

In the
United States Court of Appeals
for the Fifth Circuit

HUAWEI TECHNOLOGIES USA, INC., AND
HUAWEI TECHNOLOGIES CO., LTD.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

PETITION FOR REVIEW

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and Huawei Technologies Co., Ltd.*

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402, 28 U.S.C. §§ 2342–2344, and Federal Rule of Appellate Procedure 15(a), Huawei Technologies USA, Inc., and Huawei Technologies Co., Ltd. (collectively, “Petitioners”), hereby petition this Court for review of the final order of the United States Federal Communications Commission (“FCC”) captioned *In the Matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs, Huawei Designation, ZTE Designation* (“USF Order”), Report and Order, Further Notice of Proposed Rulemaking, and Order, FCC 19-121, WC Docket No. 18-89 and PS Docket Nos. 19-351 and 19-352 (released November 26, 2019). A copy of the USF Order is attached as Exhibit A.

Petitioners file this protective petition in an abundance of caution. Under 28 U.S.C. § 2344, a party may seek review of the USF 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.” There is some ambiguity as to what constitutes “public notice” in the context of an order that includes both rulemaking and adjudicatory actions. *Compare* 47 C.F.R. § 1.4(b)(1) (“public notice”

occurs on “the date of publication in the Federal Register” “[f]or all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act” to be published there), *with id.* § 1.4(b)(1), 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).”), *and id.* § 1.4(b)(2) (“public notice” occurs on “the release date” “[f]or non-rulemaking documents released by the Commission or staff”).

In light of this ambiguity, Petitioners file this petition in case the USF Order is construed to be final on the date that it was released (as opposed to the date on which it is published in the *Federal Register*), and the ten-day period in which a party must file a petition to “avail itself of procedures established for selection of a court in the case of multiple petitions for review,” 47 C.F.R. § 1.13(a)(1)—that is, the lottery procedures under 28 U.S.C. § 2112(a)—is likewise construed to begin on that date. *See, e.g., W. Union Tel. Co. v. FCC*, 773 F.2d 375, 380 (D.C. Cir. 1985) (encouraging parties to file protective petitions where there are questions regarding timing).

To date, no court has upheld the validity of the USF Order.

Jurisdiction and venue are proper under 47 U.S.C. § 402 and 28 U.S.C. §§ 2342 and 2343, because Petitioners are adversely affected by the USF Order, which is a final FCC order under 28 U.S.C. § 2342, and because Huawei Technologies USA, Inc., is a corporation organized under Texas law with its principal office in this circuit at 5700 Tennyson Parkway #500 in Plano, Texas 75024, *see* 28 U.S.C. § 2343.

Petitioners seek review of the USF Order on the grounds that it exceeds the FCC's statutory authority and violates federal law, the Constitution, and other laws; that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; that it was adopted without observing the procedures required by law and in violation of the notice-and-comment rule-making requirements of 5 U.S.C. § 553; that it is void for vagueness, and retroactive, in violation of the Constitution and Administrative Procedure Act; that it violates the Constitution's Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the due process protections guaranteed by the Constitution, the Administrative Procedure Act, the Communications

Act of 1934, 47 U.S.C. § 151 *et seq.*, and other laws; and that it is otherwise contrary to law. Accordingly, Petitioners respectfully request that this Court (1) hold that the FCC's USF Order is unlawful, (2) vacate the USF Order, and (3) provide such other relief as this Court deems appropriate.

Dated: December 4, 2019

Respectfully submitted,

/s/ Shay Dvoretzky

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