

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1026**September Term, 2017**

FCC-17-155
FCC-83FR2104

Filed On: August 10, 2018

National Lifeline Association, et al.,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

Oceti Sakowin Tribal Utility Authority,
Intervenor

Consolidated with 18-1080

BEFORE: Srinivasan, Millett, and Pillard, Circuit Judges

ORDER

Upon consideration of the motion for stay, the supplement thereto, the response, and the reply; and the unopposed motion for leave to file under seal certain exhibits in support of the motion for stay, it is

ORDERED that the motion for leave to file under seal be granted. The Clerk is directed to maintain these documents under seal. It is

FURTHER ORDERED that the motion for stay be granted. The Order on review, Bridging the Digital Divide for Low-Income Consumers, FCC 17-155 (Dec. 1, 2017), will be stayed pending further order of the court, insofar as the Order purports to limit eligibility for the Tribal Lifeline enhanced subsidy to “facilities-based” service providers,

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and to limit eligibility for that program to “rural areas.” Petitioners have satisfied the stringent requirements for a stay pending court review. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018).

Petitioners have demonstrated a likelihood of success on the merits of their arguments that the facilities-based and rural areas limitations contained in the Order are arbitrary and capricious. In particular, petitioners contend that the Federal Communications Commission failed to account for a lack of alternative service providers for many tribal customers. See SecurityPoint Holdings, Inc. v. TSA, 769 F.3d 1184, 1187 (D.C. Cir. 2014) (“An agency’s action is arbitrary and capricious if it has entirely failed to consider an important aspect of the problem it faces.” (internal citations omitted)). Petitioners have provided evidence that many tribal customers will lose access to vital telecommunications services under the Order’s new eligibility requirements, and the Order fails to meaningfully consider this effect. Furthermore, the Federal Communications Commission has not shown that the historical record supports its assertion that these new requirements will encourage development of communications infrastructure in underserved areas, thus preventing mass disconnection. On the contrary, petitioners credibly assert that providers have generally declined to offer Lifeline service in many tribal regions in the nearly two decades since the implementation of the Tribal Lifeline program, and furthermore that the Order’s new eligibility requirements do not attract providers to expand into those previously-ignored regions. See, e.g., Sorenson Communications, Inc. v. FCC, 755 F.3d 702, 708-09 (D.C. Cir. 2014) (agency action based on speculation rather than evidence is arbitrary and capricious).

Likewise, petitioners have demonstrated that they will suffer irreparable injury absent a stay. This court has held that “[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.” Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal citations omitted). We have, however, judged allegations of unrecoverable monetary losses by a less stringent standard. See, e.g., Robertson v. Cartinhour, 429 Fed. Appx. 1, 3 (D.C. Cir. 2011) (“Although the general rule has it that economic harm does not constitute an irreparable injury, the rule is based upon the presumption that adequate compensatory or other corrective relief will be available at a later date” (internal citations omitted)). The service provider petitioners here have shown that implementation of the Order will result in substantial, unrecoverable losses in revenue that may indeed threaten the future existence of their businesses. In addition, the tribal petitioners have shown that implementation of the Order is likely to result in a major

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reduction, or outright elimination, of critical telecommunications services for many tribal residents, which are vital for day-to-day medical, educational, family care, and other functions.

Finally, the public interest favors a stay. While there may be some public benefit to eliminating unnecessary spending, the Tribal Lifeline program has been in existence for nearly two decades, and the Federal Communications Commission has not demonstrated that allowing it to continue in its current form while these consolidated cases remain pending will result in significant harm to the government or the public at large. The Federal Communications Commission has identified no evidence of fraud or misuse of funds in the aspects of the program at issue here. On the other hand, petitioners have shown a substantial risk that tribal populations will suffer widespread loss of vital telecommunications services absent a stay.

The Clerk is directed to calendar these consolidated cases for oral argument on the first available date following the completion of briefing.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Robert J. Cavello

Deputy Clerk