No. 15-1324*

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSIST WIRELESS, LLC, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO MOTION FOR PARTIAL STAY PENDING REVIEW

INTRODUCTION

Under 47 C.F.R. § 54.400(e), low-income residents living on Tribal lands, including the "former reservations in Oklahoma," are eligible for subsidized telephone service. Before this year, the Federal Communications Commission had not issued any guidance on how to interpret or apply this language. In the order under review, the FCC announced that, effective February 9, it will view the Historical Map of Oklahoma 1870-1890 ("Oklahoma Historical Map"), which is the most accurate available representation of the boundaries of former Tribal lands in Oklahoma, as the baseline for identifying the "former reservations in Oklahoma," although the Commission continues to engage in formal consultations with the Tribal Nations in Oklahoma

* Consolidated with *U.S. Telecom Association v. FCC*, No. 15-1322. Only the *Assist Wireless* petitioners move for a partial stay pending review.

to validate the map. *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd. 7818, 7903-07 ¶¶ 257-267 (2015) (*Lifeline Reform Order* or *Order*).

Petitioners have moved to stay the Commission's guidance interpreting this language. Notably, they do not challenge the substance of the FCC's interpretive guidance or the accuracy of the Oklahoma Historical Map; they instead challenge the *Order* on procedural grounds only. But Petitioners' legal arguments are insubstantial, and they have not shown that they are likely to prevail. Nor have they demonstrated that allowing the FCC's interpretive rule to go into effect as planned would cause them any irreparable injury. And delaying implementation of this guidance would only harm the public by allowing public funds to subsidize areas that should not be eligible for enhanced Tribal Lifeline benefits. The motion for a stay pending review should therefore be denied.

BACKGROUND

1. The FCC's Lifeline program provides public subsidies to support the provision of voice telephony service to qualifying low-income consumers throughout the Nation. *Order* ¶ 1. Lifeline subsidies are paid out of the Universal Service Fund, which is funded by contributions from telecommunications carriers that are typically recovered through surcharges on all customers' monthly bills. *Id.* ¶¶ 1, 15 & n.46.

In 2000, the FCC expanded the Lifeline program to provide additional support to low-income households on Tribal lands, a program referred to here as Tribal Lifeline. *Order* ¶¶ 159-161; *see Petitions for Designation as an Eligible Telecommunica-*

tions Carrier and for Related Waivers to Provide Universal Service, 15 FCC Rcd. 12208 (2000) (*Tribal Lifeline Order*). The Commission recognized that, "unlike in urban areas where there may be a greater concentration of both residential and business customers, carriers may need additional incentives to serve Tribal lands that, due to their extreme geographic remoteness, are sparsely populated and have few businesses." *Id.* at 12235 ¶ 53; *Lifeline Reform Order* ¶ 161. Under FCC regulations, Tribal Lifeline benefits are available for qualifying low-income customers "living on Tribal lands," which "include any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma." 47 C.F.R. § 54.400(e).

Payment and eligibility determinations for the Lifeline program are handled by the Universal Service Administrative Company (USAC), an independent non-profit corporation designated to serve as the administrator of the Universal Service Fund. *See* 47 C.F.R. § 54.701. Under federal regulations, a telecommunications carrier may receive a subsidy of $9.25 per month for each low-income customer covered by the Lifeline program, 47 C.F.R. § 54.403(a)(1), a subsidy referred to here as Standard Lifeline. The carrier may also receive an additional subsidy of $25 per month for each such customer living on Tribal lands, *id.* § 54.403(a)(2), for a total subsidy of $34.25 per month for each Tribal Lifeline customer. *See Order* ¶ 160. These subsidies are paid directly to the telecommunications carrier, not to the customer, although the carrier must certify that it will pass through the full amount of the subsidy to the customer. 47 C.F.R. §§ 54.403(a)(1)-(2).

Until this year, the Commission had not interpreted the term "former reservations in Oklahoma" as that term is used to define Tribal lands in 47 C.F.R. § 54.400(e). *Order* ¶ 258. Based on informal guidance offered by FCC staff, USAC specified the eligible areas in Oklahoma using county boundaries from 1951. *Id.* ¶ 258 & n.518; Ex. A to Decl. of Dale Schmick (Mot. Ex. 4). USAC excluded three counties in the Oklahoma panhandle, three counties in the southwest corner of the state, and a portion of another southwest county, and deemed the entire rest of the state to be former reservations, including many urban areas (such as Tulsa and Oklahoma City). *Ibid.* These boundaries were later incorporated into a map maintained by the Oklahoma Corporation Commission, the state utility regulator.[1] Under that map, approximately 99.9% of the qualifying low-income residents receiving Lifeline support in Oklahoma—more than 300,000 people—were considered to live on Tribal lands. *See, e.g.*, *Order* 137-38, 30 FCC Rcd. at 7954-55 (dissenting statement of Commissioner Pai).

2. In September 2014, the Commission received a copy of the Oklahoma Historical Map from the Bureau of Indian Affairs. *Order* ¶ 261 & n.527. The Commission has recognized that the Oklahoma Historical Map is the most accurate available representation of the former reservations in Oklahoma. *Id.* ¶¶ 262-263.

In the *Lifeline Reform Order*, the Commission announced that it will view the Oklahoma Historical Map as the baseline for identifying the "former reservations in Oklahoma" under 47 C.F.R. § 54.400(e). *Order* ¶¶ 257-267. In doing so, it declined

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[1] *See* http://www.occeweb.com/pu/2011OKTribalLandsMap.pdf.

to adopt the map previously used by USAC to determine eligibility or the informal staff guidance upon which that map was based. *Id.* ¶¶ 260, 262. The Commission explained that "the Oklahoma Historical Map provides more clarity to both Tribal consumers and Lifeline providers to ensure that funds are allocated for the intended purpose of assisting those living on Tribal lands" and provides "a more accurate representation of the individual former reservations of each Tribal Nation in Oklahoma." *Id.* ¶¶ 261-263.

The Commission directed USAC to delay any changes to its administration of the Tribal Lifeline Program for 180 days to ensure an orderly transition and to allow Commission staff to consult with the Tribal Nations in Oklahoma to validate the boundaries depicted in the map. *Order* ¶¶ 265-266. It further directed Commission staff to use this time "to actively seek government-to-government consultation with Tribal Nations in Oklahoma" and, "[if] these consultations * * * find[] that the Oklahoma Historical Map should be departed from in any way to better reflect the complex legal history of the 'former reservations in Oklahoma,'" to "recommend * * * an order based on that consultation." *Ibid.*

3. Petitioners are companies that receive subsidies to provide wireless telephone service to Lifeline-eligible customers in Oklahoma. Most of their Lifeline customers do not pay anything for this service (or pay only a nominal fee, such as $1); they instead receive a fixed number of wireless minutes each month without paying

anything (or paying only a nominal fee) to the service provider.[2] In Oklahoma, Standard Lifeline customers receive at least 500 minutes per month and Tribal Lifeline customers receive at least 1000 minutes. Okla. Admin. Code § 165:59-9-3(q). Some customers may elect to pay a fee to purchase additional service, such as additional minutes, data, or text messages, but it is the FCC's understanding that the majority—perhaps the overwhelming majority—of these customers do not pay anything for their service (or pay only a nominal fee).

On October 16, Petitioners requested a partial administrative stay of the *Order* pending judicial review, which Commission staff, acting on delegated authority, denied on November 6. *Lifeline and Link Up Reform and Modernization*, DA 15-1259, WC Docket No. 11-42 (Wireline Comp. Bur. 2015) (*Stay Denial Order*). Petitioners now renew their arguments in this Court.

ARGUMENT

To qualify for the extraordinary remedy of a stay pending review, Petitioners must show that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent a stay; (3) a stay will not cause harm to others; and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Davis v. Pension Ben. Guaranty Corp.*, 571

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[2] *In re Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd. 6656, 6669-70 ¶ 23 (2012) (*2012 Lifeline Order*); U.S. Gov't Accountability Office, GAO-15-335, *FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program* 25 (2015) (wireless carriers "typically provide [Lifeline] consumers with * * * free monthly minutes, rather than providing a discount on a monthly telephone bill").

