[***Court's Lifeline Decision Seen Having Major Implications for Program's Future***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5VB6-YRY1-JC8G-8001-00000-00&context=)

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**Body**

The U.S. Court of Appeals for the D.C. Circuit rejected FCC tribal Lifeline support limits and procedures Friday. The 2017 order was vacated and remanded for a new rulemaking in a potential win for wireless resellers like TracFone (see 1902010017). It's a clean win for the order's opponents and the biggest loss for Chairman Ajit Pai so far in court, lawyers said Friday. Others said the FCC likely won't try a do-over on the order or pursue removal non-facilities-based providers in general from the program.

The decision was "unquestionably a body blow" and the "most serious defeat Pai has thus far encountered," said Georgetown Law Institute for Public Representation Senior Counselor Andrew Schwartzman.

The Lifeline "ecosystem would have been disrupted" if the FCC prevailed, said former Commissioner Mignon Clyburn, who voted against the order and whose dissent the court cited. It was "flawed from the start," she said in an interview. "I asked for us to build a better record. ... I asked for us to take a pause." The FCC had done nothing to engage with the tribes, she said: "The court recognized that there were going to be harms without any kind of answer on what's next for these communities."

"We are still reviewing the Court's decision but remain committed to combating waste, fraud, and abuse in the Lifeline program," an FCC spokesperson emailed. "We are disappointed that today's decision leaves in place an indefensible status quo where residents of Tulsa, Oklahoma, whether or not they are Native American, receive $25 more a month in Lifeline subsidies than residents of cities like St. Louis, Kansas City, and Omaha."

"It was cruel when the FCC decided that the least connected on Tribal lands would be the least able to access the opportunities made available through the Lifeline program," said Commissioner Jessica Rosenworcel in a statement. "Now we have another chance. We need to get it right."

The FCC restricted an additional $25 monthly tribal lifeline subsidy to services provided by eligible telecom carriers that use their own fixed or mobile wireless facilities, excluding carriers that resell services provided over other carriers' networks. The agency limited the extra subsidy to residents of "rural" areas on tribal lands. The additional money, beyond the $9.25 a month provided for Lifeline service, had been available since 2000. Last August, a D.C. Circuit motions panel stayed the order pending hearing (see 1808100027). "The Commission's adoption of these two limitations was arbitrary and capricious by not providing a reasoned explanation for its change of policy that is supported by record evidence," Judge Judith Rogers ruled in National Lifeline Association v. FCC. No. 18-1026.

"In adopting the Tribal Facilities Requirement, the Commission's decision evinces no consideration of the exodus of facilities-based providers from the Tribal Lifeline program," Rogers wrote. "Neither does it point to evidence that banning resellers from the Tribal Lifeline program would promote network buildout. Nor does it analyze the impact of the facilities requirement on Tribal residents who currently rely on wireless resellers." The FCC "failed to provide an adequate opportunity for comment on the proposed limitations," she said. Judges Thomas Griffith and Raymond Randolph were the panel's other members. At October's argument, they peppered both sides with questions (see 1810250041).

The decision sent a clear message to the FCC, Clyburn said. "It's a very significant loss" for Pai, she said. "This was one of the items where [Pai] was very clear, very definite and very focused on a certain direction and a framework," she said. "It's a major decision when it comes to what I consider a priority for the FCC."

"The 2017 order had attempted to recast the primary goal of the Lifeline program as focused on network facilities deployment, but that is the focus of the high-cost program," said Danielle Frappier of Davis Wright, who represents some Lifeline providers. "Lifeline was created to ensure availability and affordability, and as the court correctly recognized, wireline providers have been exiting the program, and the FCC could provide no justification for its rationale that banning resellers on tribal lands would guard against waste, fraud and abuse in the program."

No Do-Over

The ruling "makes it difficult for the FCC to move forward with their non-facilities based plan in the NPRM and it's good news for Lifeline consumers," said Crystal Rhoades, Nebraska state public service commissioner. "The court affirmed the things I've been saying for months: Removing non-facilitates based providers from the Lifeline program is not a guarantee that facilities-based providers will expedite network buildout," Rhoades said. "Excluding non-facilities based providers creates a barrier for consumers to access the services because so many facilities based providers no longer offer a Lifeline program."

The order would have "effectively ended Lifeline service on many Tribal lands," emailed Gene DeJordy, an attorney for the Crow Creek Sioux Tribe in South Dakota, one of the tribes that challenged the order. "First Americans who live in some of the most impoverished areas of the country can continue receiving essential Lifeline services that they depend on."

Free State Foundation President Randolph May predicted the FCC may decide not to pursue another order. "Aside from [the FCC's] legal authority to do so, the proposal to limit participation in the Lifeline program only to facilities-based providers is not good from a policy perspective" now, he said.

The Lifeline program is "in crisis," said John Heitmann of Kelley Drye, who argued the case on behalf of the National Lifeline Association (NaLA). "We have a substantially flawed national verifier rollout that if not corrected soon will result in the disconnection of millions of subscribers not because they are ineligible, but because they cannot successfully navigate a difficult process to stay enrolled," he said. "We also have minimum service standards that will in December require $40-plus service plans while sunsetting support for voice services. We need for the FCC to step in now to prevent more low-income consumers from being harmed."

NaLA "looks forward to engaging with the FCC and all stakeholders" to ensure that affordability remains the program's primary goal, said Chair David Dorwart in a news release. "Our hope is that this decision provides the impetus for the Commission and all stakeholders to engage in a transparent and constructive manner so that Lifeline meets its full potential to bridge the affordability aspect of the digital divide."

The decision was bad for the regulator "in the sense that the court was adamant that this FCC failed to be evidence-based in changing its policies," said New Street's Blair Levin. "That has implications for other [cases] where those challenging FCC decisions are making similar allegations."

The decision "removes the last reason for FCC delay in the open Lifeline modernization proceeding, which proposed a similar ban on non-facilities based resellers outside of Tribal areas," emailed NARUC General Counsel Brad Ramsay. "If the FCC unwisely chooses to ban non-facilities-based resellers more broadly, as proposed in that proceeding, they will have to address the concerns/flaws raised by the D.C. Circuit in today's decision. ... They will have to consider the exodus of many facilities based carriers from the lifeline program, point to evidence that such ban will promote network build out, and analyze the impact on current lifeline subscribers served by wireless resellers. That won't be easy based on the current record."

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