

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Bridging the Digital Divide for Low-Income) WC Docket No. 17-287
Consumers)
)
Lifeline and Link Up Reform and Modernization) WC Docket No. 11-42
)
Telecommunications Carriers Eligible for Universal) WC Docket No. 09-197
Service Support)

ORDER DENYING STAY PETITION

Adopted: July 5, 2018

Released: July 5, 2018

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On June 22, 2018, Assist Wireless, LLC (Assist), Boomerang Wireless, LLC d/b/a enTouch Wireless (Boomerang), and Easy Telephone Services Company d/b/a Easy Wireless (Easy) (collectively, ETC Petitioners); the National Lifeline Association (NaLA) (a trade association representing the interests of Lifeline providers, including ETC Petitioners and their customers); the Crow Creek Sioux Tribe (Crow Creek); and the Oceti Sakowin Tribal Utility Authority (Oceti) (collectively, Petitioners) filed a petition for an administrative stay of the 2017 Lifeline Order, pending judicial review.1 For the reasons discussed below, we deny the Petitioners' request for stay.

II. BACKGROUND

2. In 2000, the Federal Communications Commission (Commission) adopted Tribal Lifeline and Link Up support, establishing that customers living on "Tribal lands" are eligible to receive enhanced support under the Commission's low-income programs.2 In 2015, the Commission sought comment on limiting the provision of enhanced support to facilities-based providers, and to areas with lower population densities.3 On November 16, 2017, the Commission adopted the 2017 Lifeline Order and NPRM (2017 Lifeline Order or Order), to more effectively focus the program on bridging the digital

1 Joint Petition for Stay of Assist Wireless, LLC; Boomerang Wireless, LLC d/b/a enTouch Wireless; Easy Telephone Service Company d/b/a Easy Wireless; the National Lifeline Association (NaLA); the Crow Creek Sioux Tribe; and the Oceti Sakowin Tribal Utility Authority, WC Docket Nos. 17-287 et al. (filed June 22, 2018) (Joint Petition). On July 3, 2018, a letter supporting the Joint Petition was filed. See Letter from Tribal, Consumer, Civil Rights, and Digital Inclusion Organizations, to Commissioners Ajit Pai, Michael O'Rielly, Brendan Carr, and Jessica Rosenworcel, WC Docket Nos. 17-287 et al. (filed July 3, 2018).

2 See Federal-State Joint Board on Universal Service et al., CC Docket No. 96-45 et al., Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12235, para. 42 (2000) (2000 Tribal Order).

3 Lifeline and Link Up Reform and Modernization et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7875, 7876, paras. 167, 169 (2015 Lifeline FNPRM).

divide by directing Lifeline spending where it is most needed, constraining growth of the Universal Service Fund, and addressing ongoing waste, fraud, and abuse.⁴ In the *Order*, the Commission limited enhanced Tribal Lifeline support to rural areas on Tribal lands and to facilities-based service providers.⁵ The Commission also provided a transition period of 90 days after the Commission received approval from the Office of Management and Budget (OMB).⁶ The Commission has not yet received OMB approval of the rule.

3. On June 22, 2018, Petitioners filed a petition for stay of the *2017 Lifeline Order* pending judicial review. Petitioners requested a ruling on their petitions by July 5, 2018, “[t]o allow adequate time to seek a judicial stay[.]”⁷

III. DISCUSSION

4. To qualify for the extraordinary remedy of a stay pending judicial review, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.⁸ For the reasons described below, we conclude that Petitioners have failed to meet the test for this extraordinary equitable relief.

A. Petitioners Are Unlikely to Prevail on the Merits

5. Petitioners have not shown that they are likely to succeed on the merits of their claims. The *2017 Lifeline Order* contains a comprehensive explanation of the basis for the Commission’s decision to limit enhanced Tribal support to rural Tribal areas, and to target such support to facilities-based providers,⁹ and we see no need to repeat that explanation here. Instead, we focus our attention on several of Petitioners’ specific contentions. In particular, we address below Petitioners’ claim that: (1) the Commission failed to engage in Tribal consultation before implementing the facilities-based and rural limitations; (2) the Commission violated the Administrative Procedure Act (APA); and, (3) that the facilities based and rural limitations are otherwise unlawful. We disagree with each contention.

6. *The Commission Engaged in Tribal Consultation.* We disagree with the contention that the Commission failed to comply with the non-binding commitment contained in its 2000 *Tribal Policy Statement* to “consult with Tribal governments” prior to implementing these regulatory actions.¹⁰ As the *Order* explained, the Commission consulted with Tribal Nations on “the Lifeline proposals that the Commission sought comment on in the *2015 Lifeline NPRM*,” not only in sessions in Oklahoma in August 2015 but in additional meetings in August 2015 in Portland, Oregon and in February 2016 in

⁴ *Bridging the Digital Divide for Low-Income Consumers et al.*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, para. 1 (2017) (*2017 Lifeline Order and NPRM* or *2017 Lifeline Order*).

⁵ *Id.* at 10478-80, 10483-86, paras. 5-9, 21-30.

⁶ *Id.* at 10487, para. 31.

⁷ Joint Petition at 2.

⁸ See *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

⁹ See, e.g. *2017 Lifeline Order*, 32 FCC Rcd at 10478-80, 10483-86, paras. 5-9, 21-30.

¹⁰ *Policy Statement, In the Matter of Statement of Policy of Establishing a Gov’t-to-Gov’t Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd. 4078, 4079 (2000) (*Tribal Policy Statement*). We note at the outset that the policy statement is “not intended to, and does not, create any right enforceable in any cause of action by any party” against the agency.” *Id.* at 4080. See also *Multicultural Media, Internet & Telecom Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017) (policy statements “by themselves, do not create statutorily mandated responsibilities.”) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010)).

Suquamish, Washington.¹¹ Contrary to Petitioners' suggestion, the Oklahoma consultation was not concerned solely with "the separate issue of how the Commission should draw boundaries of tribal lands in Oklahoma."¹²

7. As the materials associated with that consultation clearly show, the agenda to that consultation included the reforms to the Lifeline program, including the targeting of funds to facilities-based providers, and to rural Tribal areas that were proposed in the *2015 Lifeline FNPRM*.¹³ Likewise, the presentation materials associated with the meetings with Tribal representatives in Suquamish, Washington and Portland, Oregon show that those meetings also included discussion of the proposed Lifeline reforms at issue here.¹⁴ The record also shows that a number of interested Tribal entities submitted comments addressing the specific issue of limiting enhanced support to facilities-based providers, and of limiting support to rural Tribal areas.¹⁵ Accordingly, the Commission did not fail to engage in Tribal consultation.

8. *The Commission Did Not Violate the APA*. Petitioners contend that the Commission violated the APA by failing to open a "future proceeding," by imposing rules that were not a "logical outgrowth" of what was originally proposed, and by imposing rules that were otherwise arbitrary and capricious. We disagree.

9. The Commission did not violate the APA by failing to open a "future proceeding" to discuss limiting enhanced Lifeline support to facilities-based providers and to rural Tribal areas. In the *2016 Lifeline Order*, the Commission specifically left "open for consideration" any issues raised in the *2015 Lifeline FNPRM*.¹⁶ Petitioners nonetheless contend that the *2016 Lifeline Order* "closed" the

¹¹ *2017 Lifeline Order*, 32 FCC Rcd at 10482, para. 17 n.47.

¹² Joint Petition at 24.

¹³ See Declaration of Daniel J. Margolis, included as Appendix A to this Order, at 2-6, paras. 7-29 (Margolis Declaration). Mr. Margolis served as an Attorney Advisor in the Commission's Office of Native Affairs and Policy (ONAP) between 2015 and 2017. *Id.* at 1, para. 2. In his role, he was responsible for organizing and attending Tribal consultations, meetings, and workshops. *Id.* at 2, para. 4. See also E-mail from Geoffrey Blackwell, Chief, ONAP, to Tribal Leaders, Representatives, and Colleagues, (July 15, 2015, 19:48:17), included as Exhibit A to the Margolis Declaration, inviting Tribal leaders to consult on Tribal-specific issues; PowerPoint used by ONAP at the August, 2015 consultations in Tulsa and Norman, Oklahoma, included as Exhibit B to the Margolis Declaration, at 26-27 (noting that the Commission was seeking comment on whether enhanced Tribal support should be limited to areas with lower population densities, and what impact the enhanced subsidy had on infrastructure deployment on Tribal lands).

¹⁴ See PowerPoint used by ONAP at the ATNI Energy, Technology, and Economic Summit in Portland, OR, included as Exhibit C to the Margolis Declaration, at 22-23; PowerPoint used by ONAP at the ATNI Energy & Telecommunications Committee in Suquamish, WA, included as Exhibit D to the Margolis Declaration, at 2. In addition, Commission staff conducted consultation workshops with various Tribes in Scottsdale, Arizona and Rapid City, South Dakota in September 2015, during which time the proposed limitations to the enhanced Tribal subsidy at issue here were discussed. See PowerPoints used by ONAP at the Tribal Broadband, Telecom, and Broadcast Training and Consultation Workshops in Scottsdale, AZ, and Rapid City, SD, included as Exhibits E and F to the Margolis Declaration, at 26-27. See also Margolis Declaration at 4-5, paras. 19-28.