F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring) (Petitioners must "show[] *both* a likelihood of success *and* a likelihood of irreparable harm, among other things."). Petitioners have not come close to satisfying these exacting requirements; indeed, they fall short on all counts.

I. PETITIONERS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS.

A. The Challenged Guidance Is An Interpretive Rule And Is Therefore Exempt From Notice-And-Comment Requirements.

1. Petitioners' contention (Mot. 9-12) that the *Lifeline Reform Order*'s guidance clarifying the meaning of "former reservations in Oklahoma" is a legislative rule requiring notice and comment, rather than an interpretive rule, is foreclosed by Circuit precedent. As this Court explained last year, "an agency action that merely interprets a prior statute or regulation, and does not *itself* purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (emphasis added). "Stated slightly differently, interpretative rules are statements as to what the [agency] thinks [a] statute or regulation means, whereas legislative rules have effects *completely independent* of the statute." *United Techs. Corp. v. U.S. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987) (internal quotation marks and alterations omitted).

This Court has explained that interpretive rules "may have the *effect* of creating new duties." *Cent. Tex. Tel. Co-op. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (collecting cases); *accord Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759

(D.C. Cir. 1992). Here, for example, "an interpretive statement may 'suppl[y] crisper and more detailed lines than the authority being interpreted.'" *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993). Thus, "to the extent petitioners are contending that interpretive rules cannot be conduct-altering, the law is to the contrary." *Cent. Tex. Tel. Co-op.*, 402 F.3d at 214.

Under these precedents, the challenged guidance in the *Lifeline Reform Order* is clearly an interpretive rule.[3] The Commission simply offered guidance interpreting, for the first time, the phrase "former reservations in Oklahoma" as it appears in the existing regulation. *See Order* n.523; *Stay Denial Order* ¶ 7. It did not "change[] the text of the regulation appearing in the Code of Federal Regulations," but "simply clarified the definition of a phrase that it had used in the initial rule." *Sprint Corp. v. FCC*, 315 F.3d 369, 375 (D.C. Cir. 2003); *see also Sentara-Hampton*, 980 F.2d at 759 (interpretive rule that "explain[s] ambiguous language" in an existing law does "not create new law").

2. Petitioners concede (Mot. 11 n.9) that interpretive rules are exempt from notice and comment. *See* 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). They nonetheless argue (Mot. 10) that notice and

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[3] Petitioners argue (Mot. 10-11) that language in a footnote describes the guidance as a legislative rule. On the contrary, that footnote discusses the separate issue of whether the guidance applies retroactively, which is governed by a different standard. *See Order* n.536. It does not purport to address whether the guidance is a legislative rule or an interpretive rule, and the Commission elsewhere expressly (and correctly) characterized it as an interpretive rule, *id.* n.523.

comment was required because the Commission allegedly "changed" its prior interpretation of the regulation. That argument is incorrect.

The *Lifeline Reform Order* did not constitute any "change" in the Commission's interpretation of the regulation, because the *Order* is the first time that the Commission has interpreted this language. *See Order* ¶ 258; *Stay Denial Order* ¶ 2 ("Until this year, the Commission had not defined the boundaries of the 'former reservations in Oklahoma' for purposes of enhanced Lifeline support."). To be sure, USAC previously construed this language differently based on informal guidance offered by FCC staff, but it is well established that staff guidance that has not been reviewed or adopted by the Commission itself does not bind the Commission.[4] As this Court has explained, staff guidance—even from "an FCC insider"—is not guaranteed to be accurate and "should not engender reliance." *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991). The informal staff guidance at issue was never adopted by any Commission order, so the Commission has not changed its position.

But even if the Commission had issued a previous interpretation of the regulation and changed that interpretation in the *Lifeline Reform Order*, an agency need not engage in notice and comment to change a prior interpretation or policy if the prior interpretation itself was not adopted through notice and comment. *Perez*, 135 S. Ct. at

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[4] *See, e.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) ("[A] long line of cases in this circuit * * * unambiguously holds that an agency is not bound by unchallenged staff decisions."); *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (staff activities do not constitute "authoritative Commission action"); *see also Stay Denial Order* n.24 (collecting additional authority).

