

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 25, 2018

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

BLANCA TELEPHONE
COMPANY,

Petitioner,

v.

No. 18-9502
(Case No. FCC-1: FCC 17-162)

FEDERAL COMMUNICATIONS
COMMISSION and UNITED
STATES OF AMERICA,

Respondents.

ORDER*

Before **BACHARACH, MURPHY, and MORITZ**, Circuit Judges.

This appeal involves our jurisdiction to review orders issued by the Federal Communications Commission. Blanca Telephone Company has petitioned us to review.

* The Court has determined that oral argument would not materially aid our consideration of the jurisdictional issue. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). Thus, we have decided this issue based on the briefs.

This order does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order may be cited for its persuasive value under Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

- a demand letter from FCC staff to Blanca, stating that Blanca had erroneously obtained almost \$7 million in federal subsidies and that Blanca must repay the United States and
- an FCC order denying Blanca’s application for review of the demand letter.¹

But Blanca has a motion for reconsideration pending before the FCC.

Because this motion renders the demand letter and FCC order nonfinal, we lack jurisdiction to consider Blanca’s petition for review.

The dispute stems from Blanca’s participation in a federal subsidy program that encourages telecommunications providers to provide

¹ Along with the demand letter and the FCC order, Blanca also asks us to review

- a letter (June 22, 2016) from FCC staff to Blanco, acknowledging the FCC’s receipt of Blanca’s emergency application for review of the demand letter (June 2, 2016) and
- a letter (Jan. 10, 2018) from FCC staff to Blanca, notifying Blanca that the FCC would begin collecting the overpayment.

The issuance of these letters does not constitute reviewable agency action. To be reviewable, an agency action “must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

The letters did not determine Blanca’s rights or obligations, and no independent legal consequences flowed from the letters. The letters just communicated to Blanca what had been decided elsewhere: The first letter informed Blanca that the FCC had received Blanca’s emergency application for review, and the second letter informed Blanca that the FCC was taking action “as directed” by the FCC’s order denying Blanca’s application for review. Petitioner’s Opening Br., App’x at 37.

telephone services in high-cost rural and insular areas. FCC staff determined that Blanca had improperly received close to \$7 million in subsidies under this program; this determination led the FCC to demand reimbursement from Blanca. The demand spurred Blanca to seek review and the FCC declined further review, affirming the staff's determination that Blanca must repay the amount it had improperly received.

Blanca then moved for the FCC to reconsider its order, and this motion for reconsideration remains pending before the FCC. Despite the pendency of this motion, Blanca has asked us to review the FCC's underlying order.

We have jurisdiction to review only "final" FCC orders. *See* 28 U.S.C. §§ 2342(1), 2344. An FCC order is "final" when the order marks the end of the FCC's decision-making process. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). "The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review"; thus, "a party who has sought rehearing cannot seek judicial review until the rehearing has concluded." *Stone v. INS*, 514 U.S. 386, 392 (1995).

Blanca has moved for reconsideration of the order denying its application for review, and the FCC has not yet decided Blanca's motion. As a result, we lack jurisdiction to consider Blanca's petition for review of the demand letter and FCC order.

* * *

Because we lack jurisdiction to consider Blanca's petition for review,
we dismiss the petition.

Entered for the Court

Robert E. Bacharach
Circuit Judge

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

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Denver, Colorado 80257
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Elisabeth A. Shumaker
Clerk of Court

October 25, 2018

Chris Wolpert
Chief Deputy Clerk

Mr. Timothy Edward Welch
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1116 Heartfields Drive
Silver Spring, MD 20904

RE: 18-9502, Blanca Telephone Company v. FCC
Dist/Ag docket: FCC 17-162

Dear Counsel:

Enclosed please find an order issued today by the court.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Adam D. Chandler
Thomas M. Johnson Jr.
Jacob Matthew Lewis
Robert Nicholson
Scott M. Noveck
Richard Welch

EAS/na