No. 18-1053

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREE PRESS,

Petitioner,

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 Free Press's petition for review because the petition is premature, as Free Press has conceded in a letter to the Commission.[1] The Court therefore must dismiss the petition for lack of jurisdiction.

[1] *See* Letter from Kevin K. Russell, Counsel for Free Press, Open Technology Institute | New America, and Public Knowledge, to Thomas M. Johnson, Jr. General Counsel, Federal Communications Commission (Jan. 16, 2018) (Free Press Letter) (attached as Exhibit 1).

BACKGROUND

Free Press'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. *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

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[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.); *County of Santa Clara v. FCC*, No. 18-70133 (9th Cir.). The FCC is filing materially identical motions to dismiss those petitions.

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. Counsel for Free Press has acknowledged in a letter to the Commission that the petition for review here is premature, stating that Free Press "do[es] not believe that the *Order* has been entered * * * within the best readings of 28 U.S.C. § 2344, 47 U.S.C. § 405(a), 47 C.F.R. § 1.4(b)(1), or the *Order*." Free Press Letter, *supra* note 1, at 1. Free Press nevertheless filed its "protective" petition for review "in an abundance of caution" (*id.* at 2) 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.* Free Press Letter at 3.[3] The

[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).

Commission therefore does not intend to transmit Free Press'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 commence until the order is published in the Federal Register."[4] 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

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[4] 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).

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.

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. Free Press's premature petition should accordingly be dismissed for lack of jurisdiction.

Dismissing this premature petition will not deprive Free Press 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 Free Press's premature petition for review for lack of jurisdiction.

Dated: February 9, 2018

Respectfully submitted,

/s/ *Scott M. Noveck*

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
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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 First Circuit using the electronic CM/ECF system.

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. Some participants, marked with an asterisk, are not CM/ECF users; I certify that I have caused paper copies of the foregoing document to be served on those participants by first-class mail, unless another attorney for the same party is receiving electronic service.

/s/ *Scott M. Noveck*
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EXHIBIT 1:
Free Press Letter

Letter from Kevin K. Russell, Counsel for Free Press, Open Technology Institute | New America, and Public Knowledge, to Thomas M. Johnson, Jr. General Counsel, Federal Communications Commission (Jan. 16, 2018)

GOLDSTEIN & RUSSELL, P.C.

7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814

January 16, 2018

VIA Email and Regular Mail
Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission
Room 8-A741
445 12th Street, S.W.
Washington, D.C. 20554
Thomas.Johnson@fcc.gov
LitigationNotice@fcc.gov

Re: Protective Petitions for Review Challenging *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (released Jan. 4, 2018)

Dear Mr. Johnson,

I am writing on behalf of Free Press, Open Technology Institute | New America, and Public Knowledge, each of which today filed a protective petition for review in the above matter. Pursuant to 28 U.S.C. § 2112(a)(1) and the relevant agency rules, we have submitted proof of filing of each petition with you in order to ensure that we are included in any lottery that may be conducted under Section 2112(a)(3) premised on petitions filed within ten days of the public release of the Order. The petitions and proof of filing have been submitted under separate cover.

We are writing this letter to urge the Commission not to forward these petitions, or any other premature petitions its receives, to the Multidistrict Litigation ("MDL") panel for inclusion in the lottery until ten days after Federal Register publication.

1. As we explain in our petitions, we do not believe that the Order has been entered, or that public notice of the Order has been provided, within the best readings of 28 U.S.C. § 2344, 47 U.S.C. § 405(a), 47 C.F.R. § 1.4(b)(1), or the Order. Our protective petitions are largely prompted by the Commission's treatment of the two premature petitions filed in previous litigation challenging the order in *Protecting and Promoting the Open Internet*, FCC 15-24 (released Mar. 12, 2015), 80 Fed. Reg. 19,738 (Apr. 13, 2015). Alamo Broadband Inc. and the United States Telecom Association each filed protective petitions within ten days of public release but before publication in the Federal Register. The Commission took the position (rightly, in our view) that each petition was incurably premature, yet nonetheless forwarded both to the MDL panel pursuant to 28 U.S.C. § 2112(a)(3). The MDL panel then held the lottery on March 30, 2015, well before publication in the Federal Register on April 13, 2015. *See* attached MDL Consolidation Order; 80

Fed. Reg. 19,738. The result was the exclusion from the lottery of any party who was waiting to file its petition until the proper time.

We recognize that the Commission has attempted to remove any ambiguity about the commencement of the period for filing petitions for review in its new Order. But we fear that others may yet file premature petitions, either out of ignorance or in an attempt to game the lottery. If that happened and the Commission followed its prior precedent of forwarding those premature petitions to the MDL, we would risk being left out of the lottery.

2. We thus have filed the petitions in an abundance of caution to protect our rights, yet realize that doing so might result in unfairness to others if the Commission follows the pattern from the last round of litigation. In our view, the Commission can and should avoid both unfairness to us and unfairness to others by declining to forward these and any other petitions its receives until ten days after Federal Register publication.

The relevant statute provides:

> (1) If within ten days after **issuance of the order** the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. …
>
> …
>
> (3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly **after the expiration of the ten-day period specified in that sentence**, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. …

28 U.S.C. § 2112(a)(1), (3) (emphasis added).

If the Commission takes the view that the "issuance of the order" occurs upon Federal Register publication, then premature petitions would seemingly fall outside the scope of subsection (a)(1). But even setting that aside, the Commission is directed *not* to forward any petitions it receives until *after* the expiration of the ten-day period following "issuance of the order" as specified in subsection (a)(1). *See* 28 U.S.C. § 2112(a)(3). Accordingly, even if the Commission worried about the appropriateness of refusing to forward premature petitions to the MDL panel *at all*, it should at least adhere to its interpretation of the "issuance" date for purposes of the *timing* for forwarding the petitions for the lottery.

Holding all the petitions until ten days after Federal Register publication would avoid the possibility of excluding from the lottery timely filed petitions and save the MDL the prospect of potential litigation over its authority to hold the lottery prior to that point (or challenges to the result of the lottery afterwards). If some party believes the Commission is compelled to forward a premature petition earlier than that, it can file a mandamus petition and have the issued settled by a court.

Sincerely,

Kevin K. Russell
Counsel for Free Press,
Open Technology Institute | New America,
and Public Knowledge

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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
United States Judicial Panel
on Multidistrict Litigation
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Room G-255, North Lobby
Washington, D.C. 20544

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