1206-07. Petitioners here do not argue that adoption of the Oklahoma Historical Map is irreconcilable with the text of the regulation. And *Perez* holds that although a regulation may be a legislative rule, a departure from a prior *interpretation* of that regulation is not a change or amendment to the underlying regulation itself.[5] *See id.* at 1207-09. Because the Commission has not changed any legislative rule, it was not required to follow the notice-and-comment procedures that govern only legislative rules.

B. The Commission Did Not Disregard Its *Tribal Consultation Policy*.

Petitioners next contend that the Commission "depart[ed] from [Commission] precedent" requiring consultation with Tribal Nations before implementing any action or policy that will significantly or uniquely affect them. Mot. 12-13. Even assuming that Petitioners, who are companies providing wireless phone service, have standing to invoke the consultation rights of the Tribal Nations (a doubtful proposition), and even ignoring that the policy statement they invoke "does not[] create any right enforceable in any cause of action," *Statement of Policy on Establishment of Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078, 4080 (2000) (*Tribal Consultation Policy*), Petitioners have failed to show a likelihood of success because the Commission is fully complying with its *Tribal Consultation Policy*.

The Commission's stated policy is to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect

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[5] To the extent any past cases suggest otherwise, *cf.* Mot. 9-10 (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005); *Sprint Corp.*, 315 F.3d at 371; and *Am. Tel. & Tel. Co.*, 454 F.3d at 332), they have been abrogated by *Perez*.

Tribal governments, their land and resources." *Tribal Consultation Policy*, 16 FCC Rcd. at 4081. Consistent with that commitment, the Commission ordered USAC not to implement the interpretive guidance for 180 days, and it directed Commission staff to use this time "to actively seek government-to-government consultation with the Tribal Nations in Oklahoma." *Order* ¶ 265; *see also Stay Denial Order* ¶¶ 8 & n.22, 24. The Commission further ordered that "[if] these consultations * * * find[] that the Oklahoma Historical Map should be departed from in any way to better reflect the complex legal history of the 'former reservations in Oklahoma," Commission staff shall "recommend * * * an order based on that consultation" with revised boundaries to address those matters. *Order* ¶ 266.

Those consultations are currently underway, and Commission staff fully anticipate that the consultation process will be completed before any changes are implemented. *Cf. Stay Denial Order* ¶ 12 (the "consultation period [will] allow sufficient time for the Commission to consult with relevant Tribal governments"). The Commission takes seriously its commitments to the Tribal Nations and is conscientiously fulfilling those commitments here.

Petitioners cite no support at all for their assertion that "solicit[ing] the views of Tribal governments *after* [the Commission] settled on its new rule"—but before implementing it, precisely as the *Tribal Consultation Policy* provides—"cannot be fairly described as 'consultation.'" Mot. 12. Petitioners' failure to cite any Commission order supporting their position is particularly glaring when their claim is only that the

Commission did not comply with *its own* precedent. Nor can Petitioners overcome the "high level of deference due to an agency in interpreting its own orders and regulations." *See, e.g., Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (quoting *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001)).

Moreover, even if the Commission's adherence to its *Tribal Consultation Policy* were in doubt, and even if that policy statement could be enforced by Petitioners, Petitioners have not shown that the challenged guidance falls within that policy, because nothing in the *Order* affects—much less "significantly or uniquely" affects—"Tribal governments, their land and resources." *See Stay Denial Order* ¶ 8. The *Order* affects Lifeline benefits only for households on *non-Tribal* lands; those residing on lands that actually constitute "former reservations in Oklahoma" are unaffected. *Ibid.*[6]

C. The Guidance Is Not Otherwise Arbitrary Or Capricious.

Petitioners nowhere dispute that the Oklahoma Historical Map is a more accurate representation of the Tribal lands that constitute the "former reservations in Oklahoma." Nevertheless, they contend that the Commission's decision to adopt this map was arbitrary and capricious because the Commission allegedly failed to consider

