

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

Accipiter Communications, Inc.,)	
Petitioner,)	
)	
v.)	No. 12-1258
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**MOTION TO DISMISS
AND TO DEFER FILING OF THE RECORD**

The Federal Communications Commission moves to dismiss this case for lack of jurisdiction. The Commission also respectfully moves for leave to defer the filing of the record in this case until the Court has ruled on the motion to dismiss.

In the order on review, *Connect America Fund*, FCC 12-52 (released May 14, 2012) (“*Third Order on Reconsideration*”), the FCC addressed several petitions for reconsideration and/or clarification of a November 2011 rulemaking order, *Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”). The *Transformation Order*, which fundamentally revised the Commission’s universal service and intercarrier compensation rules, is the subject

of pending litigation in the Tenth Circuit. *In re FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).¹

Accipiter seeks review only of the *Third Order on Reconsideration*. It is well settled, however, that an agency order denying a petition for reconsideration “is unreviewable except insofar as the request for reconsideration was based upon new evidence or changed circumstances.” *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 (D.C. Cir. 2000). Accipiter did not base its reconsideration petition on either new evidence or changed circumstances. *See Third Order on Reconsideration* ¶ 24 (describing Accipiter’s request for reconsideration).

Therefore, the *Third Order on Reconsideration* – the only order specified in Accipiter’s petition for review – “is unreviewable,” and the Court “must dismiss [Accipiter’s] petition for lack of jurisdiction.” *Entravision*, 202 F.3d at 313; *see also ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 280 (1987).

The Court cannot “fairly infer from [Accipiter’s] petition for review or nearly contemporaneous filings an intent to seek review” of any order other than the *Third Order on Reconsideration*. *Entravision*, 202 F.3d at 313. Accipiter attached only the *Third Order on Reconsideration* to its petition for review.

¹ Numerous parties (but not Accipiter) petitioned for review of the *Transformation Order* in several different courts of appeals. On the basis of a lottery conducted by the Judicial Panel on Multidistrict Litigation, the petitions were consolidated for review in the Tenth Circuit. *See In re Federal Communications Commission, Connect America Fund*, Consolidation Order (JPML Dec. 14, 2011).

Neither the petition for review nor Accipiter's docketing statement identified any other order. Likewise, Accipiter's certificate as to parties, rulings, and related cases named only the *Third Order on Reconsideration* as the "Ruling Under Review." In addition, its preliminary statement of issues listed only matters pertaining to that reconsideration order.

In past cases involving similar circumstances, this Court declined to infer that the petitioner intended to challenge any order other than a reconsideration order. *See, e.g., Entravision*, 202 F.3d at 313; *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 313 (D.C. Cir. 1999); *City of Benton v. NRC*, 136 F.3d 824, 825-26 (D.C. Cir. 1998). The Court should reach the same conclusion here. The

reconsideration order that Accipiter seeks to challenge is unreviewable.

Accordingly, the Court should dismiss this case for lack of jurisdiction.

Respectfully submitted,

Sean A. Lev
General Counsel

Peter Karanjia
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/James M. Carr
James M. Carr
Counsel

Federal Communications Commission
Washington, DC 20554
(202) 418-1740

July 30, 2012

12-1258

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

Accipiter Communications, Inc., Petitioners

v.

**Federal Communications Commission and the
United States of America, Respondents**

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on July 30, 2012, I electronically filed the foregoing Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the D.C. 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.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

Robert F. Reklaitis
Leslie Paul Machado
LeClairRyan, a Professional Corp.
1101 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036
*Counsel for: Accipiter
Communications, Inc.*

Catherine G. O'Sullivan
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

/s/ James M. Carr