

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
JAN 24 2011
CLERK

JAN 24 2011 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

METROPCS COMMUNICATIONS,)
INC.;)
METROPCS 700 MHZ, LLC;)
METROPCS AWS, LLC;)
METROPCS CALIFORNIA, LLC;)
METROPCS FLORIDA, LLC;)
METROPCS GEORGIA, LLC;)
METROPCS MASSACHUSETTS, LLC;)
METROPCS MICHIGAN, INC.;)
METROPCS NETWORKS)
CALIFORNIA, LLC;)
METROPCS NETWORKS FLORIDA,)
LLC;)
METROPCS TEXAS, LLC; and)
METROPCS WIRELESS, INC.)

Appellants,

v.

FEDERAL COMMUNICATIONS)
COMMISSION and UNITED STATES)
OF AMERICA,)

Appellee.

Case No. 11- 11-1016

NOTICE OF APPEAL

Pursuant to 47 U.S.C. § 402(b) and (c), MetroPCS Communications, Inc.,
MetroPCS 700 MHz, LLC, MetroPCS AWS, LLC, MetroPCS California, LLC,
MetroPCS Florida, LLC, MetroPCS Georgia, LLC, MetroPCS Massachusetts,

LLC, MetroPCS Michigan, Inc., MetroPCS Networks California, LLC, MetroPCS Networks Florida, LLC, MetroPCS Texas, LLC, and MetroPCS Wireless, Inc. (collectively, "MetroPCS") hereby give notice of their appeal of the order of the Federal Communications Commission (the "Commission") captioned *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) (the "*Order*").

This Court has exclusive jurisdiction over an appeal of a Commission order by "the holder of any ... station license which has been modified...by the Commission." 47 U.S.C. § 402(b)(5); *Tribune Co. v. FCC*, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998); *see also N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1208 (D.C. Cir. 2006). The Commission's *Order* purports to modify and condition the Commission licenses of all wireless service providers, including those of MetroPCS, by imposing mobile broadband Internet access requirements, relying on its authority to "change the license...terms," and "to impose new requirements on existing licenses beyond those that were in place at the time of grant." *Order* ¶¶ 133 & 135 n.439; *see also id.* ¶ 134 ("The open Internet *conditions* we adopt today likewise are necessary to advance the public interest in innovation and investment.") (emphasis added); *cf. Functional Music, Inc. v. FCC*, 274 F.2d 543, 547-48 (D.C. Cir. 1958) (holding that Commission rulemakings effecting license modifications are appealable under Section

402(b)(5)). MetroPCS actively participated in the proceeding from which the *Order* resulted, is a provider of wireless broadband Internet access services which will be subject to the regulations adopted in the *Order* if they become effective, and holds Commission licenses that purportedly are to be modified by the *Order* when effective. MetroPCS is thus aggrieved by the *Order* and has standing to challenge it.

An appeal under Section 402(b)(5) “shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the date of the decision or order complained of.” 47 U.S.C. § 402(c). Generally, the public notice date for “all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register” is “the date of publication in the Federal Register.” 47 C.F.R. § 1.4(b)(1). The *Order* has not yet been published in the Federal Register. However, the Commission has created an exception to the general rule of Subsection 1.4(b)(1) providing that “[l]icensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of 1.4(b)(2).” *Id.*, note to paragraph (b)(1). Subsection 1.4(b)(2) of the Commission’s Rules in turn provides that the public notice date “[f]or non-rulemaking documents released by the Commission or staff” is “the release date.”

Id. § 1.4(b)(2). The release date of the *Order* is December 23, 2010, and under Subsection 1.4(b)(2), any notice of appeal must be filed by January 24, 2011.

Because Section 402(c) is jurisdictional, and because there may be conflicting views on whether the exception in the note to Subsection 1.4(b)(1) establishes the public notice date for an appeal of the *Order* to the extent that the *Order* purports to act pursuant to the Commission's wireless spectrum licensing authority,¹ MetroPCS is filing this notice of appeal at this time to assure that it fully protects its rights to challenge the *Order*.

MetroPCS seeks relief on the grounds that the *Order*: (1) exceeds the Commission's statutory authority; (2) is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; (3) violates constitutional rights; and (4) is otherwise contrary to law.

Thus, MetroPCS respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the *Order*, and provide such additional relief as may be appropriate.

¹ There is an element of uncertainty whether the time for appeal begins to run from the date the *Order* is released or from the date of its publication in the Federal Register depending upon whether the licensing action it purports to take is deemed to apply to a "specific party." MetroPCS is filing this appeal within the earliest deadline out of an abundance of caution.

Respectfully submitted,

MetroPCS Communications, Inc.
MetroPCS 700 MHz, LLC
MetroPCS AWS, LLC
MetroPCS California, LLC
MetroPCS Florida, LLC
MetroPCS Georgia, LLC
MetroPCS Massachusetts, LLC
MetroPCS Michigan, Inc.
MetroPCS Networks California, LLC
MetroPCS Networks Florida, LLC
MetroPCS Texas, LLC
MetroPCS Wireless, Inc.

By: 

Carl W. Northrop
Stephen Kinnaird
Andrew Morentz
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
875 15th Street, NW
Washington, DC 20005
Telephone: (202) 551-1700
Facsimile: (202)551-1705

Mark A. Stachiw
Executive Vice President, General
Counsel and Secretary
MetroPCS Communications, Inc.
2250 Lakeside Blvd.
Richardson, Texas 75082
Telephone: (214) 570-5800
Facsimile: (866) 685-9618

Its Attorneys

Dated: January 24, 2011