

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

United States Telecom Association,)	
Petitioner,)	
)	
v.)	No. 15-1063 (and
)	consolidated cases)
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**REPLY OF THE FEDERAL COMMUNICATIONS COMMISSION
TO JOINT OPPOSITION OF USTELECOM AND ALAMO
TO MOTION TO DISMISS CASE NOS. 15-1063 AND 15-1078**

On May 8, 2015, the Federal Communications Commission filed a motion to dismiss Case Nos. 15-1063 and 15-1078. The Commission argued that those cases should be dismissed because they were filed prematurely (*i.e.*, before the challenged FCC order was published in the Federal Register). On May 21, 2015, the United States Telecom Association (“USTelecom”) and Alamo Broadband Inc. (“Alamo”) filed a joint opposition to the motion to dismiss. The Commission respectfully submits this reply to the joint opposition. For the reasons discussed below, while we disagree with petitioners’ reading of FCC rules, we do not object to petitioners’ proposal that the Court refer the motion to dismiss to the merits panel.

Petitioners’ argument against dismissal rests on a fundamental misreading of the FCC’s rules. As we explained in the motion to dismiss (at 4-5), those rules

generally provide that the period for filing petitions for review of “all [FCC] documents in notice and comment ... rulemaking proceedings” – including the order on review – does not begin until “the date of [the document’s] publication in the Federal Register.” 47 C.F.R. § 1.4(b)(1). Because USTelecom and Alamo filed their initial petitions for review before the order was published in the Federal Register, those petitions were premature.

To be sure, as petitioners note (Opp. 8), there is an exception to this rule. If parties seek to challenge “adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents,” they may petition for judicial review of any such decision as soon as the FCC releases it. *See* 47 C.F.R. § 1.4(b)(1) Note; *id.* § 1.4(b)(2). But that exception does not apply here.

USTelecom and Alamo maintain that because the order on review included a declaratory ruling, “it was reasonable” for petitioners “to conclude that the declaratory ruling portion of the Order could be found to be an ‘adjudicatory decision[] with respect to specific parties.’” Opp. 9 (quoting 47 C.F.R. § 1.4(b)(1) Note). To the contrary, the declaratory ruling contained in the order on review was plainly not an “adjudicatory decision with respect to specific parties.” Rather, it was “a ruling of general applicability” (Mot. 5) that applied to a broad category of broadband service providers.

Contrary to petitioners' assertion, the mere fact that the FCC excluded from its declaratory ruling "a wide variety of providers of broadband Internet access service" did not transform that broadly applicable ruling into an "adjudicatory decision[] with respect to specific parties.'" See Opp. 9 (quoting 47 C.F.R. § 1.4(b)(1) Note). Petitioners appear to argue that an adjudicatory decision involves "specific parties" even if it applies to some broad subset of regulated entities. If that were true, however, the order at issue in *Verizon v. FCC*, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011), would have involved licensing decisions "with respect to specific parties" – *i.e.*, mobile broadband providers.¹ This Court flatly rejected that premise, holding that the FCC order in that case was "not a licensing decision 'with respect to specific parties.'" *Id.* (quoting 47 C.F.R. § 1.4(b)(1) Note).

While we disagree with petitioners' reading of the FCC's rules, we agree with USTelecom and Alamo that "this Court need not resolve" whether their initial petitions were timely filed "in order to adjudicate [their] challenges" to the order on review. Opp. 5. Both USTelecom and Alamo filed timely supplemental petitions for review after the order was published in the Federal Register.

¹ See Verizon's Consolidated Response to the FCC's Motion to Dismiss and Motion to Defer, D.C. Cir. No. 11-1014, at 5-6 (filed Jan. 31, 2011) (arguing that the challenged order concerned licensing decisions "with respect to specific parties" because it modified the licenses of all "mobile broadband providers").

Therefore, dismissal of their original petitions would in no way affect their ability to present their challenges to the FCC's order.

Furthermore, this Court has already devoted considerable resources to addressing various motions filed in this litigation. Given that dismissal of USTelecom's and Alamo's original petitions will have no effect on the ability of those petitioners to participate fully in this litigation, it might well be appropriate to defer ruling on the motion to dismiss until the case has been briefed on the merits, when the Court will be better able to assess whether a ruling on the motion is necessary.

In light of these considerations, the Commission has no objection to petitioners' proposal that the Court refer the motion to dismiss to the merits panel.

Respectfully submitted,

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June 1, 2015

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UNITED STATES TELECOM ASSOCIATION,
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v.

FEDERAL COMMUNICATIONS COMMISSION,
AND UNITED STATES OF AMERICA,
Respondents.

No. 15-1063 *et al.*

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on June 1, 2015, I electronically filed the foregoing Reply of the Federal Communications Commission to Joint Opposition of USTelecom and Alamo to Motion to Dismiss Case Nos. 15-1063 and 15-1078 with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

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