

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

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

**REPLY OF THE FCC IN SUPPORT OF ITS MOTIONS
TO DISMISS AND TO DEFER FILING OF THE RECORD**

As we showed in our motion to dismiss, Verizon filed its notice of appeal incurably early. Verizon concedes, moreover, that dismissing its notice of appeal will not prejudice properly presented challenges to the *Open Internet Order* in the future. This case therefore should be dismissed.

1. Under FCC Rule 1.4(b)(1), the window for filing a judicial challenge to FCC orders promulgated in notice-and-comment rulemaking proceedings does not open until Federal Register publication. Mot. 3-4. Prior to the publication date, Congress imposed “a jurisdictional bar to judicial consideration” of the appeal. *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985). Appeals filed pre-publication are “incurably premature.” *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001). Verizon does not dispute that if Rule 1.4(b)(1) governs this case, it must be dismissed.

Rule 1.4(b)(1) contains a single exception that allows pre-publication appeals with respect to “[l]icensing and other *adjudicatory decisions with respect to specific parties*,” when such adjudicatory actions are embedded in a rulemaking order. 47 C.F.R. § 1.4, Note to Paragraph (b)(1) (emphasis added). In such instances of hybrid rulemaking and adjudication, Rule 1.4(b)(2) applies, and an appeal window for any party-specific adjudication opens upon release of the order, rather than its publication in the Federal Register.

For the reasons set forth in our motion, that narrow exception to Rule 1.4(b)(1) does not apply here. As the Commission stated when it promulgated the current version of Rule 1.4(b)(1), the exception applies to “adjudicatory matters, e.g., 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). The Commission thus created an easily understood, bright-line rule that separates for purposes of judicial review adjudicatory actions from rulemaking decisions, even when the two are conjoined in the same order. A generally applicable rulemaking document like the *Open Internet Order*, which applies to an open class that includes all participants in an industry, is not an “adjudicatory” decision, nor is it an “individual licensing decision” or other action with respect to any specific party. *See Mot. 5-6.*

Verizon's efforts to show that its case falls within the exception fail. It observes that the *Open Internet Order* applies to the "particular spectrum licenses" of *all* "mobile broadband providers." Opp. 6. That argument proves the decisive point: The rules promulgated in the *Open Internet Order* apply equally to every mobile broadband provider. They are not specific, individual, adjudicatory decisions that fall within the exception to Rule 1.4(b)(1). Verizon's approach would undermine the clarity of the rule and could lead to procedural litigation in many ordinary regulatory cases.

Verizon also argues that the *Open Internet Order* "modified" Verizon's own licenses and thus constituted a "licensing" decision within the meaning of the exception. Opp. 5. The language of the exception and the Commission's contemporaneous explanation of it, however, make clear that the exception applies only to adjudicatory licensing decisions that issue, rescind, or modify specific licenses (and happen to be embedded in rulemaking orders). Generally applicable rules promulgated by notice-and-comment procedures do not fall into that category, whether or not they affect the use of spectrum licenses.

Verizon additionally claims that Rule 1.4(b)(1) is ambiguous and it would be unfair to "cut off [Verizon's] right" to judicial review in light of that supposed ambiguity. Opp. 7. But Verizon has identified no ambiguity in the rule. The

meaning of the words “specific” and “individual” is clear.¹ Moreover, Verizon will suffer no prejudice from dismissal – it will be free to file a new notice of appeal after the *Open Internet Order* is published in the Federal Register. Mot. 5.

Indeed, Verizon indicates that it filed its premature notice of appeal merely to protect against the possibility of a future FCC motion to dismiss on grounds of lateness (Opp. 6-7) and states that it plans to file another notice of appeal “immediately upon” Federal Register publication (Opp. 1, 8). Verizon no longer can harbor any concern that the Commission will take the position that judicial review of the Open Internet Order must be sought before publication in the Federal Register. Thus, any prophylactic purpose underlying Verizon’s premature notice of appeal will have been fulfilled even after this case is dismissed.

2. Having presented no credible argument that this case falls outside the scope of Rule 1.4(b)(1), Verizon ultimately resorts to the argument that the Court should accept jurisdiction anyway. The theory is that “this Court has exclusive jurisdiction over Verizon’s appeal” under 47 U.S.C. § 402(b)(5), and thus the case eventually “will be heard in this Court, regardless of whether public notice is the release date or the date of Federal Register publication.” Opp. 2; *see id.* 8. In that

¹ Verizon’s assertion (Opp. 7) that the FCC’s motion “suggests that Rule 1.4(b) is not clear” is careless at best. As the motion specifically states (Mot. 5), “[t]he *Open Internet Order* plainly falls outside” the exception to the Rule. We simply noted that “even if *the Court*” were to find the Rule ambiguous, it should defer to the FCC’s construction. Mot. 6 n.1 (emphasis added).

circumstance, Verizon contends, its promised post-publication notice of appeal will “cure” the jurisdictional defect. *Id.* 2, 8. Verizon both misapprehends the nature of the jurisdictional defect and misstates the law governing jurisdiction to review the *Open Internet Order*.

Verizon’s argument provides no basis for this Court to accept jurisdiction over the premature notice of appeal. Even if the Court were to accept Verizon’s promise to file a timely future notice of appeal as the equivalent of actually having filed one, that would not solve the jurisdictional problem here. An appeal governed by Rule 1.4(b)(1) that is filed before Federal Register publication is *incurably* premature. *Small Bus. in Telecomms.*, 251 F.3d at 1024. The jurisdictional defect therefore cannot be excused, even if it is “narrow” or “technical” (Opp. 4). In the absence of jurisdiction, the Court must dismiss.

