



Decision

Matter of: Federal Communications Commission—Applicability of the Congressional Review Act to Ligado Amendment to License Modification Applications

File: B-332233

Date: August 13, 2020

DIGEST

On April 22, 2020, the Federal Communications Commission (FCC) released an order entitled LightSquared Technical Working Group Report, et al. (*Ligado Order*). The *Ligado Order* amended Ligado’s operating license and permitted Ligado to deploy a nationwide terrestrial network.

The Congressional Review Act (CRA) requires all agency rules to be submitted to Congress and the Comptroller General before they take effect. CRA incorporates the Administrative Procedure Act (APA) definition of a rule for this purpose with certain exclusions. Because the *Ligado Order* falls within the APA definition of an order and not a rule, the *Ligado Order* is not a rule for purposes of CRA.

DECISION

On April 22, 2020, the Federal Communications Commission (FCC) released an order entitled LightSquared Technical Working Group Report, et al. LightSquared Technical Working Group Report, et al., 35 FCC Rcd. 932 (2020) (*Ligado Order*). The Chairman and Ranking Member of the Senate Armed Services Committee requested a decision on whether the *Ligado Order* is a rule under the Congressional Review Act (CRA), and thus subject to congressional review. Letter from Senator James M. Inhofe, Chairman, Senate Committee on Armed Services, and Senator Jack Reed, Ranking Member, Senate Committee on Armed Services, to Comptroller General (May 22, 2020). As explained below, we conclude the *Ligado Order* is not a rule for purposes of the CRA.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept.

2006), available at www.gao.gov/products/GAO-06-1064SP. Accordingly, we contacted FCC to obtain the agency's views. Letter from Assistant General Counsel, GAO, to General Counsel, FCC (June 1, 2020). We received FCC's response on June 16, 2020. Letter from General Counsel, FCC, to Assistant General Counsel, GAO (June 16, 2020) (Response Letter).

BACKGROUND

History of the Ligado Order

Under the Communications Act of 1934, as amended, “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance . . . with a license” issued by the FCC. 47 U.S.C. § 301. Ligado Networks, LLC (Ligado), or its predecessors have been authorized since 2004 to operate ancillary terrestrial component¹ stations under such licenses. Response Letter at 2. In 2015, Ligado filed applications requesting modification of the terms of its terrestrial authorization to accommodate its plans to deploy a nationwide terrestrial network. *Id.* Ligado amended these applications in 2018. *Id.* After consideration of the record, FCC granted Ligado's applications through the *Ligado Order*. *Id.* When FCC issued the *Ligado Order*, FCC imposed conditions on Ligado's operations.² *Ligado Order* at 64, ¶ 131. Some of the conditions were proposed or agreed to by Ligado while others were imposed on FCC's own initiative. *Id.* Some of the conditions are meant to protect nearby operators from potential interference by Ligado's operations. *Id.* at 71, ¶ 158.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule's proposed effective date. *Id.* In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. 5 U.S.C. § 801(a)(1)(B).

¹ An ancillary terrestrial component is ground based infrastructure in mobile satellite systems to enhance the coverage of the satellite network. See *Ligado Order* at 3, ¶ 3.

² The conditions include compliance with GPS Co-Existence Agreements, power levels and operating restrictions, and reporting requirements. *Ligado Order* at 65, 69.

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. § 804(3).

FCC did not submit a CRA report to Congress or the Comptroller General with regard to the *Ligado Order*. In its response to us, FCC stated the *Ligado Order* falls under the APA definition of an order and not a rule, and, thus, is not subject to CRA. Response Letter at 2–3.

DISCUSSION

The issue here is whether the *Ligado Order* is a rule under CRA. As CRA adopts the APA definition of a rule, we look at whether the *Ligado Order* falls within the definition of rule or order based on the plain meaning of the language in the APA. B-289380, July 31, 2002 (looking at the plain meaning of the underlying statute to determine if an agency could enter into an interagency agreement). For the reasons discussed below, we conclude it falls within the definition of an order and therefore cannot constitute a rule.

The APA provides agencies two methods to make and implement policy decisions: rulemakings and adjudications. See *American Airlines, Inc. v. U.S. Dept. of Trans.*, 202 F.3d 788, 797 (5th Cir. 2000) (“Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy.”). The nature of an agency final action is based on which method the agency selects. Under the APA, an agency issues a rule when it engages in rulemaking and an order when it engages in adjudication. 5 U.S.C. § 551(5), (7).

As previously described, the APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. § 551(4). By contrast, the APA defines an order to be “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making but including licensing*.” 5 U.S.C. § 551(6) (emphasis added). These two definitions make rules and orders mutually exclusive categories.

As shown in the definition above, the APA includes licensing among the agency processes whose final disposition constitutes an order. Licensing is defined by the APA as “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or

conditioning of a license.” 5 U.S.C. § 551(9). A license consists of a “form of permission” granted by an agency. 5 U.S.C. § 551(8). As the process an agency takes in granting, modifying, or denying approval of a license is a licensing, it is also an order under the APA. Since the definition of a rule and an order are mutually exclusive, we look to see whether the *Ligado Order* is an order.

