

No. 21-_____

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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February 5, 2021

*Counsel for Petitioners Huawei Technologies USA, Inc.,
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* (“Final Designation Order”), Memorandum Opinion and Order, FCC 20-179, PS Docket No. 19-351. The Final Designation Order was released on December 11, 2020, and a copy of the order is attached as Exhibit A. This Petition for Review is timely filed “within 60 days after ... entry,” 28 U.S.C. § 2344, of “public notice of the order,” 47 U.S.C. § 405(a), which is “the release date” “[f]or non-rulemaking documents released by the Commission,” 47 C.F.R. § 1.4(b)(2), like the Final Designation Order.

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

Jurisdiction and venue are proper because Petitioners are adversely affected by the Final Designation Order, which is a final FCC order under 47 U.S.C. § 402 and 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 Final Designation Order on the grounds that it exceeds the FCC's statutory authority; violates federal law and the Constitution; is arbitrary, capricious, and an abuse of discretion, and not supported by substantial evidence, within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; was adopted through a process that failed to provide Petitioners with the procedural protections afforded by the Constitution and the Administrative Procedure Act; and is otherwise contrary to law. Accordingly, Petitioners respectfully request that this Court (1) hold that the Final Designation Order is unlawful, (2) vacate the Final Designation Order, and (3) provide such other relief as this Court deems appropriate.

CERTIFICATE OF INTERESTED PERSONS

No. 21-_____, *Huawei Technologies USA, Inc., and Huawei Technologies Co., Ltd. v. Federal Communications Commission and United States of America*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Petitioner Huawei Technologies USA, Inc., is a wholly owned, indirect subsidiary of Huawei Investment & Holding Co., Ltd. Specifically, Huawei Technologies USA, Inc., is wholly owned by Huawei Technologies Coöperatief U.A. (Netherlands). Huawei Technologies Coöperatief U.A.'s parent corporation is Huawei Technologies Co., Ltd. (China). Huawei Technologies Co., Ltd., is 100% owned by Huawei Investment & Holding Co., Ltd.

2. Petitioner Huawei Technologies Co., Ltd., is a wholly owned, direct subsidiary of Huawei Investment & Holding Co., Ltd.

3. Huawei Investment & Holding Co., Ltd., has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Of

Huawei Investment's shares, (a) just over 1% are owned by the founder of Huawei, Mr. Ren Zhengfei, and (b) the remainder are owned by the Union of Huawei Investment & Holding Co., Ltd., which administers an employee stock ownership plan in which around 104,500 employees participate.

4. The Federal Communications Commission is a federal agency.

5. The United States of America is a respondent by statute. *See* 28 U.S.C. § 2344; 47 U.S.C. § 402(a).

6. The order on review potentially impacts the financial interests of the telecommunications industry as a whole, including manufacturers, end users, and service providers in a broad range of industries, such as internet, cellular and landline telephone, and similar telecommunications applications. Such entities may include, among others, the parties that participated in the rulemaking proceedings before the Federal Communications Commission (WC Docket No. 18-89) on which the final designation here at issue (PS Docket No. 19-351) was based, *see* Pet. for Review 11-16, No. 19-60896 (5th Cir. filed Dec. 4, 2019; docketed Dec. 5, 2019); Pet. for Review 12-17, No. 19-60896 (5th Cir. Jan. 7, 2020), as well

as the parties that participated in the final designation proceedings leading to the Final Designation Order here at issue (PS Docket No. 19-351), *see infra* pp. 7-9.

The parties and their counsel are:

Petitioners

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Technologies Co., Ltd.

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Dated: February 5, 2021

Respectfully submitted,

/s/ Michael A. Carvin

*Counsel of Record for Huawei
Technologies USA, Inc., and
Huawei Technologies Co., Ltd.*

CERTIFICATE OF SERVICE

I certify that on February 5, 2021, the foregoing Petition for Review was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system and two copies were sent to the Clerk of Court by overnight United Parcel Service.

I further certify that today:

1. I caused a copy of this Petition for Review to be delivered to the United Parcel Service for service by overnight delivery on:

P. Michele Ellison
Office of General Counsel
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Monty Wilkinson
U.S. Department of Justice
950 Pennsylvania Ave. NW
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2. I caused a copy of this Petition for Review to be delivered to the United Parcel Service for service by overnight delivery on the following parties, who were, to Petitioners' knowledge, "admitted to participate in the agency proceedings," Fed. R. App. P. 15(c)(1):

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Dated: February 5, 2021

Respectfully submitted,

/s/ Michael A. Carvin

*Counsel of Record for Huawei
Technologies USA, Inc., and
Huawei Technologies Co., Ltd.*

CERTIFICATE OF ELECTRONIC SUBMISSION

I certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of any corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: February 5, 2021

Respectfully submitted,

/s/ Michael A. Carvin

*Counsel of Record for Huawei
Technologies USA, Inc., and
Huawei Technologies Co., Ltd.*

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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February 08, 2021

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950 Pennsylvania Avenue, N.W.
Washington, DC 20530

No. 21-60089 Huawei Technol USA v. FCC
Agency No. 20-179

Dear Mr. Johnson and Mr. Wilkinson, Acting U.S. Attorney
General,

You are served with the following document(s) under Fed. R. App.
P. 15:

Petition for Review.

Special Guidance for Filing the Administrative Record: Pursuant to
5th Cir. R. 25.2, Electronic Case Filing (ECF) is mandatory for
all counsel. Agencies responsible for filing the administrative
record with this court are requested to electronically file the
record via CM/ECF using one or more of the following events as
appropriate:

Electronic Administrative Record Filed;
Supplemental Electronic Administrative Record Filed;
Sealed Electronic Administrative Record Filed; or
Sealed Supplemental Electronic Administrative Record Filed.

Electronic records must meet the requirements listed below.
Records that do not comply with these requirements will be
rejected.

- Max file size 20 megabytes per upload.
- Where multiple uploads are needed, describe subsequent files as "Volume 2", "Volume 3", etc.

- Individual documents should remain intact within the same file/upload, when possible.
- Supplemental records must contain the supplemental documents only. No documents contained within the original record should be duplicated.

Electronic records are automatically paginated for the benefit of counsel and the court and provide an accurate means of citing to the record in briefs. A copy of the paginated electronic record is provided to all counsel at the time of filing via a Notice of Docket Activity (NDA). Upon receipt, counsel should save a copy of the paginated record to their local computer.

Agencies unable to provide the administrative record via docketing in CM/ECF may instead provide a copy of the record on a flash drive or CD which we will use to upload and paginate the record.

If the agency intends to file a certified list in lieu of the administrative record, it is *required* to be filed electronically. Paper filings will not be accepted. See Fed. R. App. P. 16 and 17 as to the composition and time for the filing of the record.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see Fed. R. App. P. and 5TH Cir. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from our docket.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Whitney M. Jett, Deputy Clerk
504-310-7772

Enclosure(s)

cc w/encl:

Mr. Michael A. Carvin
Ms. P. Michele Ellison

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 21-60089

Huawei Technologies USA, Incorporated; Huawei Technologies
Company, Limited,

Petitioners

v.

Federal Communications Commission; United States of America,

Respondents