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

VERIZON, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	No. 11-1355
VERIZON, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	)	No. 11-1356
METROPCS *et al.*, Appellants, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	No. 11-1403

METROPCS *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 11-1404
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
Free Press,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 11-1411
	)	
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

REPLY OF THE FCC IN SUPPORT OF ITS MOTION TO HOLD IN ABEYANCE

The FCC showed in its motion to hold in abeyance that a pending petition for agency reconsideration may materially affect the issues presented in these consolidated cases[1] and that, as a result, holding the matter in abeyance is the procedurally proper and prudent course of action. Petitioner Free Press has not opposed the motion. Verizon and MetroPCS,

[1] By order of December 8, 2012, the Court consolidated the cases, and we therefore will refer to them in the singular.

however, make two arguments in opposition: first, that the pending reconsideration proceeding has no bearing on what they believe is the most important issue presented in their appeals; and second, that there is a risk the matter might be held in abeyance indefinitely. Neither claim presents a good reason to deny the motion. Indeed, Verizon expressly acknowledges that the reconsideration proceeding may affect issues that will be presented for decision by the Court. To the degree that opposition to abeyance is predicated on genuine concern about indefinite delay, the FCC would not object to a reasonable limit – for example, six months – on the abeyance period, after which the Court could return the case to active status if the Commission has not timely considered the petition for reconsideration.

ARGUMENT

1. The pending petition for reconsideration filed by Southern Company Services, Inc. seeks Commission clarification of the scope of "specialized services," which are provided over the same last-mile facilities as broadband Internet access service, but are not subject to the same protections as broadband service under the FCC's Open Internet rules. Mot. 5-6. As we showed at pages 9-11 of our motion, any action taken by the Commission in response to Southern's petition could be material to the Court's assessment of claims that the Open Internet rules are arbitrary and

capricious because they are either too strict (likely to be argued by Verizon and MetroPCS) or too permissive (likely to be argued by Free Press).[2] In addition, a reconsideration order on the questions raised by Southern could affect the Court's assessment of the First Amendment issues presented in this case, particularly with respect to the Open Internet rules' alleged burden on protected speech. In situations like this, the Court typically holds cases in abeyance as "the proper course." *Wrather-Alvarez Broad., Inc. v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957).

Verizon and MetroPCS offer two responses, neither of which rebuts the Commission's showing. First, both parties state (Verizon Opp. 5-6; MetroPCS Opp. 5-10) that Southern's petition for reconsideration does not affect whether the Commission has jurisdiction to regulate broadband Internet access service, the legal issue they say will be the primary focus of their challenges. But neither Verizon nor MetroPCS disputes that the

[2] The Commission has received several comments in response to Southern's petition, one of which urges the Commission not to allow broadband providers to "devot[e] an ever-increasing amount of bandwidth to [specialized services] in a way that makes broadband Internet service (and the Internet services accessed through it) unsuited to certain high-bandwidth applications." Opposition of Public Knowledge, *et al*. at 3 (filed Dec. 16, 2011). Available at http://webapp01.fcc.gov/ecfs/document/view?id=7021750988. That issue is related directly to matters raised in earlier comments filed by all of the parties that now challenge the *Open Internet Order*. *See* Mot. at 7-8.

petition for reconsideration has the potential to affect *other* issues they intend to raise in the case.[3]

For example, MetroPCS intends to argue under the Administrative Procedure Act that the Commission "acted arbitrarily and capriciously, without reasoned decision-making, contrary to law, in excess of its statutory authority or without substantial record evidence" in adopting the Open Internet Rules. MetroPCS Statement of Issues to be Raised at 2 (filed Nov. 29, 2011). Verizon likewise intends to challenge the rules under the APA. Verizon Statement of Issues To Be Raised at 2 (filed Nov. 7, 2011). The Commission's defenses to those claims may include reliance on the scope of the specialized services exception and the freedom service providers have within its bounds. *Cf. ICORE, Inc. v. FCC*, 985 F.2d 1075, 1080 (D.C. Cir. 1993) ("a rule with a rational basis, yet otherwise impermissibly broad, can be saved by [a] safety valve") (quotation marks and citation omitted).

Similarly, Verizon intends to challenge the Open Internet rules on First Amendment grounds. *See* Verizon Statement of Issues at 2 (Verizon plans to challenge the *Open Internet Order* as "contrary to constitutional

[3] Both Verizon (Opp. at 3-4) and MetroPCS (Opp. at 4-5) also argue that the petition for reconsideration does not deprive the Court of jurisdiction over the *Open Internet Order*. The Commission did not claim otherwise.

right"). As Verizon does not dispute, the scope of specialized services may be directly material to the Court's assessment of that constitutional claim.

