

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

07-1381

CORE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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1. Parties

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner.

2. Ruling under review

Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007) (J.A. 249).

3. Related cases

This case has not previously been before this Court. Core Communications, Inc. has initiated mandamus proceedings in this Court with respect to the Commission's regulatory treatment of local telephone company-originated traffic that Core delivers to Internet service providers. *In re: Core Communications, Inc.* No. 07-1446, (D.C. Cir. filed Oct. 31, 2007). That case involves issues that potentially overlap with those in this case.

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GLOSSARY

1996 Act	The Telecommunications Act of 1996
Br.	brief
Bureau	Wireline Competition Bureau
Core	Core Communications, Inc.
FCC or Commission	Federal Communications Commission
ISP	Internet service provider
IXC	interexchange carrier
J.A.	joint appendix
LEC	local exchange carrier

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BRIEF FOR RESPONDENTS

JURISDICTION

The Commission released the order on review on July 26, 2007. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007) (“*Order*”) (J.A. 249). Core Communications, Inc. (“Core”) filed its petition for review in this case on September 20, 2007. If Core has Article III standing to present its case, this Court’s jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES PRESENTED

In a “forbearance” petition filed with the FCC, petitioner Core sought sudden and sweeping changes to the regulatory landscape for telecommunications. By a single stroke, Core’s 22-page petition (J.A. 1) sought to transform the system of statutory provisions and rules that governs: (1) “intercarrier compensation” (*i.e.*, the billions of dollars in wholesale payments between common carriers that collaborate to complete various forms of telecommunications traffic for consumers); and (2) the retail rates that carriers charge to consumers who place interstate long-distance telephone calls. Core sought this profound transformation by asking the Commission to forbear from applying 47 U.S.C. § 251(g) and related rules that govern certain forms of intercarrier compensation, and 47 U.S.C. § 254(g) and related rules that require long-distance service providers to charge consumers uniform retail rates throughout the United States. The Commission denied Core’s petition, finding its four-and-one-half pages of analysis insufficient to satisfy the requirements for forbearance under section 10 of the Communications Act, 47 U.S.C. § 160. Core’s resulting petition for review of the Commission’s *Order* presents the following issues:

- (1) Whether Core’s petition for review should be dismissed for lack of Article III standing.
- (2) Whether the Commission’s staff lawfully extended by 90 days the deadline for acting on Core’s forbearance petition pursuant to 47 U.S.C. § 160(c).
- (3) Whether the Commission lawfully denied Core’s request for forbearance from 47 U.S.C. § 251(g) and ratemaking regulations preserved by that section.
- (4) Whether the Commission lawfully denied Core’s petition for forbearance from 47 U.S.C. § 254(g).

STATUTES AND REGULATIONS

Pertinent statutes and regulations, in addition to those included in petitioner's opening brief, are appended in the addendum to this brief.

COUNTERSTATEMENT

In the *Order* on review, the FCC denied Core's request that the Commission forbear from enforcing two provisions of the Telecommunications Act of 1996 (the "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of Title 47 of the United States Code). Core had asked the Commission to forbear from enforcing 47 U.S.C. § 251(g), which requires local exchange carriers ("LECs") to provide "exchange access," "information access," and related services under certain pre-1996 Act "restrictions and obligations" until such restrictions and obligations "are explicitly superseded by [FCC] regulations." Core claimed that, if its request were granted, LECs would automatically become bound to provide those same services at different rates under the "reciprocal compensation" regime set forth in 47 U.S.C. § 251(b)(5). The Commission denied Core's request: (a) because it rejected Core's reading that forbearance from section 251(g) would lead automatically to a reciprocal compensation regime; and (b) because Core had failed to provide any analysis from which the Commission could determine how consumer protections and reasonable rates and practices would be preserved if forbearance were granted, as required by the forbearance statute, 47 U.S.C. § 160. *Order* ¶¶ 13-16 (J.A. 256-59).

Core also had asked the Commission to forbear from enforcing 47 U.S.C. § 254(g). That provision requires long-distance service providers, also known as interexchange carriers ("IXCs"), to charge uniform retail rates to consumers throughout the country. It accomplishes that result by requiring IXCs to charge long-distance service rates in rural and

high-cost areas that are no higher than the rates they charge for such service in urban areas (commonly referred to as “rate averaging”), and to charge long-distance service rates in each state that are no higher than those they charge in any other state (commonly referred to as “rate integration”). The FCC concluded that section 254(g) remains necessary to ensure Congress’s objective that long-distance telecommunications services remain affordable to consumers who reside in areas of the country where the cost of providing service may be high. The Commission accordingly denied Core’s request that it forbear from enforcing section 254(g) for failure to satisfy the forbearance criteria of 47 U.S.C. § 160. *Order* ¶¶ 17-20 (J.A. 259-62).

