No. 23-1223

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

INDIAN PEAK PROPERTIES, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders of
the Federal Communications Commission

RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondents—the Federal Communications Commission and the United States of America—respectfully move to dismiss the petition for review filed by Indian Peak Properties. Indian Peak asks this Court to "review" and "reverse" letter rulings issued by staff in two FCC bureaus, acting under delegated authority, denying Indian Peak's requests for relief under an FCC rule governing over-the-air reception devices. *See* Letter from Garnet Hanly & Maria Mullarkey, FCC, to Toneata Martoccio,

Counsel for Indian Peak (July 18, 2022) (*Letter Ruling*), *recon. denied*, Letter from Garnet Hanly & Maria Mullarkey, FCC, to Julian Gehman, Counsel for Indian Peak (Dec. 13, 2022) (*Recon. Letter*), *appl. for Comm'n review pending* (filed Jan. 12, 2023). Although Indian Peak has sought further administrative review of those letter orders by the Commission, it now seeks judicial review without awaiting the Commission's decision.[1]

This Court has jurisdiction to review only final orders of the Commission. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Because the Commission has not yet ruled in this matter, Indian Peak's petition for judicial review is incurably premature and must be dismissed for lack of jurisdiction. *See ibid.*; *see also* 47 U.S.C. § 155(c)(4)–(7) (requiring Commission review of staff action as "a condition precedent to judicial review").

BACKGROUND

A. Statutory And Regulatory Background

The FCC's rule governing over-the-air reception devices (Rule), 47 C.F.R. § 1.4000, preempts certain state or local restrictions on antennas that are used to receive either video programming or fixed-wireless

[1] The *Letter Ruling*, the *Reconsideration Letter*, and the application for Commission review of those letter rulings are all reproduced as attachments to Indian Peak's petition for review.

communications services. As amended, the Rule generally prohibits (subject to certain exceptions) "[a]ny restriction * * * that impairs the installation, maintenance, or use of" covered antennas or their supporting masts. *Id.* § 1.4000(a)(1). Generally, for an antenna to be covered by the Rule, the antenna user must "ha[ve] a direct or indirect ownership or leasehold interest in the property" where the antenna is located, *id.* § 1.4000(a)(1), and the antenna must be used only for certain specified purposes, *see id.* § 1.4000(a)(1)–(2).

In addition to dedicated antennas that serve a single customer location, the Rule extends to "hub or relay antenna[s]" that "distribut[e] * * * fixed wireless services to multiple customer locations"—but only "as long as the antenna serves a customer on whose premises it is located." *Id.* § 1.4000(a)(1)(ii)(A) & (a)(5). By extending protection to hub-or-relay antennas only if they serve a customer on the premises, the Rule ensures that hub-or-relay antennas receive neither more nor less protection than traditional, dedicated antennas. *See Updating the Commission's Rule for Over-the-Air Reception Devices*, 36 FCC Rcd. 537, 540 ¶ 8, 541–42 ¶ 11 (2021).

When a dispute implicating the Rule arises, parties may seek a ruling either from the Commission or from any "court of competent jurisdiction." 47 C.F.R. § 1.4000(e). To seek a ruling from the Commission, a party "must comply with the procedures in [47 C.F.R. § 1.4000](h)" by filing a petition for declaratory ruling and a supporting affidavit setting forth "[a]ll allegations of fact" identifying a dispute implicating the Rule. *Id.* § 1.4000(e) & (h). If the agency receives a qualifying petition, it will initiate a proceeding by "put[ting] [the petition] on public notice" to solicit comments from other interested parties. *Id.* § 1.4000(e). "[I]f a proceeding is initiated" by the agency, "the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review," unless the restrictions "pertain[] to safety [or] historic preservation." *Id.* § 1.4000(a)(4).

B. Factual Background

In December 2004, the City of Rancho Palos Verdes granted a conditional use permit to James A. Kay, Jr., authorizing him to install and operate five roof-mounted antennas on a single-family home on Indian Peak Road. *Letter Ruling* at 1 & n.2. Kay then transferred his interest in the property to Indian Peak Properties LLC, a limited liability company that is wholly owned by Kay.

