

No. 23-14125

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

INSURANCE MARKETING COALITION LIMITED,
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 the Federal Communications Commission moves to dismiss this Petition for Review because it was filed prematurely, and the Court therefore lacks jurisdiction to consider it. Undersigned counsel is authorized to state that Petitioner Insurance Marketing Coalition Limited and Respondent the United States of America both take no position on this Motion.

1. The Petition is premature.

The Petition for Review challenges the FCC’s Report and Order, *Targeting and Eliminating Unlawful Text Messages, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Advanced Methods to Target and Eliminate Unlawful Robocalls*, FCC CG Docket Nos. 21-402, 02-178, 17-59 (Dec. 13, 2023) (“*Order*”), Petition Attachment. The *Order* was adopted by the Commission on December 13, 2023, and was released to the public on the Commission’s website on December 18, 2023. 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—filed for public inspection and published in the Federal Register. *See* 5 U.S.C. §§ 552(a)(1)(D)–(E), 553(d); 47 C.F.R. § 0.445(c).

On December 21, 2023, Petitioner filed what it characterized as a “protective” petition for review, Petition at 2, challenging the *Order* under the Administrative Orders Review Act, 28 U.S.C. §§ 2341–2353, commonly known as the Hobbs Act, *see id.* at 1 (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)). The Hobbs Act directs an agency to give notice of a new rule “by service or publication in accordance with its rules,” and a party aggrieved by that order may file a petition for review “within 60

days after its entry.” 28 U.S.C. § 2344. Courts have found that “[e]ntry” of an FCC 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); see *Adams Telcom, Inc. v. FCC*, 997 F.2d 955, 957 (D.C. Cir. 1993) (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). Thus, the D.C. Circuit found in *Western Union Tel. Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985) (Scalia, J.), that FCC rulemaking orders are reviewable only when published in the Federal Register, and that any petition filed before publication in the Federal Register is “incurably premature” and must be dismissed for lack of jurisdiction. *Id.* at 378; see also *Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 101 (D.C. Cir. 2020) (“[W]e look to the agency’s governing statutes and regulations to determine when a final decision has been entered.”). So far as we are aware, every

other court to reach this issue has come to the same conclusion. *See Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 290 (3d Cir. 2007) (characterizing the interpretation of “entry” reflected in the FCC’s rules as “eminently reasonable”); *see also Mesa Airlines v. United States*, 951 F.2d 1186, 1188 (10th Cir. 1991) (citing *Western Union* with approval); *Sierra Club v. U.S. Nuclear Regul. Comm’n*, 825 F.2d 1356, 1363 (9th Cir. 1987) (same).

2. No cases have created “uncertainty” on this issue.

Because Petitioner filed its petition before the challenged order has been published in the Federal Register—and thus before “public notice” under the Commission’s rules and “entry” under the Hobbs Act has occurred—the petition must be dismissed.¹ Petitioner acknowledges this “traditional[]” interpretation, but expresses concern that recent D.C. Circuit decisions have “created uncertainty” about when a rule is

¹ As of this filing, the rules in question still have not been published. But even after publication occurs, this petition must still be dismissed because the timeliness of a petition, and this Court’s jurisdiction, must be judged at the time of filing. *See PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299, 1306 (11th Cir. 2016) (“It has long been the case that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought.’” (quoting *Grupo Dataflux v. Atlas Glob. Grp., LP*, 541 U.S. 567, 570 (2004))).

“entered.” Petition at 2 (citing *Humane Society v. Dep’t of Agric.*, 41 F.4th 564, 571 (D.C. Cir. 2022); *GPA Midstream Ass’n v. U.S. Dep’t of Transp.*, 67 F.4th 1188, 1195 (D.C. Cir. 2023)).

That concern is unfounded. Neither of the cases Petitioner cites interprets the Hobbs Act or the FCC’s regulations governing public notice of a rulemaking order. They deal with the narrow issue of the status of a rule in the window after an agency has filed it for public inspection with the Office of the Federal Register but before publication in the Federal Register. *See GPA Midstream*, 67 F.4th at 1195 (“A final rule is not duly fixed at least until it is filed for public inspection with the Office of the Federal Register.”); *Humane Society*, 41 F.4th at 569 (filing a rule for public inspection with the Office of the Federal Register triggered notice and comment obligation before withdrawal). That issue is very different from the question of when entry of an FCC (or other agency) order occurs for purposes of the Hobbs Act. Thus, whatever conceivable relevance those cases might have in other circumstances, they are irrelevant here because this Petition was filed both before publication in the Federal

Register and before the agency filed a summary for public inspection with the Office of the Federal Register.²

3. Dismissal will avoid the risk of prejudice to other parties who may wish to challenge the *Order* in other circuits.

Dismissing this case will not prejudice Petitioner. Petitioner may file a timely petition once the rule is published in the Federal Register, and it has stated that it intends to do so. Petition at 2. Its members suffer no prejudice in the interim because the rule is not effective until 30 days after it is published in the Federal Register. *Order* ¶ 109.

By contrast, any parties who intend to challenge this rule in other circuits—and who are awaiting Federal Register publication, as the law requires—may be prejudiced unless this case is dismissed. Allowing this case to proceed, or even holding it in abeyance, would subvert the statutorily prescribed process for a judicial lottery. The judicial lottery statute sets out procedures to select a forum when two or more qualifying

² After an agency has adopted a rule, it cannot immediately file it for publication in the Federal Register. Instead, it must prepare a summary, and the Office of the Federal Register must accept that the summary accords with the Office's guidelines. See Office of the Federal Register, Document Drafting Handbook, *available at* <https://www.archives.gov/federal-register/write/ddh>. This often iterative process may last several weeks.

petitions challenging the same order are filed in different circuits. 28 U.S.C. § 2112(a)(1). It directs an agency to file those petitions with the Judicial Panel on Multidistrict Litigation, which consolidates the petitions and files them in one of the circuits, selected by lottery. *Id.* This process alleviates the inefficient and unfair “race to the courthouse” that occurred under the previous “first-to-file” regime. *See Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012); *Loc. Union 36, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 631 F.3d 23, 27 (2d Cir. 2010).

An agency is directed to file petitions with 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, “[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). Again, Section 1.4(b) defines public notice of rulemaking orders as the date that a summary of the *Order* is published in the Federal Register. Thus, publication in the Federal Register is the trigger to open the 10-day window during which competing petitions may be filed for entry into the lottery.

However, if this case is not dismissed, and if parties later file petitions in other circuits within 10 days of Federal Register publication, there could be confusion about whether a lottery should be held. For example, parties wishing to see the case proceed in the Eleventh Circuit (Petitioner or others) might argue that those later petitions were too late to trigger a lottery. The resulting uncertainty would be counter to Congress's purpose in enacting the lottery procedure, and might incentivize other parties to file similar premature petitions in the future. Accordingly, this Court should follow the long-established principle of *Western Union* and dismiss this case as incurably premature.

Dated: January 19, 2024

Respectfully submitted,

/s/ Matthew J. Dunne

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, movant Federal Communications Commission hereby states that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, known to the FCC:

1. Aggarwal, Sameer
2. Boeglin, John A.
3. Citrin, Sarah E.
4. Covington & Burling LLP
5. Dunne, Matthew J.
6. Dori, Yaron
7. Ellison, P. Michele
8. Federal Communications Commission
9. Glover, Matthew J.
10. Insurance Marketing Coalition Limited;
11. King, Kevin F.
12. Lewis , Jacob M.
13. United States of America

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/s/ Matthew J. Dunne
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Counsel for Respondent
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