

Nat'l Lifeline Ass'n v. FCC

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915 F.3d 19 (D.C. Cir. 2019)

I. INTRODUCTION

Upon timely petition for review, the Court of Appeals for the District of Columbia Circuit granted petitioners' motion for a judicial stay on the *2017 Lifeline Order*¹ because "petitioners ha[d] demonstrated a likelihood of success on the merits of their arguments that the [Tribal Facilities Requirement] and [Tribal Rural Limitation] . . . [were] arbitrary and capricious."²

II. BACKGROUND

In the Communications Act of 1934, Congress specified that one of its goals was to make wire and radio communication services available at reasonable rates.³ The Telecommunications Act of 1996 reinforced this goal by stating that all consumers in all regions, including low-income consumers, should have access to telecommunications and information services.⁴ In response to these goals, the FCC created the Lifeline program in 1985 and later transformed the program to become a "stand-alone universal service program" in 1997.⁵ The Lifeline program was created "to ensure that low-income consumers had access to affordable, landline telephone service following the divestiture of AT&T."⁶

The Lifeline program operates by offering eligible telecommunications carriers (ETCs) subsidies if the ETCs provide their customers with a discount of \$9.25 on a wireline or wireless voice and broadband service plan.⁷ In 2000, the FCC "established the Tribal Lifeline program to provide an enhanced monthly subsidy of \$25 for residents of federally recognized Tribal lands."⁸ This decision was in response to alarming

1. Bridging the Digital Divide for Low-Income Consumers et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475 (released Dec. 1, 2017) ("*2017 Lifeline Order*"), 83 Fed. Reg. 2075 (Jan. 16, 2016).

2. Nat'l Lifeline Ass'n v. FCC, 915 F.3d 19, 27 (D.C. Cir. 2019).

3. *Id.* at 23.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 23–24.

8. *Id.* at 24.

statistics that revealed that Tribal lands had the lowest telephone subscribership in America.⁹ Before adopting the Tribal Lifeline program, the FCC committed to consulting “with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.”¹⁰

In 2005, major carriers withdrew from the Lifeline program because the program was no longer profitable.¹¹ The FCC responded by granting a blanket forbearance on the “own facilities” requirement found within the ETC definition for non-facilities-based providers.¹² Non-facilities-based providers do not have their own infrastructure, but instead buy “wholesale minutes, data, and text from major carriers” to resell to consumers under a different name.¹³ The FCC allowed a blanket forbearance because these “resellers play[ed] a critical role in the Lifeline program: by 2015 about two-thirds of eligible low-income consumers on Tribal lands relied on non-facilities-based providers for their Lifeline services.”¹⁴

In 2015, the FCC initiated proceedings to comprehensively restructure the Lifeline and Tribal Lifeline programs because expenditures for the program had substantially increased within fourteen years.¹⁵ However, the FCC decided to maintain current Tribal-specific eligibility programs because the program had experienced success in increasing the adoption of Lifeline services.¹⁶ But the FCC decided to consider a proposed facilities requirement and rural limitation at a future proceeding.¹⁷

On October 26, 2017, the FCC “released a draft order adopting a facilities requirement and rural limitation for the Tribal Lifeline program.”¹⁸ The Tribal Facilities Requirement limited the enhanced Tribal Lifeline to facilities-based Lifeline service providers whose facilities cover all or a portion of the Tribal lands’ service area, which effectively excluded non-facilities-based providers.¹⁹ Additionally, the Tribal Rural Limitation limited the enhanced Tribal Lifeline support to residents of “rural” areas on Tribal lands.²⁰ Rural areas are defined as an area with less than 25,000 people.²¹ This draft order was open for public comment and lobbying from interested

9. *Id.*

10. *Id.*

11. *Id.* at 25, 30.

12. *Id.* at 25-26 (“Under the 1996 Act, an ETC must ‘offer the services that are supported by Federal universal service support mechanisms’ ‘either using its own facilities or a combination of its own facilities and resale of another carrier’s services.’”).

13. List of United States Mobile Virtual Network Operators, Best MVNO, <https://bestmvno.com/mvnos/#what-is-an-mvno> (last visited Apr. 14, 2019).

14. *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 22, 25 (D.C. Cir. 2019).

15. *Id.* at 26.

16. *Id.* at 26.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 27.

21. *Id.* at 27.

persons from October 26, 2017 to November 9, 2017.²² It was then approved on November 16, 2017.²³

III. ANALYSIS

Petitioners contended that the 2017 Lifeline Order, the Tribal Facilities Requirement, and the Tribal Rural Limitation were arbitrary and capricious.²⁴ The petitioners also argued that the FCC “failed to provide sufficient notice of the proposed changes . . . [and] . . . violated its own procedural requirements by failing to consult Indian tribes in advance.”²⁵

A reviewing court will set aside agency action if the action is found to be arbitrary or capricious.²⁶ To not be arbitrary or capricious, an agency must provide a “satisfactory explanation for its action including [a] rational connection between the facts found and the choice made.”²⁷ Additionally:

[A]gency action is arbitrary and capricious if the agency ‘has relied on factors which Congress has intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’²⁸

The court began its analysis by reviewing whether the decision to enact the Tribal Facilities Requirement was arbitrary and capricious.²⁹ Then the court analyzed whether the decision to enact the Tribal Rural Limitation was arbitrary and capricious.³⁰ Finally, the court reviewed whether the FCC violated procedural requirements.³¹

A.

The court held that the Tribal Facilities Requirement was arbitrary and capricious for three reasons.³² First, the court found that the FCC ignored the substantial negative impact that the Tribal Facilities Requirement would have on affordability and access of subscribership for Tribal lands, which is

22. *Id.* at 26.

23. *Id.*

24. *Id.* at 27.

25. *Id.*

26. *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)).

27. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

28. *Id.*

29. *See infra* Section A.

30. *See infra* Section B.

31. *See infra* Section C.

32. *Id.* at 31.

the primary goal of the enhanced Tribal subsidy.³³ Second, the court found that the FCC “failed to justify its fundamental policy reversal on forbearing the ‘own facilities’ requirement” despite the FCC’s findings that non-facilities-based providers play an important role in promoting affordable telecommunications service.³⁴ The FCC reversed “its policy of forbearance . . . without conducting a new forbearance analysis or providing any reasoned explanation for its reversal.”³⁵ Third, the court found that the FCC “failed to consider . . . important aspect[s] of the problem in adopting the Tribal Facilities Requirement.”³⁶

The court listed four important aspects of the problem in adopting the Tribal Facilities Requirement that the FCC failed to consider: (1) The FCC’s decision did not explicitly consider the fact that facilities-based providers are unwilling to offer Tribal Lifeline services and the impact of this unwillingness;³⁷ (2) The FCC’s decision did not explicitly consider “the effect of eliminating the enhanced subsidy for non-facilities-based providers,” despite the FCC’s knowledge that “two thirds of enhanced Tribal support goes to non-facilities-based providers[;]”³⁸ (3) The FCC failed to provide evidence “that directing the enhanced Tribal subsidy solely to facilities-based providers would incentivize them to deploy additional facilities and networks, reduce prices, or offer new service plans for low-income consumers[;]”³⁹ and (4) the FCC “ignored serious reliance interests” that gave rise to its forbearance policy because the FCC did not consider the business models of non-facilities-based providers that have been designed to target low-income consumers.⁴⁰

B.

The court held that the Tribal Rural Limitation was also arbitrary and capricious for two reasons. First, the court found that the FCC failed to provide any evidence to support their claim that “telecommunications services are more available or more affordable for low-income consumers on urban Tribal land than on rural Tribal lands, such that the enhanced subsidy would be less necessary in urban areas.”⁴¹ Second, the court found that the FCC’s “conclusion that limiting the enhanced Tribal subsidy to rural lands will incentivize deployment is . . . speculative” because the FCC provided no evidence for this conclusion.⁴²

33. *Id.* at 28.

34. *Id.* at 29.

35. *Id.*

36. *Id.* (quoting *State Farm*, 463 U.S. at 43).

37. *Id.* at 29-30.

38. *Id.* at 30.

39. *Id.*

40. *Id.* at 31.

41. *Id.* at 32.

42. *Id.*

C.

The court ruled that the *2017 Lifeline Order* failed on procedural grounds as well. Agencies are required to provide a period of notice-and-comment.⁴³ “When substantial rule changes are proposed[,]” an agency must provide: (1) at least, a 30-day comment period;⁴⁴ (2) factual detail and rationale, so that interested parties may leave targeted comment;⁴⁵ and (3) a final rule that is “a logical outgrowth” of the proposed rule.⁴⁶

Here, the FCC’s final decision was not a “logical outgrowth” because the final decision did not include several elements that garnered comment in the initial notice.⁴⁷ Additionally, in the notice, the FCC failed to include maps that showed which areas would be affected by the proposed rule,⁴⁸ which limited meaningful comment.⁴⁹ The FCC also failed to provide the proper notice-and-comment rulemaking proceeding that it had promised and the proper 30-day comment period.⁵⁰

IV. CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit vacated the *2017 Lifeline Order* and remanded the matter to the FCC for a new notice-and-comment-rulemaking proceeding because the FCC’s adoption of the Tribal Facilities Requirement and Tribal Rural Limitation was arbitrary and capricious.⁵¹

43. *Id.*

44. *Id.* at 34.

45. *Id.* at 32.

46. *Id.* at 32.

47. *Id.* at 33.

48. *Id.*

49. *See id.*

50. *Id.* at 34-35.

51. *Id.* at 35.