

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November 3, 2008

Elisabeth A. Shumaker
Clerk of Court

SORENSEN COMMUNICATIONS,
INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES
OF AMERICA,

Respondents.

Nos. 08-9503, 08-9507 & 08-9545

(FCC No. 07-186/CG Docket No.
03-123)

GOAMERICA, INC.,

Intervenor.

GOAMERICA, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES
OF AMERICA,

Respondents.

Nos. 08-9547 & 08-9550
(FCC No. 07-186/CG Docket No.
03-123)

SORENSEN COMMUNICATIONS,
INC.,

Intervenor.

ORDER GRANTING STAY PENDING JUDICIAL REVIEW

Before **TACHA, BRISCOE, and McCONNELL**, Circuit Judges.

_____Petitioner Sorenson Communications, Inc. (“Sorenson”) challenges the declaratory rulings of the Federal Communications Commission (“FCC”) and the United States, respondents, that restrict the use of funds and customer information obtained through the provision of telecommunications relay services (“TRS”). These rulings prohibit TRS providers, such as Sorenson, from using such customer information or funds for “lobbying or advocacy activities” directed at TRS users. The matter presently before us is Sorenson’s “Corrected” Motion for a Stay Pending Judicial Review. After consideration of the briefing presented, we grant Sorenson’s motion for a stay.

I

As part of the Americans with Disabilities Act (“ADA”), Congress mandated the provision of telecommunications relay services (“TRS”) to individuals with hearing and speech impairments. 47 U.S.C. § 225(c). Sorenson provides TRS. On a monthly basis, Sorenson tabulates the number of compensable minutes it provided. To calculate the compensation amount, the FCC applies its appropriate, industry-wide rate to those minutes. An FCC administrator then compensates Sorenson.

Central issues of the underlying appeal are whether the respondents may restrict (1) how Sorenson uses the funds it receives and (2) how Sorenson uses its customer and call data. After issuing a notice of proposed rulemaking and receiving 35,000 comments, the FCC issued a “Report and Order and Declaratory Ruling.” Pet’r Br. Ex. 1. The majority of this report and order establishes new compensation rates and methodology. Sorenson does not challenge those findings.

Sorenson challenges a portion of the declaratory ruling (“November 19, 2007 Declaratory Ruling”). The paragraphs at issue state in part:

95. [P]roviders also may not use a consumer or call database to contact TRS users for lobbying or any other purpose. . . . Similarly, as noted above, a provider may not use call data to monitor the TRS use by its customers (or the customers of other providers) and to determine whether they are making a sufficient number of calls to warrant further benefits from the provider.

96. [Providers] may not use consumer or call data to contact TRS users or to in any way attempt to affect or influence, directly or indirectly, their use of relay service. . . . Providers offering such programs or otherwise taking action that has the effect of providing consumers incentives to make relay calls, or misusing customer information, will be ineligible for compensation from the Fund. [footnote omitted] Further, such providers may also be subject to other actions for violations of our rules.

Pet’r Br. Ex. 1 at 45.

Sorenson requested the FCC stay this portion of the declaratory ruling. The FCC granted this request. On May 28, 2008, the FCC issued a second

Declaratory Ruling (“May 28, 2008 Declaratory Ruling”). The parties disagree over key portions of this declaratory ruling. Both sides highlight paragraphs

9–12. These paragraphs state:

9. First, we clarify that the language in paragraphs 95 and 96 restricting the use of consumer information “for any . . . purpose,” does not prohibit contacts by TRS providers with TRS users that are directly related to the handling of TRS calls. Consistent with the Commission’s TRS rules and orders, providers may use information derived from a consumer or call database established in conjunction with Section 225 to contact users as long as it is for purposes related to the handling of relay calls. . . .

10. Second, we clarify that providers may not use customer information obtained through the provision of federally-funded relay services, or use funds obtained from the Interstate TRS Fund, to engage in lobbying or advocacy activities directed at relay users. Evidence in the record shows that at least one service provider has bombarded deaf persons with material seeking to persuade them to support the provider’s position on matters pending before the FCC. [footnote omitted] We find that using revenue from the TRS Fund, or information obtained from end users in the provision of services supported by the TRS Fund, to engage in that kind of advocacy is inconsistent with the purpose of the TRS Fund.

11. These restrictions do not run afoul of the First Amendment. In the context of a federally subsidized program, like the TRS Fund, the government “may certainly insist that these ‘public funds be spent for the purposes for which they were authorized.’” [footnote omitted] The TRS Fund is designed to ensure that persons with hearing and speech disabilities have access to the telephone system. It was not intended to finance lobbying by TRS providers directed at end users. The Commission is under no obligation “to fund such activities out of the public fisc.” [footnote omitted] We find that, for the same reasons, it is reasonable to restrict the use of customer information acquired in the provision of federally subsidized TRS services. A consumer or call database that a service provider develops and maintains through participation in the TRS program is inextricably

ted to that federally funded program. Consequently, it is permissible to prohibit the use of that database for purposes unrelated to the handling of relay calls, [footnote omitted] such as lobbying end users to support a service provider's position before the Commission.

12. We emphasize that nothing we do here would prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities. Thus, this is not an "unconstitutional conditions" case in which the government "effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program." [footnote omitted] TRS providers are free to use those resources outside the scope of the TRS program to support their positions before the Commission.

Pet'r Br. Ex. 2 at 5–6. Sorenson contends this broadens the restrictions of paragraphs 95 and 96 of the November 19, 2007 Declaratory Ruling. The FCC responds that these paragraphs only offer explanations and clarifications.

On June 9, 2008, Sorenson filed a petition for review. Sorenson asserts that the May 28, 2008 Declaratory Ruling is "procedurally flawed, contrary to the United States Constitution and the Communications Act of 1934, as amended, . . . , outside the [FCC's] jurisdiction, and is arbitrary, capricious, and otherwise contrary to law." Pet. at 2. Sorenson asks this court to vacate, enjoin, and set aside the May 28, 2008 Declaratory Ruling.

Also in response to the May 28, 2008 Declaratory Ruling, Sorenson requested the FCC issue another stay. Sorenson notified the FCC that "it would seek a stay from this Court if the FCC did not grant the stay by July 24, 2008."

Pet'r Br. at 7. The FCC did not respond. On July 25, 2008, Sorenson filed the present motion for a stay.

II

Federal Rules of Appellate Procedure 18 and 8 govern requests for stays pending review of an order of an administrative agency. Fed. R. App. P. 18; 10th Cir. R. 18.1 (“Applications for stay must comply with Rule 8”); F.T.C. v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852 (10th Cir. 2003). Under these rules, a petitioner has several obligations. First, a petitioner must “ordinarily move . . . before the agency for a stay pending review of its decision or order.” Fed. R. App. P. 18 (a)(1). Second, a motion before this court must: “(i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.” Fed. R. App. P. 18 (a)(2)(A). Third, a motion must meet the administrative requirements of Fed. R. App. P. 18(a)(2)(B)–(D). Substantively, a motion must address the following factors: (1) “the basis for the . . . agency’s subject matter jurisdiction and the basis for the court of appeals’ jurisdiction, including citation to statutes and a statement of facts establishing jurisdiction;” (2) “the likelihood of success on appeal;” (3) “the threat of irreparable harm if the stay or injunction is not granted;” (4) “the absence of harm to opposing parties if the stay or injunction is granted; and” (5) “any risk of harm to the public interest.”

10th Cir. R. 8.1 (“No application for a stay or an injunction pending appeal will be considered unless the applicant addresses [the listed factors].”); Mainstream Mktg., 345 F.3d at 852.

III

Sorenson argues that it is likely to prevail on the merits on each of its claimed bases for review: (1) the restriction on the use of TRS payments violates the First Amendment; (2) the restriction on the use of customer and call data violate the First Amendment; (3) the restrictions are unconstitutionally vague; and (4) the declaratory ruling violates the Administrative Procedures Act. Additionally, Sorenson alleges that it will suffer irreparable harm and that a stay is in the public interest.

A. The Likelihood of Sorenson to Prevail on the Merits

Because of the preference for avoiding constitutional questions if the matter can be resolved on statutory grounds, we first address Sorenson’s challenges under the Administrative Procedures Act. Harris v. Owens, 264 F.3d 1282, 1289 (10th Cir. 2001) (“[I]t is generally our practice to avoid difficult constitutional questions when a case can be resolved on simpler statutory grounds . . .”).

1. The Administrative Procedures Act

Sorenson makes two arguments related to the Administrative Procedures Act. First, Sorenson contends that Congress has not authorized the FCC to

regulate the use of TRS payments in this manner. Second, Sorenson alleges that the declaratory rulings are arbitrary and capricious.

Regarding Sorenson's contention that the declaratory rulings exceed the scope of congressional authorization, the FCC cites 47 U.S.C. § 225(b)(1) for the statement "the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." The FCC argues that the declaratory rulings are needed to ensure that TRS is provided in the most efficient manner. Additionally, the FCC cites the broad delegation of its authority to "make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(I).

Regarding Sorenson's allegations that the declaratory rulings are arbitrary and capricious, the FCC responds that the declaratory rulings are reasonable. The FCC defines the purpose of the TRS program as ensuring that hearing and speech disabled persons can access the telephone system, and not "to facilitate providers' lobbying of such persons or to facilitate communication initiated by a provider for purposes unrelated to the providers' handling of relay calls." Resp't Br. at 8.

a. Congressional Authorization of Authority to the FCC

An agency cannot create regulations that exceed the scope of the authority delegated to it by Congress. Nagahi v. I.N.S., 219 F.3d 1166, 1169 (10th Cir. 2000) (“[I]t is axiomatic that an agency cannot create regulations which are beyond the scope of its delegated authority.”). The delegation of authority to the FCC was to “ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.” 47 U.S.C. § 225(b)(1). Additionally, Congress vested the FCC with “the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the [FCC] has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication.” 47 U.S.C. § 225(b)(2).

At this stage of the proceedings, it is hard to accept the FCC’s insistence that the ability to adopt rules governing TRS encompasses the power to clarify those rules in the present manner and to establish the declaratory rulings at issue. Based upon the parties’ briefing on the motion for stay, we conclude that the ability to regulate TRS providers and their compensation rate is likely not the same as the ability to regulate how the TRS providers use the compensation they receive. Thus far, the FCC has not explained how certain uses of received compensation affect efficiency more than other uses. Sorenson argues that it

could use the received compensation to pay for shareholder bonuses, a holiday party, or a charitable donation. Moreover, the FCC has not indicated how any TRS provider's lobbying effort funded with received compensation diminished TRS efficiency.

b. Whether the FCC acted reasonably or arbitrarily and capriciously

For the purposes of resolving the present motion, it is similarly difficult to accept the FCC's argument that the declaratory rulings are not arbitrary and capricious. The FCC argues the purpose of the TRS program is to ensure that hearing and speech disabled persons can access the telephone system, and not "to facilitate providers' lobbying of such persons or to facilitate communication initiated by a provider for purposes unrelated to the providers' handling of relay calls." Resp't Br. at 8. In its present filings, the FCC has not indicated that the use of received compensation for lobbying has impeded access to the telephone system for individuals with hearing and speech disabilities. It appears that the FCC has not restricted the use of compensation funds for other activities unrelated to the purpose of the TRS program; instead, the FCC only targets the use of received compensation for lobbying.

Based on these determinations drawn from the present filings, we conclude that Sorenson has a substantial likelihood of prevailing on its Administrative Procedures Act claims against the FCC. While this alone would be sufficient to

proceed to the balance of harms analysis, we also find merit in Sorenson's First Amendment claims for the purposes of a motion for stay.

2. The First Amendment and the TRS Payments

Sorenson argues that language in the May 28, 2008 Declaratory Ruling prohibiting the use of funds from the Interstate TRS Fund for lobbying or advocacy activities directed at TRS users imposes a severe burden on its political speech. With 99.9% of its revenue coming from the TRS fund, this restriction bars Sorenson from lobbying TRS users. Because Sorenson considers its receipt of TRS funds to be compensation for services, Sorenson rejects the applicability of caselaw allowing for certain speech restrictions that are tied to grants or subsidies.

Sorenson also contends that the given reason for this restriction is pretextual. Characterizing the prohibition on using TRS funds for lobbying directed towards TRS users as irrational, Sorenson states that there is no prohibition on using TRS funds for direct lobbying to the FCC or Congress. Sorenson identifies the actual reason for the restriction is to insulate the FCC from "the administrative 'burden' of hearing from thousands of members of the deaf community." Pet'r Br. at 11.

The FCC responds that the declaratory rulings do not infringe on Sorenson's, or any other TRS provider's, First Amendment rights. "Rather than prohibiting speech, the [FCC's] rules simply bar misuse of customers' private

information and help channel federal funds toward federal goals.” Resp’t Br. at 11. To support this argument, the FCC relies on the Supreme Court’s decision in Rust v. Sullivan, 500 U.S. 173 (1991). The FCC argues that since Sorenson is not compelled to be a TRS provider, it can decline the TRS funds.

The FCC also disputes Sorenson’s effort to distinguish funds received as compensation from funds received as a subsidy or grant. First, the FCC highlights that this does not address the restriction on the use of customer information. Second, the FCC views the holding of Rust to be that it is appropriate “for the government to prevent private entities’ use of the government’s programmatic funds on activities ‘outside the scope of the federally funded program.’” Resp’t Br. at 12 (quoting Rust, 500 U.S. at 193). The FCC also denies that its stated reason for the declaratory rulings was pretextual.

The use of funds for lobbying constitutes speech under the First Amendment. Utah Educ. Ass’n v. Shurtleff, 512 F.3d 1254, 1258 (10th Cir. 2008). Restrictions on such use warrant First Amendment scrutiny. Id. Rust, however, acknowledged that “[t]he government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” 500 U.S. at 193; see United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 211

(2003) (citing Rust for the quotation “when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program”). Thus, when the government subsidizes a program for specified ends, restrictions to define the limits of the program are acceptable. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–44 (2001) (citing Rust).

Notably, Rust distinguished itself from “unconstitutional conditions” cases where “the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” Id. at 197. A key distinction is whether the purpose of the government’s funding is to convey a government message or to establish a forum for private speech. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833–34 (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”).

At this stage, the present case does not appear to involve the situation where the government has subsidized a program to convey a governmental

message. The FCC compensates TRS providers in exchange for a service. The FCC does not expect the providers to convey, or not convey, any policy positions, which was the case in Rust. On the other hand, the present case also does not seem to be the government attempting to put limits on expression within a forum it created for private speakers. While TRS can be compared to such a forum, the declaratory rulings do not affect the ideas exchanged within that forum. Instead, the declaratory rulings affect what the providers of that forum may do outside of the forum.

Nonetheless, it appears that the FCC's reliance on Rust is misplaced. Based on our present review, the FCC does not appear to be limiting for what purposes government funds may be used. The government funds at issue have already been applied to the appropriate purpose. The FCC is limiting for what purposes compensation received in exchange for a provided service may be used. Sorenson argues that it could use the received compensation for any purpose other than lobbying.

In its supplemental filing, the FCC argues that Sorenson could not use the received compensation for any purpose other than providing TRS. Because the compensation rate is not at issue, the FCC contends that Sorenson acknowledges the actual cost for providing service equals the compensation rate. From this, the FCC reasons “[t]here should not be excess money to engage in lobbying or other

activities . . . [i]nstead, providers should be plowing the compensation they receive back into the provision of service. . . .” Resp’t Supp’l Br. at 5–6.

The received compensation funds would seem to be analogous to a government paycheck. What an employee does with a government paycheck does not imply that the government is funding or endorsing that activity. See Witters v. Wash. Dep’t of Servs. For the Blind, 414 U.S. 481, 486–87 (1986) (“It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. . . . [A] State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution. . . .”). This negates the FCC’s stated purpose to ensure that the funds be spent on authorized purposes. The FCC exchanged the funds for services. After that, it is reasonable to assume for the purposes of our present analysis, that the funds no longer carry an implication of government endorsement.

Similarly, this reduces the weight of the FCC’s argument that Sorenson should not have funds leftover after deducting the costs of providing the service. Sorenson provided the service in exchange for an established rate of compensation. Under this industry-wide system, as opposed to an individualized reimbursement plan, Sorenson will gain or lose money depending on its own cost effectiveness and efficiency. After the service was provided, it is unclear how the FCC maintains an interest in Sorenson’s gains or losses.

Because this restriction affects lobbying, it affects political speech and is subject to “exacting scrutiny.” Homans v. City of Albuquerque, 366 F.3d 900, 905 (10th Cir. 2004). Accordingly it is necessary to determine if the declaratory rulings are “‘closely drawn’ to match a ‘sufficiently important interest.’” Utah Educ. Ass’n, 512 F.3d at 1266 (citations omitted). The FCC does not offer any argument that the declaratory rulings are closely drawn to its stated purpose or that it has considered less restrictive alternatives.

Based on this reasoning, it appears that Sorenson has a substantial likelihood of prevailing on at least one First Amendment claim. Because the indication of a deprivation of any First Amendment right changes the analysis for a preliminary injunction, we do not address Sorenson’s remaining First Amendment or constitutional claims: that the declaratory rulings’ restrictions on the use of call databases violates the First Amendment and that the declaratory rulings are unconstitutionally vague. We proceed to the remaining elements.

B. The Threat of Irreparable Harm

Sorenson has established the substantial likelihood of prevailing on a claim related to deprivation of its First Amendment rights. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 374–75 (1976) (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)). We find this factor in support of Sorenson’s request for a stay.

C. The Absence of Harm to the Opposing Party

Sorenson alleges that the stay will preserve the status quo and not harm the FCC. The FCC does not argue that it will suffer any specific harm. Without any threatened harm to the FCC, we find this factor in support of Sorenson's request for a stay.

D. Any Risk of Harm to the Public Interest

Sorenson argues that its ability to inform its customers of legislation affecting their use of TRS and its ability to lobby for legislation beneficial to individuals with speech and hearing impairments is in the public interest. The FCC responds that the public has an interest in the efficient implementation of TRS.

The FCC's assertion—that it has made a public interest determination by creating the Declaratory Rulings at issue and, therefore, any stay would be detrimental to the public interest—is unconvincing. Given our above conclusion that at this stage the declaratory rulings appear to be arbitrary and capricious, we are reluctant to accept wholesale the FCC's view of the public interest. There is no elaboration as to how these rulings are vital to the public interest. On the other hand, we have acknowledged that protecting First Amendment freedoms tends to be in the public interest. Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1237 (10th Cir. 2005). We conclude that granting Sorenson's request appears to be in the public interest.

IV

Because we find that Sorenson has satisfied all of the necessary elements,
we grant Sorenson's request for a stay.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk