ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1431

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

CONSOLIDATED COMMUNICATIONS OF CALIFORNIA COMPANY,
f/k/a SUREWEST TELEPHONE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** All parties appearing in this Court are listed in the Brief of Petitioner.

(B) **Ruling under Review.** The petition for review challenges the following order of the Federal Communications Commission: *Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, 31 FCC Rcd 12012 (JA __) (2016). That order denied review of the following decision of the Commission's Wireline Competition Bureau: *Petition for Waiver of Universal Service High-Cost Filing Deadlines*, 28 FCC Rcd 14852 (JA __) (Wireline Comp. Bur. 2013).

(C) **Related Cases.** The order under review has not previously been before this Court or any other court. Respondents are aware of no other related cases.

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On Petition for Review of an Order of
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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

Petitioner Consolidated Communications of California Co.—formerly known as SureWest Telephone—seeks review of a final order of the Federal Communications Commission: *Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, 31 FCC Rcd 12012 (JA __)

(2016) (*Order*).[1] The *Order* was released on October 26, 2016. As required under 28 U.S.C. § 2344, SureWest filed its petition for review within 60 days. This Court has jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

QUESTIONS PRESENTED

SureWest, a telephone company serving northern California, receives millions of dollars in annual subsidies through a Commission program that promotes the universal availability of affordable telecommunications services. Before a carrier can receive such subsidies, the state in which the carrier operates must certify that the carrier will use its funding as prescribed by the Commission. Under the governing Commission rule, 47 C.F.R. § 54.314, state certifications are due to the agency by October 1 annually. A state's delay in submitting a carrier's certification reduces the subsidies available to that carrier to a degree calibrated to the length of delay.

In 2012, SureWest failed to file with the California Public Utilities Commission a certification concerning the company's use of Universal

[1] Consistent with the petitioner's brief, we refer to the petitioner as "SureWest" and to the holding company that acquired SureWest in 2012 as "Consolidated."

Service subsidies that was required by state regulation. As a result, California did not make a Section 54.314 certification on SureWest's behalf until February 19, 2013—nearly five months late. Because of the delay in California's filing that SureWest's own, admitted mistake caused, SureWest was prevented by the terms of Section 54.314 from receiving approximately $3 million in subsidies for which SureWest might otherwise have been eligible. SureWest claims it was confused about the application of Section 54.314 (and the corresponding need to file a carrier certification with California) because the Commission had adopted that rule just months before SureWest was acquired by Consolidated—a transaction that changed SureWest's regulatory status. Relying heavily on that asserted confusion, SureWest asked the Commission to waive the application of Section 54.314. The Commission found no good cause to do so.

The petition for review presents the following questions:

1. Was the Commission's adherence to Section 54.314 an abuse of discretion?

2. Is the reduction of subsidies awarded to SureWest subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

As part of its mission to ensure the universal availability of adequate and affordable telecommunications services, the Commission oversees a program—known historically as the "Universal Service high-cost program"—that subsidizes the provision of service in areas that are costly to serve. *See Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011). Funding for that program comes directly from "fees charged to telephone companies and other providers of interstate telecommunications services." *Id.* at 57. But because those carriers "may pass these fees along to their customers, and almost always do," *id.*, the program is in reality financed by consumers.

The types of subsidies available through the high-cost program have evolved over time, and they differ depending on a carrier's regulatory classification. In 2001, for example, the Commission created a form of subsidy for rate-of-return carriers known as "Interstate Common

Line Support."[2] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 19613, 19621–22 ¶ 15 (2001) (*MAG Order*), *amended on reconsideration by* 18 FCC Rcd 10284 (2003). That subsidy was designed to compensate carriers for specified costs associated with "providing the local loop between [a] carrier's central office and the customer's premises" for use in providing interstate voice telephony—costs that, by function of the Commission's rules, could not be recovered through direct charges to end users. *Connect America Fund*, 31 FCC Rcd 3087, 3117 ¶ 81 (2016), *subsequent history omitted*; *see id.* at 3117–18 ¶¶ 81–82. The Commission made a carrier's receipt of Interstate Common Line Support contingent upon the carrier's submission of an annual certification that the carrier would use the subsidy it received only as intended by the Commission. *See MAG Order*, 16 FCC Rcd at 19688 ¶ 176.

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[2] A rate-of-return carrier is a local telephone company that, under the Commission's rules, may "charge rates no higher than necessary to obtain sufficient revenue to cover [its] costs and achieve a fair return on equity." *See Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177–78 (D.C. Cir. 1993) (internal quotation marks omitted).

In 2011, the Commission adopted comprehensive changes to the high-cost program, including several that affected the Interstate Common Line Support mechanism. *See generally Connect America Fund*, 26 FCC Rcd 17663 (2011) (*Transformation Order*), *aff'd*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). For example, as to rate-of-return carriers affiliated with price cap carriers,[3] the Commission provided that Interstate Common Line Support (among other subsidies) would in 2012 be "frozen" at 2011 levels. *See Transformation Order*, 26 FCC Rcd at 17715 ¶ 133. And the Commission determined that, beginning in 2013, such carriers would be required to use a portion of their frozen subsidies to build and operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor. *See id.* at 17723 ¶ 150.

In addition, the Commission adopted "unified reporting and certification procedures" for all types of high-cost subsidies.