¹⁵ See, e.g., Comments of the Nez Perce Tribe, WC Docket No. 11-42 et al., at 3 (filed Aug. 31, 2015) (urging the Commission to prohibit non-facilities-based providers from offering service on Tribal lands); Reply Comments of the Coquille Indian Tribe, WC Docket No. 11-42 et al., at 3-4 (filed Sep. 30, 2015) (stating that the Commission should retain enhanced Tribal support for non-facilities-based providers); Comments of the Navajo Nation Telecommunications Regulatory Commission, WC Docket No. 11-42 et al., at 12-13 (filed Aug. 28, 2015) (opposing limiting enhanced support to residents of towns with fewer than 10,000 people, but proposing alternative population density metrics).

¹⁶ *Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4038, para. 211 (2016) (*2016 Lifeline Order*).

administrative record,¹⁷ but the Commission nowhere stated that it would create a different docket or conduct a new round of notice and comment regarding the issues in question, and the Commission did not terminate the docket, as it has on other occasions when it closed an administrative record.¹⁸ In any event, we do not see how the lack of an additional round of notice and comment could have harmed Petitioners, who had a full opportunity to register their opposition to the Commission's proposals to limit enhanced support to facilities-based providers, and to rural Tribal areas, after the *2015 Lifeline FNPRM* was released.¹⁹ While Petitioners state that they "stood down on their advocacy"²⁰ between the release of the *2016 Lifeline Order* and the *2017 Lifeline Order*, they do not identify what they would have said that they had not said already.

10. Petitioners also contend that the limitation of enhanced support to facilities-based providers is not a logical outgrowth of the proposal in the *2015 Lifeline FNPRM*, and therefore violates the APA.²¹ We disagree. In *2015*, the Commission proposed "to limit enhanced Tribal Lifeline and Link Up support only to those Lifeline providers who have facilities," and then it sought comment on two options: limiting enhanced support to ETCs already receiving high-cost support, or "limit[ing] enhanced Lifeline support to those Lifeline providers that are deploying, building, or maintaining infrastructure on Tribal lands, even if they do not or are not eligible to receive high-cost support."²²

11. From this statement, Petitioners were informed that, under either option, the Commission was proposing to remove enhanced Tribal support from non-facilities-based providers; indeed, Petitioners filed comments opposing this proposal.²³ Because interested parties, including the Petitioners, understood what the Commission was proposing, and because they filed comments opposing the proposal the Commission ultimately adopted, it is clear that Petitioners had sufficient notice of the proposed change and that the rule the Commission ultimately adopted was a logical outgrowth of its proposal in the *2015 Lifeline FNPRM*.²⁴

12. Likewise, the Commission provided ample notice of its decision to limit enhanced Tribal support to rural Tribal areas. In the *2015 Lifeline FNPRM*, the Commission expressly sought comment on whether it "should focus enhanced Tribal support to those Tribal areas with lower population densities," and whether it should "exclude urban, suburban, or high-density areas on Tribal lands."²⁵ In light of these statements, Petitioners should have understood that the Commission might choose to limit enhanced Tribal support to rural Tribal areas with low population densities.

13. Petitioners claim that the Commission's decisions to limit enhanced support to facilities-based providers and to rural Tribal areas are arbitrary and capricious, and in violation of the APA.²⁶ We disagree. As the *Order* explained, last-mile facilities, which are the portion of the telecommunications network chain that physically reaches the end-user's premises, are "critical to deploying, maintaining, and

¹⁷ Joint Petition at 29-30.

¹⁸ See, e.g., *In The Matter of Fifth Generation Wireless Network and Device Security*, Order, 32 FCC Rcd 1106, 1106, para. 2 (PSHSB 2017).

¹⁹ See Comments of Assist Wireless, LLC and Easy Telephone Services, WC Docket no. 11-42 et al. (filed Aug. 31, 2015) (Assist and Easy Comments).

²⁰ Joint Petition at 32.

²¹ Joint Petition at 33.

²² *2015 Lifeline FNPRM*, 30 FCC Rcd at 7875, para. 167.

²³ See Assist and Easy Comments at i ("Both Assist and Easy operate as wireless resellers").

²⁴ See, e.g., *City of Waukesha v. E.P.A.*, 320 F.3d 228, 245 (D.C. Cir. 2003).

²⁵ *2015 Lifeline FNPRM*, 30 FCC Rcd at 7876, para. 169.

²⁶ Joint Petition at 44-56, 59-62.

building” networks on Tribal lands.²⁷ Last-mile facilities are also the most expensive to deploy and the most conspicuously lacking on Tribal lands. When the Tribal subsidy is “applied to a consumer’s bill for a facilities-based service,”²⁸ those funds in turn go directly toward “maintaining and upgrading that provider’s facilities.”²⁹ In contrast, Lifeline subsidies disbursed to non-facilities based providers will lower the consumer’s telephone bill but “cannot directly support the provider’s network because the provider does not have one.”³⁰ The Commission therefore reasonably determined that directing the enhanced support to facilities-based providers would lead to more investment in last-mile facilities.

14. In addition, the Commission clearly articulated its belief that limiting the enhanced Tribal benefit to facilities-based providers would better incentivize those providers to expand their networks in underserved areas;³¹ the statements of numerous Tribal leaders and mobile providers supported its conclusion.³² The Commission also explained that, to the extent enhanced subsidies indirectly support deployment, that benefit was outweighed “by our need to prudently manage Fund expenditures.”³³ This decision is also consistent with the Commission’s decision, in 2012, to limit Link Up funding to ETCs receiving high-cost support on Tribal lands, specifically because those ETCs were “building telecommunications infrastructure on Tribal lands, which have significant telecommunications deployment and connectivity challenges.”³⁴ As discussed above, the Commission’s overarching goals for the reforms that Petitioners challenge include constraining Lifeline spending to reduce the burden of universal service contributions on all ratepayers, and to prevent waste, fraud, and abuse in the Lifeline program.³⁵ The Commission also reasonably determined that directing enhanced support to densely populated areas, including several large cities, was inconsistent with the purposes of providing Tribal Lifeline support, and that instead “Tribal support should be targeted to rural areas where the need is greatest.”³⁶

15. *The Commission’s Decision Was Not Otherwise Unlawful.* Petitioners also claim that the enhanced subsidy limitation violates the Communications Act and effectively rescinds the Commission’s earlier decision to forebear from the facilities-based requirement of Section 214(e) of the Act.³⁷ But the Commission did not rescind forbearance. Non-facilities-based providers remain eligible to participate in the Lifeline program and to obtain the baseline subsidy; they are simply no longer eligible for the enhanced Tribal subsidy.³⁸

²⁷ 2017 Lifeline Order, 32 FCC Rcd at 10483, para. 22.

²⁸ *Id.* at 10483-4, para. 22.

²⁹ *Id.*

³⁰ *Id.* at 10484, para. 23.

³¹ *Id.* at 10485-86, paras. 27-28.

³² *Id.* at 10485, para. 27 n. 67.

³³ *Id.* at 10486, para. 28.

³⁴ *Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6767, para. 254 (2012) (2012 Lifeline Order)

³⁵ 2017 Lifeline Order, 32 FCC Rcd at 10476, para. 1.

³⁶ *Id.* at 10480, para. 9.

³⁷ Joint Petition at 37-44.

³⁸ As the Order explained, the “facilities-based standard [the Commission] describe[s] bears only on whether the Lifeline provider is eligible to receive enhanced rural Tribal support.” 2017 Lifeline Order, 32 FCC Rcd. at 10486, para. 30. However, “whether a provider is ‘facilities-based’ under the Act for purposes of seeking a Lifeline-only ETC designation . . . is unaffected by this standard and remains the same.” *Id.*

16. For these reasons, and those contained in the *Order*, Petitioners have failed to demonstrate a likelihood of success on the merits.

B. Petitioners Will Not Suffer Irreparable Injury

17. Petitioners argue that, absent a stay, they will suffer irreparable economic and non-economic injuries, and that both Easy and Assist will be forced out of business.³⁹ We find that Petitioners have failed to substantiate their claims of irreparable harm.

18. Several general principles govern the irreparable injury inquiry. First, “the injury must be both certain and great; it must be actual and not theoretical.”⁴⁰ A petitioner must also “substantiate the claim that the irreparable injury is ‘likely’ to occur. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.”⁴¹ Further, it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.”⁴² There are two exceptions to this rule: (1) when the economic loss threatens the “very existence of the movant’s business,”⁴³ (2) when the economic loss is great, certain, imminent, and unrecoverable.⁴⁴ Neither situation applies here.

1. Petitioners Have Not Shown That Their Businesses Are Threatened

19. Petitioners have not shown that the “very existence” of Assist and Easy’s business is threatened. Petitioners claim that the *Order* will force Assist and Easy into a “death spiral” which will force them to “immediately cease” distribution and marketing for new Lifeline subscribers,⁴⁵ and that the combination of lost revenue, lost subscribers, and lost goodwill will force both businesses to close within one year.⁴⁶ Petitioners’ claims are unsupported.

20. Petitioners claim that Assist and Easy will suffer irreparable harm from the loss of the enhanced Lifeline subsidy,⁴⁷ and that they, in contrast with the many other non-facilities-based providers who do not offer service on Tribal lands, would be unable to provide service for the standard \$9.25 monthly Lifeline discount.⁴⁸ We disagree.

21. As a threshold matter, the effect of the Commission’s *2017 Lifeline Order* is to deny some, but not all, Lifeline funding to non-facilities-based providers on Tribal lands. The *2017 Lifeline Order* places Petitioners in the same economic position as every other Lifeline provider that does not receive enhanced Tribal support. Moreover, both Easy and Assist have previously certified to the Commission that their business models do not rely solely on Universal Service Fund (USF or Fund)

³⁹ Joint Petition at 69. Petitioners also claim that Tribes and their members will suffer irreparable harm without a stay. Joint Petition at 70-76. However, the Tribes that have submitted declarations claiming irreparable harm are not the party or parties seeking the injunction. Because the only Tribal entities alleging irreparable harm are not parties seeking injunctive relief, we do not address their claims under the irreparable harm prong of the injunctive relief test. *Jones v. District of Columbia.*, 177 F. Supp. 3d 542, 546 n. 3 (D.D.C. 2016) (*Jones*).

⁴⁰ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas Co.*).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).

⁴⁴ *Id.*

⁴⁵ Joint Petition at Exh. B (Declaration of Joe Fernandez, President, Easy Wireless) at 2, para. 5 (Easy Declaration).

⁴⁶ Joint Petition at 64.

⁴⁷ Joint Petition at 63-69.

⁴⁸ Easy Declaration at 2-3, para. 8; Joint Petition at Exh. A (Declaration of David Dorwart, Owner and Chairman, Assist Wireless) at 3-4, para. 10 (Assist Declaration).

disbursements.⁴⁹ Even if those past statements were incorrect, Petitioners still fail to prove that a stay is needed to prevent them from going out of business.

22. Assist and Easy have failed to provide sufficient documentation to allow for an accurate assessment of their finances in order to determine whether irreparable harm would result without a stay. To evaluate Petitioners' financial status, the Bureau would need, in accordance with generally accepted accounting principles (GAAP), to examine relevant financial documents, "including balance sheets, and statements of net income and cash flow."⁵⁰

23. Here, Assist and Easy, respectively, rely only on an [CONFIDENTIAL] [CONFIDENTIAL]⁵¹ and an [CONFIDENTIAL] [CONFIDENTIAL]⁵² and have "neglected to provide basic accounting information in the form of a balance sheet showing [their] total assets and liabilities—which might reveal abundant cash reserves or other fungible assets."⁵³ Similarly, Petitioners do not provide a cash flow statement, which would reflect how much money Assist and Easy actually spent and received in a given period,⁵⁴ and which the Commission requires when evaluating a filer's financial status.⁵⁵ Without a clearer understanding of their financial status, it is not possible to determine if their businesses will be forced to close at all, much less "within a year" as they claim.⁵⁶

⁴⁹ Compliance Plan of Assist Wireless, WC Docket No. 11-42 et al., at 4 (filed June 29, 2012) (Assist Wireless Compliance Plan); Assist Wireless, LLC Amended Petition for Limited Designation as an Eligible Telecommunications Carrier in Alabama, Connecticut, Delaware, the District of Columbia, Florida, New Hampshire, New York, North Carolina, Tennessee, and Virginia, WC Docket No. 09-197, at 10 (filed Apr. 24, 2013) ("Although Assist Wireless derives revenues from the sale of Lifeline services, the Company does not rely exclusively on USF disbursements to operate."); Assist Wireless, LLC, Petition for Streamlined Designation as a Lifeline Broadband Provider Eligible Telecommunications Carrier, WC Docket No. 09-197, at 10 (filed Oct. 3, 2016) ("Assist provides several other telecommunications and broadband services to non-Lifeline customers, in addition to its Lifeline service offerings, and, therefore, is not solely dependent on Lifeline subscribers for its revenues. The Company has provided wireless telecommunications service for over five years and currently has a subscriber base of nearly 90,000 subscribers. Consequently, the Company has access to sufficient funds to operate its business and is not solely dependent on reimbursement from the Lifeline Fund."); Compliance plan of Easy Wireless, WC Docket No. 11-42 et al., at 23 (filed March 4, 2013) (Easy Wireless Compliance Plan) ("The Company generates substantial revenues from non-Lifeline services and, consequently, has not and will not be relying exclusively on Lifeline reimbursement for the Company's operating revenues.").

⁵⁰ See, e.g., *Comment Sought on Competitive Bidding Procedures & Certain Program Requirements for the Connect America Fund Phase II Auction*, Public Notice, 32 FCC Rcd 6238, 6256, para. 56 (2017).

⁵¹ [CONFIDENTIAL] [CONFIDENTIAL]

⁵² [CONFIDENTIAL] [CONFIDENTIAL]

⁵³ *Arriva Med. LLC v. United States Dep't of Health & Human Servs.*, 239 F. Supp. 3d 266, 281 (D.D.C. 2017) (*Arriva*).

⁵⁴ *Ironworkers Local 580--Joint Funds v. Linn Energy, LLC*, 29 F. Supp. 3d 400, 410 (S.D.N.Y. 2014) ("While an income statement summarizes a company's performance in a particular period by measuring the profitability of its operations (by matching revenues with their associated expenses), the cash flow statement summarizes the cash that actually flowed in and out of the company during the period.").

⁵⁵ See, e.g. *In Re: Tci Cablevision of Texas, Inc. Liberty, Texas Dayton, Texas Petition for Special Relief*, Memorandum Opinion and Order, 5 FCC Rcd 7168, 7169, para. 6 (1990) (The Commission needs to see an applicant's "revenues, profits, and cash flow," instead of "the mere detailing of expenses" before it will grant a waiver.).

⁵⁶ See *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011) (no showing of irreparable harm where claimant did not account for his company's current assets, or explain how he arrived at his conclusion that his business would close within eighteen months.).

24. Taken on their own, the documents that Easy and Assist have submitted are also insufficient to prove irreparable harm. According to its [CONFIDENTIAL] [CONFIDENTIAL] Assist Wireless will have a net income of [CONFIDENTIAL] [CONFIDENTIAL] in 2018, and [CONFIDENTIAL] [CONFIDENTIAL]. We fail to see how this projected income stream will force the closure of Assist's business within 12 months. Similarly, Easy's income statement indicates that it expects [CONFIDENTIAL] [CONFIDENTIAL],⁵⁷ again belying the notion that it will be unable to stay in business after the Commission's reforms are implemented.

25. Petitioners also argue that the implementation of the *2017 Lifeline Order* will force them to close all of their physical stores almost immediately,⁵⁸ but they fail to explain why this is the case. [CONFIDENTIAL] [CONFIDENTIAL] which would make closing its stores in the next few months, [CONFIDENTIAL] [CONFIDENTIAL], impracticable. More generally, Petitioners have offered no evidence to substantiate their claim that they will enter a "death spiral," or that they will be unable to change their business model. Accordingly, even when considering only the financial documents submitted by the Petitioners, Petitioners have failed to show that their businesses will be forced to close.

26. Next, Petitioners assert that they will lose most of their customers in short order, because they will be unhappy with the reduced offerings that would be necessary to keep the Lifeline offering free to the end user absent the enhanced Tribal subsidy,⁵⁹ and may switch to a facilities-based provider, which can offer more robust service with the enhanced Tribal benefit.⁶⁰ Petitioners offer no support for their claims in the form of customer affidavits,⁶¹ and these claims are also in tension with Petitioners' claim that facilities-based providers do not want to participate in the Lifeline program.⁶² If Petitioners' customers would not be able to switch to a more robust, free offering, as Petitioners claim, then there is no reason to think that the customers would choose to receive no service rather than the reduced, free offering Petitioners would provide.

27. Additionally, Petitioners complain that an Easy customer that wanted free service would be forced to switch to the free basic Lifeline plan that includes only 750 minutes of voice, unlimited text, and 25 MB of data.⁶³ But Petitioners have not provided any evidence showing how many (if any) of their customers typically use more voice minutes or data than that. If Petitioners' customers do not typically use more than 750 minutes of voice or 25 MB of data, then those customers are unlikely to notice any change to their service. Finally, Petitioners have not substantiated their claims that their customers cannot or will not pay any fee for their Lifeline service.⁶⁴

⁵⁷ [CONFIDENTIAL] [CONFIDENTIAL]

⁵⁸ Joint Petition at 65.

⁵⁹ Easy Declaration at 4, para. 12.

⁶⁰ *Id.*

⁶¹ *Cf. Arriva*, 239 F. Supp.3d at 283 (Party seeking a stay submitted affidavits from customers detailing customers' reactions).

⁶² Joint Petition at 51.

⁶³ Joint Petition at 66 n. 224.

⁶⁴ This claim seems inconsistent with the fact that Assist and Easy offer multiple plans to Lifeline customers with enhanced features for nominal or larger fees. See Assist Wireless Phone Calling Plans Non-Tribal <https://www.assistwireless.com/cell-phone-plan-states/ok-non-tribal/>; Easy Wireless Lifeline Plans <http://www.myeasywireless.com/lifelineplans>. We also note that "[a] recent study of the existing Lifeline program ... found that 87.5% of Lifeline subscribers could afford and would subscribe to telephone service even without a

(continued...)

28. Petitioners assert that Easy and Assist have no way to mitigate any claimed economic losses, but they do not substantiate this conclusion. Both Assist⁶⁵ and Easy⁶⁶ are designated as ETCs in other states, and neither explains why they would be unable to expand their customer base in those areas. While Easy states that it currently operates in a “niche space in the Lifeline industry,”⁶⁷ it does not explain why it would be unable to “focus on volume in more densely populated areas,”⁶⁸ and Assist offers no indication that it would be unable to modify its existing business model, or why it continues to provide Lifeline service in other states in which it does not receive enhanced support. Instead, Easy appears to suggest that its only two options would be to switch to a “harvesting” model, or to continue providing service only in rural, Tribal areas, without receiving enhanced support,⁶⁹ but it offers no support for this claim.

29. Petitioners also assert, without proof, that they cannot mitigate economic losses because they will be unable to renegotiate their underlying contracts for purchased wholesale minutes.⁷⁰ Assist concedes that it could remain profitable with a renegotiation,⁷¹ but then states that it is both “certain” that its underlying rates could not be renegotiated, and that a renegotiation would be “nearly impossible.”⁷² Easy states that it is “certain” that Sprint would refuse to renegotiate its wholesale rates. Petitioners fail to include declarations from the providers of wholesale minutes demonstrating that the wholesalers would refuse to negotiate modified contractual terms, and Petitioners offer no other support for these assertions.

30. Finally, Petitioners claim that, absent a stay, Assist and Easy will suffer significant damage to their “goodwill and brands,” and that they will never be able to recover the lost goodwill.⁷³ Petitioners fail to explain why Lifeline customers would view Assist and Easy differently than they would view any other non-facilities-based Lifeline provider, which would similarly be ineligible to receive enhanced Tribal support, and would presumably also be forced to offer a reduced Lifeline package to continue providing free service. While both Assist⁷⁴ and Easy⁷⁵ state that it is their “experience” that customers will blame them for any changes to their service, they offer nothing to support this claim, or why they would be unable to explain to their customers that the cause of the change is a Commission rule that they are challenging. Petitioners also state that customers may be confused by the definition of “urban clusters,”⁷⁶ but they provide no evidence for this declaration; the *2017 Lifeline Order* explains what an urban cluster is, and it also provides information on the Census Bureau’s definition.⁷⁷

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subsidy.” *2016 Lifeline Order*, 31 FCC Rcd at 4166 (dissenting statement of then-Commissioner Ajit Pai), citing Olga Ukhaneva, *Universal Service in a Wireless World*, at 18 (Nov. 17, 2015), available at <http://bit.ly/1WcWrUQ>.

⁶⁵ Assist Declaration at 1, para. 3.

⁶⁶ Easy Declaration at 1, para. 3.

⁶⁷ Easy Declaration at 2, para. 7.

⁶⁸ *Id.*

⁶⁹ Assist Declaration at 2, para. 7.

⁷⁰ Joint Petition at 67.

⁷¹ Assist Declaration at 5, para. 13.

⁷² *Id.*

⁷³ Joint Petition at 69.

⁷⁴ Assist Declaration at 6, para. 17.

⁷⁵ Easy Declaration at 7, para. 18.

⁷⁶ Joint Petition at 68 n. 235.

⁷⁷ *2017 Lifeline Order*, 32 FCC Rcd at 10479, para. 7 & n. 23.

2. Petitioners Have Not Shown Unrecoverable Harm

31. Petitioners also have not shown any reason why, if the limitation of enhanced support to facilities-based providers is later overturned, they will be unable to recover their monetary losses. An economic loss is unrecoverable when an affected party has no recourse to recoup funds to which it is legally entitled.⁷⁸ If Petitioners are successful in their litigation, and the Commission's decision to limit enhanced support to facilities-based providers is held unlawful, we are unaware of any obstacle to their filing a claim with the Universal Service Administrative Company (USAC) seeking payment of any unlawfully withheld funds. Accordingly, the harm petitioners claim is not irreparable.⁷⁹

C. The Requested Stay Will Result in Harm to Others and is Contrary to the Public Interest

32. We also find that the Petitioners have failed to demonstrate that the requested stay will serve the public interest and will not harm third parties. The Commission concluded that the American public is better served by directing enhanced Lifeline support to those providers who are building telecommunications networks, which will “ultimately provide more robust networks and higher quality service on rural Tribal lands,”⁸⁰ and it specifically disagreed with the contention that resellers' purchase of wholesale service from facilities-based carriers incentivized facilities-based carriers to deploy and maintain their networks.⁸¹ The Commission also found that directing enhanced support to densely populated Tribal areas (including several large cities) where facilities deployment is already abundant did not serve the primary purposes of enhanced Tribal support.⁸² Granting a stay would allow portions of the Fund to continue to be spent in a manner the Commission determined to be wasteful and inefficient, which would harm the public interest.⁸³

33. Petitioners also submit declarations that Tribal members would be harmed without a stay.⁸⁴ However, these declarations offer no proof that Tribal residents have come to rely on the extra features associated with the enhanced Tribal subsidy, or that most customers use more than the 750 voice minutes which are included in Petitioners' non-Tribal Lifeline offerings.⁸⁵ Additionally, while Petitioners point out that low-income residents on Tribal lands “often cannot afford telephone and broadband

⁷⁸ See *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 67 (D.D.C. 2004).

⁷⁹ *VA Petroleum Jobbers*, 259 F.2d at 925. Petitioners also argue that they will suffer the loss of goodwill from their customers. While that contention is discussed in more detail above, lost goodwill is the type of purely economic injury that does not constitute irreparable injury unless that lost goodwill threatens a movant's business. *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 4 (D.D.C. 1994). Here, Petitioners appear to assert that the primary cause of their businesses' hypothetical closure is the loss of “the vast majority of their revenues,” and not the loss of customer goodwill. See Joint Petition at 64; Easy Declaration at 2-3, para. 8 (“if Easy marketed and provided service to only non-Tribal Lifeline customers, its business model would not be sustainable.”); Assist Declaration at 3-4, para. 10 (“The basic Lifeline service business model is unsustainable for Assist.”). Accordingly, any loss of goodwill is the type of economic injury that can be rectified in the event Petitioners succeed in their litigation.

⁸⁰ *2017 Lifeline Order*, 32 FCC Rcd at 10485, para. 27.

⁸¹ *Id.*, 32 FCC Rcd at 10486, para. 28.

⁸² *Id.*, 32 FCC Rcd at 10480, para. 9.

⁸³ See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (“Moreover, excessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers and thus indirectly by the customers excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.”); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009) (quoting *Alenco*).

⁸⁴ Joint Petition at 64.

⁸⁵ *Id.*

services at unsubsidized rates,”⁸⁶ the *Order* has not removed the Lifeline subsidy from any resident of Tribal lands; instead, the Commission has only focused on targeting the *enhanced* Lifeline subsidy more efficiently. Moreover, Tribal residents who no longer qualify for enhanced support remain eligible for the \$9.25 monthly baseline support amount.

34. Petitioners claim that if a stay is not granted, “eligible but unenrolled individuals living in [Tribal areas where wireless Lifeline service is available only through a reseller] will be unable to sign up for service.”⁸⁷ This is incorrect. Unenrolled residents of Tribal lands would remain eligible to sign up for Lifeline through resellers who no longer receive the enhanced benefit, and those resellers remain obligated to provide Lifeline service.⁸⁸

35. For the foregoing reasons we conclude that the requested stay is not warranted. Petitioners have failed to demonstrate that they are likely to succeed, they have not demonstrated that any harm to them from the Commission’s order is certain and irreparable, and the balance of harms, including the harm to the public interest, does not weigh in favor of staying the *Order* pending judicial review.

IV. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 5, 201, 205, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 155, 201, 205, and 254 and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, this Order Denying Stay Petition in WC Docket Nos. 17-287, 11-42, and 09-197 IS ADOPTED.

37. IT IS FURTHER ORDERED that the petition for partial stay of Assist Wireless, LLC, Boomerang Wireless, LLC d/b/a enTouch Wireless, Easy Telephone Services Company d/b/a Easy Wireless, the National Lifeline Association, the Crow Creek Sioux Tribe, and the Oceti Sakowin Tribal Utility Authority, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

⁸⁶ Joint Petition at 71.

⁸⁷ Joint Petition at 76.

⁸⁸ 47 CFR § 54.405(a).