Upon receiving a complaint in August 2014 about the number of antennas on the property, the City discovered that there were as many as 17 antennas and supporting masts installed on the roof. After extended negotiations to revise the conditional use permit were unsuccessful, and Indian Peak refused to comply with the original terms of the permit, the City revoked the permit in August 2018.[2]

In November 2018, after Indian Peak failed to remove the unpermitted antennas, the City filed a nuisance-abatement action in Los Angeles Superior Court, and Indian Peak filed a parallel action against the City. Indian Peak did not seek an FCC determination at that time as to whether the City's actions violated the Rule governing over-the-air-reception devices; it instead chose to invoke the Rule as a federal-preemption defense in the state-court actions. In November 2019, the superior court entered summary judgment in favor of the City and rejected Indian Peak's defense under the Rule.[3]

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[2] *See generally* Rancho Palos Verdes, Cal., Res. No. 2018-61 (Aug. 21, 2018).

[3] Minute Order, *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. 18STCV03781 (Cal. Super. Ct. Nov. 20, 2019); *see also* Order Denying Petition for Writ of Mandate, *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. 18STCP02913, slip op. at 8–9 (Cal. Super. Ct. Aug. 9, 2019).

Indian Peak appealed the superior court's decision.[4] In November 2021, the California Court of Appeal affirmed in pertinent part the superior court's judgment for the City, including the denial of Indian Peak's defense under the Commission's Rule.[5] On remand, the superior court entered final judgment for the City and entered an injunction requiring Indian Peak to remove the unpermitted antennas.[6] Indian Peak apparently removed the antennas in July 2022. *See Recon. Letter* at 3 & nn.19–20.

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[4] In parallel, after the City Council directed City staff to proceed with abatement of the nuisance, Indian Peak filed a separate action in federal district court seeking a determination that the Rule barred the City from removing the disputed antennas. The district court denied Indian Peak's requests for a temporary restraining order and for a preliminary injunction. *See* Order Denying Appl. for TRO, *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. Feb. 13, 2020); Order Denying 2d Appl. for TRO, *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. Apr. 17, 2020); Order Denying Prelim. Inj., *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. July 15, 2020). Indian Peak then voluntarily dismissed its district court complaint.

[5] *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. B303638, 2021 WL 5316348, slip op. at 33–37 (Cal. Ct. App. Nov. 16, 2021); *see also Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. B303325, 2021 WL 5316457 (Cal. Ct. App. Nov. 16, 2021) (denying appeal in the parallel action).

[6] Judgment After Appeal, *City of Ranchos Palos Verdes v. Indian Peak Props., LLC*, No. 18STCV03781 (Cal. Super. Ct. Nov. 1, 2022).

C. Background Before The Agency

In April 2020, after its initial losses in both state and federal court and while awaiting a decision in its state-court appeal, Indian Peak filed a petition for declaratory ruling seeking protection from the FCC for eleven separate roof-mounted antennas on the residence. In April 2022, FCC staff issued a decision "dismiss[ing] the [p]etition without prejudice because it fail[ed] to provide sufficient information to support a showing that each antenna m[et] all of the criteria required for protection under the [Rule]."[7]

In May 2022, Indian Peak filed five new petitions for declaratory ruling, three of which—concerning what Indian Peak labels Antennas 2, 3, and 4—are at issue here. These three antennas reportedly provided broadband internet service. The petitions state that Antennas 3 and 4 are "hub or relay" antennas and that Antenna 2 is not. *Letter Ruling* at 3–4.

1. The *Letter Ruling*

In July 2022, FCC staff issued a *Letter Ruling* dismissing each of Indian Peak's underlying petitions because the allegations on which they

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[7] Letter from Garnet Hanly, FCC, to Toneata Martocchio, Counsel for Indian Peak (Apr. 22, 2022).

are based lack "sufficient detail, clarity, and accuracy * * * to identify * * * a dispute [that] implicates the [Rule]." *Letter Ruling* at 9.[8]

As to the three antennas at issue here, the *Letter Ruling* found that the petitions make no showing that the antennas "serve[] a customer on [the] premises," 47 C.F.R. § 1.4000(a)(5), or identify a "user [who] has a direct or indirect ownership or leasehold interest in the property," *id.* § 1.4000(a)(1). *See Letter Ruling* at 3–6. The *Letter Ruling* explained that the only end-user that the petitions clearly identify is James Kay, but "[i]t is not evident from the Petitions whether [Mr.] Kay qualifies as a user, since he does not claim to reside at the property or regularly use the service there." *Id.* at 6.

