24-3137 (lead case), 24-3388, 24-3415, 24-3442, 24-3469

In the United States Court of Appeals for the Eighth Circuit

CUSTOM COMMUNICATIONS, INC., D/B/A CUSTOM ALARM, ET AL.

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petitions for Review of an Order of the Federal Trade Commission

PETITIONERS' OPPOSITION TO MOTION TO INTERVENE BY MAIN STREET ALLIANCE

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INTRODUCTION

Main Street Alliance's egregiously untimely motion to intervene in these cases in the middle of merits briefing should be denied. Petitioners filed their petitions for review of the Federal Trade Commission rule on October 22, 2024. Under the Federal Rules of Appellate Procedure, motions to intervene were due 30 days later, on November 21, 2024. That deadline came and went, and Main Street Alliance sat on the sidelines. The presidential election occurred on November 5, 2024. After that date, it was obvious to the world that Commission leadership would change. Even then, Main Street Alliance still sat on the sidelines. In December 2024, President-elect Trump announced that Commissioner Ferguson would be the next Chairman of the Commission. But Main Street Alliance continued to sit on the sidelines.

Now, 106 days after petitions for review were filed—after substantial litigation has occurred and while merits briefing is in progress under a tight schedule ordered by the Court—Main Street Alliance has surfaced with nothing more than speculation about how an election that happened months ago might affect the Commission's willingness to defend the Rule. It is far too late, far too disruptive, and

far too prejudicial to allow Main Street Alliance to enter the case at this late juncture. And it is unnecessary, because the Commission is already in the case and able to defend its Rule and because Petitioners have no objection to Main Street Alliance's participation as amicus. Main Street Alliance's motion to intervene should be denied.

BACKGROUND

Petitioners are businesses and trade associations that seek review of the Federal Trade Commission's "Negative Option Rule." 89 Fed. Reg. 90,476 (Nov. 15, 2024). Petitioners filed petitions for review on October 22, 2024, in four federal courts of appeals pursuant to Federal Rule of Appellate Procedure 15. *See Elec. Sec. Ass'n v. FTC*, 24-60542 (5th Cir.); *Mich. Press Ass'n v. FTC*, 24-3912 (6th Cir.); *Custom Commc'ns, Inc. v. FTC*, 24-3137 (8th Cir.); *Chamber of Commerce of the United States v. FTC*, No. 24-13436 (11th Cir.). These filings were the subject of national and trade press attention.[1] When the Commission didn't forward the

[1] *See, e.g.*, Jody Godoy, *Telecom Group Sues To Block FTC's "Click To Cancel" Rule*, Reuters (Oct. 23, 2024), https://tinyurl.com/53pxasae; Shweta Watwe, *Trade Associations Challenge FTC's Final Click-to-Cancel Rule*, Bloomberg Law (Oct. 23, 2024), https://tinyurl.com/msrk5rkf; Lauren Berg, *Media, Small Biz Orgs. Fight FTC's "Click To Cancel" Rule*, Law360 (Oct. 22, 2024), https://tinyurl.com/4xcnbfdt.

petitions to the Judicial Panel on Multidistrict Litigation ("JPML"), the Petitioners in the Fifth Circuit and the Commission litigated the issue, resulting in the Fifth Circuit issuing a mandamus order against the Commission. *In re Elec. Sec. Ass'n*, No. 24-60570 (5th Cir. filed Nov. 19, 2024). The JPML subsequently ran the required lottery, *see* 28 U.S.C. § 2112(a), which resulted in the selection of this Court to hear the challenges. Consolidation Order, *In re Federal Trade Commission, Negative Option Rule*, MCP No. 192 (Nov. 21, 2024). The JPML's consolidation order directed the Commission to file the record "pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure." *Id*. The petitions from the Fifth, Sixth, and Eleventh Circuits were then transferred to and consolidated in this Court. *See* General Docket, 24-3137 (consolidated with 24-3388, 24-3415, and 24-3442).

In this Court, Petitioners moved to stay the Rule pending judicial review pursuant to Federal Rule of Appellate Procedure 18. Stay Mot. (Dec. 5, 2024). Throughout December, the parties briefed the stay motion, conferred on the administrative record, and negotiated a joint proposed merits briefing schedule. Letter Regarding Joint Proposed Briefing Schedule (Jan. 1, 2025). This Court denied the stay motion on

January 17. Order (Jan. 17, 2025). On that same date, the Court entered a consolidated merits briefing schedule that compressed the proposed schedule and emphasized that no extensions would be granted. Consolidated Briefing Schedule (Jan. 17, 2025). Merits briefing is now well underway. The parties have negotiated the joint appendix and Petitioners filed their opening brief and the joint appendix on February 14. Pet. Br. (Feb. 14, 2025).