[3] A price cap carrier is a local telephone company that is required, under the Commission's rules, to set its rates at or below a maximum price established by the agency. *See National Rural Telecom Association*, 988 F.2d at 178. The Commission determined in the *Transformation Order* that, with respect to the high-cost subsidies at issue in this case, the Commission would treat rate-of-return carriers affiliated with holding companies that own mostly price cap carriers "as price cap carriers." 26 FCC Rcd at 17713 ¶ 129.

Transformation Order, 26 FCC Rcd at 17850 ¶ 573. The new procedures were intended "to ensure [the] appropriate use of high-cost support and to allow the Commission to determine whether it is achieving its goals efficiently and effectively." *Id.*

One of those requirements—codified at Section 54.314 of the Commission's rules, 47 C.F.R. § 54.314 (2012)[4]—is that before any carrier can receive Universal Service subsidies under any of the high-cost program's available mechanisms, the state in which the carrier operates must file a written certification with the Commission. *See Transformation Order*, 26 FCC Rcd at 17860 ¶ 609. In that document, the state must certify that all federal subsidies awarded to the carrier in question "[were] used in the preceding calendar year and will be used in the new calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended, regardless of the rule under which that support is provided." *Id.*

The first state certifications required under Section 54.314 were due on October 1, 2012, and they are now due on October 1 annually.

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[4] Further references to Section 54.314 are to the 2012 version, which was in place during the period relevant to this case. As noted in the *Order*, the Commission has since amended the rule. *See Order* ¶ 16 (JA __).

Transformation Order, 26 FCC Rcd at 17860 ¶ 609. The rule specifies that, if a state files the required certification for a given carrier after October 1, disbursements of high-cost subsidies to that carrier for the relevant year will be diminished to a degree linked to the state's delay in making the filing. Carriers for which the Commission receives a state's certification up to three months late (i.e., by January 1) will receive nine instead of twelve months' worth of subsidies. *See* 47 C.F.R. § 54.314(d)(2). Carriers for which the Commission receives a state's certification between three and six months late (i.e., by April 1) will receive six months' worth of subsidies. *See id.* § 54.314(d)(3).

When adopting Section 54.314, the Commission "eliminate[d] carriers' separate certification requirements for" Interstate Common Line Support. *Transformation Order*, 26 FCC Rcd at 17862 ¶ 614. To prevent any "gap in coverage," however, the Commission required carriers receiving Interstate Common Line Support to "file a final certification under" the Commission's former certification rule by June 30, 2012. *Id.*

B. Factual Background

SureWest is a telephone company that serves an area near Sacramento, California. *See* Application for Review 2 (JA __). In 2011,

SureWest was classified as a rate-of-return carrier and received Interstate Common Line Support of approximately $5.8 million. Br. 4. SureWest was thus subject to the Commission's directive to "file a final certification under" the former certification rule, eliminated in the *Transformation Order*, specific to Interstate Common Line Support. 26 FCC Rcd at 17862 ¶ 614. On June 21, 2012, SureWest certified that it would use that subsidy in the coming year as intended by the Commission. Application for Review 3 (JA __).

On July 2, 2012, "SureWest was acquired by Consolidated," "a holding company whose subsidiaries include several [carriers] regulated as price-cap carriers." Application for Review 3 (JA __). As a result, "SureWest became a price-cap carrier affiliate" for purposes of the Commission's Universal Service rules. *Id.* As a price cap carrier affiliate, SureWest's high-cost subsidies were frozen at 2011 levels and, beginning in 2013, SureWest was obligated to spend specified portions of those subsidies on the provision of broadband-capable networks in underserved areas. *See supra* p. 6.

Pursuant to Section 54.314, "[h]igh-cost support [could] only be provided" to SureWest in 2013 "to the extent" California certified to the Commission that SureWest would use any frozen Universal Service

subsidies it received as intended by the Commission. 47 C.F.R. § 54.314(a). Before filing that certification, California required SureWest to file a related certification with the state. *See* Application for Review 4 (JA __); *see also* Exhibit A to Waiver Petition 1 (JA __) (referencing the requirements of Resolution T-17002). According to SureWest, "[a]s a result of confusion stemming from the change in the [high-cost program's] certification requirements, and the change in SureWest's high-cost support status caused by the Consolidated acquisition," SureWest failed to provide its required certification to California on time. Application for Review 4 (JA __). Consequently, although California filed a timely Section 54.314 certification in 2012 for other carriers, it did not do so for SureWest. *See Order* ¶ 5 (JA __).

On January 17, 2013, the Universal Service Administrative Company—which administers the Commission's high-cost and other Universal Service programs—"contacted SureWest . . . about the absence of a California certification." Application for Review 4 (JA __). Thereafter, on January 24, 2013, SureWest "asked the California Public Utilities Commission . . . to file a Section 54.314 certification for SureWest" and petitioned the Commission "for a waiver of the filing deadlines of Section

54.314." *Id.* California ultimately "filed the requested certification with the Commission on February 19, 2013," *id.*, nearly five months late.

