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

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

MOTION OF THE FCC TO DISMISS

The Federal Communications Commission moves to dismiss this case because it was filed prematurely and the Court thus lacks jurisdiction.

BACKGROUND

1. In the order on review, *Preserving the Open Internet*, FCC No. 10-201 (rel. Dec. 23, 2010) (*Open Internet Order*), the Commission adopted, after a notice-and-comment rulemaking proceeding, three high-level rules governing the provision of mass market broadband Internet access services by Internet Service Providers (ISPs). The rules are: (1) all ISPs must disclose their network management practices and the terms and conditions of service; (2) fixed (*i.e.*, wired) providers, such as cable modem ISPs, may not block any lawful Internet content, applications, services, or devices; for their part, wireless mobile providers (*i.e.*, mobile telephone companies that provide broadband service) may not block

Internet content or applications that compete with their own telephony services; and (3) fixed (as opposed to wireless mobile) providers may not unreasonably discriminate in transmitting lawful network traffic. The rules thus apply to the interstate communications services of both fixed and mobile ISPs, albeit somewhat differently.

On December 23, 2010, the *Open Internet Order* and the corresponding rules were released to the public. Consistent with the Administrative Procedure Act, a summary of the *Open Internet Order* and the rules it promulgates will be published in the Federal Register. *See* 5 U.S.C. § 552(a)(1)(D).

2. Under 47 U.S.C. § 402(a), review of FCC orders is generally vested in the federal courts of appeals pursuant to the Hobbs Act, 28 U.S.C. §§ 2341 *et seq*. 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). As an exception to that general rule, a limited set of FCC decisions, including those denying or modifying FCC licenses, are reviewable exclusively in the D.C. Circuit by the filing of a notice of appeal under 47 U.S.C. § 402(b). Sections 402(a) and 402(b) are mutually exclusive; if the Court has jurisdiction over a party's claim under Section 402(a), it cannot have jurisdiction under Section 402(b), and vice versa. *See Tribune Co. v. FCC*, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998).

Verizon has filed a notice of appeal in advance of the *Open Internet Order*'s publication in the Federal Register. The notice of appeal asserts both that the time to seek judicial review of the order began on its release and that this Court has exclusive jurisdiction to review the Order under 47 U.S.C. § 402(b). If the Court accepts Verizon's assertion and challenges are filed in other circuits, either the Order would be subject to review simultaneously in multiple courts, or all other potential litigants would be required to accede to Verizon's selection of a forum for judicial review of the industry-wide rules.

ARGUMENT

The Court should dismiss Verizon's notice of appeal because it was filed prior to publication of the *Open Internet Order* in the Federal Register and is thus jurisdictionally barred.

Congress established in 47 U.S.C. § 405(a) that the time for either filing a petition for review under Section 402(a) or taking an appeal under Section 402(b) "shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of." In the case of a petition for review, the Hobbs Act provides that "[a]ny party aggrieved by [a] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. In the case of a notice of appeal,

the notice 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).

Congress thus provided two windows within which to file judicial challenges to FCC orders, both of which open upon "public notice" or "entry." "Public notice" of an order and its "entry" are one and the same because "[e]ntry of the agency order occurs on the date the Commission gives public notice of the order" under its own rules. *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001); *see also Adams Telcom, Inc. v. FCC*, 997 F.2d 955, 957 (D.C. Cir. 1993) (this Court "has encouraged administrative agencies, whenever possible, to specify – by regulation or in their notices to persons subject to agency action – the beginning of the relevant judicial review period").

"For all documents in notice and comment … rulemaking proceedings" – the type of proceeding at issue here – FCC Rule 1.4(b)(1) defines "public notice" to mean "the date of publication in the Federal Register." 47 C.F.R. § 1.4(b)(1). The filing window for challenging the *Open Internet Order* therefore does not open until the Order is published in the Federal Register. Prior to publication, the judicial review statutes erect "a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain." *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985). Put differently, an appeal filed prior to Federal Register publication of the challenged order is

"incurably premature." *Small Bus. in Telecomms.*, 251 F.3d at 1024. That settled principle requires dismissal of Verizon's notice of appeal at this time because it was filed too early, although Verizon may pursue a timely challenge to the *Open Internet Order* after its publication.

Verizon suggests that the *Open Internet Order* modifies Verizon's wireless licenses, and, accordingly, the determination of when public notice has been given "appears to be governed by [FCC] Rule 1.4(b)(2)." Notice of Appeal at 3 n.2. Verizon's contention is based on a note to Rule 1.4(b)(1) stating that public notice for "[l]icensing and other adjudicatory decisions **with respect to specific parties** that may be associated with or contained in rulemaking documents" is determined under Rule 1.4(b)(2). Note to Paragraph (b)(1) (emphasis added). Rule 1.4(b)(2) defines the date of public notice "for non-rulemaking documents" to be the date of release rather than Federal Register publication.

Verizon's contention that the *Open Internet Order* constitutes a "licensing or other adjudicatory decision[] with respect to specific parties" is untenable. First, as the Commission explained when it promulgated the Note to Paragraph (b)(1), the Note creates an exception from the general public notice rule for "*individual* licensing decisions and waivers as to *specific* parties." *Amendment of Section 1.4 of the Commission's Rules*, 15 FCC Rcd 9583, 9584 ¶4 (2000) (emphasis added). The *Open Internet Order* plainly falls outside that description. It establishes

general rules that apply to *all* fixed and wireless mobile ISPs, not to any specific ISP. The Order does not even discuss its application to any specific ISP. Nor, in light of the numerous ISPs that provide service throughout the country, can the Order be viewed as addressing such a small set of identifiable ISPs (using wireless or any other technology) that it can properly be described as implicitly pertaining only to specific parties.[1]

Second, the *Open Internet Order* is not a "licensing or other adjudicatory decision[]." It is a pure rulemaking decision of general applicability that does not adjudicate any individual license matter and therefore falls within Rule 1.4(b)(1) and not Rule 1.4(b)(2).

For both of those reasons, this case is governed by Rule 1.4(b)(1), under which the filing window does not open until Federal Register publication. Verizon's notice of appeal thus is fatally premature and must be dismissed.

[1] Even if the Court were to find that the Note to Rule 1.4(b)(1) creates ambiguity, the interpretation set forth in this motion is at the very least reasonable and therefore warrants deference. *See Chase Bank USA v. McCoy*, No. 09-329, slip op. at 12 (S. Ct. Jan. 24, 2011) (Court will "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent with the regulation") (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Court should dismiss this case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on January 28, 2011, I directed that the foregoing Motion to Dismiss be filed 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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