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

Great Lakes Communication Corp., *et al.*, Petitioners,	)	
v.	)	No. 19-1233 (consolidated with No. 19-1244)
Federal Communications Commission and United States of America, Respondents.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY MOTION FOR STAY

In September 2019, the Federal Communications Commission (FCC or Commission) adopted new rules designed to discourage regulatory arbitrage and a 45-day transition period for companies to comply with them. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd 9035 (2019) (*Order*). The emergency motion for stay filed by CarrierX, LLC (Free Conferencing), the operating subsidiary of Free Conferencing Corporation, is the second attempt in this Court to avoid compliance with that transition period, but it is premised on a problem of Free Conferencing's own creation.[1] So far as it appears, only days before the transition period expired, Free Conferencing took numerous actions that made the transition more—not less—difficult. Free

[1] Although CarrierX and Free Conferencing Corporation are two different entities, Carrier X refers to itself in the stay motion as "Free Conferencing." We will follow the same convention here. We will refer to CarrierX's parent company as "Free Conferencing Corporation."

Conferencing is not entitled to obtain the extraordinary relief it seeks based on problems caused by its own actions.

As this Court is well aware, some local exchange carriers (providers of local telephone service) employ a practice known as access stimulation or "traffic pumping" to artificially inflate the number and duration of long-distance calls their customers receive, thereby increasing by tens of millions of dollars annually the per-minute access charges they collect from long-distance carriers to complete those calls.[2] As part of its ongoing effort to combat such arbitrage schemes, the FCC in the *Order* adopted new rules to discourage access stimulation.

Less than two months ago, this Court denied a similar motion by other petitioners to stay some of the FCC's new rules pending appeal. Among other things, those petitioners claimed that they could face "substantial business disruption" because the "extremely brief implementation period" did not give them adequate time to move their call traffic to comply with the rules. Emergency Motion for Stay of FCC Order Pending Review (filed Oct. 30, 2019), at 23-24.

Free Conferencing now seeks a stay of the *Order* on the same grounds. Free Conferencing has teamed with local carriers to provide conferencing services that are free to its customers but are subsidized, through access charges, by long-

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[2] *See All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81 (D.C. Cir. 2017); *N. Valley Commc'ns, LLC v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013); *Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011).

distance carriers and their customers. Free Conferencing, which is not itself a carrier, is not subject to the new rules; but those rules apply to local carriers that transmit calls to Free Conferencing. The company asserts that, in response to the new rules, some local carriers that previously delivered high volumes of calls to Free Conferencing have decided to stop carrying those calls because they are leaving the access stimulation business or cannot otherwise comply with the *Order*. Mot. 8. Free Conferencing claims that as a result, it must move its call traffic, apparently amounting to hundreds of millions of minutes, to other networks that are willing to carry its calls. *Ibid*.

Free Conferencing alleges that the 45-day transition period provided by the *Order* has proved insufficient to implement its plans because long-distance carriers have refused to take the necessary steps to accommodate the migration of Free Conferencing's traffic, and consequently some calls to Free Conferencing are being dropped or blocked. It therefore asks this Court to stay the applicable access stimulation rules with regard to the local carriers that currently deliver traffic to Free Conferencing until long-distance carriers "can provide assurances that all calls will be properly routed without failures or blocking." Mot. 1.

Free Conferencing has not come close to justifying such extraordinary relief. It does not attempt to show that the transition period the Commission adopted was unreasonable or unsupported by the record before the agency. And, as a submission by AT&T to the agency appears to show, the subsequent developments of which Free Conferencing complains reflect a problem of its own making. That problem neither undermines the Commission's predictive judgment nor constitutes irreparable harm because it is self-inflicted. A stay would also cause substantial harm to the public interest by leaving in place access stimulation schemes that the Commission has long sought to discourage because they impose tens of millions of dollars in unjust and unreasonable costs on long-distance carriers and their customers. For all these reasons, the motion for stay should be denied.

BACKGROUND

When an interexchange carrier (a provider of long-distance telephone service) transmits a long-distance call to the local exchange carrier serving the call's recipient, the interexchange carrier must pay an access charge to the local carrier for completing the call. *All Am. Tel.*, 867 F.3d at 84. Taking advantage of this access charge regime, some local carriers have engaged in an arbitrage "scheme known as 'traffic pumping' or 'access stimulation,'" whereby they artificially inflate the number and duration of long-distance calls their customers receive. *Id*. at 85. As a result of this practice, long-distance carriers and their customers have had to pay significant amounts to local carriers "in the form of artificially inflated and distorted access charges." *Ibid.*; *see also N. Valley Commc'ns*, 717 F.3d at 1018-19.

