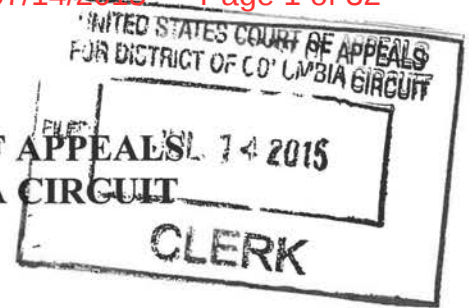


UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

JUL 14 2015

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



RECEIVED

SIRIUS XM RADIO INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION,

Respondent.

Case No. 15-

15-1218

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), Sirius XM Radio Inc. (Sirius XM) hereby petitions this Court for review of the Federal Communications Commission's order captioned *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (released July 10, 2015).¹ A copy of the Declaratory Ruling and Order is attached as

¹ Sirius XM files this protective petition out of an abundance of caution. Under 28 U.S.C. § 2344, parties may seek review of the Declaratory Ruling and Order "within 60 days after its entry," and under 47 U.S.C. § 405(a) that date "shall be computed from the date upon which the Commission gives public notice of the order." The FCC's regulations then specify differing dates of "public notice" for different types of agency action, but there is some confusion about how those regulations apply in the context of omnibus declaratory rulings that resolve broad questions of general applicability, as the Declaratory Ruling and Order does. See 47 C.F.R. § 1.4(b)(1) ("public notice" occurs upon publication in the Federal

Attachment A. Venue is necessarily proper in this Court pursuant to 28 U.S.C. § 2343.

Among other things, the Declaratory Ruling and Order vastly expands the TCPA's reach by sweeping in calls to wireless numbers made from equipment that lacks the present capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and "to dial such numbers." 47 U.S.C. § 227(a)(1). *But see* Declaratory Ruling and Order ¶¶ 10-24. The Declaratory Ruling and Order also improperly defines the term "called party" for purposes of the TCPA's consent provisions as the "current subscriber (or non-subscriber customary user of the phone)" rather than "intended recipient," *id.* ¶ 72, and gives callers only one call before holding them liable for calls made to

(continued...)

Register for "all documents in notice and comment and non-notice and comment rulemaking proceedings" required by the Administrative Procedure Act to be published there); *id.* § 1.4(b), Note ("Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)"); *id.* § 1.4(b)(2) ("public notice" occurs on the "release date" for "non-rule making documents released by the Commission or staff").

In light of this potential confusion, Sirius XM files this petition in case the Declaratory Ruling and Order is construed to be final on the date it was issued (as opposed to after Federal Register publication), and the ten-day period in which a party must file a petition for review to "avail itself of procedures established for selection of a court in the case of multiple appeals"—that is, the lottery procedures under 28 U.S.C. § 2112(a)—is likewise construed to begin on that date. *See, e.g., Western Union Tel. Co. v. FCC*, 773 F.2d 375, 380 (D.C. Cir. 1985) (encouraging

numbers that, without the caller's knowledge, had been reassigned to persons other than one from whom the caller had express consent, *id.* ¶¶ 85-97. Among these other holdings, the Declaratory Ruling and Order also sets forth certain rules regarding the TCPA's consent defense. *Id.* ¶¶ 47-70, 98-102.

In these respects and others, the Declaratory Ruling and Order is arbitrary and capricious, an abuse of discretion, in excess of the FCC's statutory authority, and otherwise contrary to the Constitution and other laws. Accordingly, Sirius XM respectfully requests that this Court (1) hold that the FCC's Declaratory Ruling and Order was unlawful, (2) vacate the Declaratory Ruling and Order, (3) remand to the FCC for an order consistent with this Court's findings, or (4) provide such other relief as this Court deems appropriate.

(continued...)

parties to file protective and supplemental petitions where there are questions surrounding the date of public notice).

Dated: July 14, 2015

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, Sirius XM Radio Inc. respectfully submits the following corporate disclosure statement:

Sirius XM Radio Inc. is the nation's largest satellite radio provider. Sirius XM Holdings Inc., a corporation listed on the NASDAQ Global Select Market, owns all of the outstanding capital stock of Sirius XM Radio Inc. Liberty Media Corporation beneficially owns more than fifty percent of the outstanding capital stock of Sirius XM Holdings Inc.

CERTIFICATE OF SERVICE

Within one business day of this petition for review being filed:

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