

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

United States Telecom Association, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 00-1012
)	(and consolidated cases)
)	
Federal Communications Commission and)	
United States of America,)	
)	
Respondents.)	

RESPONSE OF FCC AND THE UNITED STATES TO ILECS’ MOTION TO GOVERN FURTHER PROCEEDINGS AND REPLY TO RESPONSE OF ILECS TO MOTION TO DISMISS

In compliance with this Court’s order directing the parties to file motions to govern further proceedings on the ILECs’ petition for mandamus concerning the Federal Communications Commission’s interim requirements, the FCC and the United States filed a motion to dismiss, contending that the Commission’s adoption of new rules had “obviated any need for further proceedings on the mandamus petition.”¹ The ILEC petitioners filed a motion asking the Court to retain jurisdiction over their mandamus petition and to require the ILECs and the federal respondents to exchange supplemental briefs after the Commission issues its rulemaking order promulgating permanent rules.² The federal respondents hereby respond to the ILECs’ motion and reply to the ILECs’ response to the motion to dismiss. For the reasons stated in our motion to dismiss and in

¹ Motion of Respondents to Dismiss Petition for a Writ of Mandamus, at 3 (filed January 4, 2005). The ILEC petitioners responded to that motion. Response of ILECs to FCC’s Motion to Dismiss (filed January 6, 2005).

² ILECs’ Motion to Govern Further Proceedings, at 4, 17 (filed January 4, 2005) (“ILECs’ Motion”).

this filing, the Commission and the United States respectfully ask the Court to deny the ILECs' motion and to grant the motion to dismiss.

1. The ILECs' motion to govern further proceedings seeks to shift the target of their mandamus petition from the interim requirements that the Commission adopted in August 2004,³ to the Commission's final rulemaking order, which is expected to be released shortly. This is an extraordinary attempt to use the Court's mandamus jurisdiction to effect a rolling judicial oversight proceeding that is indifferent to the agency's ongoing decisional process. The Commission and the U.S. in response to the mandamus petition advised the Court that final rules superseding the interim requirements would be put to a vote in December 2004. The federal respondents' January 4 motion to dismiss informed the Court that the agency had voted on schedule to adopt final rules and expected to release its order promulgating those rules "within approximately a month."⁴ This timely action by the agency "obviated any need for further proceedings" on a mandamus petition that sought relief from the interim requirements. And, as petitioners acknowledge in requesting supplemental briefing, their anticipatory arguments against the FCC's forthcoming permanent rules are premature. There is no warrant for the Court to retain jurisdiction over the mandamus challenge to the interim rules, in order to allow petitioners to seek different relief based on a different agency decision.

³ The mandamus petition was a challenge to the interim requirements and asked the Court "to enforce its mandate and invalidate these interim rules." Mandamus Petition, at 3.

⁴ Motion to Dismiss, at 3.

2. Mandamus relief from the permanent rules is not available in any event because review of those rules in the ordinary exercise of the Court's Hobbs Act jurisdiction is adequate.⁵ The Commission's release of the order promulgating those rules is imminent, and parties aggrieved by those rules (including the ILECs) will be free to challenge them. In any review proceeding so initiated, arguments about proper implementation of the USTA II mandate can be raised and resolved by the Court. Indeed, the ILECs acknowledge that the issues of mandate compliance they seek to raise "cannot be fully evaluated until the agency releases its [upcoming] order."⁶ Although the ILECs in their motion make assertions about the state of the record before the agency that would be contested in a proper proceeding, the Court is in no position to consider the adequacy of that record to support the new rules until it knows the Commission's reasoning in adopting those rules. A bobtailed exchange of supplemental mandamus filings between the ILECs and the federal respondents is no substitute for full and timely briefing of the issues in proceedings that contemplate the participation of all interested parties, and allow all aggrieved parties to put their claims before the reviewing court. See 47 U.S.C. § 402(a); 28 U.S.C. § 2344. In these circumstances, where relief is available under the ordinary Hobbs Act procedures specifically established by Congress, there is no justification for extraordinary review under the Court's mandamus power.

⁵ In re Papandreou, 136 F.3d 247, 250 (D.C. Cir. 1998) (mandamus not available unless "no other adequate means to attain the relief exist"); see 28 U.S.C. §§ 2341-2351.

⁶ ILECs' Motion to Govern Further Proceedings, at 17.

3. Although we do not here address the ILECs' substantive arguments against the rules they expect the Commission to issue,⁷ a major premise of those arguments is that the Court in USTA II required the agency to reach specific conclusions with respect to the unbundling of individual network elements. That simply is not the case. The Court found fault with the agency's framework for applying the statutory unbundling requirements and directed the Commission on remand to consider several matters that the Court held are relevant to a correct analysis. But the USTA II decision did not guarantee the ILECS or any other party any particular outcome with respect to individual elements, and it did not create an entitlement with respect to particular elements that is enforceable in a mandamus proceeding.

⁷ Any response we might make to those arguments at this point necessarily would be the argument of counsel because the agency's order is not out yet and we cannot know what the agency's response to those arguments might be. Cf. Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

CONCLUSION

The Court should deny the ILECs' motion to govern further proceedings and grant the federal respondents' motion to dismiss.

Respectfully submitted,

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