In 2011, the FCC adopted rules designed to curb such access arbitrage. *Connect America Fund*, 26 FCC Rcd 17663, 17874-90 ¶¶ 656-701 (2011). Under those rules, each carrier engaged in access stimulation must file revised tariffs reducing its access rates. *Id.* ¶¶ 679-698. As defined by the 2011 rules, access stimulation occurs when a local carrier has (1) entered into a revenue sharing agreement with another party collaborating in the scheme (such as a provider of conference calling service), *id*. ¶¶ 668-674, and (2) either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month or more than 100 percent growth in interstate minutes in a month compared to the same month in the preceding year, *id*. ¶¶ 675-678. The United States Court of Appeals for the Tenth Circuit upheld these rules as a reasonable exercise of the FCC's authority under 47 U.S.C. § 201(b) to prohibit unjust and unreasonable access rates. *In re FCC 11-161*, 753 F.3d 1015, 1144-47 (10th Cir. 2014).

Access-stimulating carriers changed their practices to circumvent the 2011 rules "by interposing intermediate providers of switched access service not subject to the … rules in the call route, thereby increasing the access charges" paid by long-distance carriers. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd 5466, 5467 ¶ 2 (2018) (*Notice*). To address these new arbitrage schemes, the FCC issued a notice of proposed rulemaking in 2018 seeking comment on proposed amendments to the access stimulation rules. *See id.* ¶¶ 8-37.

Commenters submitted evidence that access-stimulating carriers, working in concert with intermediate access providers, had routed "*billions* of minutes" of long-distance traffic "through a handful of rural areas" in order "to increase [the] tandem switching and transport charges" they collected from long-distance carriers. *Order* ¶ 14 (internal quotation marks omitted). For example, one carrier reported that twice as many minutes per month were routed to Redfield, South Dakota (population 2,300) as were routed to Verizon's facilities in New York City (population 8.5 million). *Id.* ¶ 15. These new arbitrage schemes, like those targeted by the 2011 rules, involved the provision of "free" conference calling and other high-volume calling services to "a small proportion of consumers." *Id.* ¶ 20. Such services were provided "at an annual cost of $60 million to $80 million in access charges"—a cost that long-distance carriers and their customers were "forced to bear." *Ibid.* The Commission also found "evidence that the staggering volume of minutes generated by these [access stimulation] schemes can result in call blocking and dropped calls." *Id.* ¶ 3.

To reduce the incentive to participate in such schemes, the FCC in September 2019 adopted rules requiring any access-stimulating local carrier "to bear financial responsibility for all interstate and intrastate tandem switching and transport charges for terminating traffic to its own end office(s) or functional equivalent whether terminated directly or indirectly." *Order* ¶ 17. Under the new rules, access-stimulating carriers will not collect access charges and will be required to pay for services provided by intermediate carriers that they had introduced into the call path to evade the 2011 rules. The agency explained that the new rules "properly align financial incentives by making the access-stimulating [carrier] responsible for paying for the part of the call path that it dictates." *Ibid.*

The Commission also found evidence that "access stimulation may occur even when there is no access revenue sharing agreement." *Order* ¶ 4. To account for this possibility, the agency amended its rules to establish "alternate tests" for access stimulation "that require no revenue sharing agreement." *Id.* ¶ 43. The new rules define a competitive local carrier without a revenue sharing agreement as "engaging in access stimulation" if it has "an interstate terminating-to-originating traffic ratio of at least 6:1 in a calendar month." *Ibid.*; *see* 47 C.F.R. § 61.3(bbb)(1)(ii).[3]

The FCC determined that a "transition period of 45 days after the effective date of the rules" would give access-stimulating carriers "sufficient time" to come into compliance with the rules. *Order* ¶ 76. The agency declined to adopt a longer

[3] A separate access stimulation test applies to rate-of-return local carriers without revenue sharing agreements. *See* 47 C.F.R. § 61.3(bbb)(1)(iii). Free Conferencing does not seek a stay of that provision.

transition period. It saw "no reason to allow access-stimulating [carriers] and the intermediate access providers that they choose to use to continue to benefit from access arbitrage schemes." *Ibid*.

