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

National Lifeline Association, *et al.*, Petitioners,	)	
v.	)	Nos. 18-1026, 18-1080 (consolidated)
Federal Communications Commission and United States of America, Respondents.	)	

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

Respondent the Federal Communications Commission (Commission or FCC) opposes the motion for stay pending judicial review filed by Petitioners.

Under the federal Lifeline program, low-income consumers are eligible for subsidized telephone service, and for extra or "enhanced" subsidies if they live on federally recognized Indian Tribal lands. The Commission has reformed Lifeline in recent years to better achieve program goals and to constrain program growth. In the *Order* on review,[1] the FCC limited enhanced Lifeline subsidies to rural Tribal lands and to facilities-based service providers. The FCC did so to target enhanced subsidies to sparsely populated areas of Tribal lands where infrastructure deployment is most needed.

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[1] *Bridging the Digital Divide for Low-Income Consumers*, 2017 WL 6015800 ¶¶ 3-9, 21-30 (rel. Dec. 1, 2017) (*Order*).

Petitioners have moved to stay the FCC's reforms pending judicial review, but they are not entitled to such extraordinary relief. They are not likely to succeed on the merits of their arguments, and they have not shown that implementation of the *Order* will cause them irreparable harm. On the other hand, delaying the FCC's Tribal Lifeline reforms will harm the public by wasting public funds on areas and providers that should not be eligible for enhanced subsidies. The Court should therefore deny the stay.

BACKGROUND

1. The FCC's Lifeline program provides public subsidies to support provision of wireline and wireless telephone and broadband (Internet) service to qualifying low-income consumers nationwide. *Lifeline and Link Up Reform*, 30 FCC Rcd 7818, 7819-20 ¶ 1 (2015) (*2015 FNPRM*). Lifeline subsidies are paid out of the Universal Service Fund, which is supported by contributions from telecommunications carriers that are recovered through surcharges on all customers' monthly bills. *Id.* ¶¶ 1, 15 & n.46.

A Lifeline provider receives a basic subsidy of $9.25 per month for each qualifying low-income customer that it serves. 47 C.F.R. § 54.403(a)(1). The provider receives up to $25 per month more for each such customer living on Tribal lands, *id.* § 54.403(a)(2), for a total subsidy of up to $34.25. *See 2015 FNPRM*, 30 FCC Rcd at 7873 ¶ 160. These subsidies are paid directly to providers,

not customers, although providers must certify that they will pass through the full amount of the subsidies to customers. 47 C.F.R. § 54.403(a)(1), (2).

2. The Commission initiated comprehensive Lifeline reform in 2011 to curb waste, fraud and abuse of the program and "reduce the burden on all who contribute to the Universal Service Fund." *Lifeline and Link Up Reform*, 27 FCC Rcd 6656, 6659 ¶ 1 (2012) (*2012 Order*). One animating concern with respect to the enhanced Tribal subsidy was that Lifeline spending was not being used to construct facilities on Tribal lands. The Lifeline program originally was limited to facilities-based carriers, *Federal-State Joint Board*, 15 FCC Rcd 12208, 12227 ¶ 30 (2000) (*2000 Order*), and enhanced Tribal subsidies were intended "to encourage deployment and infrastructure build-out." *2015 FNPRM,* 30 FCC Rcd at 7875 ¶ 166; *2000 Order*, 15 FCC Rcd at 12235 ¶ 53. Over time, however, the FCC allowed participation in the Lifeline program by non-facilities-based providers that purchase service wholesale and then resell it to retail customers; by 2015, two-thirds of enhanced subsidies went to non-facilities-based providers. *2015 FNPRM*, 30 FCC Rcd at 7875 ¶ 167.

3. The Commission took two steps in the *Order* on review to target enhanced subsidies to areas where they are most needed and where they would not be wasted. First, it limited enhanced subsidies to rural Tribal lands, defined as any Tribal land that is not an urbanized area with a population over 25,000. *Order* ¶¶ 3-

9. Second, the FCC limited enhanced subsidies to facilities-based providers, consistent with the Commission's "desire to use enhanced support to incent the deployment of facilities on Tribal lands." *Id*. ¶ 23 (citation omitted). Enhanced subsidies disbursed to non-facilities-based resellers, the FCC reasoned, "cannot directly support the provider's network because the provider does not have one." *Id*. ¶ 23. To the extent that enhanced subsidies indirectly support deployment, the FCC found this benefit outweighed "by our need to prudently manage Fund expenditures." *Id.* ¶ 28.

