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

VERIZON, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	Case No. 11-1014

VERIZON'S CONSOLIDATED RESPONSE TO THE FCC'S MOTION TO DISMISS AND MOTION TO DEFER

The Court should deny the Federal Communications Commission's ("FCC" or "Commission") Motion to Dismiss Verizon's appeal ("Motion to Dismiss") as premature under FCC Rule 1.4(b), 47 C.F.R. § 1.4(b), and Motion to Defer Consideration of Verizon's Motion for Panel Assignment and to Defer Filing of the Record ("Motion to Defer"). As to the Motion to Dismiss, Verizon properly filed its Notice of Appeal under Rule 1.4(b)(2) within thirty days of the release date of the agency's order.[1] In any event, Verizon made clear in its Notice of Appeal that it intends in an abundance of caution to file a Protective Notice of Appeal promptly upon publication of the *Order* in the Federal Register, the timing of which the FCC controls. The Commission concedes that such a filing would

[1] *In the Matter of Preserving the Open Internet*; *Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52 (rel. Dec. 23, 2010) ("*Order*").

cure the claimed prematurity. Further, this Court has exclusive jurisdiction over Verizon's appeal, a critical point that the FCC has *not* contested. For all these reasons, Verizon's challenge to the *Order* will be heard in this Court, regardless of whether public notice is the release date or the date of Federal Register publication.

With respect to the Motion to Defer, the mere filing of the Motion to Dismiss is no basis for relieving the Commission of the February 3, 2011, deadline set by this Court for responding to Verizon's pending Motion to Assign Case to the Panel That Decided *Comcast Corp. v. FCC* ("Panel Motion"). The possibility of a future lottery under 28 U.S.C. § 2112 also should not delay briefing or consideration of the Panel Motion. Even if multiple petitions for review of the *Order* are eventually filed in different circuits upon Federal Register publication of the *Order* and a lottery is held, Verizon's appeal would not properly be included in any such lottery and, in light of this Court's exclusive jurisdiction under 47 U.S.C. § 402(b)(5), must ultimately be heard by this Court in all events.

1. The FCC's Motion to Dismiss Verizon's appeal as premature under its rule defining "public notice" for purposes of judicial review should be denied. *See* 47 C.F.R. § 1.4(b). As an initial matter, the FCC does not contest that the *Order* modified wireless spectrum licenses within the meaning of Section 402(b)(5) and that this Court thus has exclusive jurisdiction over Verizon's challenge to the *Order*. Nor could it. In the *Order*, the FCC expressly relied on its claimed

authority to "change the license . . . terms," *Order* ¶ 133, and "to impose new requirements on existing licenses beyond those that were in place at the time of grant," *id.* ¶ 135, in order to mandate compliance with the new rules adopted therein, *id.* ¶¶ 93-106. Thus, the FCC cannot dispute that this appeal falls squarely within the ambit of Section 402(b)(5) without disclaiming reliance on the *Order*'s theory of statutory authority under Title III, which it also has not done. This Court's precedent confirms that because the *Order* "modified" Verizon's licenses, it is indeed subject to appeal under Section 402(b)(5). *See, e.g.*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 547-48 (D.C. Cir. 1958) (holding that modification of licenses effected in rulemakings are appealable under Section 402(b)(5)).

Moreover, as this Court has explained, "the provisions for judicial review contained in §§ 402(a) and 402(b) are mutually exclusive, so that a claim directed to the same matters may be brought only under one of the two provisions," *Tribune Co. v. FCC*, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998) (internal citations and quotation marks omitted); *see also N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1208 (D.C. Cir. 2006), and Commission orders are challengeable only "as an inseparable whole," *id.* at 1210; *see also Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963) (explaining that "a given order may not be reviewed in two separate cases"). Further, "§ 402(a) is a residual category," such that jurisdiction exists under that provision "only if §

402(b) does *not* apply." *WHDH, Inc. v. United States*, 457 F.2d 559, 560-61 (1st Cir. 1972) (emphasis in original); *see also N. Am. Catholic*, 437 F.3d at 1208 ("Section 402(b) provides for appeals of FCC orders in nine enumerated situations, including licensing. For all *other* final orders of the Commission, § 402(a) provides . . . review . . . ." (emphasis added)).[2] Thus, jurisdiction to review Verizon's challenge to the entire *Order* lies exclusively with this Court under Section 402(b)(5).

