

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING
SERVICES, INC., a Colorado
corporation; TMG MARKETING,
INC., a Colorado corporation;
AMERICAN TELESERVICES
ASSOCIATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION,

Respondent.

No. 03-9571

ORDER
Filed September 26, 2003

Before **SEYMOUR, EBEL** and **HENRY**, Circuit Judges.

PER CURIAM.

Petitioners seek review of an order of the Federal Communications Commission (FCC) adopting rules and regulations implementing the Telephone Consumer Protection Act of 1991 (TCPA). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144 (2003). Jurisdiction over this petition for review is vested in the federal court of appeals. 28 U.S.C. § 2342(1) (1994). Venue is appropriate in

either the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 2343. Petitioners have their principal office in Denver, Colorado, and venue is therefore appropriate in this court.

The only issue to be decided at this time is petitioners' request for a stay of certain provisions of the FCC's order pending review of the order on the merits. The order is scheduled to go into effect on October 1, 2003.

Petitioners' request for stay is governed by Federal Rules of Appellate Procedure 8 and 18. To obtain a stay under these rules, petitioners must address the following four factors: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay is not granted; (c) the absence of harm to opposing parties; and (d) the risk of harm to the public interest. *See, e.g., Spain v. Podrebarac*, 68 F.3d 1246, 1247 (10th Cir. 1995); 10th Cir. R. 8.1.

Where the moving party has established the three "harm" factors, the "probability of success" requirement is relaxed somewhat. *See Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (quotation omitted).

We conclude, first, that petitioners have established they will suffer irreparable injury if a stay is not granted. The remaining two harm factors are conflated in this instance because the FCC is a governmental agency charged with protecting the public interest. We conclude that petitioners have failed to meet their burden on these remaining two factors, for two reasons. First, the public interest in respecting “residential privacy” weighs against a stay of the FCC’s order. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 737 (1970). Second, the strong expectation interest of the many millions of Americans who have registered with the FCC’s “do not call” list weighs in favor of denying the stay.

Since petitioners have failed to establish that each of the harm factors tilts in their favor, they are required to show a substantial likelihood of success on the merits of their petition. On the record presented, we conclude that petitioners have failed to establish a substantial likelihood of success on the merits, and we therefore DENY the motion for stay of the FCC’s order pending review of the merits.

The panel further orders that the petition for review on the merits be expedited, and that oral argument be scheduled on the petition at the earliest practical time. The clerk of this court is directed to establish a briefing and oral argument schedule consistent with this order to expedite the petition for review.

Entered for the Court
PATRICK FISHER, Clerk of Court