

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

Accipiter Communications, Inc.,)	
Petitioner,)	
)	
v.)	No. 12-1258
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

REPLY IN SUPPORT OF FCC’S MOTION TO DISMISS

Introduction

The Federal Communications Commission (“FCC” or “Commission”) respectfully submits this reply in further support of its July 30, 2012 motion to dismiss this case for want of jurisdiction.

As the FCC pointed out in its motion, Accipiter filed a petition for review of the *Third Order on Reconsideration in Connect America Fund*, 27 FCC Rcd 5622 (May 14, 2012) (“*Third Order on Reconsideration*”). That order addressed several petitions for reconsideration and/or clarification of a November 11, 2011 rulemaking order, *Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”), which is the subject of pending litigation in the Tenth Circuit. *In re FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

It is well settled that “except insofar as the request for reconsideration was based upon new evidence or changed circumstances,” an agency order denying a

petition for reconsideration “is unreviewable.” *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 (D.C. Cir. 2000). Because Accipiter relied on neither ground in its petition for agency reconsideration, the Court “must dismiss” this case “for lack of jurisdiction.” *Id.*

In opposing the Commission’s motion to dismiss, Accipiter contends (Resp. 4-9) that documents contemporaneously filed with the petition for review demonstrated that it is also appealing the *Transformation Order*. As explained below, Accipiter is wrong. But even if Accipiter had clearly indicated its intent to challenge the *Transformation Order* in addition to the *Third Order on Reconsideration*, and even if Accipiter’s characterization of the *Third Order on Reconsideration* were correct, the Court would lack jurisdiction over this case on the independent ground that Accipiter’s purported challenge to the *Transformation Order* is “incurably premature.” *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Thus, Accipiter’s arguments fail to stave off dismissal for want of jurisdiction.

Discussion

1. Accipiter identified only the *Third Order on Reconsideration* in its petition for review, and attached only that Order as Exhibit 1 to its petition. It specified the *Third Order on Reconsideration* as “the Ruling Under Review” in its certificate as to parties, rulings and related cases, and it filed a copy of the *Third*

Order on Reconsideration – and no other FCC order – as the underlying decision from which its petition arose. It also specified that the Commission’s *Transformation Order* was being challenged, not in this case, but in a “related case” in the U.S. Court of Appeals for the Tenth Circuit. Accipiter thus indicated that it was seeking review of the *Third Order on Reconsideration*, and not of the underlying *Transformation Order*.

Relying on *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 158 (D.C. Cir. 2002), Accipiter seeks to resurrect its case by contending that its Statement of Issues “makes clear that it is challenging the *Transformation Order*.” Resp. 5. *Sinclair* is inapposite. In that case, petitioner’s “statement of issues named the ‘new local television ownership regulations’ as the source of each of its issues,” which “gave notice” that the petitioner “intended to make a substantive challenge to the underlying [rulemaking order] and not only to the *Reconsideration Order*.” *Sinclair*, 284 F.3d at 323. Here, by contrast, Accipiter’s Statement of Issues refers simply to “the *Order*” – repeatedly identified by Accipiter as the *Third Order on Reconsideration*. Accipiter, moreover, did not identify a specific Commission policy or rule in its Statement of Issues that would have made clear any intent to challenge the *Transformation Order*. By contrast, the petitioner in *Sinclair* specified in its Statement of Issues that it was challenging the FCC’s “new local television ownership regulations.” *Sinclair*, 284 F.3d at 323. Because that

statement clearly referred to the underlying order from which reconsideration was sought, the *Sinclair* Court held that the petitioner had sufficiently indicated its intent to challenge the underlying order. *Sinclair* applies when petitioner's statement of issues "can only refer" to the underlying order, *id.* That is not the case here.

2. Accipiter separately claims that the Court may consider its challenge to the *Third Order on Reconsideration* because its petition for reconsideration before the agency "was based, in part, on new evidence" consisting of "specific data ... showing the financial impact of the *Transformation Order* on Accipiter." Resp. 10. However, this "alleged ... new evidence ... is not evidence at all, but simply an argument that the Commission made a material error" when it adopted the *Transformation Order*. *Sw. Bell Tel. Co. v. FCC*, 180 F.3d 307, 312 (D.C. Cir. 1999). Specifically, Accipiter relies on these data in an effort to demonstrate that certain models and inputs in the *Transformation Order* are erroneous. But under this Court's precedent, that does not constitute "new evidence" – only "argument." *Compare* Resp. at 8-10 (describing the impact of alleged errors in certain data and cost models) *with Sw. Bell*, 180 F.3d at 312 (holding that "a demonstration that the method the Commission chose ... is less accurate than [petitioner's] method" is not "new evidence").

3. Finally, accepting the arguments raised in Accipiter's opposition, the Court should dismiss this case for lack of jurisdiction. Even assuming for the sake of argument that (a) Accipiter's Statement of Issues had sufficiently demonstrated an intent to challenge the *Transformation Order* (see Resp. 4-9), and (b) "[a]ll of" the issues identified in Accipiter's Statement of Issues "were raised in [its] petition for reconsideration/clarification and *none* was addressed or decided in the *Third Order on Reconsideration*" (id. at 7 (emphasis added)), the Court would lack jurisdiction over this case on the independent ground that Accipiter's challenge is "incurably premature." *BellSouth Corp.*, 17 F.3d at 1498-90.

If Accipiter's characterization of the agency's reconsideration order were correct, that would mean that (a) the *Third Order on Reconsideration* did nothing to foreclose Commission consideration of Accipiter's arguments, which remain pending before the agency,¹ and (b) any challenge to the *Transformation Order* is therefore "incurably premature." *BellSouth Corp. v. FCC*, 17 F.3d at 1498-90. As this Court has repeatedly held, a petition for reconsideration pending before the

¹ The FCC in the *Third Reconsideration Order* (27 FCC Rcd at 5631 (¶ 24)) rejected Accipiter's request to abandon or eliminate the "rate floor" rule, which limits high-cost universal service support to incumbent LECs charging artificially low end-user rates. The issues raised by Accipiter in its petition for reconsideration that were not addressed in paragraph 24 of the *Third Order on Reconsideration* remain pending before the agency. See 27 FCC Rcd at 5645 (¶ 68) (denying Accipiter's petition for reconsideration "IN PART").

Commission renders the FCC's order non-final with respect to that party, thereby requiring the Court to dismiss the case for lack of jurisdiction. *Id.*; *see also TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989). Thus, Accipiter's arguments in its opposition to the FCC's motion to dismiss fail to show that the Court has jurisdiction over this case.

Conclusion

This Court should dismiss this case for lack of jurisdiction.

Respectfully submitted,

Sean A. Lev
General Counsel

Peter Karanjia
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/Maureen K. Flood

Maureen K. Flood
Counsel
Federal Communications Commission
Washington, DC 20554
(202) 418-1740

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12-1258

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CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on August 16, 2012, I electronically filed the foregoing Reply In Support of FCC's Motion To Dismiss 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.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

Robert F. Reklaitis
Leslie Paul Machado
LeClairRyan, a Professional Corp.
1101 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036
*Counsel for: Accipiter
Communications, Inc.*

Catherine G. O'Sullivan
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

/s/ Maureen K. Flood