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[6] Petitioners contend that, because the scope of the *Tribal Consultation Policy* was not addressed in the *Lifeline Reform Order*, this argument must be *post hoc* rationalization. Mot. 13. But the *Order* never suggested that consultation was required under the *Tribal Consultation Policy*; instead, it directed staff to consult with the Tribal Nations simply to help validate the Oklahoma Historical Map, since "Tribal Nations are an important source regarding the [accuracy] of the mapped boundaries of their lands." *See Order* ¶ 265. The agency fully addressed this issue when it was raised in Petitioners' administrative stay request. *See Stay Denial Order* ¶ 8.

the impact on Tribal communities or because it allegedly did not explain a difference in coverage from unrelated welfare programs. These arguments are makeweight.

1. Petitioners' contention that the Commission failed to consider the impact of the Oklahoma Historical Map on Tribal communities (Mot. 13-14) is baseless. By adopting a more accurate map of the Tribal lands in Oklahoma, the *Lifeline Reform Order* simply ensures that the beneficiaries of the Tribal Lifeline program in fact reside on Tribal lands and that program funds are not spent on areas that fall outside the scope of the program. The adoption of a more accurate map affects only those who are not entitled to enhanced Tribal Lifeline benefits, with no detrimental effect on those who actually reside on Tribal lands. *Cf. Stay Denial Order* n.32 ("[t]here is no entitlement to support" for those not made eligible by Commission rules).[7]

Nevertheless, the Commission *did* consider the effect of its guidance on residents who will no longer be eligible for enhanced benefits. The Commission noted that the effect of its guidance will be limited because all consumers who were previously eligible for Tribal Lifeline benefits will still receive Standard Lifeline benefits. *Order* ¶¶ 257, 265-267; *Stay Denial Order* ¶ 10. For most customers, the only change

[7] To the extent that some Tribe members may be ineligible for benefits because they live outside of Tribal lands, *cf.* Mot. 20, they fall outside the mission of the Tribal Lifeline program. The purpose of the program is to promote access to telecommunications "on typically remote and underserved Tribal lands." *Order* ¶ 159; *see also id.* ¶ 161. The subsidies are tied to these remote lands, not to the recipient's race or ancestry. Accordingly, Tribal Lifeline benefits are provided to all low-income residents living on Tribal lands, even those who are not members of a Tribal Nation, and conversely are unavailable to those who move outside of Tribal lands, no matter their race or ancestry.

is that they will receive fewer free wireless voice minutes per month, and there is no evidence in the record that many customers use more than the 500 minutes per month available under a Standard Lifeline plan in Oklahoma. In addition, the Commission prevented any sudden change by ordering a 180-day delay to ensure an orderly transition. *Stay Denial Order* ¶ 10. These actions demonstrate that the Commission reasonably considered the consequences of its guidance.

2. Finally, Petitioners erroneously contend that the Commission did not offer "any explanation" for why it did not "link" Tribal Lifeline coverage "to BIA's benefits coverage" for unrelated social support and welfare programs. Mot. 14-15. To the extent explanation is needed for why different programs with different goals have different coverage areas, the Commission gave that explanation in 2003 on reconsideration of the *Tribal Lifeline Order*, and it again invoked that explanation here. *See Lifeline Reform Order* n.528 (quoting 18 FCC Rcd. 10958, 10966-67 ¶¶ 16-17 (2003)); *see also Stay Denial Order* ¶ 11 & n.33 ("[T]he Commission previously made clear [in 2003] that its interpretation of the term 'Tribal lands' was not intended to encompass areas identical to any BIA financial assistance and social support programs.").

II. PETITIONERS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

Even if Petitioners could prevail on the merits, a stay is not warranted because they have not demonstrated irreparable harm. To obtain a stay, they must show an injury "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). In addition, they must "substantiate the

claim that 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." *Ibid.* (citation omitted). Petitioners insist that a stay is necessary to prevent irreparable harm to their finances, to their customers, and to their goodwill. None of these claims holds up to scrutiny.