The uncontested fact that this Court has exclusive jurisdiction over Verizon's appeal bears directly on the FCC's motions. Given that this Court must hear Verizon's appeal under Section 402(b)(5), the sole issue raised in the Motion to Dismiss is a narrow, technical one arising under the agency's rules: whether Verizon's Notice of Appeal is premature because Rule 1.4(b)(1), which defines "public notice" of a document as the date of Federal Register publication, rather than Rule 1.4(b)(2), which defines "public notice" as the date of release, governed Verizon's filing. *See* Mot. to Dismiss at 3-5. As regards that question, the

[2] In light of this precedent, the Motion to Dismiss mischaracterizes Section 402(b) as an "exception" to the general rule of appealability under Section 402(a). *See* Mot. to Dismiss at 2. Indeed, the FCC has successfully argued the opposite (and correct) position before this Court. *See* Brief for FCC at 28 n.29, *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206 (D.C. Cir. 2006) (No. 04-1384), 2005 WL 3105752 ("Section 402(a), a '*residual*' provision, *see WHDH, Inc. v. United States*, 457 F.2d 559, 560 (1st Cir. 1972), authorizes review of final Commission orders *not* within Section 402(b)." (emphasis added)).

assertion in the Commission's Motion to Dismiss that the date of Federal Register publication controls is in error.

Verizon's Notice of Appeal was properly filed thirty days from release of the *Order*. A notice of appeal must be filed "within thirty days from the date upon which public notice is given of the decision or order complained of." 47 U.S.C. § 402(c). Here, Verizon has appealed, pursuant to Section 402(b)(5), an FCC decision that modified its wireless spectrum licenses and was included in a rulemaking document. Rule 1.4(b) directs that licensing decisions contained in rulemaking documents are controlled by Subsection (b)(2). 47 C.F.R. § 1.4(b)(1) NOTE TO PARAGRAPH (B)(1) ("Licensing and other adjudicatory decisions with respect to specific parties that may be . . . contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)."). Indeed, the Note to Subsection (b)(1), which, as quoted immediately above, points the reader to Subsection (b)(2), is the *sole* reference in either Subsections (b)(1) or (b)(2) to licensing decisions. And under Subsection (b)(2), the date of public notice for the *Order* was the "release date." *Id.* § 1.4(b)(2).

The FCC responds that the Note to Subsection (b)(1) does not apply because the *Order* did not modify licenses by adjudication and because it did not modify the licenses of individually identified parties. *See* Mot. to Dismiss at 5-6. Each of these arguments is unavailing. First, although the Commission's appellate counsel

now argues that Subsection (b)(1) controls because it governs "all documents in notice and comment . . . rulemaking proceedings required by the Administrative Procedure Act . . . to be published in the Federal Register," 47 C.F.R. § 1.4(b)(1), this interpretation of Subsection (b)(1) would require reading into that provision a reference to licensing decisions that the Commission simply did not include in its text. Indeed, as noted above, the only reference to "licensing" action in either Subsections (b)(1) or (b)(2) provides that Subsection (b)(2) controls and further covers licensing decisions "contained in rulemaking documents." 47 C.F.R. § 1.4(b)(1) NOTE TO PARAGRAPH (B)(1). Second, with respect to the requisite specificity of the licensing decisions at issue, the Commission does not dispute that the *Order* modified particular spectrum licenses—namely, those held by "mobile broadband providers" that are used to provide broadband Internet access services. *Order* ¶ 135 & n.439. The *Order's* license modification by its terms thus covered a "specific" and "identifiable" group of FCC licensees who provide wireless broadband Internet access service. Mot. to Dismiss at 6. Contrary to the FCC's claim, that action was sufficiently specific to be covered by the Note to Subsection (b)(1).

Furthermore, the Commission historically has aggressively—and successfully—moved to dismiss appeals that were not filed within thirty days of the relevant order's release date. *See, e.g.*, *Nat'l Black Media Coal. v. FCC*, 760

F.2d 1297, 1298-99 & n.2 (D.C. Cir. 1985). Had Verizon incorrectly assumed that the thirty-day period ran from Federal Register publication and not the release date, the FCC might well have argued for dismissal of Verizon's appeal as *forever* barred because it was *too late*. Given the importance of the issues involved in this appeal and in light of Rule 1.4(b)'s text, the only prudent course for Verizon was to file its appeal within thirty days of the *Order's* release.

