No. 18-70133

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF SANTA CLARA; SANTA CLARA COUNTY CENTRAL FIRE PROTECTION DISTRICT,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

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

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondent Federal Communications Commission moves to dismiss the petition for review filed by the County of Santa Clara and Santa Clara County Central Fire Protection District (collectively, Santa Clara) because the petition is premature, as Santa Clara has conceded in a letter to the Commission.[1] The Court therefore must dismiss the

[1] *See* Letter from James R. Williams, County Counsel, County of Santa Clara, to Thomas M. Johnson, Jr. General Counsel, Federal

petition for lack of jurisdiction.

BACKGROUND

Santa Clara's petition for review challenges the Federal Communications Commission's Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. ----, 2018 WL 305638 (2018) (*Internet Freedom Order* or *Order*).[2] The *Order* was adopted by a vote of the Commission on December 14, 2017, and was released to the public on the Commission's website on January 4, 2018. Because the *Order* results from a rulemaking proceeding, a summary of the *Order* and the text of the amended rules will be—but have not yet been—published in the Federal Register. *See* 5 U.S.C. §§ 552(a)(1)(D)–(E), 553(d); 47 C.F.R. § 0.445(c).

Subject to certain exceptions not relevant here, the exclusive means for challenging FCC orders are set forth in the Administrative Orders Review Act, 28 U.S.C. §§ 2341–2353, commonly known as the Hobbs Act.

Communications Commission (Jan. 16, 2018) (Santa Clara Letter) (attached as Exhibit 1).

[2] Separate petitions for review purporting to challenge the *Internet Freedom Order* have been filed in two other circuits. *See New Am. Found.'s Open Tech. Inst. v. FCC*, Nos. 18-1011 *et al.* (D.C. Cir.); *Free Press v. FCC*, No. 18-1053 (1st Cir.). The FCC is filing materially identical motions to dismiss those petitions.

See 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Under the Hobbs Act, a party aggrieved by such an order may file a petition for review "within 60 days after its entry," with the "entry" of an order indicated by "notice * * * or publication in accordance with [agency] rules." 28 U.S.C. § 2344; *see also* 47 U.S.C. § 405(a) ("The time within which a petition for review must be filed * * * shall be computed from the date upon which the Commission gives public notice of the order"); *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001) ("Entry" of an FCC order "occurs on the date the Commission gives public notice of the order" as provided by agency rules).

Under applicable FCC regulations, *see* 47 C.F.R. § 1.103(b), the relevant date "for purposes of seeking * * * judicial review" of an FCC order is the date of "public notice" under Section 1.4(b) of the Commission's rules. As relevant here, that rule provides that "[f]or all documents in * * * rulemaking proceedings" that are "required by the Administrative Procedure Act to be published in the Federal Register," the time for filing petitions for review begins on "the date of publication in the Federal Register." *Id.* § 1.4(b)(1) (citations omitted). And the *Order* at issue in this case specifically provides that, "pursuant to 47 C.F.R. § 1.4(b)(1), the period for filing petitions * * * for judicial review * * * will

commence on the date that a summary of [the *Order*] is published in the Federal Register." *Order* ¶ 359.

Any petition for review filed before the time prescribed by the Hobbs Act and applicable agency regulations is "incurably premature." *Council Tree Commc'ns v. FCC*, 503 F.3d 284 (3d Cir. 2007) (citing *Western Union Tel. Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985) (Scalia, J.)); *see also Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1359 (9th Cir. 1987) (agreeing with *Western Union* that a "jurisdictional bar * * * applies to petitions filed before a final order has been entered").

ARGUMENT

Because the petition for review was filed prior to publication of the *Order* in the Federal Register, it is—concededly—premature, and must be dismissed for lack of jurisdiction.

1. The time for seeking judicial review of the *Order* under the Hobbs Act and applicable agency regulations does not commence until a summary of the *Order* is published in the Federal Register. That has not yet occurred.

Section 1.4(b)(1) of the Commission's rules states that, "[f]or all documents in * * * rulemaking proceedings" that are "required by the Administrative Procedure Act to be published in the Federal Register,"

such as the *Order* at issue here, the time for filing petitions for review begins on "the date of publication in the Federal Register." *Id.* § 1.4(b)(1) (citations omitted). Consistent with this provision, the *Order* itself specifically advises all interested parties that, "pursuant to 47 C.F.R. § 1.4(b)(1), the period for filing petitions * * * for judicial review * * * will commence on the date that a summary of [the *Order*] is published in the Federal Register." *Order* ¶ 359.