C. FCC's Waiver Denial Orders

Acting on delegated authority, the Commission's Wireline Competition Bureau denied SureWest's waiver petition in October 2013. *See Petition for Waiver of Universal Service High-Cost Filing Deadlines*, 28 FCC Rcd 14852, 14852 ¶ 1 (JA __) (Wireline Comp. Bur. 2013) (*Staff Order*). In doing so, the Bureau explained that the Section 54.314 certification operated as "part of the Commission's new national framework for accountability" in the use of Universal Service funding. *Id.* ¶ 6 (JA __). Moreover, the Bureau observed, "[i]n adopting [that] framework, the Commission specifically provided for the loss of support [due to missed certifications] to be proportional to the time period in which there is non-compliance." *Id.* "SureWest's mere confusion regarding the Commission's rules," the Bureau held, "is not sufficient to establish good cause for a waiver." *Id.* In the Bureau's view, "[t]he magnitude of SureWest's delay in filing the requisite certification" also weighed against a waiver. *Id.*

SureWest timely sought Commission review of the *Staff Order*. *See generally* Application for Review (JA __–__). In support of that request,

SureWest argued that its June 2012 carrier certification presented a special circumstance warranting a waiver. *See id.* at 8–9 (JA __–__). SureWest also claimed that its "unintentional error [did] not pose any risk" to the Universal Fund, *id.* at 9 (JA __), and that a waiver would serve the public interest because "[w]ithout the funding" SureWest had anticipated receiving in the first two quarters of 2013, "SureWest's ability to update its network and achieve the Commission's goals to accelerate broadband deployment [might] not be possible, or at a minimum, might be significantly delayed," *id.* at 11 (JA __). Finally, SureWest argued that withholding its desired funding would be an unduly harsh consequence—one that would violate the Excessive Fines Clause of the Eighth Amendment. *See id.* at 11–16 (JA __–__).

In the *Order* under review, the Commission rejected SureWest's arguments and approved the Bureau's decision and reasoning in full. *See Order* ¶¶ 7–18 (JA __–__). "[C]onfusion regarding the [agency's] rules," the Commission explained, "does not establish special circumstances that warrant [a waiver]." *Id.* ¶ 8 (JA __) (internal quotation marks omitted). To the contrary, "[c]arriers are responsible for reviewing and understanding the rules to ensure that [Universal Service] submissions are filed in a timely manner." *Id.* ¶ 9 (JA __) (first alteration in original;

internal quotation marks omitted). Accordingly, the Commission concluded, to grant a waiver in the circumstances of this case—in which SureWest did not "quickly remedy [its] error," *id.* ¶ 10 (JA __), and "the missed filing was submitted months after the deadline," *id.* ¶ 12 (JA __)—would contravene prior agency orders, *see id.* ¶¶ 8–9 (JA __–__), and governing precedent of this Court, *see id.* ¶¶ 7, 13 & nn. 18, 33 (JA __, __).

The Commission rejected SureWest's argument that a waiver was warranted on the basis of SureWest's June 2012 certification as a rate-of-return carrier. *See Order* ¶ 11 (JA __). That certification, the Commission explained, was meaningfully different from, and not an adequate substitute for, the missed Section 54.314 certification. *See id.* ¶¶ 11–12 (JA __–__).

The Commission acknowledged that the two certification rules—the rule pursuant to which SureWest made its June 2012 filing, and the new Section 54.314—both prescribed certifications that the carrier in question would "use the relevant support for its intended purpose." *Order* ¶ 11 (JA __). But, the Commission stressed, "SureWest had different obligations and received different support when it made its [June 2012] certification as a rate-of-return carrier than when the annual [state]

certification was due." *Id.* Once SureWest was acquired by Consolidated and became a price cap carrier affiliate—which occurred after SureWest filed its June 2012 certification—SureWest became obligated to use a portion of its 2013 allotment of frozen high-cost subsidies "to build and operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor." *Id.* (JA __–__). Because SureWest did not have that same obligation before the acquisition, the June 2012 certification gave no assurance that SureWest would use its 2013 high-cost subsidies for that purpose. *See id.* (JA __).

The Commission was also unpersuaded by SureWest's claims that California's late filing posed no risk to the Universal Service Fund, and that reducing SureWest's subsidies would impair its ability to accelerate broadband deployment. *See Order* ¶¶ 13–14 (JA __–__). Section 54.314 certifications allow the agency to "fulfill its responsibility to oversee the [appropriate] use of high-cost support"; SureWest's June 2012 carrier certification was not an adequate substitute. *Id.* ¶ 14 (JA __–__). The Commission also recognized that agencies are not empowered to grant waivers solely on public interest grounds, without a demonstrated showing of special circumstances. *See id.* ¶ 13 (JA __). Moreover, the Commission observed, if "whenever a carrier [was] faced with a reduction

in [Universal Service] support" the agency were to find that the public interest favors a waiver, that "criterion would [routinely] be met." *Id.*

Finally, the Commission rejected SureWest's claim that enforcing Section 54.314 resulted in a "disproportionate penalty" that violated the Excessive Fines Clause of the Eighth Amendment. *Order* ¶ 15 (JA __); *see id.* ¶ 16 (JA __). The Commission merely withheld public funds from SureWest to which SureWest had no legal entitlement; it did not impose a forfeiture that would "require[] a carrier to pay its own funds to the U.S. Treasury." *Id.* ¶ 15 (JA __). SureWest's failure to receive public funds to which it was not entitled, the Commission explained, "does not constitute a payment by the [carrier] to the government" for the purpose of punishment "that is subject to the Excessive Fines [C]lause." *Id.*

STANDARDS OF REVIEW

SureWest bears a heavy burden to establish that the *Order* under review is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under the arbitrary-and-capricious standard, which is "[h]ighly deferential," this Court "presumes the validity of agency action." *E.g.*, *City of Portland, Or. v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks omitted). The Court must affirm an agency's action unless the agency failed to consider "relevant factors" or made "a

clear error in judgment." *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

The arbitrary-and-capricious standard is particularly deferential when an agency has declined to waive a generally applicable rule. The Court may reverse such orders "only when [an] agency's reasons [for denying waiver] are so insubstantial as to render that denial an abuse of discretion." *E.g.*, *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003) (internal quotation marks omitted).