Indeed, the FCC's Motion to Dismiss itself suggests that Rule 1.4(b) is not clear on the question of how to treat licensing decisions effected by rulemaking, rather than adjudication, contained in rulemaking documents. According to the Commission, the interpretation of Rule 1.4(b) now propounded by appellate counsel "is at the very least reasonable and therefore warrants deference." Mot. to Dismiss at 6 n.1. Even if true, that would not be enough to warrant dismissal of Verizon's appeal. A motion to dismiss disputing the date of public notice should be denied when the FCC's "reasonable" interpretation "is not obvious . . . upon a careful reading of the Commission's regulations." *Adams Telecom, Inc. v. FCC*, 997 F.2d 955, 957 (D.C. Cir. 1993). "'The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of that interpretation.'" *Id*. (quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)). Because nothing in Rule 1.4(b)(1) speaks directly to licensing decisions made by rulemaking rather than by adjudication (and,

indeed, the only reference in Subsections (b)(1) and (b)(2) to licensing decisions contained in rulemaking documents provides that Subsection (b)(2) controls), the "distinction" that the FCC has drawn is, at a minimum, "not obvious" on the face of Rule 1.4(b). *Id.* For all of the above-described reasons, the FCC's Motion to Dismiss must be denied.

In any event, any possible timing issues under the FCC's rule will be put to rest upon publication of the *Order*. As Verizon has already explained, *see* Notice of Appeal at 3 n.2, it intends to file a Protective Notice of Appeal in an abundance of caution immediately upon the *Order*'s publication in the Federal Register. The Commission concedes that such action will cure any possible prematurity. *See* Mot. to Dismiss at 5. The Commission also controls when Federal Register publication will occur, and it has been over a month since the *Order* was released.[3] In view of all that, as well as this Court's uncontested exclusive jurisdiction over Verizon's challenge, the FCC's Motion to Dismiss is an ultimately fruitless exercise. Regardless of whether public notice is the release date or the date of Federal Register publication, Verizon's challenge to the *Order* will be heard in this Court. Indeed, if the *Order* is published by the time the current briefing cycles on the pending motions (and existing deadlines for dispositive and other motions,

[3] According to the Office of the Federal Register's Electronic Public Inspection Desk, the FCC has not yet submitted the *Order* for publication. *See* http://www.ofr.gov/inspection.aspx (last visited Jan. 31, 2011).

which extend until March 7, 2011) in this case have expired, and even afterwards, it may be unnecessary for the Court to decide the merits of the Motion to Dismiss.

2. The FCC also argues that briefing and consideration of Verizon's Panel Motion should be indefinitely suspended—specifically seeking to be relieved of its current obligation to respond to the pending Panel Motion by February 3, 2011—for two reasons. First, the Commission argues that its Motion to Dismiss could "moot" the Panel Motion. *See* Mot. to Defer at 1. As explained above, however, that Motion lacks merit. Thus, the filing of the Motion to Dismiss is no reason to delay the Commission's response to, or the Court's consideration of, the Panel Motion.[4]

Second, the FCC argues that the Panel Motion should be deferred due to the possibility of a lottery under 28 U.S.C. § 2112 and venue litigation that might arise out of any such process. *See* Mot. to Defer at 2. This is not a proper basis for seeking an indefinite postponement of briefing or resolution of the Panel Motion either. Whether and where petitions for review of the *Order* will be filed when it is

[4] In filing the Motion to Defer only six days before the February 3, 2011, deadline for its response to the Panel Motion, the FCC failed to abide by this Court's rule for requesting relief that is needed before the time it would ordinarily take the Court to receive and consider a response. *See* D.C. Cir. Rule 27(f). Thus, the FCC cannot reasonably expect an answer from the Court on its request to be relieved of the response deadline before that date. If no action is taken by the Court on the FCC's request by February 3, 2011, the FCC must either file its response or be deemed to have waived the right to respond.

published in the Federal Register is speculative. The Commission's conjecture about a lottery, and its further conjecture that the lottery process will necessarily result in collateral venue litigation, does not warrant any delay in briefing or resolution of the Panel Motion.