4. On June 22, Petitioners asked the Commission to stay the *Order* pending judicial review. FCC staff, acting on delegated authority, denied that request on July 5. *Bridging the Digital Divide for Low-Income Consumers et al.*, DA 18-701, 2018 WL 3327652 (WCB July 5, 2018) (*Stay Denial Order*). Petitioners now renew their arguments for a stay in this Court.

ARGUMENT

To obtain a stay pending review, Petitioners must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) other parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Petitioners must make "a clear showing" that they are entitled to such an "extraordinary

remedy." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Petitioners have not met this exacting standard.

I. Petitioners Are Not Likely to Prevail on the Merits

A. Petitioners first contend that the Commission failed to provide interested parties with a sufficient opportunity to express their views on its proposed reforms. Mot. 3-8. Those claims are belied by the record. The *2015 FNPRM* clearly placed parties on notice that the FCC was considering limiting enhanced subsidies to facilities-based providers in rural areas. *See* 30 FCC Rcd at 7875 ¶ 167 (proposing "to limit enhanced Tribal Lifeline . . . support only to those Lifeline providers who have facilities"); *id*. at 7876 ¶ 169 (seeking comment "on whether we should focus enhanced Tribal support to those Tribal areas with lower population densities").

1. Petitioners argue that the Commission failed to consult with Tribes regarding the facilities requirement, in violation of the *Statement of Policy of Establishing a Gov't-to-Gov't Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4081 ¶ 2 (2000) (*Policy Statement*), which provides that the FCC will, "to the extent practicable, … consult with Tribal governments" before taking action that would significantly affect them. Petitioners' argument fails for three reasons.

First, the *Policy Statement* is nonbinding: it "is not intended to, and does not create any right enforceable in any cause of action by any party." *Id.* at 4080. That language forecloses any argument that a failure to engage in consultation renders

the *Order* infirm. *See, e.g.*, *Yankton Sioux Tribe v. DHHS*, 533 F.3d 634, 643-44 (8th Cir. 2008) (no right of judicial review where consultation policy included similar language); *N. Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1281 (D.Wy. 2015) (same); *Crow Creek Sioux Tribe v. Donovan*, 2010 WL 1005170 at *4-5 (D.S.D. Mar. 16, 2010) (same).

Second, the FCC engaged in consultation by meeting with Tribes on the proposals in the *2015 FNPRM* before the *Order* was adopted. *See Order* ¶ 5 & n.47; *Stay Denial Order* ¶¶ 6-7.[2] Petitioners complain that the FCC only consulted with Tribes in Oklahoma when affected Tribes are located nationwide. But the FCC invited Tribes from across the country to that consultation, and held consultations with Tribes in four other States as well. *See Order* n.47; *Stay Denial Order* ¶¶ 6-7. And the *Policy Statement* does not require the FCC to consult individually with each of the over 500 federally-recognized Tribes nationwide, nor would it be practicable to do so. Petitioners also complain that the facilities requirement was not discussed in "meaningful depth," Mot. 5, but the record shows that the proposal was specifically addressed at the consultations. *See id.* ¶¶ 6-7 &

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[2] Petitioners urge the Court to ignore the materials associated with those meetings that were appended to the *Stay Denial Order*. Mot. 5. But the materials were produced in direct response to Petitioners' arguments before the agency that the meetings did not concern the facilities and rural limitations. *See Stay Denial Order* ¶¶ 6-7. And because the consultation process was independent of the APA rulemaking process, the agency was under no APA obligation to include these materials in the rulemaking record.

App'x A. In all events, the Commission provided a forum for the Tribes to air any concerns that they might have had relating to the agency's proposed reforms; nothing in the *Policy Statement*, or the concept of consultation, requires a particular amount or level of detailed discussion if the opportunity for an exchange of views is afforded. In this regard, moreover, the FCC's determination that it satisfied its own policy, *see Order* ¶ 5 & n.47, should suffice. *See Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998).

Third, Tribes had an additional opportunity, of which they took advantage, to be heard by filing comments in the rulemaking record. *Cf. Native Ams. For Enola v. U.S. Forest Serv.*, 832 F. Supp. 297, 300 (D. Or. 1993) (comments helped satisfy statutory consultation requirement). All told, the Commission received over 45 comments from Tribes and members in response to the *2015 FNPRM*.

2. Petitioners argue that the FCC failed to provide adequate notice of its proposals under the APA because it did not precisely define the "facilities" that providers would need to have to be entitled to enhanced subsidies or the "rural areas" to which such subsidies would be limited. Mot. 7-8.