The Court reviews an agency's disposition of constitutional issues de novo. *E.g.*, *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1179 (D.C. Cir. 2014). An agency's interpretation of an ambiguous provision of its own rules and orders, however, is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 547, 548 (D.C. Cir. 2001).

SUMMARY OF THE ARGUMENT

1. The Commission reasonably concluded that SureWest is not entitled to a waiver of Section 54.314. This Court has repeatedly stressed that agencies should not waive their rules except where special circumstances warrant deviation and a waiver is in the public interest.

SureWest's confusion regarding the Commission's rules—which caused a filing error not remedied for many months—is not the kind of special circumstance that can justify a waiver. Nor has SureWest justified a waiver by claiming an impaired ability to serve its customers; mere public benefit, taken alone, is not grounds for a waiver.

SureWest argues that the Commission should have awarded a waiver because SureWest is similarly situated to the carrier in *Smith Bagley, Inc. Petition for Waiver of Section 54.809(c) of the Commission's Rules and Regulations*, 16 FCC Rcd 15275 (Common Carrier Bur. 2001), in which the Commission's Common Carrier Bureau waived a Universal Service filing deadline. That unchallenged, staff-level decision was not binding on the full Commission, and thus cannot sustain SureWest's challenge to the *Order*. In any event, the Commission reasonably distinguished *Smith Bagley*. That case involved a Universal Service certification filed two weeks late that was identical to a certification filed with the Commission three months before. In this case, the untimely state certification was almost five months late and covered different funding and obligations from those addressed in SureWest's June 2012 certification.

Also unpersuasive is SureWest's claim that the late filing in this case posed no risk to the Universal Service Fund. Under governing precedent, lack of harm to the Fund cannot itself justify a waiver. And because Section 54.314 certifications are critical to effective oversight of the Fund, the Commission reasonably disagreed that the late filing here was harmless.

2. The Commission correctly recognized that the Excessive Fines Clause does not apply in this case. A "fine" within the meaning of that clause involves a payment to the government for the purpose of punishment. Here, because SureWest had no legal entitlement to the subsidies withheld, there was no "payment" to the government at all. Nor was there any "punishment"; the Commission sought only to preserve the integrity of the Universal Service Fund.

ARGUMENT

I. THE COMMISSION LAWFULLY DENIED SUREWEST'S REQUEST FOR A WAIVER.

"The FCC has authority to waive its rules if there is 'good cause' to do so." *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (quoting 47 C.F.R. § 1.3). This Court has made clear, however, that a waiver is appropriate "only if [1] special circumstances warrant a

deviation from the general rule and [2] such deviation will serve the public interest." *Id.* "The reason for this two-part test flows from the principle that an agency must adhere to its own rules and regulations, and [that] *ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (internal quotation marks and alteration omitted). Thus, the Commission may grant waivers "only pursuant to a relevant standard"; it "may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

The applicant for a waiver bears a heavy burden to satisfy both prongs of this Court's two-part test. *See WAIT Radio*, 418 F.2d at 1157. Here, as the Commission reasonably concluded, SureWest has failed to do so. *See Order* ¶¶ 7–14 (JA __–__).

A. The Commission Reasonably Determined That SureWest Failed to Show Special Circumstances Justifying a Waiver.

The Commission reasonably declined to treat as a special circumstance SureWest's confusion regarding the revised certification requirements adopted in the *Transformation Order*. *See Order* ¶ 8 (JA __). SureWest emphasized, as an explanation for its confusion, that

its "high-cost support status" had changed shortly after the revised requirements took effect, when Consolidated acquired SureWest. *See id.*; *accord* Br. 6–7; Application for Review 4 (JA __); Waiver Petition 1, 3–4 (JA __, __–__). Nonetheless, the Commission reasoned, to treat SureWest's confusion as justifying a waiver "would imply that special circumstances exist any time there is a rule change coupled with a change in high-cost support status." *Order* ¶ 9 (JA __).

The Commission's view on that point fully comports with this Court's precedent and prior agency orders. In *NetworkIP*, for example, this Court reversed a Commission decision that waived a filing deadline when the party's delay in filing arose from its counsel's confusion as to the governing filing requirements. *See* 548 F.3d at 126–27. That was not a "sufficiently unique . . . situation," the Court held, to justify a waiver. *See id.* at 127 (internal quotation marks omitted; alteration in original). Likewise, the agency's Wireline Competition Bureau has concluded in numerous orders that "confusion regarding the [Commission's] rules does not establish special circumstances that warrant deviation." *Order* ¶ 8 (JA __) (internal quotation marks omitted); *see id.* ¶ 8 n.20 (JA __) (citing prior orders). The Bureau has also repeatedly stated that "[c]arriers are responsible for reviewing and understanding the rules to ensure that

[Universal Service] submissions are filed in a timely manner." *Id.* ¶ 9 (JA __) (first alteration in original; internal quotation marks omitted); *see id.* ¶ 9 n.22 (JA __) (citing prior orders).