MetroPCS thus is incorrect when it claims that "there are no overlapping issues between the Southern Petition" and the questions presented here. Indeed, Verizon acknowledges that "future treatment of specialized services *might* tangentially affect the constitutional and *other* issues in this case" (*i.e.*, issues other than agency jurisdiction). Verizon Opp. at 6 (emphasis in original). That acknowledged overlap of issues warrants abeyance.

Second, Verizon and MetroPCS attempt to draw factual distinctions between this case and certain published decisions discussing abeyance. Verizon Opp. at 4 n.3; MetroPCS Opp. at 10-12. Neither Verizon nor MetroPCS, however, disputes that abeyance generally is "the proper course" when petitions for reconsideration are pending. *Wrather-Alvarez*, 248 F.2d at 649. *Wrather-Alvarez* rests on the commonsense principle that the judicial process is best served by first allowing the agency to address any material issues presented in administrative petitions for reconsideration before the Court grapples with those issues on judicial review. That approach also avoids piecemeal litigation should the party seeking reconsideration subsequently seek judicial review. For precisely those

reasons, the Commission typically seeks – and this Court typically grants – abeyance when reconsideration is pending, as it has done over the years in dozens of cases. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 23 n.27 (D.C. Cir. 1977) (noting that Court would "in all likelihood" grant abeyance in the face of a petition for agency reconsideration).

2. Verizon and MetroPCS express concern that granting the FCC's motion could lead to "regulatory limbo" that might "persist for years." Verizon Opp. at 2; *see* MetroPCS Opp. at 10, 12. Both challengers claim that it is unfair to defer review of rules with which the companies must comply in the meantime.

Agency rules remain in effect during the process of judicial review in every case, unless the Court issues a stay. Here, neither Verizon nor MetroPCS has sought a stay of the *Open Internet Order* pending judicial review. Nor does either company claim that the rules actually affect its business operations in any significant way. Quite to the contrary, when asked at an investor meeting whether the Open Internet rules would affect Verizon's business, Verizon's then-CEO, Ivan Seidenberg, answered that "I don't think [the rules] will affect [Verizon's business] at all." To the degree the rules have any effect, Mr. Seidenberg continued, it would be only "over

the longer term." Transcript of Jan. 25, 2011, Verizon Earnings and Investor Meeting at 23-24 (relevant excerpt attached).

Indeed, Mr. Seidenberg stressed how little impact the Open Internet rules have on Verizon: "Just for a point, if you actually read the rules they put in effect, the rules don't sound anywhere near as troublesome as the order which [according to Mr. Seidenberg] encourages the FCC to seek broader authority over time. So I don't think it will have any effect on the current business but I do believe that longer term, we need to challenge the expansion of the FCC's authority there." *Id.* at 24. Verizon's pursuit of this litigation, in other words, has little to do with the Open Internet rules themselves and much more to do with Verizon's fear that the Commission might in the future adopt different rules that significantly burden the company's broadband operations. Such hypothetical concerns about possible future FCC action do not support departure here from the general policy favoring abeyance during agency reconsideration proceedings.

The FCC nevertheless shares the litigants' desire to avoid undue delay in this proceeding. Under the particular circumstances presented here, the FCC would not oppose the establishment of a reasonable abeyance period – for instance, six months – after which the Court could return the matter to active status if the Commission has not timely considered the petition for

reconsideration. MetroPCS itself suggests a similar approach. Opp. at 12 n.7. Such a mechanism would strike a reasonable balance between the prudential reasons for abeyance and the shared desire to avoid prolonged delay.[4]

CONCLUSION

For the foregoing reasons and those set forth in our motion, the Court should hold these cases in abeyance while the agency considers the pending petition for reconsideration.

Respectfully submitted,

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[4] In a footnote, Verizon makes a token attempt to claim that the FCC's motion was untimely because the scheduling order in No. 11-1356 established a procedural motion deadline of November 7. Verizon Opp. at 6 n.4. Verizon ignores both the scheduling order in No. 11-1403, which established a deadline of November 28 and the fact that the Court had not established any deadline in Nos. 11-1355 and 11-1411.

EXHIBIT

Transcript of Jan. 25, 2011, Verizon
Earnings and Investor Meeting (excerpt)

FINAL TRANSCRIPT

Thomson StreetEvents℠

VZ - Q4 2010 Verizon Earnings and Investor Meeting

Event Date/Time: Jan. 25. 2011 / 1:30PM GMT

THOMSON REUTERS

But I think that as we get to the end of this year, we will sit down and we will talk about it in the Board and we will figure out what a fair and reasonable dividend is.

John Doherty - *Verizon - SVP, IR*

Why don't we go over to Jason.

