

ORIGINAL
FILED
SEP 30 2011
CLERK

SEP 30 2011
RECEIVED

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

VERIZON,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION,

and UNITED STATES OF AMERICA,

Respondents.

11-1356

Case No. 11-_____

PROTECTIVE PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, Verizon¹ hereby petitions the Court for review of the final order of the Federal Communications Commission (“FCC” or “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) (“*Order*”). The *Order* was published in the Federal Register on September 23, 2011. 76 Fed. Reg. 59192. A copy of the full text of the *Order* is attached as Exhibit A.

¹ The Verizon companies participating in this filing are Cellco Partnership, d/b/a Verizon Wireless, and the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

Verizon is simultaneously filing a Notice of Appeal of the *Order* pursuant to 47 U.S.C. § 402(b) and (c) and Rule 15(a) of the Federal Rules of Appellate Procedure. As explained in the Notice of Appeal and below, a Notice of Appeal under Section 402(b)(5) is the proper vehicle to challenge the *Order*. Nonetheless, and in the alternative, Verizon files this Protective Petition for Review under Section 402(a) in an abundance of caution.

In the *Order*, the FCC formally adopts rules that regulate the broadband Internet access services offered by wireless and wireline providers. The *Order* directly responds to this Court's decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (2010). In *Comcast*, this Court previously held that the FCC had failed to justify its exercise of authority over the broadband Internet access services at issue in that case. *Id.* at 644, 661. In the *Order* on review here, the FCC responds to the Court's decision and again attempts to justify its assertion of regulatory authority over broadband Internet access services. *See Order* ¶¶ 42, 118, 122 & n.380; *id.* ¶¶ 115-37.

This Court possesses exclusive jurisdiction over Verizon's challenge to the *Order* because Verizon "hold[s]" wireless spectrum "license[s] which ha[ve] been modified . . . by the Commission." 47 U.S.C. § 402(b)(5). In the *Order*, the Commission 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. The *Order* thus “modified” Verizon’s licenses and is 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)

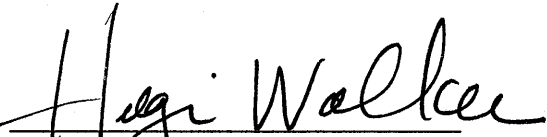
provides . . . review” (emphasis added)). Thus, jurisdiction to review Verizon’s challenge to the entire *Order* lies exclusively with this Court under Section 402(b)(5).

Nonetheless, as noted above, Verizon files this alternative Protective Petition for Review under Section 402(a) in an abundance of caution. Verizon, which participated in the proceeding below, is a provider of both wireline and wireless broadband Internet access services subject to the regulations adopted by the *Order*, and it holds licenses that were modified by the *Order*. Verizon thus is aggrieved by the *Order* and possesses standing to challenge it.

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

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

Respectfully submitted,

By: 

Helgi C. Walker*

Eve Klindera Reed

William S. Consovoy

Brett A. Shumate

WILEY REIN LLP

1776 K Street, NW

Washington, DC 20006

TEL: (202) 719-7000

FAX: (202) 719-7049

Michael E. Glover

Edward Shakin

William H. Johnson

1320 North Courthouse Road

9th Floor

Arlington, VA 22201

TEL: (703) 351-3060

FAX: (703) 351-3670

John T. Scott, III

William D. Wallace

1300 I Street, NW

Suite 400 West

Washington, DC 20005

TEL: (202) 589-3770

FAX: (202) 598-3750

Samir C. Jain

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Ave., NW

Washington, DC 20006

TEL: (202) 663-6083

FAX: (202) 663-6363

*Attorneys for Verizon and Verizon
Wireless*

Walter E. Dellinger

Brianne Gorod

O'MELVENY & MYERS LLP

1625 Eye Street, NW

Washington, DC 20006

TEL: (202) 383-5300

FAX: (202) 383-5414

Dated: September 30, 2011

* *Counsel of Record*

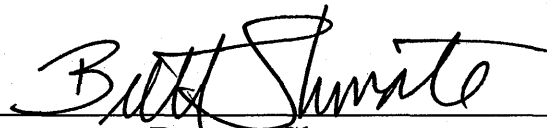
CERTIFICATE OF SERVICE

I, Brett A. Shumate, hereby certify that on September 30, 2011, I caused one copy of the foregoing **Protective Petition for Review and Corporate Disclosure Statement** to be delivered by hand and electronic mail to:

Austin Schlick
Federal Communications Commission
Office of the General Counsel
Room 8-A741
445 12th Street, S.W.
Washington, DC 20554
Austin.Schlick@fcc.gov

Catherine G. O'Sullivan
U.S. Department of Justice
Antitrust Division/Appellate Division
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, DC 20530-0001
Catherine.O'Sullivan@usdoj.gov

*Counsel for the Federal Communications Counsel for the United States of America
Commission*



Brett A. Shumate