In addition, the Commission reasonably rejected the claim that SureWest had "promptly" remedied the missed filing deadline. Application for Review 4 (JA __); Waiver Petition 4 (JA __); *see Order* ¶ 10 (JA __). The Commission acknowledged that the Wireline Competition Bureau has, in the past, treated the brevity of a party's delay in meeting a Universal Service filing deadline (in combination with other mitigating circumstances) as a factor favoring the award of a waiver. *See id.* ¶ 10 n.23 (JA __) (citing *Staff Order* ¶ 6 n.22 (JA __)). The Bureau has granted waivers, for example, "when line count data was received one business day after the filing deadline," or "when [a] deadline was missed by two business days." *Staff Order* ¶ 6 n.22 (JA __–__); *see also Connect America Fund*, 29 FCC Rcd 15644, 15690 ¶ 132 (2014) (*December 2014 CAF Order*) (providing "a one-time grace period" for a carrier that misses a filing deadline but "quickly rectifies" that failure "within three days").

Here, by contrast, the filing at issue was close to five months late. *See* Application for Review 4 (JA __). Thus, the Commission reasonably held that denying SureWest's waiver petition was "consistent with" prior

orders denying "petitions for waiver where the [carriers] did not quickly remedy their error." *Order* ¶ 10 (JA __); *see, e.g.*, *NPI-Omnipoint Wireless, LLC Petition for Waiver of Sections 54.307(c), 54.802(a), and 54.903 of the Commission's Rules*, 22 FCC Rcd 4946, 4947–48 ¶¶ 4–7 (Wireline Comp. Bur. 2007) (denying waiver requests of carriers that made their required filings two, three, and six months late); *see also Staff Order* ¶ 6 n.22 (JA __–__) (citing additional representative orders).

Finally, while SureWest claimed that its error "did not harm the Universal Service Fund," the Commission reasonably declined to award a waiver on that basis. *Order* ¶ 14 (JA __); *see* Application for Review 9–10 (JA __–__); Waiver Petition 5 (JA __); *Order* ¶ 11 (JA __). As SureWest did not (and does not now) dispute, "the [S]ection 54.314 annual certification is a critical part of the Commission's new national framework for accountability" in the use of Universal Service high-cost subsidies. *Order* ¶ 14 (JA __–__) (internal quotation marks omitted). With price cap carrier affiliates like SureWest, for example, the Commission depends on the Section 54.314 certification to ensure that the carriers are using specified portions of their high-cost subsidies "to build and operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor." *Id.* ¶ 11 (JA __–__); *see*

Transformation Order, 26 FCC Rcd at 17723 ¶ 150. Without a Section 54.314 certification for SureWest, the Commission could not "fully fulfill its responsibility to oversee the use of high-cost [subsidies to SureWest]"—subsidies funded by "end-user ratepayers"—for that intended purpose. *Order* ¶ 14 (JA __). SureWest thus failed to show that the late filing in this case posed no risk to the Universal Service Fund. *See id.*

B. The Commission Reasonably Determined That SureWest Failed to Show the Public Interest Compels a Waiver.

The Commission also reasonably rejected SureWest's claim that a waiver of Section 54.314 was justified on public interest grounds. *See Order* ¶ 13 (JA __). SureWest argued that its ability "to invest in new and upgraded telecommunications infrastructure in California" would be "impair[ed]" without a waiver. Waiver Petition 5 (JA __); *accord* Application for Review 11 (JA __). But as the Commission explained, if "the public interest prong of the waiver standard [were] met whenever a carrier is faced with a reduction in [Universal Service subsidies], that would effectively negate the public interest requirement, as this criterion would be met any time failure to meet a filing deadline resulted in reduced [subsidies]." *Order* ¶ 13 (JA __).

Moreover, as the Commission recognized, even a valid public interest showing would not, standing alone, establish good cause for a waiver. *See Order* ¶ 13 (JA __). This Court has stated that if the Commission's "discretion [to grant waivers were] not restrained by a test more stringent than 'whatever is consistent with the public interest . . . as best determined by the agency,'" there would be no means "to effectively ensure [that the Commission's] power is not abused." *NetworkIP*, 548 F.3d at 127. Here, therefore, because the Commission reasonably concluded there were no special circumstances to justify a waiver, *see supra* Part I.A, public interest considerations were not determinative, *see Order* ¶ 13 (JA __).

C. SureWest's Challenges to the *Order* Are Unpersuasive.

1. *The Staff's Decision in* Smith Bagley *Was Not Binding on the Full Commission, and the Commission Rationally Distinguished* Smith Bagley *in Any Event.*

SureWest challenges the *Order* primarily on a theory that the Commission "[i]rrationally [t]reated [s]imilar [c]ases [d]ifferently." Br. 13. In support of that claim, SureWest identifies a single order—

Smith Bagley—that it contends the Commission did not adequately distinguish. *See* Br. 13–18.[5]

Smith Bagley was a staff-level decision never challenged before the full Commission. As this Court has held, "unchallenged staff decisions are not Commission precedent, and agency actions contrary to those decisions cannot be deemed arbitrary and capricious." *E.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008); *see also Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) ("We recently reaffirmed our well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions."); *Amor Family Broad. Grp. v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (holding that the Commission was not bound by supposedly inconsistent decisions of the Mass Media Bureau).