1. First and foremost, Petitioners have not shown any reason why, if the Oklahoma Historical Map goes into effect but Petitioners later prevail on their challenge, they would be unable to recover any subsidies withheld in the interim. Petitioners suggest that the FCC has not told them the "way in which these losses could be recouped" if they prevail, Mot. 16, but we are not aware of any obstacle to their filing a claim with USAC seeking payment of any unlawfully withheld funds. "The possibility that adequate compensatory or other corrective relief will be available at a later date * * * weighs heavily against a claim of irreparable harm." *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *cf. Wis. Gas*, 758 F.2d at 675 ("neither [petitioner] has shown that the alleged loss is unrecoverable").

But even if the marginal difference in subsidies during the pendency of this case were unrecoverable, Petitioners have not shown that their losses will be "certain and great." *Wis. Gas*, 758 F.2d at 674. Petitioners have not, for example, offered any concrete information about their financial status or total revenues. *Stay Denial Order* ¶ 17; *see Wis. Gas*, 758 F.2d at 675 (alleged injury only "speculative and hypothetical" where "petitioners have not attempted to provide any substantiation"). In fact, each

Petitioner has certified that it has other revenue streams and does not rely solely on Lifeline subsidies. *Id.* ¶ 17 & n.52. And Petitioners do not dispute the agency's calculation that, even taking Petitioners' projected losses at face value, these losses amount at most to less than 22% of their gross revenues. *Id.* ¶ 17. In fact, Petitioners' losses will likely be far less than their projections, which assume that many customers will cancel service altogether—an assumption that is unfounded. *See infra* p. 18.

It is unsurprising, then, that three of the four petitioners do not contend that any coverage changes threaten the viability of their businesses. *Stay Denial Order* ¶ 15; *see, e.g.*, *Mylan Labs., Inc. v. Leavitt*, 484 F. Supp. 2d 109, 123 (D.D.C. 2007). The only petitioner to claim that it might go out of business is True Wireless, but that claim is wholly unsubstantiated. As the agency explained, True Wireless fails to provide any of the information necessary to substantiate its bare assertion that the changes will "likely" drive it out of business. *See id.* ¶¶ 20-21. Claims of insolvency that do not offer reasonably specific projections of future revenues and losses, do not detail the company's available assets, and do not "explain with any specificity" how these numbers are reached "fall[] short of what is necessary to merit a finding of irreparable harm." *See Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011).[8]

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[8] Even following the *Stay Denial Order*, True Wireless has not come forth with any of the missing information. Instead, it simply resubmits the same threadbare declaration; argues that it has adequately projected its likely losses; and then repeats the naked assertion that these losses exceed its cash flow. Mot. 17 & n.17. It has not, however, detailed its projected cash flow or shown that *that* projection is reasonably specific and supported by substantial evidence. Nor has it addressed its

2. Petitioners likewise have not demonstrated that there will be any substantial and irreparable harm to Lifeline customers. Most customers will not see any change in their bills, because the vast majority of Lifeline customers do not pay anything for service (or pay only a nominal fee). *See supra* pp. 5-6. Most customers are on plans that are entirely or essentially free to the customer, and even after any change they will continue to receive free service under a Standard Lifeline plan. *Ibid.*

The only difference for these customers is that they may receive an allotment of fewer wireless voice minutes on a Standard Lifeline plan than they would receive on a Tribal Lifeline plan. But even under a Standard Lifeline plan, each customer will continue to receive an allotment of at least 500 free minutes each month. Petitioners have not shown (or even sought to show) that any substantial number of their customers use more than 500 wireless voice minutes each month. Customers who spend fewer than 500 minutes talking on their wireless phone each month—an allotment of more than eight hours of talk time—will not experience *any* noticeable impact.

3. Finally, Petitioners have not shown that they will experience any substantial and irreparable harm through loss of goodwill. Petitioners insist that they will suffer "reputational harm," Mot. 18, but their companies do not receive any inherent value from having a good reputation. Instead, for a telecommunications carrier, harm to

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ability to cut costs elsewhere to help offset any reduction in subsidies (for example, by closing unprofitable stores or reducing payroll). And it has not detailed its current assets or cash on hand to show that it would be unable to absorb any losses during the time it takes the Court to resolve this case.

goodwill matters only insofar as it translates into economic loss—that is, only insofar as it affects subscription revenues. *See, e.g.*, *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 4 (D.D.C. 1994) ("claimed injury" from "loss of goodwill" by cruise ship company is "wholly economic in character" and not irreparable).

