

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

United States Telecom Association,)	
Petitioner,)	
)	
v.)	No. 15-1063 (and
)	consolidated cases)
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**MOTION OF THE FCC TO DISMISS
CASE NOS. 15-1063 AND 15-1078**

The Federal Communications Commission moves to dismiss the petitions for review in Nos. 15-1063 and 15-1078 because they were filed prematurely and the Court thus lacks jurisdiction to consider them.

BACKGROUND

In the order on review, *Protecting and Promoting the Open Internet*, FCC 15-24 (released March 12, 2015), 80 Fed. Reg. 19738 (Apr. 13, 2015) (*Order*), the FCC completed a notice-and-comment rulemaking proceeding by adopting “carefully-tailored rules” to “prevent specific practices” that “are harmful to Internet openness – blocking, throttling, and paid prioritization – as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.” *Order* ¶ 4. The agency also revised its existing transparency rule “to ensure that consumers are fully informed as to whether the [broadband Internet access] services they purchase are delivering what

they expect.” *Id.* In addition, in a declaratory ruling issued as part of the *Order*, the Commission classified broadband Internet access service as a telecommunications service, and it classified mobile broadband Internet access service as commercial mobile service. *Id.* ¶¶ 306-433.

The *Order* was posted on the Commission’s website and released to the public on March 12, 2015.

On March 23, 2015, the Commission was served with two petitions for review of the *Order*: one filed by Alamo Broadband in the United States Court of Appeals for the Fifth Circuit, the other filed by the United States Telecom Association (“USTelecom”) in this Court. Pursuant to the random selection procedure prescribed by 28 U.S.C. § 2112(a), the Commission referred the two petitions to the Judicial Panel on Multidistrict Litigation. In a letter accompanying its submission of the petitions to the Judicial Panel, the Commission noted that it believed both petitions had been filed prematurely, but that it expected to raise that issue in the court that the Judicial Panel selected. The Judicial Panel conducted a lottery and designated this Court as the venue where the cases would be consolidated. The Fifth Circuit transferred Alamo’s petition to this Court on April 1, 2015. By order dated April 2, 2015, the Court consolidated USTA’s and Alamo’s petitions.

Consistent with the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), a summary of the *Order* and the rules it promulgates was published in the Federal Register on April 13, 2015. *See* 80 Fed. Reg. 19738 (Apr. 13, 2015). Since the *Order* was published in the Federal Register, several parties – including USTelecom – have filed petitions for review of the *Order* in this Court.¹ Those petitions have been consolidated with the two originally filed by USTelecom and Alamo prior to Federal Register publication. In addition, on April 14, 2015, Alamo filed another petition for review of the *Order* in the Fifth Circuit, and on April 23, 2015, a group of petitioners including Full Service Network, TruConnect Mobile, Sage Telecommunications LLC, and Telescape Communications, Inc. filed a petition for review of the *Order* in the Third Circuit. On April 30, 2015, the Commission filed motions to transfer the new Third and Fifth Circuit petitions to this Court pursuant to 28 U.S.C. § 2112(a)(5).

ARGUMENT

The Court should dismiss the petitions for review in Case Nos. 15-1063 and 15-1078. Those petitions are jurisdictionally barred because they were filed prior to publication of the *Order* in the Federal Register.

¹ After the *Order*'s publication in the Federal Register, petitions for review of the *Order* have been filed in this Court by eight different parties: USTelecom (No. 15-1086); the National Cable & Telecommunications Association (No. 15-1090); CTIA (No. 15-1091); AT&T (No. 15-1092); the American Cable Association (No. 15-1095); CenturyLink (No. 15-1099); the Wireless Internet Service Providers Association (No. 15-1117); and Daniel Berninger (No. 15-1128).