In any event, as the Commission explained, the underlying circumstances in *Smith Bagley* are readily distinguishable from those

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[5] In addition, SureWest cites a February 2017 blog post by Commissioner Michael O'Rielly to support its claim that there are "inconsistencies in the agency's handling of missed deadlines." Br. 17. SureWest's reliance on that blog post is misplaced. Not only is the blog post not part of the administrative record, but Commissioner O'Rielly there supported the uniformly strict enforcement of FCC filing deadlines. And indeed, he voted for the *Order* under review.

here. *See Order* ¶ 12 (JA __). In *Smith Bagley*, the Commission's Common Carrier Bureau waived a Universal Service annual certification deadline that governed specified carriers seeking "interstate access" subsidies. *See* 16 FCC Rcd at 15275–76 ¶¶ 1–2. The rule required carriers to attest that they would use their subsidies only for the subsidies' intended purpose. *See id.* at 15276 ¶ 2. In granting a waiver of the rule, the Bureau cited a combination of three "special circumstances." *Id.* at 15277 ¶ 6. The petitioning carrier had (1) filed a certification three months earlier that contained the same attestation it should have provided in its annual certification, (2) filed its annual "certification . . . less than two weeks after the deadline," and (3) complied at all times "with the commitments made in its [original] certification." *Id.*

Here, by contrast, neither of those first two circumstances applies. SureWest's June 2012 rate-of-return carrier certification "was a different certification [from the missed filing and] did not cover the relevant support or . . . obligations"—such as using a portion of the funding SureWest received to deploy broadband in areas not served by an unsubsidized competitor. *Order* ¶ 12 (JA __); *see id.* ¶ 11 (JA __). And the missed filing was submitted nearly five months late—compared to less than two weeks in *Smith Bagley*. *See id.* ¶ 12 (JA __).

SureWest characterizes the Commission's distinction between SureWest's June 2012 certification and the "early" certification in *Smith Bagley* as "irrational." Br. 16. That is so, SureWest contends, because "the Commission continued to pay high-cost support to SureWest in the fourth quarter of 2012," after SureWest's acquisition by Consolidated, on the basis of the June 2012 certification. *Id.* But payments to SureWest in 2012 are beside the point. The Commission stressed in the *Order* that SureWest's June 2012 certification did not cover a particular obligation: the obligation of price cap carrier affiliates to use specified portions of their subsidies to build broadband-capable networks in underserved areas. *See Order* ¶ 11 (JA __–__). That obligation did not take effect until 2013. *See Transformation Order*, 26 FCC Rcd at 17723 ¶ 150.

2. The Commission Reasonably Recognized a Risk to the Universal Service Fund.

SureWest also contends that "the FCC should have found good cause . . . to grant the waiver for the reason that no harm would have resulted to the [Universal Service] Fund from" doing so. Br. 18. That argument is unpersuasive. Insofar as SureWest contends there was no risk to the Fund because of SureWest's June 2012 certification as a rate-of-return carrier, *see* Br. 18–19, SureWest ignores the fact that its June

2012 certification did not address its obligations in 2013 as the affiliate of a price cap carrier. *See Order* ¶ 14 (JA __); *supra* pp. 13–14, 27.

SureWest's additional theories for why the late filing in this case posed no risk to the Universal Service Fund fare no better. SureWest asserts that "[t]he late-filed certification did not provide any data needed to calculate" the amount of high-cost subsidies SureWest should receive, Br. 18, and thus that the late filing did not harm the Fund, "any other Fund recipient," or "end-user ratepayers," *id.* at 20. That argument ignores the "critical" function of annual certifications pursuant to Section 54.314, which is to allow the Commission to "fulfill its responsibility to oversee the use of high-cost" subsidies awarded through the Fund. *Order* ¶ 14 (JA __) (internal quotation marks omitted). It is thus immaterial that the Commission was not dependent on the missing state certification for the "line count data" used in calculating carriers' allotments of high-cost subsidies. *Id.* ¶ 10 (JA __) (internal quotation marks omitted).

SureWest also argues that the Commission could have fulfilled its Universal Service oversight obligations using its ordinary enforcement powers. *See* Br. 19. As the Commission has explained in a related context, however, "[i]f the Commission were to conduct an enforcement proceeding every time [a carrier receiving Universal Service subsidies]

misses a deadline, that would divert Commission resources from other Commission priorities." *December 2014 CAF Order*, 29 FCC Rcd at 15692 ¶ 137.

Finally, SureWest repeatedly argues that the Commission "fail[ed] to consider the impact that a denial of the waiver [would have] on the public interest." Br. 20; *accord id.* at 22. But as described above, *see supra* Part I.B, the Commission did address SureWest's public interest arguments; it merely disagreed that they justified a waiver, *see Order* ¶ 13–14 (JA __). That conclusion was both reasonable and consistent with this Court's governing precedent. *See, e.g.*, *NetworkIP*, 548 F.3d at 127 (holding that the public interest alone, absent "unique" circumstances, cannot justify a waiver (internal quotation marks omitted)).

For all of these reasons, SureWest cannot meet its "heavy burden" to show that denying a waiver in the circumstances here was an abuse of discretion. *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

II. THE EXCESSIVE FINES CLAUSE DOES NOT APPLY IN THIS CASE.

SureWest attempts to portray this routine waiver case as presenting a constitutional question. That effort is unavailing. The

Supreme Court has explained that the Eighth Amendment's Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted; quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).[6] The analysis of asserted claims of excessive fines thus involves two questions: (1) whether there was an extraction of "payments" to the government for the purpose of "punishment," and (2) whether any such extraction of payments was "excessive." *See id.* The first question determines whether the Excessive Fines Clause applies; the second whether it has been violated. *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000). Here, because the Commission did not extract a payment to the government for the purpose of punishment, the Excessive Fines Clause does not apply.[7]