Here, the *Ligado Order* is a licensing action and thus falls within the APA definition of an order. The Communications Act of 1934, as amended, requires communications transmitters to operate with a license, and Ligado or its predecessors have been operating ancillary terrestrial component stations under licenses since 2004. Response Letter at 1–2. The *Ligado Order* modified the current licenses by modifying the terms of Ligado’s terrestrial authorization to accommodate Ligado’s plans to deploy a nationwide terrestrial network. *Id.* at 2. By permitting Ligado to conduct a new activity and setting up certain conditions on that activity in the *Ligado Order*, FCC modified Ligado’s licenses and, thus, engaged in licensing under the APA. Because the APA includes licensing under the definition of an order, the *Ligado Order* falls within the APA definition of an order and not a rule.

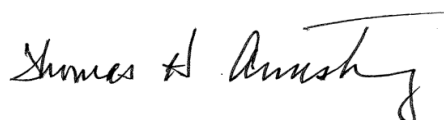
While there are circumstances in which a rule may also result in the modification of licenses, modification of an individual applicant’s licenses requires adjudication and an order, consistent with what occurred here. The D.C. Circuit decided FCC properly promulgated a rule when it changed certain technical requirements resulting in modification of all licenses granted by FCC for a particular industry in *Committee for Effective Cellular Rules (CECR) v. FCC*; FCC did not have to undergo adjudication since it was not modifying particular licenses. 53 F.3d 1309, 1319–1320 (D.C. Cir. 1995).

As part of its goal to foster the rapid expansion of cellular service, FCC’s regulations use to require an applicant for a license to outline a particular area of the country it wanted to cover. *Id.* at 1312. The applicant had to cover 75 percent of the market area, and, also, it had to provide reliable service to 75 percent of the area proposed to be served. *Id.* at 1312–13. FCC defined reliable service based on a particular standard. *Id.* at 1313. Then, FCC determined its standard was based on outdated technology, so FCC issued new rules lowering the standard and amending all impacted licenses to reflect the new standard. *Id.* at 1313–1314. CECR challenged the rules, arguing that FCC modified licenses through rulemaking and not adjudication as required. *Id.* at 1314. The D.C. Circuit held FCC’s actions were permissible because the rulemaking merely changed the standards to which all licenses were subject and did not carry out individual actions which require adjudication. *Id.* at 1320 (“Our review of the Commission’s rulemaking in the instant case satisfies us that the Commission established a rule of general applicability when it lowered the required signal strength for cellular systems . . . in response to the technical developments in the cellular industry. As in *American Airlines*, we find no individual action here masquerading as a general rule.”) (internal quotations omitted).

Applying the rationale from *CECR*, the *Ligado Order* is an individual action rather than a rule of general applicability. The *Ligado Order* grants a modification to the licenses of an individual application. See Response Letter at 2. As such, the *Ligado Order* is only binding on Ligado, and other entities regulated by FCC are not subject to its requirements and limitations. According to *CECR*, license modifications applicable to all regulated entities may be made through a rulemaking given the policy nature and across-the-board applicability, but individual actions must be evaluated through adjudication, which is what FCC did here. See *CECR*, 53 F.3d at 1320. FCC conducted a fact-intensive inquiry into the merits of Ligado's applications. Response Letter at 2. FCC solicited two rounds of public comment on the applications and considered reports commissioned by Ligado and other federal agencies on the impact Ligado's operations would have on other licensees and global position satellite systems. *Ligado Order* at 7–11, ¶¶ 9–17. As part of FCC's approval of the modified licenses, FCC looked at the facts and imposed conditions on Ligado's operations. *Id.* at 64, ¶ 131. Some of the conditions were proposed or agreed to by Ligado while others were imposed on FCC's own initiative. *Id.* Following the principles set out in *CECR*, FCC conducted an adjudication as required. The resultant action, the *Ligado Order*, falls within the APA definition of order and not rule. It is therefore not subject to CRA.

CONCLUSION

The *Ligado Order* approved license modifications to permit Ligado to deploy a nationwide terrestrial network. FCC did not create a policy applicable to all licensees, such that it should have undergone a rulemaking. Rather, this constitutes a licensing action with respect to an individual applicant, which the APA defines as an order. Because the *Ligado Order* falls within the APA definition of an order and not a rule, and CRA adopts the APA definition of a rule, the *Ligado Order* is not a rule for purposes of CRA.³



Thomas H. Armstrong
General Counsel

³ Even if the *Ligado Order* fell within the APA definition of a rule, it still would not be a rule for purposes of CRA because of the exception for rules of particular applicability. In B-330843, we determined that a rule of particular applicability is a rule that is addressed to an identified entity and also addresses actions that entity may or may not take, taking into account facts and circumstances specific to that the entity. B-330843, Oct. 22, 2019. Here, the *Ligado Order* is addressed only to Ligado and authorizes an amendment to Ligado's licenses subject specific limitations. Response Letter at 2. Consequently, the *Ligado Order* would be a rule of particular applicability and, thus, still exempt from CRA requirements.