There is nothing controversial or mysterious about this rule. As the D.C. Circuit has held (in dismissing premature challenges to an FCC order also concerning the proper regulatory framework for broadband Internet access), when "[t]he challenged order is a rulemaking document subject to publication in the Federal Register, and is not a licensing decision 'with respect to specific parties,'" it is "subject to judicial review upon publication in the Federal Register." *Verizon v. FCC*, 2011 WL 1235523, at *1 (D.C. Cir. Apr. 4, 2011) (per curiam). For any petition for review filed before that time, "the prematurity is incurable." *Ibid.*

Likewise, in *Western Union*, an FCC order was released to the public on March 8, and a petition for review was filed on March 15, even though the order was not published in the Federal Register until March 21. *See* 773 F.2d at 376. In an opinion by then-Judge Scalia, the D.C.

Circuit held that the language of the Hobbs Act—which requires any petition for review to be filed "within 60 days after * * * entry" of the order—establishes a fixed filing window, rather than a mere deadline, and that a court lacks jurisdiction to consider any petition filed before that period begins. *Id.* at 376–78, 380, 381; *see also Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1092 (D.C. Cir. 1997).

Similarly, in *Council Tree*, an FCC order was released on June 2 and a petition for review was filed on June 7, even though the order was not published in the Federal Register until June 14. *See* 503 F.3d at 286–87. Agreeing with the D.C. Circuit's analysis in *Western Union*, the Third Circuit held that the petition was "incurably premature" because it was filed prior to the notice date set forth in applicable FCC regulations (which, as here, was the date of Federal Register publication). *Id.* at 287–91; *see also id.* at 291 ("Filing a petition before the sixty-day filing period begins * * * deprives us of jurisdiction.").

A different notice date applies to "rule makings of particular applicability" (which need not be published in the Federal Register), 47 C.F.R. § 1.4(b)(3); *see* 5 U.S.C. § 553(b), and to "[l]icensing and other adjudicatory decisions with respect to specific parties that may be * * * contained in particular rulemaking documents." 47 C.F.R.

§ 1.4(b)(1) Note. But neither of those exceptions applies here: Although the *Order* consists in part of a declaratory ruling (which is a form of informal adjudication) concerning the proper regulatory classification of broadband Internet access service, that ruling is one of general applicability, not a ruling of particular applicability or one with respect only to specific parties. And even if there were any ambiguity on this point, the Commission's specific statement that the period for judicial review will commence on the date of Federal Register publication, *Order* ¶ 359, would resolve the issue.

2. Santa Clara has acknowledged in a letter to the Commission that the petition for review here is premature, recognizing that "in the case of this *Order*, the period for filing petitions for judicial review does not commence until the *Order* is published in the Federal Register" and stating that it thus "agrees with the Commission[] * * * that petitions for review * * * are premature at this time." Santa Clara Letter, *supra* note 1, at 1. Santa Clara nevertheless filed its "protective" petition for review "[i]n an abundance of caution" (*ibid.*) because, under purportedly similar circumstances arising from challenges to a 2015 order (the *Title II Order*), the Commission previously forwarded premature petitions to the Judicial

Panel on Multidistrict Litigation, which then held a judicial lottery under 28 U.S.C. § 2112(a) to consolidate all challenges in a single judicial forum.

The judicial lottery statute directs the Commission to notify the Judicial Panel if it receives qualifying petitions for review filed in two or more circuits "within ten days after issuance" of an order. 28 U.S.C. § 2112(a)(1). Under the Commission's rules, however, "[t]he date of issuance of a Commission order for [these] purposes * * * shall be the date of public notice as defined in § 1.4(b) of the Commission's rules, 47 C.F.R. § 1.4(b)." 47 C.F.R. § 1.13(a)(3). And as previously explained, the relevant notice date under Section 1.4(b) of the Commission's rules is the date that a summary of the *Order* is published in the Federal Register, which has not yet occurred.

Under these circumstances, the premature petition here was not filed "within ten days after issuance" of the *Order*. 28 U.S.C. § 2112(a)(1). What's more, conducting a judicial lottery now to determine the judicial forum for all challenges to the *Order*, absent any compelling need to select a single forum at this time, could unfairly reward parties who filed prematurely while potentially excluding from any lottery interested parties who may be waiting to timely file any challenges once the *Order* is published in the Federal Register. *Cf.* Santa Clara Letter at 2 (raising

concerns about "improper exclusion from the lottery of parties waiting until publication in the Federal Register to file petitions").[3] Therefore, consistent with Santa Clara's own position,[4] the Commission does not intend to transmit Santa Clara's petition to the Judicial Panel for a judicial lottery because it does not fall within the terms of the lottery statute.

It is true that, in 2015, the Commission forwarded petitions challenging the *Title II Order* to the Judicial Panel even though those petitions were filed prior to Federal Register publication. But the Commission accompanied those petitions with a letter advising the Judicial Panel that "[i]n our view * * * these petitions are premature" and that "because the order in question was issued in a notice-and-comment rulemaking proceeding, the period for seeking judicial review does not

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[3] *See also Horsehead*, 130 F.3d at 1094 (observing that if a sixty-day filing window were to begin before Federal Register publication, then it would also end less than sixty days after Federal Register publication, potentially depriving interested parties of time for seeking judicial review).

[4] Santa Clara Letter at 2 ("[T]he Commission should refrain from providing notice to the MDL panel of petitions filed prior to publication in the Federal Register, including the County's."); *id.* at 3 ("[W]e urge the Commission not to forward premature petitions to the MDL panel").

commence until the order is published in the Federal Register."[5] Despite the qualification in the cover note, the Judicial Panel nonetheless held a judicial lottery based on the premature petitions.

In light of this experience, the Commission has determined that the best course here is to await timely-filed petitions before referring any such petitions to the Judicial Panel, consistent with the text of the relevant statute and regulations. Moreover, the situation here is different from the one the Commission faced in 2015 in at least two respects.

First, there was arguably some question under the Commission's rules as to when the time for seeking judicial review of the *Title II Order* began. By contrast, to avoid a recurrence of the confusion that arose from that order, the *Order* for which review is sought here expressly clarifies that "the period for filing * * * petitions for judicial review" under the relevant regulations "will commence on the date that a summary [of the order] is published in the Federal Register." *Order* ¶ 359.

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[5] Letter from Richard K. Welch, Deputy Associate General Counsel, Federal Communications Commission, to Jeffrey N. Luthi, Clerk, United States Judicial Panel on Multidistrict Litigation (Mar. 27, 2015) (2015 Lottery Submission Letter) (attached as Exhibit 2).

Second, certain non-rulemaking portions of the *Title II Order* potentially had immediate effect prior to Federal Register publication, and it would have been anomalous if judicial review could not be commenced before the order went into effect. That is not the case here: The *Order* expressly provides that its substantive provisions will not become effective until its information-collection requirements are approved by the Office of Management and Budget and notice is then published in the Federal Register. *See Order* ¶ 354. There is thus no pressing need to select a single judicial forum before publication. Santa Clara's premature petition should accordingly be dismissed for lack of jurisdiction.

Dismissing this premature petition will not deprive Santa Clara of its opportunity to seek judicial review of the *Order* or to participate in any judicial lottery. Instead, it remains free to file a new petition for review *after* the summary of the *Order* is published in the Federal Register. *See Western Union*, 773 F.2d at 380 ("[N]othing prevent[s] [a petitioner] from supplementing its premature petition with a later protective petition * * * as we have repeatedly urged petitioners to do in analogous situations."); *accord Horsehead*, 130 F.3d at 1095.

CONCLUSION

The Court should dismiss Santa Clara's premature petition for review for lack of jurisdiction.

Dated: February 9, 2018

Respectfully submitted,

/s/ *Scott M. Noveck*

Thomas M. Johnson, Jr.
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/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondent
Federal Communications Commission

CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on February 9, 2018, I caused the foregoing Motion to Dismiss for Lack of Jurisdiction to be filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system and by causing an original and three paper copies to be mailed to the Clerk of Court by first-class mail. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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EXHIBIT 1:
Santa Clara Letter

Letter from James R. Williams, County Counsel, County of Santa Clara, to Thomas M. Johnson, Jr. General Counsel, Federal Communications Commission (Jan. 16, 2018)

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January 16, 2018

Thomas M. Johnson, Jr.
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445 12th Street SW
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Re: Protective Petition for Review challenging *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (released January 4, 2018).

Dear Mr. Johnson:

In an abundance of caution, and in light of prior Federal Communications Commission ("Commission") practice, the County of Santa Clara and the Santa Clara County Central Fire Protection District (collectively, "the County") submit the accompanying protective petition for review pursuant to 47 C.F.R. § 1.13. The County agrees with the Commission's stated position that petitions for review of the above-captioned order (the "Order") are premature at this time. As a result, no action by the Commission on these petitions is necessary. However, to protect the County's right to participate in the random selection process of 28 U.S.C. § 2112, if the Commission determines that it is obligated by that statute to provide notice to the judicial panel on multidistrict litigation ("the MDL panel") of any other petition received prior to publication in the Federal Register, we request that the MDL panel be notified of the County's protective petition as well.