The FCC found that a 45-day transition period would afford carriers sufficient time to adjust their business to avoid the new access stimulation triggers. The Commission cited record evidence that "access-stimulating [carriers] are able to relocate their traffic in days, if not hours." *Order* ¶ 77 (citing AT&T Feb. 5, 2019 *Ex Parte* at 6 (a local carrier had previously moved a large volume of traffic "seemingly overnight")). And the agency observed that its "rules provide a clear process by which an access-stimulating [carrier] can transition out of being categorized as such." *Ibid*. (citing App. A, 47 C.F.R. § 61.3(bbb)(2)-(3)).

The new rules were published in the Federal Register on October 28, 2019. 84 Fed. Reg. 57629. Shortly thereafter, several petitioners moved for a stay of some of the rules pending appeal. The Court denied that motion on November 25, 2019. The rules took effect—and the 45-day transition period commenced—on November 27, 2019.[4]

[4] On the same day, Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon) filed a petition for FCC reconsideration of the *Order*. The FCC accordingly moved to hold this case in abeyance for six months while the agency considers Aureon's petition. That motion, which was not opposed by Free Conferencing or any other party, was granted on December 23, 2019.

On January 8, 2020, more than three months after the *Order* was adopted, and just three days before the transition period was scheduled to expire, Free Conferencing Corporation (the parent company of CarrierX) filed with the Commission a "Petition for Expedited Waiver" of the *Order*. The company stated that it had "made arrangements to transition its traffic away from carriers that are either no longer engaging in the 'access stimulation' business or would not have balanced traffic ratios" that would comply with the new rules. Pet. at 4. Free Conferencing Corporation alleged that long-distance carriers were "making [this] transition impossible" by "intentionally refusing" to follow routing guidelines for the public switched telephone network and failing to provision "additional capacity required to handle the transition." *Id.* at 4-5. The company requested a waiver of the *Order* "for any and all providers that transmit calls to Free Conferencing" Corporation "until [long-distance carriers] can provide assurances that all calls will be properly routed." *Id.* at 7.

The day after Free Conferencing Corporation filed its petition for waiver with the Commission, CarrierX (calling itself "Free Conferencing") filed with this Court an emergency motion for stay that largely reiterated the same claims and requested similar relief. Free Conferencing asked that the new rules applicable to competitive carriers without revenue sharing agreements (specifically, 47 C.F.R. §§ 51.914, 61.3(bbb)(1)(ii), 61.26(g), 69.3, 69.4, and 69.5) "be stayed with regard to any and all providers that currently transmit calls to Free Conferencing" until long-distance carriers "can provide assurances that all calls will be properly routed without failures or blocking." Mot. 1. Free Conferencing also requested an administrative stay "to give the Court more time to consider the matter." Mot. 3-4.

The Court denied the request for an administrative stay on January 10. The transition period expired as scheduled on January 11.

On January 15, AT&T filed an opposition to Free Conferencing Corporation's waiver petition, asserting that Free Conferencing had effectively manufactured its own call disruption problems.[5] AT&T stated that on January 2, 2020—just nine days before the transition period expired—Wide Voice (a carrier working with Free Conferencing) "abruptly announced … that AT&T must begin within days to re-route about 127 million minutes of calls in January alone." AT&T Opposition to Waiver Petition (AT&T Opp.) at 2.[6] According to AT&T, Free Conferencing then "began unilaterally to re-route millions of minutes" of calls to existing facilities in Miami and Los Angeles, even though Free Conferencing "*knew*" that those facilities "lacked capacity to handle such enormous call volumes" and "could not be upgraded on such limited notice." *Id.* at 11; *see also*

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[5] A copy of AT&T's opposition to the waiver petition is attached for the Court's convenience.

[6] To give some idea of just how massive this volume of call traffic is, AT&T noted that it "is typically billed for about 20 million minutes per month by Verizon for *all* of its New York City traffic." AT&T Opp. at 2.

id. at 16 (asserting that "any call congestion that has occurred is the result of [Free Conferencing's] decision to suddenly and unilaterally re-route millions of minutes to Miami or Los Angeles"). AT&T also asserted that Wide Voice sought unilaterally to designate two new points of interconnection for Free Conferencing Corporation's traffic in remote locations in Iowa and South Dakota where AT&T and other long-distance carriers have no existing facilities. *Id.* at 13-15. AT&T maintained that Free Conferencing, by "unilaterally deciding … at the eleventh hour to shift millions of minutes" of calls "to new providers and new locations," had "all but ensured" that "call completion issues" would ensue. *Id*. at 8.