But the FCC defined "facilities" precisely as Petitioners "should have anticipated … in light of the initial notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (citation omitted). The FCC stated that the purpose of its proposed limitation was to "encourage … infrastructure build-out to and on

Tribal lands." *2015 FNPRM*, 30 FCC Rcd at 7875 ¶ 166. The *Order* accordingly defined "facilities" as last-mile facilities—facilities that physically reach customer premises—since they "are critical to deploying, maintaining, and building voice- and broadband-capable networks on Tribal lands," *Order* ¶ 22, and are "the most expensive to deploy and the most conspicuously lacking on Tribal lands." *Stay Denial Order* ¶ 13. Petitioners cannot reasonably claim to have been surprised by the Commission's straightforward decision to adopt the definition best suited to its stated purpose.[3]

Petitioners likewise complain that the FCC did not seek comment on the specific definition of "rural area" that it ultimately adopted. Yet notice need not include "every precise proposal which (the agency) may ultimately adopt as a rule." *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976) (citation omitted). Here, the FCC asked whether to target enhanced subsidies to less populated areas, and specifically asked for comment on whether it should exclude towns or cities with populations greater than 10,000. *2015 NPRM*, 30 FCC Rcd at 7876-77 ¶ 170. The less restrictive definition it ultimately adopted excludes urbanized areas with

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[3] Petitioners suggest that they were misled because the *2015 FNPRM* "indicated that the FCC would preserve some role for resellers," Mot. 7, but their comments reflect that they understood the FCC's proposal could make resellers entirely ineligible for enhanced subsidies. *See, e.g.*, Comments of Assist Wireless and Easy Wireless at 15-16 (Aug. 31, 2015) ("If the Commission limits the enhanced Tribal benefit to facilities-based providers, up to two-thirds of the Tribal subscribers could lose their enhanced service … [w]ithout wireless resellers").

populations equal to or greater than 25,000. *Order* ¶ 5. This change from the proposed definition was not "so major that the original notice did not adequately frame the subjects for discussion." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).

In addition, any failure to provide notice, even had it existed, would have been harmless because the Commission released a draft version of the *Order* on October 26, 2017, three weeks before its adoption, setting forth what became the final definitions. The FCC fully considered the substantial input it received regarding the draft *Order*—which included comments from, and *ex parte* meetings with, the reseller Petitioners.[4] *See* 5 U.S.C. § 706 (courts reviewing agency action under the APA must take "due account … of the rule of prejudicial error."); *First Am. Disc. Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

3. Finally, Petitioners argue that the FCC violated a promise to provide an additional round of public comment because the agency did not dispose of the proposals in 2016, but instead stated at the time that the proposals "remain open for consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands." *Lifeline and Link Up Reform*, 31 FCC

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[4] *See, e.g.*, Letter to Marlene Dortch from John J. Heitmann in WC Docket No. 17-287 (Nov. 13, 2017); Letter to Marlene Dortch from John J. Heitmann in WC Docket No. 17-287 (Nov. 9, 2017).

Rcd 3962, 4038 ¶ 211 (2016) (*2016 Order*). But nothing in that statement committed the Commission to an additional (and unnecessary) round of public comment before adopting the *Order* under review. On the contrary, the FCC stated that the proposals "remain *open* for consideration," *2016 Order*, 31 FCC Rcd at 4038 ¶ 211 (emphasis added), and did not terminate the docket, close the record, or otherwise suggest that further comment was needed. It was thus entirely appropriate for the Commission to dispose of the proposals in a subsequent *Order* on the basis of the record generated by the *2015 FNPRM*, and Petitioners do not suggest how "the content of their criticisms would have been different" if they had yet another chance to file a new round of comment. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540 n.95 (D.C. Cir. 1983).

C. Petitioners next argue that the Commission's reforms are arbitrary and, in the case of the facilities requirement, violate the Communications Act. Mot. 8-13. But the FCC's decisions to target enhanced Tribal Lifeline support to facilities-based providers on rural Tribal lands were reasonable and well within its authority.