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[6] The Eighth Amendment provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[7] There is thus no cause for this Court to consider whether the Commission has imposed a "grossly disproportional" consequence for SureWest's misunderstanding of Section 54.314, as would be required to show a violation of the Excessive Fines Clause. *Bajakajian*, 524 U.S. at 334. In any event, the subsidy reduction here was not excessive by that standard. *See Order* ¶ 16 (JA __) (observing that the subsidies withheld

A "fine" within the meaning of the Eighth Amendment is limited to "a payment to a sovereign as punishment for some offense." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). Thus, "the Excessive Fines Clause . . . applies only when the payment to the government involves turning over 'property' of some kind that once belonged to the defendant." *Hopkins v. Okla. Pub. Emp. Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998). And as the Supreme Court has stated, having "a property interest in a benefit" requires having "more than a unilateral expectation of it"; there must be "a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In the *Order* under review, the Commission concluded that SureWest had "no property interest in or right to" the high-cost subsidies withheld from SureWest for the first two quarters of 2013. *Order* ¶ 15 (JA __). That determination reflects a reasonable interpretation of Section 54.314. Section 54.314 provides that "[h]igh-cost support shall only be provided to the extent that the State has filed the requisite

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from SureWest (six months' worth) were "proportional to the amount of time it took to make the [Section 54.314] filing" (an almost five-month delay), and "to the total amount of high-cost support [SureWest] receives" (exceeding $5.8 million)).

certification pursuant to [the rule]." 47 C.F.R. § 54.314(a); *see also id.* § 54.314(d) ("In order for an eligible telecommunications carrier to receive federal high-cost support, the State . . . must file an annual certification . . . with both the [Universal Service Administrative Company] and the Commission."). During the period of the events here, the rule provided that when a state filed a carrier's certification after October 1 but "on or before January 1," the carrier would "receive support in the second, third, and fourth quarters of [the funding] year," but would "not receive support in the first quarter." *Id.* § 54.314(d)(2). When a state filed a carrier's certification after January 1 but "on or before April 1," the rule allowed the carrier to "receive support in the third and fourth quarters of [the funding] year," but "not . . . in the first or second quarters." *Id.* § 54.314(d)(3).

Given the text of Section 54.314, there should be no doubt that the Commission's receipt of a carrier's annual state certification is a condition precedent to the carrier's entitlement to high-cost subsidies. Indeed, SureWest itself implicitly recognizes as much. *See* Br. 25 ("[T]here is no dispute that, *if the California certification had been timely filed*, SureWest would have received this funding." (emphasis added)).

And were there any ambiguity on that point, the Commission's view would be entitled to deference. *See Auer*, 519 U.S. at 461.

Furthermore, the Commission's view is well supported by judicial precedent and prior Commission statements. Both this Court and the Fifth Circuit have observed, for example, that "[t]he purpose of universal service is to benefit the customer, not the carrier." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (alteration in original; quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)). And the Commission has repeatedly concluded that there is no statute, Commission rule, or "other, independent source of law that gives particular companies an entitlement to ongoing [Universal Service] support." *Transformation Order*, 26 FCC Rcd at 17771 ¶ 293; *see also In re FCC 11-161*, 753 F.3d at 1070–71 (discussing that statement with approval in affirming the *Transformation Order*); *Connect America Fund*, 29 FCC Rcd 7051, 7093 ¶ 121 (2014) (rejecting "the notion that incumbent [local telephone companies] are entitled to [U]niversal [S]ervice subsidies").

Significantly, SureWest makes no attempt to show it had a vested right to the high-cost subsidies at issue in this case. *See* Br. 25–26. SureWest argues only that it "anticipated receiving" those funds "so long

as it used [them] for [their] intended purposes." *Id.* at 25. However "reasonable" that "expectation" may have seemed to SureWest, *id.* at 25, 26, it was not objectively reasonable given the text of Section 54.314 and the Commission orders and judicial precedent cited above. Moreover, even if SureWest's expectation of receiving the disputed subsidies had been reasonable, that still would not make withholding the subsidies a "fine" within the meaning of the Eighth Amendment when (as SureWest does not dispute) there has been no "payment to the government" of anything "that once belonged to" SureWest. *Hopkins*, 150 F.3d at 1162; *see also Fla. Med. Ctr. v. Sebelius*, 614 F.3d 1276, 1278, 1282 (11th Cir. 2010) (holding that the recoupment of "payments to a Medicare services provider that had falsified its Medicare enrollment application" did "not qualify as a punitive fine" when the government merely "sought to recover money to which [the provider] was never entitled"). Far from "elevat[ing] form over substance," Br. 25, the Commission's conclusion on that point correctly applied the law.

The Excessive Fines Clause does not apply in this case for the additional, separate reason that "the denial of a noncontractual governmental benefit does not fall within the historical meaning of legislative punishment." *Garner v. U.S. Dep't of Labor*, 221 F.3d 822, 826

(5th Cir. 2000). The Fifth Circuit has held, for example, that disqualifying from federal disability benefits a person convicted of making false statements to obtain them was not a punitive sanction subject to Eighth Amendment scrutiny. *See id.* at 827–28. Rather, disqualification served "the remedial goal of saving the federal government, and therefore the taxpayers, from expending large sums of [Federal Employee Compensation Act] funds, funds which are limited in amount, on those who have been convicted of defrauding the program." *Id.* at 826; *see also Florida Medical Center*, 614 F.3d at 1282 (holding that the recoupment of Medicare payments from a provider that falsified its enrollment application "did not seek to punish" the provider as required to implicate the Excessive Fines Clause); *cf. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 853 (1984) (holding that the temporary denial of federal financial aid to male students who failed to register for the draft "impose[d] none of the burdens historically associated with punishment"); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[I]t cannot be said . . . that the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country . . . must . . . be taken as evidencing a Congressional desire to punish.");

County Line Cheese Co. v. Lying, 823 F.2d 1127, 1133 (7th Cir. 1987) (holding that requiring dairy companies to return payments received from a government settlement fund for which the companies did not qualify did not amount to punishing those companies for "wrongdoing," but merely "rectif[ied] . . . mistakenly made payments").

