

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.	)	

**RESPONSE OF THE FCC TO ACCIPITER COMMUNICATIONS, INC.’S  
MOTION TO STRIKE OR, IN THE ALTERNATIVE,  
FOR LEAVE TO FILE A RESPONSE**

The Federal Communications Commission (“FCC” or “Commission”) respectfully submits this response to Accipiter Communications, Inc.’s (“Accipiter”) motion to strike a purportedly “new” argument presented in the FCC’s August 16, 2012 reply in support of its motion to dismiss this appeal. Because the FCC properly replied to an argument raised in Accipiter’s response to the Commission’s motion to dismiss, the Court should deny both Accipiter’s motion to strike and its alternative request to allow Accipiter to file a surreply.

Background

On July 30, 2012, the FCC moved to dismiss this case for want of jurisdiction on the ground that Accipiter filed a petition for review of an order that denied petitions for reconsideration of a prior rulemaking order. *See Third Order*

*on Reconsideration in Connect America Fund*, 27 FCC Rcd 5622 (May 14, 2012) (“*Third Order on Reconsideration*”). Opposing the FCC’s motion, Accipiter contended that documents contemporaneously filed with its petition for review – notably, its Statement of Issues – demonstrated that Accipiter also sought to appeal the underlying rulemaking order that was the subject of its petition for reconsideration (*see Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”). Resp. 4-9. According to Accipiter, “[a]ll of” the issues identified in Accipiter’s Statement of Issues “were raised in [its] petition for reconsideration and none was decided in the *Third Order on Reconsideration*,” Resp. 7, providing the Court jurisdiction to hear its challenges to the underlying *Transformation Order* and, by extension, the *Third Order on Reconsideration*.

Responding to that argument, the FCC in its reply explained that “[i]f Accipiter’s characterization of the agency’s reconsideration order were correct, that would mean that (a) the *Third Order on Reconsideration* did nothing to foreclose consideration of Accipiter’s arguments, which remain pending before the agency, and (b) any challenge to the *Transformation Order* is therefore ‘incurably premature.’” Reply 5 & n.1, quoting *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (petition for reconsideration pending before the Commission renders the FCC’s order non-final with respect to that party, thereby requiring the Court to dismiss for lack of jurisdiction).

### Argument

Accipiter now claims that the FCC improperly presented a new argument for the first time in its reply brief. It is wrong, and its motion to strike should be denied.

It was permissible and appropriate for the FCC to point out on reply that Accipiter's argument in response to the FCC's motion to dismiss would render incurably premature any challenge to the *Transformation Order* because that observation directly "relate[d] to the response" filed by Accipiter. Fed. R. App. Proc. 27(a)(4). The FCC was addressing Accipiter's claim that its Statement of Issues demonstrated an intent to challenge the *Transformation Order* as well as the *Third Order on Reconsideration* and that "[a]ll of" the issues identified in Accipiter's Statement of Issues "were raised in [its] petition for reconsideration and none was decided in the *Third Order on Reconsideration*." Resp. 7. The FCC simply pointed out that if Accipiter's arguments were correct, the Court still would lack jurisdiction over the petition for review.<sup>1</sup>

Nor is it surprising that the FCC did not make this point in its moving papers: as the FCC showed, Accipiter had not sufficiently indicated any intention

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<sup>1</sup> See Reply 5 ("Even assuming for the sake of argument that ... Accipiter's Statement of Issues demonstrated an intent to challenge the *Transformation Order* ... the Court would lack jurisdiction over this case on the independent ground that Accipiter's challenge is 'incurably premature.'") (quoting *BellSouth*, 17 F.3d at 1490)).

to challenge the *Transformation Order*. Thus, there was no need for the FCC to note that a hypothetical challenge to that order also would fail because it would be incurably premature. But after Accipiter argued in its response to the motion to dismiss that it did indeed seek to challenge the *Transformation Order*, it was entirely appropriate for the FCC to note the infirmities of any such challenge. Because the FCC's observation related directly to Accipiter's response to the FCC's motion to dismiss this case, Accipiter's motion to strike is meritless and should be denied.

Nor is there any foundation for Accipiter's concern (Mot. at 3-5) that the FCC may unreasonably delay action on the remaining issues raised by its petition for reconsideration. In addition to resolving part of Accipiter's petition for reconsideration, *see Third Order on Reconsideration*, 27 FCC Rcd at 5631, 5645 (¶¶ 24, 68),<sup>2</sup> the FCC, as Accipiter concedes (Accipiter Mot. 4, n.1), already has issued four separate orders addressing multiple petitions for reconsideration of the November 11, 2011 *Transformation Order*. To the extent Accipiter believes the

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<sup>2</sup> As we noted in our reply at 5 n.1, “[t]he FCC in the *Third Order on Reconsideration* (27 FCC Rcd at 5631 (¶ 24)) rejected Accipiter's request to abandon or eliminate the “rate floor” rule, which limits high-cost universal service support to incumbent local exchange carriers charging artificially low end-user rates. The issues raised by Accipiter in its petition for reconsideration that were not addressed in paragraph 24 of the *Third Order on Reconsideration* remain pending before the agency. *See* 27 FCC Rcd at 5645 (¶ 68) (denying Accipiter's petition for reconsideration ‘IN PART’).”

FCC in the future unreasonably is delaying action on the remainder of its petition for reconsideration, it may seek relief under the All Writs Act, 28 U.S.C. § 1651.

Conclusion

This Court should deny Accipiter's motion to strike or, in the alternative, its request to file a surreply.

Respectfully submitted,

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August 28, 2012

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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, Maureen K. Flood, hereby certify that on August 28, 2012, I electronically filed the foregoing Response of the Federal Communications Commission to Accipiter Communications, Inc.'s Motion to Strike Or, In the Alternative, For Leave to File a Response 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.

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