1. Petitioners contend that the facilities requirement is irrational because some major facilities-based wireless carriers "have exited the retail Lifeline business" and "there is no alternative to a reseller in many areas." Mot. 8. The record contained evidence, however, that the requirement would encourage

network investment by other facilities-based providers on Tribal lands.[5] And the fact that facilities-based carriers do not provide Lifeline service in every area that resellers now serve does not undermine the FCC's reasonable determination that targeting enhanced subsidies would provide an incentive for facilities-based carriers to extend their networks and enter new markets, as well as to invest the enhanced subsidies to maintain their existing networks.[6] There is also no reason to assume that all resellers will withdraw from areas they now serve without enhanced subsidies. *See* § II, *infra*. In short, the FCC made a predictive judgment, based on the evidence before it, that a facilities requirement would spur network deployment and buildout on rural Tribal lands and limit the risk of waste, fraud and abuse of the Lifeline program posed by resellers' receipt of enhanced subsidies, all without sacrificing other Lifeline goals. *Order* ¶¶ 27-28, 68. That judgment falls well within the agency's policy discretion. *See Nat'l Tel. Coop. Ass'n v. FCC*, 563

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[5] *See, e.g.*, Letter from Smith Bagley to FCC Secretary Marlene H. Dortch in WC Docket No. 11-42 at 1-2 (Oct. 20, 2017) (enhanced subsidies are an important reason why Smith Bagley and other "facilities-based carriers have entered Tribal lands in Arizona and New Mexico to build facilities and provide competitive service."); Letter from Navajo Nation Telecomms. Regulatory Comm'n in WC Docket No. 11-42 to Chairman Wheeler at 2 (Mar. 24, 2016) (carriers that received enhanced support "began a significant build-out on … portions of the Navajo Nation . . . while infrastructure … continued to languish [where enhanced subsidies were not available]."); *see also Order* nn.56, 67.

[6] By definition, the presence of a reseller in an area means that at least one facilities-based carrier has the infrastructure in place to offer service there. *See Order* n.55.

F.3d 536, 541 (2009) (review is "particularly" deferential "with regard to an agency's predictive judgments about the likely economic effects of a rule.").

2. Petitioners also argue that the FCC did not explain how the facilities requirement will "increase affordability and investment" even where a facilities-based Lifeline provider is available. Mot. 9. They contend that "resellers are critical to promoting affordability through choice and competition" and "increase facilities investment" by "pay[ing] underlying carriers for network usage." Mot. 9-10. But as the Commission explained, "Lifeline funds disbursed to non-facilities-based providers," though they may "lower the cost of the consumer's service, . . . cannot directly support the provider's network because the provider does not have one." *Order* ¶ 23. Nor could the agency see "how passing only a fraction of fund[] through to facilities-based carriers will mean more investment in rural Tribal areas than ensuring that facilities-based carriers receive 100 percent of the support." *Id.* ¶ 28. The Commission therefore concluded that directing the enhanced subsidy to facilities-based services would "encourage[] investment that will ultimately provide more robust networks and higher quality service[s] on … Tribal lands," making "those services more affordable and competitive for low-income consumers." *Order* ¶ 27.

Petitioners argue that the FCC irrationally failed to consider the efficiencies that resellers create through specialization. Mot. 10. But the Commission is not

required to consider only these purported efficiencies in exercising its discretion on how best to disburse its limited Lifeline assets. Rather, the Commission has long been concerned about the possibility of waste, fraud, and abuse, and about unconstrained growth of the Lifeline program, in conjunction with the disbursement of enhanced Lifeline subsidies. *See Order* ¶ 1 (reforms will, *inter alia*, "reduce the demands on ratepayers" of universal service contributions); *2012 Order*, 27 FCC Rcd at 6659 ¶ 1 (Lifeline reforms intended to "reduce the burden on all who contribute to the Universal Service Fund."). The FCC concluded that the "marginal benefit" of resellers passing through "a fraction" of enhanced subsidies to facilities-based carriers in the form of payments for wholesale network access is "outweighed by our need to prudently manage Fund expenditures." *Order* ¶ 28; *see Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011) (recognizing FCC's "responsibility to be a prudent guardian of the public's resources") (internal quotations omitted).

3. Petitioners contend that the FCC violated Section 10 of the Act[7] by adopting the facilities requirement without an analysis of why the "findings about

[7] Section 10 provides that the "Commission shall forbear from applying any regulation" if it determines that enforcement: (1) is not necessary to ensure just and reasonable rates; (2) is not necessary to protect consumers; and (3) is consistent with the public interest. 47 U.S.C. § 160.

resellers" that led it to forbear from applying the facilities requirement of Section 214(e) to Lifeline providers "no longer hold true." Mot. 11; *see* 47 U.S.C. § 214(e)(1)(A) (requiring that services subsidized by federal universal service support be provided using a carrier's "own facilities" or "a combination of its own facilities and resale of another carrier's services").

But the FCC's decisions forbearing from Section 214(e)(1)(A) addressed the eligibility of non-facilities-based resellers for Lifeline generally; they did not speak to eligibility for the enhanced Tribal subsidy. And the Commission has not rescinded that general forbearance; the facilities requirement adopted in the *Order* "bears only on whether the Lifeline provider is eligible to receive enhanced rural Tribal support." *Order* ¶ 30. Resellers may still provide Lifeline service; they are merely limited to the basic Lifeline subsidy of $9.25 per month.

Petitioners also argue that the *Order* failed to "consider the reliance interests of changing course." Mot. 11. On the contrary, the FCC considered reliance interests by, among other things, providing a transition period to ensure that "impacted parties have sufficient time to make the necessary changes adopted." *Order* ¶ 31. The FCC's launching of the Tribal Mobility Fund (estimated at $340 million) also will help to mitigate any short-term impact of withdrawing enhanced subsidies from resellers. *Connect America Fund*, 32 FCC Rcd 2152 ¶¶ 31, 33 (2017).

Petitioners further argue that the FCC "read the resale option out of" Section 214(e)(1)(A) by limiting enhanced subsidies to carriers "providing service only over their 'own facilities.'" Mot. 12. But Section 214(e)(1)(A) provides that a carrier can receive universal service support for services provided over resale only if it does so in "combination" with "its own facilities." 47 U.S.C. § 214(e)(1)(A). The Order simply provides that the carrier must have "its own last-mile facilities" to receive enhanced subsidies. *Order* ¶ 26. In this respect, the facilities requirement is *more* consistent with the statutory language than Petitioners' position, which seeks to retain eligibility for resale alone. In all events, as stated above, the requirement does not prevent resellers from providing basic Lifeline service.

4. Finally, Petitioners argue that "whether a subscriber lives in an urban or rural area is irrelevant" to the enhanced subsidy, because the purpose of the subsidy "is to improve service affordability and subscribership." Mot. 12. That is not the program's sole purpose. Promoting network deployment has been a longstanding goal of enhanced subsidies. *Order* ¶ 4 (citing *2000 Order*, 15 FCC Rcd at 12221 ¶ 20, 12235-36 ¶¶ 52-53). The agency reasonably determined that goal was not served, and that "scarce program resources" were wasted, *Order* ¶ 9, by directing enhanced subsidies toward large, urban cities where there is no "lack[] in either voice or broadband networks." *Id.* ¶ 3.

II. Petitioners Have Not Demonstrated Irreparable Injury

Because Petitioners have not shown a likelihood of success on the merits, their request for a stay pending review can be denied on that basis alone. *See Ark. Dairy Co-op Ass'n v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009). But Petitioners also fail to satisfy this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Under that standard, "the injury 'must be both certain and great; it must be actual and not theoretical." *Id.* (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). In addition, "the injury must be beyond remediation." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

A. Petitioners rely first on alleged harms to Tribes and their members, who they claim will encounter reduced access to telephone and broadband services as a result of the *Order*. Mot. 13-20.

At the outset, neither Petitioner Crow Creek nor Intervenor Oceti Sakowan Tribal Utility Authority has substantiated its injury claims with a declaration or other evidence.[8] The declarations from non-party Tribal leaders submitted with the Motion (Ex. B-E) do not support a finding of irreparable injury because they do not concern "harm suffered by *the party or parties seeking injunctive relief*." *Jones v.*

[8] The Crow Creek Tribal Resolution that the Petition references identifies no irreparable injury to Crow Creek due to implementation of the *Order*. Mot. 15, 19.

Dist. of Columbia, 177 F. Supp. 3d 542, 546 n.3 (D.D.C. 2016) (citing *Winter*, 555 U.S. at 20); *see Cardinal Health Inc. v. Holder*, 846 F. Supp. 2d 203, 213 (D.D.C. 2012) (alleged harm to third-party consumers could not support a finding of "irreparable injury" to enjoin enforcement of agency order revoking wholesale pharmaceutical distributor's registration to distribute controlled substances from its Florida facility).[9] Indeed, Crow Creek asserts (Mot. 19) that it is not currently served by any wireless Lifeline reseller, and thus the *Order*'s limitations on such resellers have no present impact on it at all.

In any event, the Tribe's claimed injuries are largely premised on the assumption that wireless resellers will terminate service on Tribal lands and that facilities-based providers will not fill the gap, leading to "mass disconnection." Mot. 17. As we show below, these consequences are by no means certain, let alone immediate.