Verizon is also wrong in asserting that this Court inevitably will be the venue for challenges to the *Open Internet Order*. Opp. 2, 4, 8, 10-12. Under the judicial lottery statute, the filing of “petition[s] for review” of the *Open Internet Order* in multiple courts, within ten days of Federal Register publication, will trigger the random selection provisions of 28 U.S.C. §§ 2112(a)(1) & (3). After a single forum for hearing the case has been determined by lottery, “[a]ll courts in which proceedings are instituted,” including this Court in a Section 402(b) case,

“shall transfer those proceedings to the court” chosen by the lottery. 28 U.S.C. § 2112(a)(5).

Section 2112(a)(2) defines “petition to review” for purposes of the lottery provisions to mean “the petition or other pleading which institutes proceedings in a court of appeals,” inclusive terminology that covers all case-initiating documents, whether filed pursuant Section 402(a) or Section 402(b) of the Communications Act, 47 U.S.C. §§ 402(a), (b). Moreover, 47 U.S.C. § 402(d), which governs notices of appeal filed under Section 402(b), directs the Commission to file the record “as provided in section 2112 of Title 28, United States Code,” which includes the lottery provisions. Thus, with respect to the lottery and transfer procedures, the statute draws no distinction between petitions for review filed under Section 402(a) and notices of appeal filed under Section 402(b). All relevant cases initiated under either judicial review provision must be entered into the lottery and transferred to the selected circuit. 28 U.S.C. §§ 2112(a)(3), (5).

In fact, this Court already has rejected, in very similar circumstances, Verizon’s view that the grant of exclusive jurisdiction in Section 402(b) bars transfer of a notice of appeal. In *Valley Vision, Inc. v. FCC*, 383 F.2d 218, 219 (D.C. Cir. 1967), the Court transferred a Section 402(b) notice of appeal to the Ninth Circuit after a judicial lottery “in deference to Section 2112(a) and the need for avoiding unseemly conflict.” Contrary to a footnote in Verizon’s opposition (at

11-12 n.5), *Valley Vision* remains good law. Just over two years ago, relying on *Valley Vision*, the Court again transferred a number of Section 402(b) appeals of a Commission order to the Ninth Circuit after that court was designated by the Judicial Panel on Multidistrict Litigation under the lottery process, reiterating that “the possibility of exclusive jurisdiction under 47 U.S.C. § 402(b) does not override the transfer provisions of 28 U.S.C. § 2112(a).” *Newspaper Ass’n of America v. FCC*, No. 08-1082 (Order of May 29, 2008) (attached hereto). To be sure, § 2112(a)(5) grants the transferee court authority to determine whether “the interest of justice” require the case to be transferred back to this Court (or any other court), *see Valley Vision, Inc. v. FCC*, 399 F.2d 511 (9th Cir. 1968), but that decision is made by the transferee court.

For all these reasons, Verizon’s attempt to invoke this Court’s exclusive jurisdiction under 47 U.S.C. § 402(b) does not and cannot cure the fatal prematurity of its notice of appeal.²

3. In light of the prematurity of the appeal, the manner in which Section 2112 was applied by this Court in *Valley Vision* and *Newspaper Association*, and Section 2112’s detailed instructions governing where the FCC must file the

² The Commission does not necessarily agree that the *Open Internet Order* is subject to challenge under 47 U.S.C. § 402(b). That issue need be addressed, if at all, only by the transferee court selected by a judicial lottery, and there is no need to brief the matter now.

administrative record, the Court should defer the filing of the record in this case until venue has been determined (if the case is not first dismissed). The order issued in this matter on February 2, 2011, denying Verizon's motion for panel assignment has rendered moot the FCC's motion to defer a response to Verizon's request.

CONCLUSION

For the foregoing reasons and those stated in our motions, the Court should dismiss this case for lack of jurisdiction. Pending dismissal, it should defer the filing of the record.

Respectfully submitted,

/s/ Joel Marcus

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February 2, 2011

Order of May 29, 2008
In *Newspaper Ass'n of America v. FCC*, No. 08-1082

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1082

September Term 2007

FCC-73FR9481

Filed On: May 29, 2008

Newspaper Association of America,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Media Alliance and United Church of Christ,
Intervenors

Consolidated with 08-1083, 08-1085, 08-1086,
08-1087, 08-1089, 08-1090, 08-1091,
08-1092, 08-1093, 08-1094, 08-1095,
08-1096, 08-1097, 08-1098, 08-1099,
08-1100, 08-1101, 08-1102, 08-1103,
08-1155

BEFORE: Henderson and Brown, Circuit Judges

ORDER

Upon consideration of the consolidation order of the Judicial Panel on Multidistrict Litigation; the motion to unconsolidate the appeals filed pursuant to 47 U.S.C. § 402(b), the opposition thereto, and the reply; the motion to dismiss the § 402(b) appeals; the motion to extend the time to respond to the motion to dismiss; the motion for leave to amend the petition in No. 08-1102; and the motion to defer filing of the certified index to the record, it is

ORDERED that these consolidated cases and the motions to unconsolidate, to

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No. 08-1082

September Term 2007

dismiss, to extend the time to respond, and for leave to amend the petition in No. 08-1102 be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(3), (5). The possibility of exclusive jurisdiction under 47 U.S.C. § 402(b) does not override the transfer provisions of 28 U.S.C. § 2112(a). See Valley Vision, Inc. v. FCC, 383 F.2d 218, 219 (D.C. Cir. 1967). It is

FURTHER ORDERED that the motion to defer filing of the certified index to the record be dismissed as moot.

The Clerk is directed to send the original file and a certified copy of this order to the United States Court of Appeals for the Ninth Circuit.

Per Curiam

