

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

LOCUS TELECOMMUNICATIONS, LLC,	)	
	)	
Petitioner	)	
	)	
v.	)	<b>No. 16-4419</b>
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and THE UNITED STATES OF AMERICA,	)	
	)	
Respondents	)	

**RESPONSE TO ORDER**

Respondents Federal Communications Commission and United States hereby submit this response to the Court's Order of December 28, 2016 in the captioned case. That Order suggested that the Court may not have jurisdiction to review the FCC orders that are the subject of the petition for review in this case and directed the parties to file written responses addressing that issue.

As discussed below, the Court lacks jurisdiction to consider this petition for review. Petitioner Locus seeks review of a forfeiture order of the FCC that was adopted pursuant to the procedures set out in 47 U.S.C. § 503(b)(4) and that Locus has not paid. In such cases, the Communications Act places exclusive jurisdiction to challenge the agency's basis for imposing the forfeiture in a trial de novo in district court. The Government has initiated an enforcement action that is currently pending in district court to collect this forfeiture. If petitioner had first paid the forfeiture, the District of Columbia Circuit has held that the Communications Act places exclusive jurisdiction to review the agency's order imposing the forfeiture

in a court of appeals by way of a petition for review, and there are no court decisions holding to the contrary. Since Locus has not paid the forfeiture, however, this Court lacks jurisdiction to consider its petition for review.

## ***BACKGROUND***

### ***A. Statutory And Regulatory Background***

#### ***1. FCC Forfeiture Process***

Congress has authorized the FCC to impose monetary forfeitures for “willful” or “repeated” violations of the Communications Act of 1934 or the FCC’s rules, using either of two procedures at the agency’s discretion. First, it may conduct a hearing according to the formal adjudication standards set out in the Administrative Procedure Act (“APA”). *See* 47 U.S.C. § 503(b)(3)(A); *see also* 47 C.F.R. § 1.80(g) (setting out FCC hearing procedures). Alternatively, the FCC may issue a “notice of apparent liability” (“NAL”) that proposes a forfeiture amount. 47 U.S.C. § 503(b)(4)(C); *see also* 47 C.F.R. § 1.80(f). The agency must then grant the company “an opportunity to show, in writing ... why no such forfeiture penalty should be imposed.” *Id.* After considering the company’s arguments made in response to the NAL, the FCC will decide whether to issue a forfeiture order, and in what amount. *Id.* In so doing, “the [FCC] or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” *Id.* § 503(b)(2)(E). The Commission pursued the NAL approach in this case.

When a forfeiture order is issued, but unpaid after a designated period of time, the United States may bring an enforcement action in district court to recover the forfeiture penalty imposed under this procedure, and the trial on such a complaint is de novo. 47 U.S.C. § 504(a).

## 2. Judicial Review Of FCC Orders

Judicial review of FCC orders is governed by Section 402 of the Communications Act, 47 U.S.C. § 402. Section 402(a) provides that a proceeding to “enjoin, set aside, annul or suspend” any type of Commission order not governed by Section 402(b)<sup>1</sup> is to be brought under the Administrative Orders Review Act (otherwise known as the Hobbs Act), 28 U.S.C. § 2341 *et seq.*, which provides for exclusive jurisdiction in the courts of appeals (other than the Federal Circuit) to review “all final orders” of the FCC “made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342(1). Final orders reviewable under section 402(a) include not only adjudicative orders, but orders adopting Commission rules. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 417 (1942).

The Communications Act provides that a party may obtain judicial review of forfeiture orders adopted pursuant to formal APA hearing procedures “pursuant to

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<sup>1</sup> Section 402(b) covers challenges to FCC decisions involving specific categories of FCC actions, including radio licensing and certain other matters that do not involve issues presented by the petition for review in this case. *See* 47 U.S.C. § 402(b)(1)-(10). Exclusive jurisdiction to consider appeals under 47 U.S.C. § 402(b) is in the D.C. Circuit. The two methods for judicial review under Sections 402(a) and 402(b) are “mutually exclusive.” *North American Catholic Educ. Prog. Found. v. FCC*, 437 F.3d 1206, 1208 (D.C. Cir. 2006).

Section 402(a).” 47 U.S.C. § 503(b)(3)(A). The Act contains no similar language with respect to judicial review of forfeiture orders adopted pursuant to less formal NAL procedures provided under 47 U.S.C. § 503(b)(4). And courts have held that Section 504(a), which states that unpaid forfeitures adopted pursuant to these procedures “shall be recoverable ... in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office.” 47 U.S.C. § 504(a), is “the exclusive forum for challenges to unpaid forfeiture orders” issued by way of the NAL procedures. *AT&T Corp. v. FCC*, 323 F.3d 108, 1085 (D.C. Cir. 2003), citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 501 (D.C. Cir. 1977).

### 3. The Locus Administrative Forfeiture Proceeding

The FCC issued a Notice of Apparent Liability for forfeiture to Locus in 2011. *Locus Telecomms., Inc.*, 26 FCC Rcd 12818 (2011)(“NAL”). Locus is a Delaware corporation that provides long distance telecommunications service through the use of prepaid calling cards. *Id.* at 12819 ¶3. Locus sells prepaid phone calling cards through a national distributor network that reaches over 70,000 retailers. Based on its investigation and other facts in the record, the Commission issued the NAL, finding that the company’s practices constituted deceptive marketing of its prepaid calling cards that were an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). The Commission explained that Locus misled consumers about the number of minutes buyers of its cards could use to make calls to foreign

countries and failed to disclose, in any meaningful way, material information about its rates, charges, and practices that would enable consumers to calculate the cost of certain international or interstate calls, and thus substantially harmed persons who purchased its calling cards. The Commission ultimately proposed a forfeiture of \$5,000,000 for the violations. *NAL*, 26 FCC Rcd at 12824-25 ¶¶16-18.

Following consideration of Locus' response to the *NAL*, the Commission found "no reason to cancel, withdraw or reduce the proposed penalty" and assessed the \$5,000,000 forfeiture that it had proposed in the *NAL*. *Locus Telecomms., Inc.*, 30 FCC Rcd 11805 (2015). The Commission subsequently denied Locus' petition for reconsideration of the Forfeiture Order in an October 2016 decision. *Locus Telecomms., Inc.*, 31 FCC Rcd 12110 (2016).

#### 4. Government Action To Collect The Locus Forfeiture

On June 2, 2016 the Government filed a complaint in Federal district court for recovery of the monetary forfeiture imposed by the FCC, which Locus had not paid. *United States v. Locus Telecommunications, Inc.*, No: 2:16-cv-3178-SDW (D. N.J.). The complaint also sought injunctive relief to have the court enjoin Locus from continuing to violate 47 U.S.C. 201(b). Locus still has not paid the forfeiture, and the district court action remains pending.

#### ***B. Locus' Petition For Review In This Case***

On December 27, 2016, Locus filed its "Protective Petition for Review or Appeal" in this case, seeking review of the FCC's Forfeiture Order as well as the

Reconsideration Order. It stated that it was “currently challenging [those orders] in a civil collection matter” in the district court proceeding cited above. The petition indicates that Locus seeks to raise both factual and legal issues in this Court. It added that it believed it had to raise its challenges in both the district court and in this Court because there was a disagreement among other courts as to the proper forum in which to raise its challenge that this Court has not had occasion to address. *See* Pet. Rev. at 2.

### ***ARGUMENT***

#### ***The Court Lacks Jurisdiction To Consider The Petition For Review.***

Contrary to Locus’ claims, there is no circuit disagreement as to the only jurisdictional question that is before this Court – whether a court of appeals has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) to review an unpaid forfeiture order adopted by the FCC under the NAL procedures of 47 U.S.C. § 503(b)(4). All the cases that have addressed that question agree that no such jurisdiction exists. To the extent that Locus raises concerns that the district court’s jurisdiction in the pending enforcement action may preclude it from raising certain challenges, under current case law it had the option to pay the forfeiture and challenge the Commission’s order in this Court. It chose not to take that route and is now precluded from challenging in this Court the unpaid forfeiture order to which it is subject.

***1. Case Law Consistently Holds That Exclusive Jurisdiction To Review Unpaid FCC Forfeiture Orders Issued Pursuant To Section 503(b)(4) Procedures Is In The District Courts.***

Absent a showing that the “special [review] procedure enacted by Congress [in 47 U.S.C. § 504(a)] is unavailable or inadequate” the D.C. Circuit has determined that “a trial de novo in the district court [under 47 U.S.C. § 504(a)] is the exclusive means for review of a [section 503(b)(4)] forfeiture order entered by the Commission.” *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 501 (D.C. Cir. 1977). In that case, which involved an unpaid forfeiture order, the court found that judicial review under the 47 U.S.C. § 504(a) procedure was neither unavailable nor inadequate. *Id.* at 496.

In examining the legislative history of section 504(a), the court considered it “unlikely” that Congress had intended to permit forfeiture subjects to mount successive challenges to a Commission forfeiture order. 564 F.2d at 501. Even if it were assured, however, that a forfeiture subject that obtained review in a court of appeals would not thereafter pursue the matter further in district court, the court nevertheless declined to give litigants a choice of forums for review in the absence of support for such a choice in the language or legislative history of section 504(a), or a showing that review under those procedures was unavailable or inadequate. *Id.* The court found that the legislative history, “rather than supporting a choice of forums for review,” indicated that Congress was operating under the assumption that “any review would occur through trial de novo in the district court.” *Id.*

The D.C. Circuit has subsequently construed *Pleasant Broadcasting* to apply only in the case of *unpaid* forfeiture orders, concluding that that decision dealt “not with the question of post-compliance review of forfeiture orders, but rather with a forfeiture subject’s challenge to an *unpaid* forfeiture order.” *AT&T Corp. v. FCC*, 323 F.3d 108, 1084 (D.C. Cir. 2003)(emphasis in original). “Because payment [of the forfeiture] renders [47 U.S.C. §] 504 review ‘unavailable,’ court of appeals review pursuant to [47 U.S.C. §] 402(a) is ‘appropriate.’” *Id.* In *AT&T* the court reaffirmed that “*Pleasant Broadcasting* tells us only that section 504(a) establishes district court jurisdiction as the exclusive forum for challenges to unpaid forfeiture orders. Like section 504(a) itself, it has no effect on court of appeals jurisdiction to review challenges to paid forfeiture orders.” *Id.* at 1085. No other court of appeals decision conflicts with this holding.

Other courts have similarly held that exclusive jurisdiction to review FCC forfeiture orders of this type is in the district court under Section 504, although those cases do not address the paid versus unpaid issue. *See Dougan v. FCC*, 21 F.3d 1488 (9<sup>th</sup> Cir. 1994); *United States v. Dunifer*, 219 F.3d 1004 (9<sup>th</sup> Cir. 2000); *United States v. Stevens* 691 F.3d 620 (5<sup>th</sup> Cir. 2012), *cert. denied*, 135 S.Ct. 887 (2013). The *Stevens* decision held, in addition, that a district court’s jurisdiction in an enforcement action under 47 U.S.C. § 504(a) was limited to considering the factual basis for the FCC’s action, precluding the consideration of legal defenses. However, as discussed below, the Court need not reach that separate issue here.



***2. The Court Need Not Address The Scope Of District Court Jurisdiction Under Section 504(a).***

To the extent that Locus expresses uncertainty about the extent of the defenses it may raise in the pending district court enforcement action (*see* Pet. Rev. at 2), that is an uncertainty of Locus' own making. The Communications Act's statutory jurisdictional rules did not deprive Locus of the ability to challenge the legal validity of the FCC's forfeiture order in addition to the factual basis of the order. Locus could have removed any uncertainty by paying the forfeiture order and raising its legal challenges in a direct review action pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) as parties subject to forfeiture orders have done in other cases. *See, e.g., SBC Communications, Inc. v. FCC*, 373 F.3d 140, 146 (D.C. Cir. 2004); *AT&T*, 323 F.3d at 1083-85.<sup>2</sup> Since it did not do so and since this Court lacks jurisdiction of the petition for review, it need not address here the question of the scope of the district court's jurisdiction to consider whatever defenses Locus may raise in the pending enforcement proceeding.

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<sup>2</sup> Although the forfeiture at issue in this case was significant – \$5 million – Locus has never argued that it lacks the ability to pay the forfeiture despite the fact that “inability to pay” is one of the specific criteria set out in the Communications Act and the FCC's rules as a basis for a downward adjustment in the amount of a proposed forfeiture. *See* 47 U.S.C. 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8) Note: Section II.

***CONCLUSION***

In consideration of the foregoing, the Court should dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

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16-4419

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**CERTIFICATE OF SERVICE**

I, C. Grey Pash, Jr., hereby certify that on February 9, 2017, I electronically filed the foregoing Response to Order with the Clerk of the Court for the United States Court of Appeals for the Third 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.

*/s/ C. Grey Pash, Jr.*