To be included in the lottery for multidistrict litigation, petitions for review must be filed within ten days of the issuance of the challenged order. 28 U.S.C. § 2112; 47 C.F.R. § 1.13. The Commission has stated that, in the case of this Order, the period for filing petitions for judicial review does not commence until the Order is published in the Federal Register. Order ¶ 359. The County agrees. The date of issuance is set by 47 C.F.R. § 1.4(b). 47 C.F.R. § 1.13(a)(3). This rule identifies publication in the Federal Register as the relevant date. *Id.* § 1.4(b).

The Commission's obligation to notify the MDL panel of petitions for review is governed by 28 U.S.C. § 2112. That statute provides that "[i]f within ten days after issuance of the order" the Commission receives petitions for review filed in more than one court of appeals, the Commission shall notify the MDL panel of the petitions. Because, as discussed above, the Order in this case is issued as of the date of publication in the Federal Register, we believe the Commission should refrain from providing notice to the MDL panel of petitions filed prior to publication in the Federal Register, including the County's.

However, because the Commission's past practice has not been consistent with this approach, the County is obliged to file the attached protective petition to ensure it is not unfairly denied the opportunity to "avail itself of procedures established for selection of a court in the case of multiple petitions for review" under 28 U.S.C. § 2112(a). 47 C.F.R. § 1.13(a)(1). In particular, this filing is prompted by the Commission's response to the premature petitions challenging *Protecting and Promoting the Open Internet* FCC 15-24 (released Mar. 12, 2015), 80 Fed. Reg. 19738 (Apr. 13, 2015). Within ten days of the Commission's *release* of the order, but well before *publication* in the Federal Register, Alamo Broadband Inc. and United States Telecom Association filed petitions for review in the Court of Appeals for the Fifth Circuit and the Court of Appeals for the District of Columbia Circuit, respectively. The Commission nonetheless notified the MDL panel of these petitions on March 27, 2015, noting its belief that the petitions were premature and stating its position that the ten-day filing period would not commence until publication of the order in the Federal Register. The MDL panel conducted its random selection lottery on March 30, 2015, resulting in the improper exclusion from the lottery of parties waiting until publication in the Federal Register to file petitions.

We recognize that the Commission has expressed its position that the period for filing petitions will not begin until this Order is published in the Federal Register. Order ¶ 359. However, the Commission took that same position in 2015, but apparently concluded that it was obligated to notify the MDL panel of the premature petitions. This resulted in the exclusion from the lottery of potential timely petitions. Further, it is our understanding that the Commission's Office of General Counsel was unable to confirm that it would not forward premature petitions to the MDL panel in this case, as it did in 2015.

To ensure that all timely petitions filed are included in the lottery, we urge the Commission not to forward premature petitions to the MDL panel, and to wait until the proper deadline for doing so under the rules and governing statute. Nevertheless, the County has filed this protective petition for review based on release of the Order in order to preserve its rights and ensure participation in the event of an early lottery.

Sincerely,

JAMES R. WILLIAMS
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Counsel for Petitioners County of Santa Clara and Santa Clara County Central Fire Protection District

EXHIBIT 2:
2015 Lottery Submission Letter

Letter from Richard K. Welch, Deputy Associate General Counsel, Federal Communications Commission, to Jeffrey N. Luthi, Clerk, United States Judicial Panel on Multidistrict Litigation (Mar. 27, 2015)

Federal Communications Commission
Washington, D.C. 20554

March 27, 2015

Jeffery N. Luthi, Clerk
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RE: *Protecting and Promoting the Open Internet*, FCC 15-24
(released March 12, 2015)

Dear Mr. Luthi:

Within ten days after the release of the above referenced order, the Federal Communications Commission was served with two petitions for judicial review of the order (one filed in the D.C. Circuit, the other filed in the Fifth Circuit).

In our view, both of these petitions are premature. We believe that because the order in question was issued in a notice-and-comment rulemaking proceeding, the period for seeking judicial review of the order does not commence until the order is published in the Federal Register. *See* 47 C.F.R. § 1.4(b)(1); *see also Verizon v. FCC*, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011) (dismissing appeals from 2010 Open Internet order as premature because they were filed before the order was published in the Federal Register). The Open Internet order that the FCC released on March 12, 2015 has not yet been published in the Federal Register.

In submitting the attached Notice of Multicircuit Petitions for Review, we are proceeding on the assumption that the issue of whether these petitions are premature should be resolved not by the Judicial Panel on Multidistrict Litigation, but by the court of appeals that the Judicial Panel randomly selects as the venue where the petitions will be consolidated. Once the Judicial Panel chooses that

court, we plan to file with the court a motion to dismiss the petitions as premature. If you believe that our assumption is incorrect, and if you think that we should proceed differently, please let us know.

Respectfully submitted,

/s/ Richard K. Welch

Richard K. Welch
Deputy Associate General Counsel

Attachments