Moreover, Verizon's Notice of Appeal, by definition, would not properly be included in any lottery that may eventually occur. And it ultimately must be heard by this Court in all events. As explained above, Verizon's Notice of Appeal is subject to this Court's exclusive jurisdiction under Section 402(b)(5). Section 2112 provides that a lottery will be conducted only when a "*petition for review* with respect to proceedings" is filed "in at least two courts of appeals" within ten days of the issuance of the *Order*. 28 U.S.C. § 2112(a)(1) (emphasis added). Thus, as the FCC's own lottery rules suggest, Section 402(b) appeals should not be included in any lottery to consolidate Section 402(a) "petitions for review" in one court of appeals. *Compare* 47 C.F.R. § 1.13(a)(1), *with id.* § 1.13(b); *see also* Mot. to Dismiss at 2 ("If *petitions for review* of an FCC order are filed in multiple courts of appeals within ten days after the order is entered, the cases are assigned to a single court through the judicial lottery procedure established under 28 U.S.C. § 2112(a)." (emphasis added)).

The purpose of the 1988 amendments to Section 2112 confirms that appeals subject to exclusive jurisdiction in this Court should not be included in a lottery.

The legislative history explains the situation prior to the amendments and the problem that Congress sought to address:

> When a Federal agency issues an order, two or more parties often file judicial challenges to the validity of that order. *Because many statutes do not specify a particular circuit as the court to handle these challenges, venue for the judicial challenge is often proper in any of the Federal circuits in which challenges are filed*. If appeals are filed in more than one circuit, a single circuit must be selected to handle the appeal.
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> . . . .
>
> [Thus,] S. 1134 provides that, *when petitions for judicial review of an agency order have been filed in more than one circuit*, the Judicial Panel on Multidistrict Litigation (Judicial Panel) will choose a circuit from among those in which petitions have been filed to review the order. . . .

S. Rep. No. 100-263, at 2-3 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3198-3201 (emphasis added).

The "choice of circuit" problem that the lottery provision was intended to address does not exist, however, in the context of appeals, like this one, subject to exclusive jurisdiction under Section 402(b). Because Section 2112, in light of its text and purpose, excludes agency appeals subject to exclusive jurisdiction from the lottery process, the potential of a lottery for any multi-jurisdictional petitions for review of the *Order* is no justification for delaying briefing or consideration of the Panel Motion.[5]

[5] In light of the 1988 amendments to Section 2112, *Valley Vision, Inc. v. FCC*,

In addition to the fact that Verizon's Notice of Appeal would not properly be included in any lottery regarding petitions for review of the *Order*, such inclusion would be a futile endeavor. Because this Court has exclusive jurisdiction over Verizon's challenge to the *Order* under Section 402(b), no other court of appeals could have jurisdiction over the case. *See, e.g.*, *Valley Vision, Inc. v. FCC*, 399 F.2d 511, 513 (9th Cir. 1968) (transferring appeal pursuant to Section 2112(a) because "exclusive jurisdiction . . . [wa]s in the Court of Appeals for the District of Columbia Circuit" under Section 402(b)(7)). Accordingly, Verizon's challenge ultimately must be heard by this Court in all events.

3. Finally, the Commission argues that the Court should defer the date for the certified list of items in the record "until it is clear whether the case will be heard in this Court." Mot. to Defer at 1. For the reasons set forth above, Verizon's appeal of the *Order* will be heard in this Court, and there is in any event no reason that the FCC should not proceed to meet the deadlines currently established by the Court in this docket, including the deadline for filing the record list.

For the foregoing reasons, Verizon respectfully requests that this Court deny the FCC's Motion to Dismiss and Motion to Defer.

(Continued . . .)
383 F.2d 218 (D.C. Cir. 1967) (per curiam), would not apply here. The "Congressional intent," *id.* at 219, underlying Section 2112(a) has changed, and the amendments make clear Congress' intent that Section 402(b) appeals not be subject to the lottery provision of Section 2112.

Respectfully submitted,

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Dated: January 31, 2011

CERTIFICATE OF SERVICE

I, Brett A. Shumate, hereby certify that on January 31, 2011, I electronically filed **Verizon's Consolidated Response to the FCC's Motion to Dismiss and Motion to Defer** with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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