ARGUMENT

To obtain the extraordinary remedy of a stay, Free Conferencing must demonstrate that (1) it will likely prevail on the merits, (2) it will suffer irreparable harm without a stay, (3) a stay will not harm other parties, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Free Conferencing has not satisfied any of these prerequisites. Instead, it appears to have manufactured its own "emergency."

I. Free Conferencing Has Not Demonstrated A Likelihood Of Success On The Merits

1. At the outset, Free Conferencing's appeal is subject to dismissal because it did not participate in the proceedings before the agency that led to the *Order*.[7] It is therefore not a "party aggrieved" that is entitled to seek judicial review of the *Order*, and its request for extraordinary relief must be rejected on that basis alone. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983); 47 U.S.C. § 405(a) (a petition for reconsideration is a "condition precedent to judicial review" of an FCC order if the party seeking review "was not a party to the proceedings resulting in" the order).

Furthermore, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In this case, Free Conferencing—which is not a carrier and therefore is not subject to the challenged rules—is asserting the legal rights and interests of carriers that *are* subject to the rules. Those carriers, which are

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[7] Free Conferencing asserts that it participated in meetings with FCC staff and filed "written comments" in the proceeding below. Mot. 1-2. But the administrative record does not reflect any comments or other participation by either Free Conferencing Corporation or its CarrierX subsidiary before the *Order* was adopted.

perfectly capable of asserting their own interests, have not joined Free Conferencing's motion.

2. In any event, Free Conferencing is not likely to prevail on the merits. It has made no attempt to show that the transition period the Commission adopted was unreasonable or unsupported by the record before the agency.

Instead, Free Conferencing relies on comments by other parties arguing that a 45-day transition period would be inadequate, as well as events that happened after the *Order* was issued and that Free Conferencing appears to have manufactured, to suggest that the FCC unreasonably and inaccurately predicted that a 45-day transition period would be sufficient. Mot. 4-8. As a general matter, the Commission's predictive judgments "are entitled to *particularly deferential* review, as long as they are reasonable." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016) (internal quotation marks omitted). And it is well settled that the reasonableness of the Commission's predictive judgment must be assessed "on the basis of the record then before it." *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999). Free Conferencing cannot prevail merely by asserting that the FCC's prediction regarding the adequacy of a 45-day transition period "appears *ex post* to have been mistaken." *Ibid*. The company must show that "the Commission's decision was unreasonable *ex ante*." *Ibid*. It has made no such showing.

Although some commenters in the proceeding below argued that carriers would need 18 to 24 months to come into compliance with the new rules, *Order* ¶ 77, the Commission identified "contrary evidence in the record" supporting the conclusion that 45 days would provide enough time for local carriers to shift their traffic and "avoid the definitional triggers," *ibid.* (citing AT&T Feb. 5, 2019 *Ex Parte* at 6). Free Conferencing's contention that the agency should have given greater weight to the comments questioning the sufficiency of a 45-day transition period is unavailing. Mot. 4-7. The FCC reasonably credited countervailing record evidence demonstrating that access-stimulating carriers "are able to relocate their traffic in days, if not hours," *Order* ¶ 77, and the fact that the new rules "provide a clear process by which an access-stimulating [carrier] can transition out of being categorized as such," *ibid.* Accordingly, the FCC had a reasonable basis for predicting that carriers could achieve compliance within 45 days after the rules took effect.

Furthermore, as explained in its opposition to Free Conferencing Corporation's waiver petition, AT&T has submitted substantial evidence that the call disruptions about which Free Conferencing complains did not result from an insufficient transition period, but from the company's own actions. There is evidence, as the Commission recognized, that a "staggering volume of minutes generated" during a short time "can result in call blocking and dropped calls."

Order ¶ 3. In this case, Free Conferencing itself states that it seeks to shift "9,000,000 calls" comprising "250,000,000 minutes" in response to the *Order*. Mot. 13. And AT&T states that it received notice from Free Conferencing's carrier—less than ten days before the transition period expired—that it was being asked to re-route about 127 million minutes of calls in January alone. AT&T Opp. at 2. According to AT&T, Free Conferencing then unilaterally re-routed millions of minutes of calls to tandem switches in Miami and Los Angeles, even though it knew that those switches lacked the capacity to handle such high traffic volumes. *Id*. at 11, 13-16. AT&T maintains that Free Conferencing's "decision to suddenly and unilaterally re-route millions of minutes" to facilities that could not bear the traffic is the cause of "any call congestion that has occurred." *Id*. at 16.

Free Conferencing contends that it could not shift its call traffic to other networks within the 45-day transition period because long-distance carriers were "not prepared to transition in a manner that will preserve the integrity of millions of calls." Mot. 8. But the *Order* made clear that long-distance carriers are under no "legal requirements" to "agree to a new point of interconnection designated by an access-stimulating [local carrier]" that "unilaterally attempt[s] to move the point of interconnection." *Order* ¶ 34. AT&T states that Wide Voice, a carrier that works with Free Conferencing, sought unilaterally to designate new points of interconnection for Free Conferencing's traffic in remote areas where long-distance carriers have no existing facilities. *See* AT&T Opp. at 13-15. Nothing in the *Order* imposes any requirement on a long-distance carrier to accede to a unilateral demand that it accommodate the routing of large volumes of call traffic to remote locations.

3. Because any harm to Free Conferencing appears to have been "self-inflicted," it also would "not amount to an 'injury' cognizable under Article III." *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Such self-inflicted harm is "not fairly traceable to the challenged government conduct." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012). And even if Free Conferencing were correct that the disruption of its call traffic is attributable to misconduct by AT&T and other long-distance carriers, the cause of its injury would not be the FCC's *Order*, but the "independent action of some third part[ies] not before the court." *Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv.*, 786 F.3d 1050, 1054 (D.C. Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Either way, the alleged injury would not be "fairly traceable" to the FCC's *Order*, and Free Conferencing would lack standing to challenge the *Order*. *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 817 (D.C. Cir. 2006) (internal quotation marks omitted). These jurisdictional questions further diminish the likelihood that Free Conferencing will prevail on the merits.

II. Free Conferencing Has Not Shown Irreparable Injury

A party seeking a stay also must "demonstrate that irreparable injury is *likely*" in the absence of a stay. *Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 22 (2008). But, as the courts have consistently held, a "self-inflicted" harm cannot qualify as "irreparable" injury because it is "entirely avoidable." *San Francisco Real Estate Inv'rs v. Real Estate Inv. Trust of America*, 692 F.2d 814, 818 (1st Cir. 1982).[8]

In its opposition to Free Conferencing Corporation's waiver petition, AT&T has presented substantial evidence that Free Conferencing's own actions led to the call disruptions that serve as the basis for its stay request. AT&T states that less than ten days before the transition period expired, it received a demand from Wide Voice (Free Conferencing's carrier) that AT&T re-route about 127 million minutes of calls within the next month. AT&T Opp. at 2. According to AT&T, Free Conferencing then proceeded unilaterally to re-route millions of call minutes to facilities that lacked the capacity to handle the surge in traffic. *Id.* at 11, 13-16. Because Free Conferencing's own actions appear to have directly contributed to

[8] *See also Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 40 (2d Cir. 1993).

the call disruption problems it is now experiencing, it cannot claim to have been injured, much less irreparably, by the Commission's *Order*.

III. A Stay Would Harm Other Parties And The Public Interest

A stay in this case would harm long-distance carriers and their customers. The new rules are reasonably designed to dismantle arbitrage schemes that impose unjust and unreasonable costs on both providers and consumers of long-distance telephone service. As a result of access arbitrage, "long-distance customers" throughout the nation have been "forced to bear the costs of 'free' conferencing and other services" that "only a small proportion of consumers" use. *Order* ¶ 20. If a stay is granted, access arbitrage schemes will persist, and long-distance carriers and their customers will continue to shoulder the cost of inequitable access charges artificially generated by access stimulation.

In addition, a stay would not serve the public interest. Even if (as Free Conferencing asserts) many of its calls "could fail" without a stay (Mot. 13), such call completion issues appear to be the consequence of its own actions. Moreover, access stimulation generally is a form of regulatory arbitrage that unfairly enriches the access stimulator and distorts competition "because access-stimulation revenues subsidize the costs of high-volume calling services, granting providers of those services a competitive advantage over companies that collect such costs directly from their customers." *Order* ¶ 26. Although roughly 75 million consumers use "free" high-volume calling services, those services "are paid for by the more than 455 million subscribers of voice services across the United States, most of whom do not use high-volume calling services." *Id*. ¶ 25. If the rules are stayed, implicit subsidies and inefficiencies will continue to skew competition in the telecommunications market. Given these competitive concerns, there is "no reason to allow access-stimulating [carriers] … to continue to benefit from access arbitrage schemes." *Id*. ¶ 76.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

Respectfully submitted,

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January 17, 2020

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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on January 17, 2020, I filed the foregoing Opposition of Federal Communications Commission to Emergency Motion for Stay with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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