The Hobbs Act provides that “[a]ny party aggrieved by [a] final order” of the FCC “may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.” 28 U.S.C. § 2344. Pursuant to section 405(a) of the Communications Act, the time for filing a petition for review of an FCC order “shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.” 47 U.S.C. § 405(a). In this context, “[e]ntry” of the FCC’s order “occurs on the date the Commission gives public notice of the order” under its own rules. *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001) (internal quotation marks omitted); *Adams Telcom, Inc. v. FCC*, 997 F.2d 955, 957 (D.C. Cir. 1993) (this Court “has encouraged administrative agencies, whenever possible, to specify – by regulation or in their notices to persons subject to agency action – the beginning of the relevant judicial review period”).

“For all documents in notice and comment ... rulemaking proceedings” – the type of proceeding at issue here – FCC Rule 1.4(b)(1) defines “public notice” to mean “the date of publication in the Federal Register.” 47 C.F.R. § 1.4(b)(1). Therefore, the window for filing petitions for judicial review of the *Order* does not open until the *Order* is published in the Federal Register.

There is only one exception to this rule, but it is not appropriately invoked here. Public notice of “[l]icensing and other adjudicatory decisions with respect to

specific parties that may be associated with or contained in rulemaking documents” is governed by 47 C.F.R. § 1.4(b)(2), which defines the date of public notice as the release date of the order. *See* 47 C.F.R. § 1.4(b)(1) Note. That narrow exception does not apply here. Although the *Order* contains a declaratory ruling (a form of adjudicatory decision), it is a ruling of general applicability, not an adjudicatory decision “with respect to specific parties.” Thus, the date of public notice for the *Order* (a document issued in a notice and comment rulemaking) is the date of Federal Register publication.

In a previous case involving challenges to the 2010 FCC order adopting Open Internet rules, this Court dismissed two appeals as premature because they were filed before the challenged order was published in the Federal Register. *Verizon v. FCC*, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011). The Court should reach the same conclusion here.

The Hobbs Act “imposes a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain.” *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) (citing 28 U.S.C. § 2344). For that reason, any review petition filed prior to Federal Register publication of the *Order* is “incurably premature.” *Small Bus. in Telecomms.*, 251 F.3d at 1024 (quoting *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1490 (D.C. Cir.

1994); *see also Verizon*, 2011 WL 1235523.² Consequently, the petitions for review in Case Nos. 15-1063 and 15-1078 must be dismissed because they were filed too early.³

² Both USTelecom and Alamo acknowledge that their original petitions may have been filed prematurely. USTelecom stated that it was filing a “protective” petition “out of an abundance of caution,” to ensure that it qualified for a judicial lottery under 28 U.S.C. § 2112(a) in the event “the FCC’s Order (or the Declaratory Ruling part of that Order) is construed to be final on the date it was issued (as opposed to after Federal Register publication, which USTelecom believes is the better view).” USTelecom Petition at 2. Similarly, Alamo Broadband stated that it filed its petition for review “within ten days of the release date of the *Order* in an abundance of caution” because (in its view) the fact that the *Order* “contains a declaratory ruling ... creates some ambiguity regarding the date of ‘issuance of the order.’” Alamo Petition at 1 n.1. Both petitioners have since filed timely petitions.

³ Particularly given that the *Order* results from a remand from this Court, *see Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *see also Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), dismissal of the petitions in Nos. 15-1063 and 15-1078 will not affect the appropriateness of the Court’s consideration of the remaining petitions for review. *ACLU v. FCC*, 523 F.2d 1344, 1346 (9th Cir. 1975); 28 U.S.C. § 2112(a)(5).

CONCLUSION

For the foregoing reasons, the Court should dismiss the petitions in Nos. 15-1063 and 15-1078 for lack of jurisdiction.

Respectfully submitted,

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May 8, 2015

No. 15-1063

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UNITED STATES TELECOM ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
AND UNITED STATES OF AMERICA,
Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on May 8, 2015, I electronically filed the foregoing Motion of the FCC to Dismiss Case Nos. 15-1063 and 15-1078 with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the 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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