More generally, this Court has stressed that whether government action is punitive for Eighth Amendment purposes does not turn on whether that action "may hurt" or "cause loss." *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 199 (D.C. Cir. 2000) (quoting *FCC v. WOKO*, 329 U.S. 223, 228 (1946)). Thus, for example, "FCC license revocations or nonrenewals based on character considerations" do not reflect an intent on the agency's part "to punish a licensee for its conduct," but rather a recognition that "the licensee is no longer qualified to hold [the license]." *Id.* at 198–99; *see also FCC v. WOKO*, 329 U.S. 223, 228 (1946) (holding that the "denial of an application for a license because of the insufficiency . . . of . . . information lawfully required to be furnished is not a penal measure").

Here, Section 54.314 "obviously is protective of the integrity of the [Universal Service] program." *Garner*, 221 F.3d at 826. Consistent with that conclusion, in the portion of the *Transformation Order* in which the

Commission adopted Section 54.314 and related certification requirements, the Commission made clear that its aim in doing so was to "provide federal and state regulators the factual basis to determine that all [subsidy] recipients are using [Universal Service funds] for the intended purposes," and "to allow the Commission to determine whether it is achieving its goals efficiently and effectively." 26 FCC Rcd at 17850 ¶ 573.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: May 10, 2017

Respectfully submitted,

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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47 C.F.R. § 1.3 (2016)

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. § 54.314 (2012)

§ 54.314 Certification of support for eligible telecommunications carriers.

(a) Certification. States that desire eligible telecommunications carriers to receive support pursuant to the high-cost program must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers within that State was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.

(b) Carriers not subject to State jurisdiction. An eligible telecommunications carrier not subject to the jurisdiction of a State that desires to receive support pursuant to the high-cost program must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carrier was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Support provided pursuant to the high-cost program shall only be provided to the extent that the carrier has filed the requisite certification pursuant to this section.

(c) Certification format.

(1) A certification pursuant to this section may be filed in the form of a letter from the appropriate regulatory authority for the State, and must be filed with both the Office of the Secretary of the Commission clearly referencing WC Docket No. 10-90, and with the Administrator of the high-cost support mechanism, on or before the deadlines set forth in paragraph (d) of this section. If provided by the appropriate regulatory authority for the State, the annual certification must identify which carriers in the State are eligible to receive federal support during the applicable 12-month period, and must certify that those carriers only used support during the preceding calendar year and will only use support in the coming calendar year for the provision, maintenance, and upgrading of facilities and services for which support is intended. A State may file a supplemental certification for carriers not subject to the State's annual certification. All certificates filed by a State pursuant to this section shall become part of the public record maintained by the Commission.

(2) An eligible telecommunications carrier not subject to the jurisdiction of a State shall file a sworn affidavit executed by a corporate officer attesting that the carrier only used support during the preceding calendar year and will only use support in the coming calendar year for the provision, maintenance, and upgrading of facilities and services for which support is intended. The affidavit must be filed with both the Office of the Secretary of the Commission clearly referencing WC Docket No. 10-90, and with the Administrator of the high-cost universal service support mechanism, on or before the deadlines set forth in paragraph (d) of this section. All affidavits filed pursuant to this section shall become part of the public record maintained by the Commission.

(d) Filing deadlines. In order for an eligible telecommunications carrier to receive federal high-cost support, the State or the carrier, if not subject to the jurisdiction of a State, must file an annual certification, as described in paragraph (c) of this section, with both the Administrator and the Commission. Upon the filing of the certification described in this section, support shall be provided in accordance with the following schedule:

(1) Certifications filed on or before October 1. Carriers subject to certifications filed on or before October 1 shall receive support in the first, second, third, and fourth quarters of the succeeding year.

(2) Certifications filed on or before January 1. Carriers subject to certifications filed on or before January 1 shall receive support in the second, third, and fourth quarters of that year. Such carriers shall not receive support in the first quarter of that year.

(3) Certifications filed on or before April 1. Carriers subject to certifications filed on or before April 1 shall receive support in the third and fourth quarters of that year. Such carriers shall not receive support in the first or second quarters of that year.

(4) Certifications filed on or before July 1. Carriers subject to certifications filed on or before July 1 shall receive support beginning in the fourth quarter of that year. Such carriers shall not receive support in the first, second, or third quarters of that year.

(5) Certifications filed after July 1. Carriers subject to certifications filed after July 1 shall not receive support in that year.

(6) Newly designated eligible telecommunications carriers. Notwithstanding the deadlines in paragraph (d) of this section, a carrier shall be eligible to receive support as of the effective date of its designation as an eligible telecommunications carrier under section 214(e)(2) or (e)(6) of the Act, provided that it files the certification described in paragraph (b) of this section or the state commission files the certification described in paragraph (a) of this section within 60 days of the effective date of the carrier's designation as an eligible telecommunications carrier. Thereafter, the certification required by paragraphs (a) or (b) of this section must be submitted pursuant to the schedule in paragraph (d) of this section.