

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1431

September Term, 2017

FILED ON: MARCH 9, 2018

CONSOLIDATED COMMUNICATIONS OF CALIFORNIA COMPANY, F/K/A SUREWEST TELEPHONE,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of an Order
of the Federal Communications Commission

Before: GRIFFITH and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This petition for review of an order of the Federal Communications Commission was considered on the basis of the appendix submitted by the parties and the presentations in the briefs. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be **DENIED**.

The Federal Communications Commission (FCC) administers the Universal Service for High-Cost Areas program (“the Program”), which subsidizes the provision of communications services to certain areas that are costly to serve. *See generally* *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56-57 (D.C. Cir. 2011). The Program offers different subsidies to telephone companies depending on the carrier’s regulatory classification. For a carrier to receive such subsidies, the state in which it operates must file a certification affirming that the carrier has used and will use its subsidies in compliance with the Program’s requirements. *See* 47 C.F.R. § 54.314.

In July 2012, petitioner Consolidated Communications of California Company (“Consolidated”) acquired SureWest Telephone (“SureWest”), a local carrier in rural California. Several months later, SureWest failed to provide the correct Program certification to California because the carrier was confused about its new regulatory classification after the acquisition. As a

result, even though California filed timely certifications for other in-state carriers, it did not file a certification for SureWest. SureWest then sought from the FCC a waiver of the certification-filing deadline, but the FCC denied the request.

Consolidated argues the FCC acted arbitrarily and capriciously when it denied SureWest's waiver request. *See Petitions for Waiver of Universal Serv. High-Cost Filing Deadlines*, 31 FCC Rcd. 12012 (2016) ("Review Order"); *see also Petition for Waiver of Universal Serv. High-Cost Filing Deadlines*, 28 FCC Rcd. 14852 (2013) ("Bureau Order"). This is so, Consolidated claims, because "special circumstances" required the FCC to grant a waiver, the agency previously granted waivers to similarly situated parties, and a waiver would promote the public interest without harming the FCC's subsidy fund. In addition, Consolidated argues that the waiver denial amounted to an excessive fine under the Eighth Amendment. None of these arguments have merit.

The FCC may exercise its discretion "to waive its rules if there is 'good cause' to do so." *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (quoting 47 C.F.R. § 1.3). We have made clear, however, that a "good cause" for waiver exists only if (1) "special circumstances warrant a deviation from the general rule," and (2) the waiver will "serve the public interest." *Id.*

Consolidated fails to show that "special circumstances" required the FCC to grant a waiver here. SureWest's mere "confusion" about its new regulatory classification after the acquisition is insufficient to justify a waiver. *See, e.g., NetworkIP, LLC v. FCC*, 548 F.3d 116, 126-28 (D.C. Cir. 2008) (reversing an FCC decision that waived a filing deadline when the party's delay in filing arose from confusion over the filing requirements); *see also Review Order*, 31 FCC Rcd. at 12014 n.20 (citing representative orders). And the long delay before filing the missing certification—nearly four months—further weighs against granting a waiver. *See, e.g., Fed.-State Joint Bd. on Universal Serv.*, 22 FCC Rcd. 4946, 4947-48 (2007) (denying waiver requests of carriers that made their required filings two, three, and six months late); *see also Bureau Order*, 28 FCC Rcd. at 14854 (citing additional representative orders).

Consolidated also argues that SureWest's prior certification in June 2012, which was filed before Consolidated acquired SureWest in July, establishes special circumstances that warrant a waiver. However, SureWest's regulatory classification was different before it was acquired by Consolidated, so its pre-acquisition filing certified compliance with *different obligations* than those required post-acquisition. *See Review Order*, 31 FCC Rcd. at 12015-16. The earlier certification did not relieve SureWest of its responsibility to file a different certification after it was acquired by Consolidated.

Nor has Consolidated shown that the FCC's waiver denial is inconsistent with the agency's waiver grants to similarly situated parties in the past. Consolidated cites only nonbinding, staff-level decisions to support this argument, but those decisions do not establish a prior practice from which the FCC must justify a departure. *See, e.g., Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008) (although staff-level decisions are "binding on the parties to the proceeding," they are

“not Commission precedent, and agency actions contrary to those decisions cannot be deemed arbitrary and capricious”). Moreover, the central FCC decision upon which Consolidated relies is easily distinguishable from this case. In *Smith Bagley, Inc.*, 16 FCC Rcd. 15275 (2001), the agency granted a waiver under meaningfully different circumstances. There, the carrier’s earlier filing attested to compliance with *the same obligations* that were required in the missing certification, and the carrier missed the filing deadline by only *two weeks*.

Consolidated also argues the FCC was required to grant a waiver both to promote the public interest and because SureWest’s delayed filing did not harm the FCC’s subsidy fund. Even if true, these rationales would not require the agency to exercise its discretion to grant a waiver under the “good cause” standard. Promotion of the public interest, without more, does not compel the FCC to grant a waiver. *See NetworkIP*, 548 F.3d at 127 (“[B]efore the FCC can invoke its good cause exception, it *both* ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.’” (quoting *Ne. Cellular Tel. Co.*, 897 F.2d at 1166)). Nor is it material whether or not the late filing harmed the FCC’s subsidy fund. The FCC is tasked with overseeing carriers’ compliance with the Program generally, and the annual certification is one of the agency’s “critical” means for fulfilling this mandate. *See* § 54.314; *Review Order*, 31 FCC Rcd. at 12013.

Finally, Consolidated argues the waiver denial amounted to an excessive fine under the Eighth Amendment because the amount of subsidy support it lost was disproportionate to the gravity of its filing error. But this argument is misplaced because the Eighth Amendment does not apply here. Our analysis under the Excessive Fines Clause entails two steps: (1) determining whether the government extracted payments for the purpose of punishment; and (2) assessing whether the extraction was excessive. *See United States v. Bajakajian*, 524 U.S. 321, 328, 334 (1998). The first step determines whether the Excessive Fines Clause applies, and the second determines if the Clause was violated. Consolidated’s argument fails at the first step. Here, the FCC did not extract a payment because the agency never took any property from SureWest. The subsidy program, by its own terms, restricted eligibility to carriers who complied with the certification requirement. § 54.314(a); *see also* § 54.314(d). SureWest failed to meet this condition and thus had no “legitimate claim of entitlement” to the subsidy. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (having “a property interest in a benefit” requires having “more than a unilateral expectation of it”—instead, there must be “a legitimate claim of entitlement to it”).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk