FILED
United States Court of Appeals
Tenth Circuit

August 13, 2012

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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IN RE: FCC 11-161

No. 11-9900
(No. 10-1 FCC 11-161)

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**ORDER**

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Before **KELLY** and **MATHESON**, Circuit Judges.

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Petitioner National Telecommunications Cooperative Association requests an order staying implementation of reimbursement limits adopted by the FCC in its "Transformation Order," issued as part of FCC Order 11-161.[1] The limits were implemented by the FCC's Wireline Competition Bureau in the "Regression Order." In the alternative, petitioner requests a writ of mandamus directing the FCC to rule on its pending application for review before implementing the new reimbursement limits. The FCC opposes the petition.

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[1] This case is a consolidation of some thirty cases seeking review of FCC Order 11-161. Pursuant to this court's Order Governing Motion Practice in the Consolidated Proceedings, filings in support of the motion for stay are not permitted; therefore, we recognize that the positions stated in the motion are likely those of other petitioners and the intervenors aligned with the petitioners. Similarly, pursuant to the order, defendants other than the FCC and the intervenors aligned with the defendants who did not file separate responses are presumed not to support the motion.

In deciding whether to grant a motion for a stay, this court evaluates the following factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted) (internal quotation marks and brackets omitted).

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). Petitioner's request for mandamus relief is "technically preclude[d]" by the availability of a remedy under the Administrative Procedure Act, 5 U.S.C. § 706(1). *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997). "[A]s a reviewing court, we must 'compel agency action unlawfully withheld or unreasonably delayed.'" *Id.* (quoting § 706(1)). Such a mandatory injunction, however, "is essentially in the nature of mandamus relief." *Id.*

We have reviewed and considered the arguments and authorities presented by both sides. In light of all of the circumstances, we are not convinced that petitioner

has carried its "burden of showing that the circumstances justify an exercise of [the court's] discretion" to enter a stay in this matter. *Nken*, 129 U.S. at 433-34.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk