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United States Court of Appeals
Tenth Circuit

March 12, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BLANCA TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

No. 18-9587
(FCC No. FCC 17-162)
(Federal Communications Commission)

ORDER

Before **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

This is the second petition for review Blanca Telephone Company has filed seeking review of orders the Federal Communications Commission issued regarding Blanca's participation in a federal subsidy program for telecommunications providers in high-cost rural and insular areas. [*See* Petition at 1 ("[t]he subject matter of the instant petition for review was previously before this court in No. 18-950[2] . . . ."); Blanca's Response to Show Cause Order at 4, n.2 (acknowledging typographical error in the earlier case number noted in its petition)].

The court dismissed the first petition for lack of a final agency order and thus of jurisdiction. *See Blanca Tel. Co. v. FCC*, No. 18-9502 (10th Cir. Oct. 25, 2018). The court likewise issued a show cause order regarding the existence of its jurisdiction over

this second petition for review, and the matter is now before the court on the parties' briefing regarding that issue.

The FCC orders at issue require Blanca to repay subsidies the FCC determined Blanca wrongly received. Specifically, on June 2, 2016, FCC staff sent Blanca a letter, stating the agency had determined Blanca improperly received roughly $6.75 million in FCC subsidies and demanding repayment. Blanca sought—and, on December 8, 2017, the FCC declined—further agency review, instead affirming the determination that Blanca must repay the amount the FCC previously determined Blanca had improperly received. Blanca sought agency reconsideration, but also filed its first petition for review requesting that this court review the FCC's orders. *See Blanca Tel. Co. v. FCC*, No. 18-9502.

In Case No. 18-9502, this court: (a) noted that Blanca's motion for agency reconsideration remained pending; (b) held that Blanca's motion for reconsideration "renders the [June 2, 2016] demand letter and [December 8, 2017] FCC order nonfinal;" and (c) dismissed Blanca's petition for lack of a final order and thus of jurisdiction. *See Blanca Tel. Co. v. FCC*, No. 18-9502 (10th Cir. Oct. 25, 2018). The court also rejected Blanca's request that it review two letters from FCC staff to Blanca because the issuance of the letters neither "determine[d] Blanca's rights or obligations" nor constituted agency action "from which legal consequences will flow", and thus did not constitute agency action this court had jurisdiction to review. *See id*. (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Blanca petitioned this court for rehearing. The FCC and the United States (collectively, the "FCC") filed an opposition to that petition, and Blanca filed a reply in support of its petition. The court denied rehearing. *Blanca Tel. Co. v. FCC*, No. 18-9502 (10th Cir. Dec. 10, 2018).

Blanca now petitions the court for review of: (1) the June 2, 2016 demand letter; (2) the FCC's December 8, 2017 order; and (3) a footnote the FCC included in its response to Blanca's petition for rehearing in Case No. 18-9502, which footnote Blanca contends "constitutes a final merits denial of Blanca's December 2017 petition for reconsideration . . ." [Petition at 8].

As the court stated in its order dismissing Blanca's petition in Case No. 18-9502, this court has jurisdiction to review only "final" FCC orders. *See* 28 U.S.C. §§ 2342(1), 2344. An FCC order is "final" when it 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).

The footnote Blanca asks this court to construe as an "order" denying its motion for agency reconsideration follows the FCC's discussion of 47 U.S.C. § 405(a)'s bar on judicial review of "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." [Opp. to Pet. for Reh'g, No. 18-9502 at 13 (filed Nov. 20, 2018)]. The footnote reads, in its entirety, as follows:

> Section 405(a) has the effect of precluding judicial review of issues that a party has forfeited because it did not timely raise them prior to the Commission's initial decision, unless the party petitions for reconsideration and the Commission agrees to consider them. *Cf.* 47 C.F.R. §§ 1.106(b)(2), 1.115(g). But in that situation, the need to file a petition for reconsideration is a consequence of the party's initial forfeiture, not of any inherent statutory requirement to petition for reconsideration before proceeding to court.

[*Id.* at 13 n.4]. Blanca contends the footnote embodies the FCC's determination that Blanca "forfeited" its arguments on reconsideration. [Blanca's Response to Show Cause Order at 5].

The court does not read the footnote so broadly: the footnote states only that federal statute and regulation prohibit a party to an agency proceeding from seeking judicial review on a ground on which it has not afforded the agency an opportunity to rule. *See* 47 U.S.C. § 405; *cf. City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987) (construing § 405 to "codify the judicially-created doctrine of exhaustion of administrative remedies" (internal quotation marks and citations omitted)); *Gerico Inv. Co. v. FCC*, 240 F.2d 410, 411 (D.C. Cir. 1957) ("The obvious purpose of section 405 is to afford the Commission an opportunity to consider and pass upon matters prior to their presentation to the court."). As this court has previously stated, "[u]nder 47 U.S.C. § 405(a), when 'the party seeking [] review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass,' a petition for reconsideration is a condition precedent to judicial review." *See Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1227 (10th Cir. 2009) (quoting § 405(a)).

Blanca has filed a motion for agency reconsideration through which: (1) the FCC may consider "questions of fact or law" on which it has not yet been afforded an "opportunity to pass," *see id.*; and (2) the FCC must determine grounds it acknowledges were "fully preserved." [FCC's Response to Show Cause Order at 7].

Although this court has previously held "[a] communication need not be formal to constitute a final agency action," *see Tulsa Airports Improvement Trust v. FAA*, 839 F.3d 945, 949 (10th Cir. 2016), the FCC's footnote here simply does not address or purport to deny Blanca's motion for agency reconsideration. And even if, as Blanca suggests, the footnote could be read as an agency interpretation of the regulations it cites, Blanca does not contend that the cited regulations are ambiguous and thus require this court's deference to that "interpretation." *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154 (2012) (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) and holding that an agency's interpretation of its regulations is entitled to deference unless there exists reason to suspect the interpretation does not reflect the agency's fair and considered judgment on the matter in question and noting such suspicion might exist, if, for example, the interpretation conflicts with a prior interpretation, it appears the interpretation is nothing more than a convenient litigating position, or the interpretation appears to be a post hoc rationalization advanced by an agency seeking to defend past agency action against attack (citations omitted)).

Undeterred, Blanca argues the court may exercise jurisdiction in the absence of a final order, pursuant to either: (1) *Leedom v. Kyne*, 358 U.S. 184 (1958); or (2) the All

Writs Act, 28 U.S.C. § 1651. [*See* Blanco's Response to Show Cause Order at 16-21 & n.8 ; Blanco's Reply at 2-11]. Neither basis supports this court's jurisdiction.

In *Kyne*, the Supreme Court upheld judicial review—despite a statutory provision that precluded such review—"where the National Labor Relations Board had acted in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations] Act." *See U.S. Dep't of Interior v. Fed. Labor Relations Auth.*, 1 F.3d 1059, 1061 (10th Cir. 1993) (citations and internal quotation marks omitted).

The *Kyne* exception is one of "very limited scope," "to be invoked only in exceptional circumstances." *See id.* To fall within the *Kyne* exception, it is insufficient that the agency "may have made an error of fact or law"; the agency "must have acted without statutory authority." *Id.* at 1062 (citation and internal quotation marks omitted). Further, the *Kyne* exception does not apply where, as here, either the aggrieved party is currently seeking agency review that—if successful—could provide the requested relief, *see, e.g., Farrell-Cooper Min. Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1238 (10th Cir. 2013), or the aggrieved party may seek judicial review before this court if it remains dissatisfied once the agency order becomes final. *See Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991).

Blanco's invocation of the All Writs Act to confer jurisdiction over its petition is similarly misplaced: a writ is "not a substitute for an appeal" but is, instead "a drastic remedy . . . to be invoked only in extraordinary circumstances." *See In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (citation and internal quotation marks omitted). Accordingly, and among other things, "the party seeking issuance of the writ

must have no other adequate means to attain the relief he desires." *Id.* at 1187 (citation and internal quotation marks omitted). Here, however, Blanco's motion for agency reconsideration remains pending, and—failing success at the agency level—Blanco may obtain review of the FCC's orders by filing a timely petition for review once the orders are final. Accordingly, the All Writs Act does not apply.

In sum, Blanco's motion for agency reconsideration remains pending, "render[ing] the underlying order nonfinal for purposes of judicial review." *See Stone*, 514 U.S. at 392. Accordingly, the court is without jurisdiction over the petition for review and thus dismisses it.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk