

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

UNITED STATES TELECOM ASSOCIATION,)

Petitioner,)

v.)

No. 00-1428)

FEDERAL COMMUNICATIONS)
COMMISSION and THE UNITED STATES OF)
AMERICA,)

Respondents.)

REPLY OF FEDERAL COMMUNICATIONS COMMISSION
ON ITS MOTION TO HOLD IN ABEYANCE
AND TO DEFER FILING OF CERTIFIED INDEX
TO THE RECORD

The Federal Communications Commission hereby submits a reply to the opposition to its motion to hold in abeyance the petition for review filed by the United States Telecom Association (“USTA”) in the above-captioned case. In opposing the FCC’s motion to hold the instant case in abeyance pending disposition by the Commission of pending reconsideration petitions, USTA contends that it is entitled to immediate judicial review because of: (1) the “clear legal infirmities” and “negative

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policy effects” of the Commission’s order; and (2) the “FCC’s demonstrated slow pace in deciding petitions for reconsideration.”¹

When petitions for judicial review of a Commission order and petitions for agency reconsideration of the same order have been filed by different parties, this Court’s usual practice is to hold the review proceeding in abeyance pending agency action on reconsideration. *See, e.g., Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957). The Court has held that the proper course in such a case is to “hold the appeal in abeyance pending the Commission’s further proceedings, keeping the record open for supplementation to reflect those proceedings.” *Wrather-Alvarez*, 248 F.2d at 649; *accord American Farm Lines v. Black Ball*, 397 U.S. 532, 541 (1970).

USTA suggests that abeyance is inappropriate here because the petitions for reconsideration were filed by other parties, and not by USTA. But the law in this Circuit is that abeyance is the “proper course” when petitions for judicial review and agency reconsideration are pending. If petitions at *both* levels have been filed by a single party, dismissal for want of jurisdiction is the only correct disposition for the judicial petition for review. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132 (D.C. Cir. 1989). But where different parties have followed different avenues of relief – one in court and the other at the agency – jurisdiction rests in both the court and the agency. And the task for the court is to determine a proper accommodation of the two jurisdictions. This Court has found that accommodation in the practice of abeyance, *Wrather-Alvarez*, 248 F.2d at 649, while recognizing that judicial review may go forward without abeyance in appropriate

¹ *Opposition of Petitioner to Motion of FCC to Hold in Abeyance and to Defer Filing of the Certified Index to the Record* at 2.

circumstances. *See, e.g., ICG Concerned Workers Assn., v. U.S.*, 888 F.2d 1455, 1458 (D.C. Cir. 1989).

In reviewing the arguments USTA offers in support of its opposition to the instant motion (and presumably forming the basis for USTA's petition for review), it is clear that nearly identical arguments are raised in the two petitions for reconsideration that are currently pending before the Commission.² In disposing of the pending reconsideration petitions, the possibility therefore exists that the Commission will modify the order that is on review here in a manner that could affect the Court's decision in this case or even obviate the need for judicial review at all. The parallel nature of the arguments in the pending reconsideration petitions and those before the Court raises the potential for multiple review proceedings that might result in inefficient use of the resources of the Court and the parties.

Allowing the Commission to fully consider the issues before it, in contrast, will encourage the development of a more complete record, thereby facilitating any judicial review that ultimately is necessary. Granting the Commission's motion, therefore, would promote judicial economy and efficiency in this respect as well.

USTA relies upon this Court's decision in *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998), for the proposition that this case should go forward now, notwithstanding the filing of petitions for reconsideration.³ Unlike this

² *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Petition for Reconsideration of Project Telephone Company and Range Telephone Cooperative and Petition for Reconsideration and Clarification of the South Dakota Independent Telephone Coalition, filed Sept. 11, 2000.

³ *Opposition* at 2.

case, however, the parties (including the Commission) did not object to immediate judicial review in that case. *MCI*, 143 F.3d at 608. In addition, the Court was of the view that “resolution of the petitions for reconsideration will benefit from a resolution of the present case.” *Id.* The reverse is true here: Resolution of the reconsideration petitions is likely to cast light on this judicial review proceeding, or even alter it fundamentally or moot it.

USTA’s additional argument, that the Commission’s motion “offers nothing to give confidence” that it will promptly resolve the reconsideration petitions pending before it, is not based on facts before the Court.⁴ The two reconsideration petitions at issue here were filed with the Commission on September 11, 2000. The Commission provided public notice of the petitions and established a pleading cycle for parties seeking to file comments thereon in a notice issued on October 12, 2000.⁵ The public comment period concluded on November 13, 2000. USTA has no basis for suggesting here that the Commission has acted or will act in a dilatory fashion. Finally, if USTA decides at some future time that the reconsideration proceeding is not progressing fast enough, it may file a petition for a writ of mandamus with this Court to compel the Commission to decide the petitions for reconsideration pending before it.⁶

The Commission respectfully moves that this case be held in abeyance until the Commission acts on the reconsideration petitions that are before it and that the filing of

⁴ *Opposition* at 5.

⁵ *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, Public Notice, 2000 WL 1509975 (rel. Oct. 12, 2000).

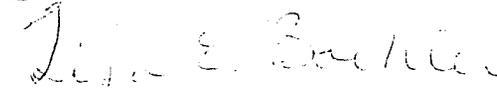
⁶ *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984).

the certified index to the record be deferred pending action by the Commission on those reconsideration petitions.

Respectfully submitted,



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Nov. 22, 2000

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

United States Telecom Association, Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Reply Of Federal Communications Commission On Its Motion To Hold In Abeyance And To Defer Filing Of Certified Index To The Record" was served this 22nd day of November, 2000, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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A handwritten signature in cursive script, appearing to read "Sharon D. Freeman", written over a horizontal line.

Sharon D. Freeman