

Professional Perspective

# Mastering the Multicircuit Petition Statute Process

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# Mastering the Multicircuit Petition Statute Process

**Editor's Note:** The author was among the counsel to one of the parties in the 2018 *In re FERC* decision from the Judicial Panel on Multidistrict Litigation.

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For those challenging federal agency action, where the case is heard can make all the difference. Different circuits have different case law, and what might be a winning argument in one court might be foreclosed by precedent in another. And even for issues of first impression, different circuits have different judges with different temperaments and approaches to administrative law.

But securing your preferred forum when a statute allows review in more than one circuit requires mastering the Multicircuit Petition Statute, [28 U.S.C. § 2112\(a\)](#)—a technical, but important enactment that any agency litigator should know. When petitioners file in different circuits, the statute provides for a random draw to determine the forum. But, in order to get a “lottery ticket,” petitioners must jump through several procedural hoops—and all too often they miss one.

## The Race to the Courthouse and Congress's Answer

Some judicial-review statutes allow review to occur in more than one circuit court of appeals. The Natural Gas Act, for instance, allows review in either the U.S. Court of Appeals for the D.C. Circuit or the circuit where the pipeline to which the Federal Energy Regulatory Commission's order relates is incorporated or headquartered. [15 U.S.C. § 717r\(b\)](#). Or the Hobbs Act allows for a challenge to a Federal Communications Commission order to be brought in either the D.C. Circuit or where the petitioner is incorporated or headquartered. [28 U.S.C. § 2343](#).

Before the Multicircuit Petition Statute, the circuit that received the first petition for review of an order heard all challenges to the order. But that led to chaotic races to the courthouse as lawyers rushed to file petitions within seconds of an agency order issuing. *Sacramento Mun. Util. Dist. v. FERC*, [683 F.3d 769](#), 770 (7th Cir. 2012).

Congress slowed the race in 1988, replacing it with a random lottery in some circumstances. Under the Multicircuit Petition Statute, “[i]f within ten days after issuance of the order the agency ... 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” must notify the Judicial Panel on Multidistrict Litigation.” The panel will then, “by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received in the ten-day period” to hear the cases. [28 U.S.C. § 2112\(a\)\(1\)](#), (3).

The statute defines a “petition for review” as “a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing.” [28 U.S.C. § 2112\(a\)\(2\)](#). And the statute states that every agency must issue a rule designating the person—or office—to receive petitions for review.

## Getting the Multicircuit Petition for Review Procedure Right

The Multicircuit Petition Statute's dense text comes with traps for the unwary. Petitioner's counsel has to do three things—all within 10 days of the challenged order—to get a lottery ticket for a chance to litigate in their preferred circuit.

First, file a petition for review with the circuit court of appeals.

Second, get a date-stamped copy of the petition for review from the circuit clerk. The date stamp can be electronic. See *In re FERC*, [341 F. Supp. 3d 1378](#), 1380 n.2. (JPML 2018). But a circuit clerk may not promptly process an electronically submitted petition, so go and get a physical date stamp if you're filing close to the 10-day deadline.

Third, deliver a date-stamped copy of the petition for review to the designated agency office or officer. This is the step that often trips up counsel, because it is really four distinct sub-requirements.

- The petitioner has to deliver a date-stamped copy of the petition. Delivering an unstamped copy—often the result of a petitioner mailing a copy to the agency at the same time it files with the court—is not sufficient. See *In re FERC*, [278 F. Supp. 2d 1379](#) (JPML 2003).

- The petitioner has to deliver the petition. The circuit clerk serving a copy on the agency under [Fed. R. App. P. 15\(c\)](#) is not sufficient.
- The petitioner has to deliver the date-stamped copy of the petition to the particular office or officer designated by agency rule. The designated office or officer varies; check the agency's rules of practice and procedure.
- The agency must receive the date-stamped petition for review within the ten-day window. If it's close to the deadline, deliver by hand.

## Not Done Yet: Fighting Transfer

The panel's selection of a circuit is just a starting point. The statute says the selected circuit can transfer the cases “[f]or the convenience of parties in the interest of justice.” [28 U.S.C. § 2112\(a\)\(5\)](#). Put to practice, the circuit courts weigh a mix of factors, including “the location of counsel, location of the parties, whether the impact of the litigation is local to one region, whether one circuit is more familiar with the same parties and issues or related issues than other courts, the caseloads of the respective courts, and whether there is but one truly aggrieved party.” *Liquor Salesmen's Union Local 2 of N.Y. v. NLRB*, [662 F.2d 1200](#), 1205 (D.C. Cir. 1981).

But winning the lottery puts a thumb on the scale. Courts typically “respect” a petitioner's “choice to file a petition for review” in a particular circuit, creating something of a presumption against transfer. *Id.* at 1204. So despite the possibility of transfer, getting the lottery procedure right in the first instance is essential.