B. Petitioners have submitted declarations from Assist Wireless, LLC (Assist) and Easy Telephone Services Company (Easy), which claim that, absent a stay, they will be "forced out of business within a year." Mot. 23, Exs. F-I.

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[9] Petitioners claim that "the Mississippi Choctaw," whose Tribal Chief submitted a Declaration, is a member of Petitioner National Lifeline Association. Mot. 20. But in its merits brief in this case, National Lifeline describes itself as "an industry association" whose members include resellers; it does not claim associational standing on behalf of any Tribal entities. Brief of Petitioners National Lifeline Ass'n, at 2 (filed May 9, 2018).

Petitioners assert that lost revenues from enhanced subsidies will force Assist and Easy to "abandon current business models … and significantly limit operations," leading in turn to "swift[] and dramatic[]" customer losses because their "basic offerings will be unable to compete with" facilities-based Lifeline providers eligible for enhanced subsidies, and even without facilities-based competition because "Lifeline customers cannot pay $25 per month" and will be "dissatisfied with a basic Lifeline service" and reduced "levels of customer care." Mot. 21, 22. These claims do not bear scrutiny.

1. Assist's and Easy's self-serving description of "an irreversible death spiral" depends on a series of hypothetical and draconian measures, including "terminat[ing] nearly all staff" (save a "skeleton crew"), "exit[ing] leases," and "shutter[ing] all physical stores." Mot. 20-22. There is no evidence that such measures would be required; to the contrary, Lifeline-eligible carriers will have continued access to the basic Lifeline subsidy of $9.25 per month for most of their customers, amounting to substantial monthly revenues for Assist and for Easy. Mot. Exs. G, I ¶ 4.[10] Even assuming the necessity of such measures, Assist and

[10] Both Assist and Easy offer their Lifeline customers that are not eligible for enhanced subsidies free phones with service including at least 500 minutes of calls and a data allowance monthly. *See* https://www.assistwireless.com/cell-phone-plan-states/ok-non-tribal; http://www.myeasywireless.com/lifeline-plans (last visited July 23, 2018).

Easy acknowledge that they can remain profitable without preliminary relief until June and October 2019, respectively. Exs. F ¶ 4, H ¶ 5.

2. Assist's and Easy's claims to irreparable harm also depend on "swift[] and dramatic[]" customer losses. Mot. 22. Yet their argument that they will lose customers to facilities-based providers eligible for enhanced subsidies is in tension with their argument that facilities-based carriers will not participate in the Lifeline program. Mot. 8-10. Absent competition from a facilities-based provider, "there is no reason to think that [their] customers would choose to receive no service rather than the reduced, free offering [Assist and Easy] would provide." *Stay Denial Order* ¶ 26.

c. Petitioners' alleged injuries also can be mitigated by rapid resolution of this case on the merits. *See Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 513 (D.D.C. 2018) (no irreparable harm where alleged harms would not arise immediately and could be "mitigated by resolving this case on the merits according to an expedited litigation schedule, which the government suggests and which the Court intends to set"). Petitioners state that their harms will begin to accrue when they must notify customers about the reforms adopted in the *Order*, *see Order* ¶ 31 (requiring notification 30 days after announcement of OMB approval of the *Order*), or "as early as August 12," Mot. 23, but OMB approval has not yet occurred, and the reforms do not take effect for another 60 days, *id.*, so Assist and

Easy will lose no revenues until sometime in October at the earliest. This case will be fully briefed by September 10. The FCC has no objection to setting oral argument as soon as practicable thereafter. The Court then may reach a decision on the merits in short order. In sum, therefore, "the alleged harms do not creat[e] a clear and present need for extraordinary equitable relief to prevent harm." *Navajo Nation*, 292 F. Supp. 2d at 513-14.

c. A Stay Would Harm the Public.

Finally, the public will be harmed if the FCC's reforms are not permitted to go into effect pending review. The Commission determined that it is not a prudent expenditure of Universal Service Fund resources to make enhanced subsidies available to providers that have no facilities and in urban areas where network deployment is already abundant. Such "excess subsidization" 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). That ongoing harm would continue if a stay were granted in the face of the Commission's conclusions.

CONCLUSION

The motion for stay pending review should be denied.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, William J. Scher, hereby certify that on July 23, 2018, I filed the foregoing Opposition of the Federal Communications Commission to Motion for Stay Pending Review with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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