Jason Armstrong - *Goldman Sachs - Analyst*

Just one follow-up. I guess one of the key inputs is around iPhone subs, where they are coming from. And if the consensus is 11 million units, can you help us think through, in percentage terms, is it more weighted towards external? Is it internal smartphone upgrades, which I guess you're doubling smartphone percentage would suggest it is not. Or is it existing feature phone upgrades? Maybe help us think through that.

Fran Shammo - *Verizon - EVP and CFO*

Yes, so I think a couple of important facts here, Jason, is, one is, if you look at our current base today, 52% of that base is on feature phones with no data plan. There is another 15% on multi-video type devices which only had a $10 data plan at that time, which you know now we don't -- we have discontinued that line. So within our own base, there are 67% of the people who can upgrade and bring more ARPU with them. So if you think about a feature phone customer going to a smartphone, the ARPU on that is 2 times what they deliver on a feature phone. So I think it is important because I don't know exactly what the mix will be at this point in time.

So -- but I think it is important to know that there is tremendous growth within our own base by moving that base to smartphones, whether it be an iPhone or a DROID or some other device. So I think as you think through that, I think you have to look at the overall base plus what will be coming in from new.

John Doherty - *Verizon - SVP, IR*

All right, so that we're not leaving the back of the room out, I'm going to go Jim Peshek, with a question from the back.

Jim Ratcliffe - *Barclays Capital - Analyst*

Hi, Jim Ratcliffe, Barclays Capital. Two questions, quickly, Fran, did I hear you say that you will not be offering the $15 data plan for iPhone customers?

Fran Shammo - *Verizon - EVP and CFO*

The $15 promotional price that was offered will be discontinued at the end of this month.

Jim Ratcliffe - *Barclays Capital - Analyst*

Thanks. And you have chosen to take legal action to push back against the FCC's net neutrality proposals. How do you see those affecting the business, whether those proposals actually take effect or not, in particular regarding applications like Flex View?

Ivan Seidenberg - *Verizon - Chairman and CEO*

(multiple speakers). I don't think it will affect it at all. I think the FCC decision is kind of a far-reaching one. I think that most of the impact of that order will not be felt this year, but over the longer term, it would be felt if the FCC actually exercised all the authority.

Just for a point, if you actually read the rules they put in effect, the rules don't sound anywhere near as troublesome as the order which encourages the FCC to seek broader authority over time. So I don't think it will have any effect on the current business but I do believe that longer term, we need to challenge the expansion of the FCC's authority there.

Ivan Seidenberg - *Verizon - Chairman and CEO*

You know since I have the floor let me just add a point to that last couple of questions on this guidance question. You know Fran and Lowell have tried to give you as much guidance as we can. There is a couple of unknowns here that I think it is worth just slowing you down a little bit.

So we can get into this contest of, so we think we know how many people will switch from T to us. We don't really know the answer to that. We know you are being subjected to lots of discussion around that. We do believe that our brand and our network will drive a lot of people.

But, so Jonathan, to your point about what will earnings look like in the future? Why don't you do this, over the next couple of quarters, as we get some experience on volumes, we will share with you what those results look like, and I think you'll get a better view. It is much better than overestimating something that we don't know.

The other point is that we also believe that all our strategies will frankly lift the whole industry. So yes, this is about us today, but I think that as all these 4G and 3G devices get out there, you will find all of the carriers doing better. Our view is, we will do better because of the position we have established, but the entire base is going to move from feature phones up to smartphones over the course of the next 12 months. So I think you are sitting in a really good spot when we look at the entire industry's growth. And obviously we believe we will have an edge on that. But I think when you look at these numbers, my advice is be careful about 2011. And 2012 and 2013 will absolutely be clear to you once you get to the middle of the year.

Chris Larsen - *Piper Jaffray & Co. - Analyst*

Chris Larsen from Piper Jaffray. Fran, could you talk a little bit about the optimal capital structure? And within that, not just at the corporate level but also at the wireless level. Going back to the dividend question, arguably, the Wireless business will be under-levered if it was a stand-alone business. Do you think about it as a stand-alone business when you think about that capital structure?

And then do you think maybe it makes sense to lever that up and then cash that out to the parents? And then what is the proper leverage ratio for Verizon?

And then a second question, as you look at the last 30% of your access lines that are not going to have FiOS, what is the long-term strategy for those access lines? Thank you.

Fran Shammo - *Verizon - EVP and CFO*

Okay, so I will take the capital and maybe I will have Lowell take the long-term strategy on the access lines for the LTE. But on the capital structure, I think the way we look at it is, as we said, we are going to continue to de-lever. So that de-lever will happen in the Wireless unit. I'm not going to lever just to distribute cash to the parent. That is not going to happen.

CERTIFICATE OF SERVICE

I, Joel Marcus hereby certify that on December 22, 2011, I electronically filed the foregoing Motion to Hold in Abeyance with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through CM/ECF.

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