court pursuant to the judicial lottery statute that "the possibility of exclusive jurisdiction under [Section] 402(b) does not override the transfer provisions of 28 U.S.C. § 2112(a)." *Newspaper Ass'n of America v. FCC*, No. 08-1082 (Order of May 29, 2008). Contrary to MetroPCS's suggestion, Opp. 13 n.3, the *Newspaper Association* decision is directly applicable to this case, which presents the same legal question. The question whether the transferee court selected pursuant to Section 2112(a) will re-transfer the case to

this or any other circuit under 28 U.S.C. § 2112(a)(5) is properly addressed in the first instance by the transferee court. *See* FCC *Verizon* Reply 6-7.

5. Section 2112 also contains specific rules that determine in which Court an agency must file the administrative record. The Court should not pretermit the application of those statutory rules; instead, pursuant to Section 2112, the Court should defer the filing of the record until such time, if any, as it is clear that challenges to the *Open Internet Order* will be heard in this Court.

Respectfully submitted,

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February 16, 2011

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CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on February 16, 2011, I filed the foregoing Reply of the FCC in Support of its Motion to Dismiss and to Defer Filing of the Record electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Counsel for appellant listed below, who are registered CM/ECF users, will be served by the CM/ECF system.

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