Here, Petitioners' claim that they will lose subscriber revenue because many customers will cancel service (Mot. 18 & n.18) is unfounded. All affected customers will still be eligible for Standard Lifeline benefits, under which each customer will continue to receive 500 minutes per month *entirely for free* (and the carrier will continue to receive a $9.25 subsidy). Petitioners cannot seriously contend that most customers will choose to have no phone service rather than accept the free service available under Standard Lifeline plans. *See Stay Denial Order* ¶ 19. Nor are customers likely to switch to other carriers, because the Lifeline discount available through other carriers will be no different from the discount available through their current carrier. *Ibid.* And some customers may elect to pay the extra $25 per month to keep their existing plans, which would offset any losses to the carrier.

If Petitioners are truly concerned about a loss of goodwill, moreover, they can prevent that harm by electing to continue providing customers in affected areas the same number of minutes they receive on their current plans while this case is pending. Although Petitioners have not quantified the expense of continuing to provide extra minutes at no extra cost to the customer, the cost to their companies will likely be small, because most customers likely are not using most of the minutes included in

their plans (and may not even exceed the 500 free minutes per month in the Standard Lifeline plan they will retain) and because the marginal cost to supply an additional minute of wireless voice connectivity is insubstantial.

Moreover, Petitioners can mitigate any damage to their goodwill by explaining to their customers that any change in their plans is due to a change by the government and that they are fighting the change by filing a lawsuit on their customers' behalf. Instead, however, two Petitioners have told the state utility regulator that they wish to notify their customers of the change in their benefits only by text message. *See* Ex. A to Decl. of Bryan Young (Mot. Ex. 1). If Petitioners were genuinely concerned about loss of goodwill, presumably they would not be delivering this news by text message.

III. A STAY WOULD HARM THE PUBLIC.

Petitioners insist (Mot. 19-20) that no one will be harmed if the implementation of the new map is stayed. That entirely overlooks the Commission's public-interest obligation to ensure that Tribal Lifeline subsidies are accurately targeted to qualified recipients in need of assistance and to minimize the burden on other ratepayers. When Petitioners receive Tribal Lifeline payments to which they are not entitled, it harms all other ratepayers and providers—virtually the entire public—who contribute to the Universal Service Fund from which Lifeline subsidies are paid.

The Lifeline program is funded through contributions by telecommunications carriers that are typically recovered through surcharges on all residential and business customers' monthly bills. *See* 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.706, 54.712;

Universal Service Contribution Methodology, 27 FCC Rcd. 5357, 5362 ¶ 9 (2012). "[E]xcess subsidization" therefore harms the public "[b]ecause universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by the customers." *Alenco Commc'ns v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000); *see Stay Denial Order* n.71.

The Commission has therefore sought to "minimiz[e] the contribution burden on consumers and businesses." *2012 Lifeline Order*, 27 FCC Rcd. at 6675 ¶ 37. Indeed, this Court has emphasized that the FCC "has a responsibility to be a prudent guardian of the public's resources." *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011) (internal quotation marks omitted).[9]

Here, "a stay of the *Order* * * * would not serve the public interest and would harm third parties by disbursing enhanced Lifeline funding for geographic areas that do not qualify as Tribal lands under [the regulation] and burdening contributing providers and ratepayers to bear the cost of those disbursements." *Stay Denial Order* ¶ 24. That ongoing harm to the public should not be allowed to persist simply because Petitioners have filed a lawsuit.

CONCLUSION

Petitioners' motion for a partial stay pending review should be denied.

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[9] *See also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009) (the Commission "must consider * * * the need to limit the burden" on other ratepayers and need not condone "wretched excess" to would-be beneficiaries).

Dated: November 30, 2015

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on November 30, 2015, I filed the foregoing Opposition to Petitioners' Motion for Partial Stay Pending Review with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system and by causing an original and four copies to be hand-delivered to the Clerk's Office. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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