One hundred six days after this litigation began, Main Street Alliance moved to intervene on February 5.

ARGUMENT

Main Street Alliance's motion to intervene is egregiously untimely. It has failed to show that its interests are not adequately represented by the FTC. And intervention at this late date would be highly disruptive and prejudicial.

I. The Motion To Intervene Is Egregiously Untimely.

Main Street Alliance missed the deadline for intervention—by *almost three months*. And no good cause justifies Main Street Alliance's egregious delay.

A. Main Street Alliance Missed Rule 15(d)'s Deadline By Almost Three Months.

Rule 15(d) of the Federal Rules of Appellate Procedure sets a mandatory deadline for motions to intervene in proceedings in the courts of appeals for judicial review of agency orders. It provides that any motion to intervene "*must* be filed within 30 days after the petition for review is filed." Fed. R. App. P. 15(d) (emphasis added). The only exception allowed under the Rule is when "a statute provides another method," *id.*, and that exception does not apply here.

A straightforward application of Rule 15(d) and settled appellate practice requires denying the motion. Petitions for review were filed on October 22, 2024. Any motion to intervene was due 30 days later, on November 21, 2024. But Main Street Alliance did not file its motion to intervene until February 5, 2025—two-and-a-half months after Rule 15(d)'s mandatory deadline. Therefore, the motion to intervene was well out of time and must be denied.

Main Street Alliance does not cite any statutory exception. Instead, it makes the frivolous argument that Rule 15(d) does not apply to rulemaking challenges under the Administrative Procedure Act ("APA"). Specifically, Main Street Alliance argues that Rule 15(d) does not govern

because it speaks of an "agency order" and here, the petitions for review challenge an agency rule, not an agency order. Mot. 14. The argument is absurd as it would leave the Federal Rules without essential procedures for petitions for review of agency rules. For decades, it has been settled that Rule 15—and also Rules 16–20, which use the same "order" language—apply in full to petitions seeking review of agency rules as well as agency adjudications.

For example, the D.C. Circuit has explained that Rule 15 broadly addresses intervention "in proceedings to review agency action." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276-77 (2022) (explaining that Rule 15 "concerns the review of agency action"). "[A]gency action" is a category broad enough to encompass *both* rulemakings *and* individualized adjudications. Thus, circuits around the country have routinely relied on Rule 15 in challenges to agency rules. *See, e.g.*, Petn. for Rev. at 1, *Zimmer Radio of Mid-Missouri v. FCC*, No. 24-1380 (8th Cir. Feb. 23, 2024) (pending case in this Court relying upon Rule 15 for review of agency rules); Petn. for Rev. at 1, *Minn. Telecom All. v. FCC*, No. 24-1179

(8th Cir. Jan. 30, 2024) (same); Petn. for Rev. at 1, *North Dakota v. EPA*, 12-1844 (8th Cir. Apr. 9, 2012) (same for case this Court adjudicated on the merits), *decided*, 730 F.3d 750 (8th Cir. 2013); *see also, e.g., Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1108 (5th Cir. 2024); *Heal Utah v. EPA*, 77 F.4th 1275, 1286 n.15 (10th Cir. 2023); *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 7 (D.C. Cir. 2015); *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 9 (D.C. Cir. 2011); *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008); *Sierra Club v. EPA*, 118 F.3d 1324, 1325-26 (9th Cir. 1997).

Not surprisingly, then, Main Street Alliance is not able to cite a single case supporting its position. Instead, it cobbles together defined terms in different statutes and asserts that *those* statutes established the meaning of the terms in this Rule. True, the terms "order" and "rule" are defined in the APA, 5 U.S.C. § 551(4), (6), because the procedures used by administrative agencies are different in the two scenarios. Likewise, in the FTC Act, where the agency's procedures are different for enforcement actions under Section 5, 15 U.S.C. § 45, and rulemaking under the Magnuson-Moss Act, 15 U.S.C. § 57a(e), it makes sense to treat cease-and-desist orders separately from rulemakings because the former

are adjudicatory decisions. But those statutes do not dictate the meaning of the word "order" in the Federal Rules of Appellate Procedure.

Other provisions relevant to the procedures for judicial review of agency action use the term "order" to encompass rules and adjudications. For instance, Section 18 specifically provides that challenges to an FTC "rule" are governed by the circuit lottery statute, *see* 15 U.S.C. § 57a(e)(1)(A), which is entitled "Record on review and enforcement of agency orders" and speaks only of "orders," 28 U.S.C. § 2112. Section 5 likewise expressly references the lottery statute. *See* 15 U.S.C. § 45(c). The fact that *both* provisions incorporate the requirements of the lottery statute tells us that *both* types of FTC action are covered by the term "order."

It would not make sense to import Main Street Alliance's statutory distinctions into the Federal Rules. Rule 15(a)(1) applies to any "order" for which the law provides for review by "petition" with "a court of appeals." In ordinary usage, an "order" can encompass a "command, direction, or instruction." Order, Black's Law Dictionary (12th ed. 2024). That meaning includes "a specific rule, regulation, or authoritative direction." Order, Merriam-Webster, https://www.merriam-

webster.com/dictionary/order. That term is certainly broad enough to encompass the commands of administrative agencies, whether that be an order adopting a rule or an order issuing a decision in an adjudication—which, as explained above, is exactly how it has been understood without question for *decades* in APA rule challenges.

Even if there could be any doubt about the applicability of Rule 15, it is the law of the case that Rule 15 (and its counterparts) applies. All four petitions were filed pursuant to Rule 15. The Fifth Circuit issued a writ of mandamus based on the timely filing of these petitions filed pursuant to Rule 15. *In re Elec. Sec. Ass'n*, No. 24-60570, slip op. at 1. The JPML conducted a lottery and issued a consolidation order based upon the service of those petitions for review and 28 U.S.C. § 2112, which also refers only to agency "order[s]."[2] Indeed, the consolidation order even directed the Commission to file a record in accordance with Rules 16 and 17. *In re Federal Trade Commission, Negative Option Rule*, MCP

[2] Main Street's position thus also stands opposed to longstanding caselaw, including multiple judicial decisions in this case alone, applying the federal lottery statute referencing agency "orders" to rulemakings. *See supra*, at 4 (listing the Fifth Circuit's, JPML's, and this Court's decisions regarding the lottery statute); Consolidation Order, *Chamber of Commerce v. SEC*, No. 24-1628, Entry ID 5377330 (8th Cir. Mar. 22, 2024).

No. 192, at 1. And the parties litigated a stay of the rule pursuant to Rule 18, which refers to an "order" but not a "rule." *See* Stay Mot. 12 n.1. The necessary implication of Main Street Alliance's argument is that these litigation events all rested on a faulty premise that the Federal Rules applied, but that ship has sailed. On top of being meritless and counter to well-established appellate practice, Main Street Alliance's argument is antithetical to the law of the case and should not be entertained. *See, e.g.*, *Thompson v. Comm'r*, 821 F.3d 1008, 1011 (8th Cir. 2016) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case") (quotation marks omitted).[3]

B. No Good Cause Excuses Main Street Alliance's Extreme Delay.

Similarly unavailing is Main Street Alliance's argument that it has shown "good cause" to excuse its extreme delay.

[3] Main Street Alliance cites cases permitting intervention under Federal Rule of Civil Procedure 24. Mot. 13. But the Federal Rules of Civil Procedure apply only in "proceedings in the United States *district courts*." Fed. R. Civ. P. 1 (emphasis added). Federal Rule of Civil Procedure 24 does not govern motions to intervene in the *courts of appeals*.

As an initial matter, Rule 15(d) is mandatory and does not contain any "good cause" exception. The cases that Main Street Alliance cites where deviations were allowed are all distinguishable. In *International Union of Operating Engineers, Loc. 18 v. NLRB*, the intervention motions were *unopposed*, and the Sixth Circuit merely held that Rule 15(d)'s 30-day limit was not jurisdictional. 837 F.3d 593, 595 (6th Cir. 2016). In *Zeigler Coal Co. v. Office of Workers' Comp. Programs*, an insurer was permitted to intervene where another Seventh Circuit decision had newly established that the insurer needed to intervene to protect its interests in the underlying company because that company was bankrupt. 490 F.3d 609, 610 n.1 (7th Cir. 2007). And in *City of Naples Airport Authority v. FAA*, the D.C. Circuit *denied* a motion to intervene. 2004 WL 1080160, at *1 (D.C. Cir. May 13, 2004).

Next, Main Steet Alliance argues that the change of administration as a result of the 2024 presidential election excuses its untimeliness. As an example of this, Main Street Alliance points to Chair Ferguson's recent statements and argues that they create doubt about the Commission's commitment to defending the Rule. Mot. 11. Those statements don't excuse Main Street Alliance's long delay. The

Commission issued the Rule by a 3-2 vote, with Commissioner Ferguson voting against the Rule. 89 Fed. Reg. 90,539. When President Trump won the 2024 election on November 6, 2024, it became obvious that leadership at the Commission would change. Sure enough, on December 10, 2024, President-elect Trump announced that Commissioner Ferguson would be the next Chairman of the Commission. Donald J. Trump, Posting on TruthSocial (Dec. 10, 2024), https://tinyurl.com/avckhk4r; Andrew Ferguson, Posting on X (Dec. 10, 2024), https://tinyurl.com/38ky3avf. The political circumstances that Main Street Alliance cites for its concern that the Commission's policy might change were known months ago—indeed, even in early November *two weeks* before the deadline to intervene ran. If Main Street Alliance was concerned about changing FTC policies, it could have filed a motion to intervene on time, instead of waiting until February 2025.

Main Street Alliance also argues that this litigation is at an early stage, Mot. 17, but that characterization can't be squared with the timeline of the appeal. These consolidated cases kicked off on October 22, 2024. Since then, there have been more than three months of hard-fought litigation, including an extraordinary mandamus proceeding in

the Fifth Circuit; transfer and consolidation following the JPML's lottery; extensive stay litigation in this Court; and now merits briefing. The compressed briefing schedule ordered by the Court, against the backdrop of the fast-approaching compliance date of the Rule (May 14, 2025), indicates that this Court is interested in moving the appeal along. In fact, merits briefing has been underway for more than a month, and Petitioners have already filed their opening brief. The parties negotiated and filed their joint appendix. Main Street Alliance sat by while all this happened instead of timely appearing and asserting its supposed interest within the time required by Rule 15(d). It cannot hop aboard at this late date and participate as a party. The train left the station long ago.

II. Main Street Alliance's Interests Are Adequately Represented.

The motion should be denied for an independent reason: Main Street Alliance's interests are already adequately represented in this case.

The Commission has statutory authority to supervise litigation over its rules. *See* 15 U.S.C. § 56(a)(2) (providing that the Commission "shall have exclusive authority" to "defend" and "supervise the litigation of" any suit seeking to "obtain judicial review of a rule prescribed by the

Commission"). How to run the defense of the Rule is thus the Commission's call. Here, the Commission appeared in this litigation early on and, since appearing on November 1, has been actively defending the case and responding to Petitioners' challenges. All that Main Street Alliance offers is mere speculation that the Commission might change its position about the Rule. That is surely not sufficient to rebut the "presumption of adequate representation" that this Court applies when "an existing party to the suit," particularly an "agency of the government," is already "representing the intervenor's interests." *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). With only speculation on its side, Main Street Alliance falls far short of the "'strong showing' of inadequacy" that this Court requires to rebut the presumption in favor of the government's representation. *Entergy Ark., LLC v. Thomas*, 76 F.4th 1069, 1072 (8th Cir. 2023). Main Street Alliance has failed to meet its burden to oust the Commission of the control over litigation that Congress entrusted to it.

III. Intervention Would Be Highly Disruptive And Prejudicial.

Allowing Main Street Alliance to intervene now, with merits briefing already well underway, would be highly disruptive and

prejudicial. Just having to respond to the motion to intervene while briefing the opening merits brief and compiling the joint appendix *already* has been burdensome and disruptive.

Intervention also would be very unfair to the existing parties and disruptive to the plan set by the Court for how the appeal should proceed. Petitioners asserted their interests at the earliest possible time, and the parties have been litigating expeditiously. The parties relied on the interests represented in these consolidated cases to confer on the administrative record, the joint appendix, and the briefing schedule. They litigated the stay motion based on the parties and interests represented. And this Court ruled on the stay motion and entered a faster briefing schedule in reliance on the parties and interests represented at that time. That briefing schedule does not provide for intervenors' briefs, does not allow time (or extra words) for petitioners to reply to multiple briefs, and does not allow for extensions. Pursuant to that schedule, Petitioners duly filed their opening brief on February 14, 2025.

All of these events may have played out differently had an intervenor, effectively acting as a second respondent, representing a

different set of interests, appeared in the litigation at the proper time. Adding a new party to this case at this advanced stage will either delay the resolution of this case, with the compliance date just around the corner, or else require Petitioners to confront a new set of arguments from a new litigant on a short timeline. It would be unfair and prejudicial to the parties who have been diligent in this case to add another party now—especially one that has slept on its rights—and disruptive of the approach that the Court has set for managing the appeal.

None of this is necessary. If Main Street Alliance wishes its views to be heard, it can move to file an amicus curiae brief within 7 days of the Commission's brief, in accordance with the rules. *See* Fed. R. App. P. 29(a)(6). Petitioners would consent to such an amicus brief. But Petitioners strenuously oppose the unfair, disruptive, and prejudicial appearance of a new party at this advanced stage of the proceedings.

CONCLUSION

For all these reasons, the Court should deny Main Street Alliance's motion to intervene.

Dated: February 18, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 3,230 words.

I certify that this opposition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this opposition has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook LT.

I further certify that this opposition has been scanned for viruses and is virus-free.

Dated: February 18, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, an electronic copy of the foregoing opposition was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

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