The *Letter Ruling* acknowledged that a subsequent "supplement" to the petitions states that the antennas also served two other companies, Fisher Wireless and Comm Enterprises, that are owned by or associated

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[8] One month after filing the underlying petitions, and without awaiting a decision from the agency, Indian Peak filed a petition for mandamus seeking immediate relief from this Court. *In re Indian Peak Props., LLC*, No. 22-1098 (D.C. Cir. filed June 3, 2022). After the *Letter Ruling* was issued, the Court dismissed the mandamus petition as moot, and further stated that "[i]nsofar as Indian Peak also request[ed] additional forms of relief," Indian Peak had shown no "clear and indisputable entitlement to the relief sought." Order, *In re Indian Peak Props. LLC*, No. 22-1098 (D.C. Cir. Sept. 2, 2022).

with Kay. *Id.* at 5–6. But the *Letter Ruling* observed that these companies appear to be communications service providers whose business is to provide communications service to others, not the ultimate end-users of service provided by the antennas. *Ibid.*; *see also* Appl. for Rev. at 10–11 (these companies "use the broadband service from the antennas to help serve offsite customers"). The *Letter Ruling* construed relevant Commission precedent to provide that intermediate service providers, as opposed to actual end-users, do not qualify as antenna users or customers for purposes of the Rule. *Letter Ruling* at 5 & n.34. Indian Peak has not identified who the companies' ultimate customers are.

Reasoning that the petitions do not meaningfully identify the users or customers served by the antennas, or how those users receive service at the premises where the antennas are located, the *Letter Ruling* dismissed the petitions as facially deficient without initiating a proceeding. *Letter Ruling* at 8–10.

2. The *Reconsideration Letter*

Indian Peak sought reconsideration. In doing so, Indian Peak again did not identify any actual end-users at the property who receive service through the antennas. *See Recon. Letter* at 3. Indian Peak instead

sought to identify Fisher Wireless and Comm Enterprises as themselves "customers, as well as end users." *Id.* at 4 (quoting Pet. for Recon. at 4).

FCC staff denied Indian Peak's request for reconsideration in the December 2022 *Reconsideration Letter*. In doing so, the Bureau reaffirmed that the Rule "does not protect antennas where the user is a service provider that merely provides communications service to others not located on the premises," and that, "in all cases, the rule requires that there be an antenna user on the premises." *Id.* at 4.

3. Indian Peak's Application for Review

In January 2023, Indian Peak filed an application for review by the Commission. The Commission has not yet acted on the application.

ARGUMENT

1. Indian Peak's petition for review must be dismissed for lack of jurisdiction because it seeks to challenge letter rulings issued by FCC staff acting on delegated authority, not a final order by the Commission.

The Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. §§ 2341 *et seq.*, vests the courts of appeals with jurisdiction to review only "final orders of the Federal Communications Commission made reviewable by Section 402(a) of" the Communications Act. 28 U.S.C. § 2342(1). The cross-referenced section of the

Communications Act in turn provides for review only of "order[s] of the Commission" itself. 47 U.S.C. § 402(a). And "[w]hen Congress says 'the Commission,' it means the Commission [itself]"—not "delegated subdivisions of the Commission." *NTCH, Inc. v. FCC*, 877 F.3d 408, 413 (D.C. Cir. 2017).

In addition, when the Commission delegates authority to agency staff, *see* 47 U.S.C. § 155(c)(1), the Communications Act requires that "an application for review [by the full Commission] shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation," *id.* § 155(c)(7); *accord* 47 C.F.R. § 1.115(k). This Court has construed that provision to require the applicant to also "await the Commission's disposition" before it may seek further review. *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (per curiam). This requirement "prevents a party from appealing directly to this Court from a decision made by a delegated authority." *Environmentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011).

Because the Commission has not yet decided Indian Peak's application for Commission review of the letter rulings, those orders are "nonfinal for purposes of judicial review," and Indian Peak's "petition for review of the order[s] is incurably premature." *Int'l Telecard Ass'n*, 166

F.3d at 388. The Court's "jurisdiction in this case extends only to 'final orders' of the Commission, 28 U.S.C. § 2342(1)." *Flat Wireless, LLC v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019). "Because the petition[] for review do[es] not seek to challenge a final agency action," the Court "do[es] not have jurisdiction to consider petitioners' premature challenge to any future resolution" by the Commission. *Verizon Tel. Co. v. FCC*, 453 F.3d 487, 500 (D.C. Cir. 2006). Indian Peak's petition for review of the letter rulings must therefore be dismissed for lack of jurisdiction. *See NTCH*, 877 F.3d at 412.

None of the cases cited in Indian Peak's petition for review supports its request for the Court to review its dispute on the merits when the full Commission has not yet done so. *Friedman v. FAA* arose after an agency "clearly communicated that it will not reach a determination on a petitioner's submission"—a situation not present here.[9] 841 F.3d 537,

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[9] The petition for review states (at 2) that Indian Peak's counsel sent emails seeking status updates to two officials in the FCC Chairwoman's Office (one of which also copied the FCC Secretary) and did not receive a response. Neither of those officials was previously involved in this matter, and the lack of response from those officials does not mean that the Commission has silently disposed of Indian Peak's petition for review. Indian Peak's counsel apparently did not copy or otherwise attempt to reach the FCC staff who had previously (cont'd)

543 (D.C. Cir. 2016). *Sierra Club v. Thomas* considered—and denied—a request for an injunction ordering the agency to reach a decision in the underlying proceeding within 90 days, not a request for the court to review and rule on the underlying merits. 828 F.2d 783 (D.C. Cir. 1987). Indeed, the relevant case cited by *Sierra Club* (and in turn by Indian Peak) acknowledges that "the role of the court is merely to ensure that [the agency acts] within a reasonable time" because "meaningful appellate review of [the merits] is impossible in the absence of any record" setting forth the basis for the agency's granting or withholding of relief. *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099–100 (D.C. Cir. 1970). And *Telecommunications Research & Action Center v. FCC* (*TRAC*) explains that for claims of undue delay by the FCC, the proper course is to seek a writ of mandamus ordering the agency to act within a reasonable time, not judicial review of the merits in the absence of any final Commission order. 750 F.2d 70, 76 (D.C. Cir. 1984).

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communicated with him about this matter, nor did he submit anything to the dedicated OTARD@fcc.gov mailbox for matters involving the over-the-air reception device rule. Had counsel done so, he would have been advised that Indian Peak's application for review remains under consideration before the agency.

2. Absent a final order from the Commission, Indian Peak may seek relief (if at all) only under the All Writs Act, and could only seek an order directing the Commission to act sooner on its application for review—not judicial review of the underlying merits. *See TRAC*, 750 F.2d at 74–79.

But Indian Peak has not invoked the All Writs Act, nor even attempted to meet the extraordinary standard for mandamus relief—a showing it could not plausibly make here in any event. Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary cases.'" *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004); *see In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). For claims of unreasonable delay, mandamus is available "only when agency delay is egregious." *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988).

To start, Indian Peak has made no showing that the nine months the Commission has so far taken to consider this matter has been unreasonable—much less egregious. Indian Peak has sought Commission review of staff action on several underlying petitions, each accompanied by numerous technical and legal exhibits, arising out of a long-running dispute with the City that has a lengthy and complex

factual and procedural history. *Cf. Sierra Club*, 828 F.2d at 798 (for matters presenting "complex scientific, technological, and policy questions," the agency "must be afforded the amount of time necessary to analyze such questions"). And courts "are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." *Id.* at 797. Considering the number of other matters that FCC staff handle, many "of a higher or competing priority," *TRAC*, 750 F.2d at 80, it is unsurprising that the Commission might require months or longer to thoroughly investigate and deliberate on this matter.

Nor does the record here evince any need for urgent action. "[T]he interests at stake here are commercial, not directly implicating human health and welfare," and so "the need to protect them through the exceptional remedy of mandamus is therefore lessened." *Monroe*, 840 F.2d at 945. The antennas at issue have been removed and are not currently operational; no one is currently relying on them for service, so there is no risk of any service interruption in the absence of Commission action. And although Indian Peak is no longer receiving broadband service from the antennas, it has apparently now been able to obtain a wireline broadband connection instead. *See* Appl. for Rev. at 6.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction.

Dated: October 5, 2023

Respectfully submitted,

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