I. The Forbearance Standard

The 1996 Act added section 10 to the Communications Act of 1934, as amended, which enables the Commission to relieve regulated carriers from outdated statutory or regulatory requirements in certain circumstances. Specifically, section 10 authorizes the Commission to “forbear from applying any regulation or any provision” of the Communications Act “to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services.” 47 U.S.C. § 160(a). Section 10(a) directs the Commission to exercise its forbearance authority if it determines that: (1) enforcement of a regulation or statutory provision is not necessary to ensure that charges and practices are just, reasonable, and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance from applying the regulation or provision is consistent with the public interest. Section 10(b) further provides that, in making its public interest determination, the Commission must consider whether forbearance will promote competitive market conditions. 47 U.S.C. § 160(b). The

Commission may forbear from applying a statutory provision or rule only if it finds that all three parts of the forbearance test are satisfied. *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“*CTIA*”).

Section 10(c) of the Act permits telecommunications carriers to submit a petition to the Commission requesting that the agency exercise its forbearance authority. 47 U.S.C. § 160(c). That section states that “[a]ny such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under [section 10(a)] within one year after the Commission receives it, unless the one-year period is extended by the Commission.” *Ibid.* The Commission may grant itself such an extension for “an additional 90 days” if it “finds that an extension is necessary to meet the requirements of [section 10(a)].” *Ibid.*

II. Regulatory Background

Core’s forbearance petition implicates two sets of regulatory policies. The first deals with intercarrier compensation, *i.e.*, the system by which telecommunications carriers compensate each other when multiple carriers are involved in completing a call. The second concerns the policy of promoting universal service, here, by ensuring that customers who live in rural areas or in states where the cost of long-distance services would otherwise be prohibitively expensive have access to long-distance services at affordable rates. Some background on these policies is necessary to understand the nature of Core’s forbearance request.

Intercarrier Compensation. Prior to 1996, nearly all local telephone service in the nation was provided by incumbent LECs that held monopoly franchises to serve particular areas. IXCs required access to the LECs’ local networks to connect long-distance callers and

called parties, but the incumbent LECs' monopoly position, left unchecked, would have enabled them unlawfully to charge "unjust" and "unreasonable" rates for that access. *See* 47 U.S.C. §§ 201–202. To prevent that from happening, the Commission established a system of rate regulation that limits the access charges that incumbent LECs could charge IXCs (as well as other users of interstate access services, such as cellular providers and large enterprises) for originating and terminating long-distance calls. State regulatory commissions had similar rules regulating intrastate access charges. *See generally Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 477 (2002).

In the 1996 Act, Congress eliminated local monopoly franchises, *see* 47 U.S.C. § 253, and established a framework for promoting the development of competition in local telephone markets, *see* 47 U.S.C. §§ 251–252. Local telephone competition meant that, for the first time, more than one LEC could be involved in the transmission of a local telephone call. To address that situation, Congress added section 251(b)(5) to the Communications Act, which requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). As this Court has observed, "[u]nder a reciprocal compensation arrangement, '[w]hen a customer of carrier A makes a local call to a customer of carrier B, and carrier B uses its facilities to connect, or 'terminate,' that call to its own customer, the 'originating' carrier A is ordinarily required to compensate the 'terminating' carrier B for the use of carrier B's facilities.'" *In re: Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006) (quoting *SBC Inc. v. FCC*, 414 F.3d 486, 490 (3d Cir. 2005)). Reciprocal compensation arrangements thus are designed to ensure that the terminating LEC that carries a qualifying telephone call is compensated for the costs it incurs in completing the call.

Initially, the Commission read section 251(b)(5) to “apply only to traffic that originates and terminates within a local area.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (¶ 1034) (1996) (subsequent history omitted). Thus, long-distance traffic remained subject to access charges, rather than the new reciprocal compensation regime. *Ibid.*

The Commission revisited its interpretation of section 251(b)(5) after this Court held that the Commission (in a 1999 decision) had not adequately explained why it had concluded that dial-up calls to the Internet (via Internet service providers (“ISPs”)) were not “local” calls subject to reciprocal compensation. *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 5–8 (D.C. Cir. 2000). In its 2001 *ISP Remand Order*,¹ the Commission interpreted section 251(b)(5) in light of section 251(g) of the Communications Act, which requires LECs, following enactment of the 1996 Act, to continue “provid[ing] exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)” previously in effect “until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after [such date of enactment].” 47 U.S.C. § 251(g). The Commission concluded that access services covered by section 251(g) – exchange access, information access, and related services – are “carve[d] out” from the scope of section 251(b)(5) and therefore are not subject to reciprocal compensation. *ISP Remand Order* ¶ 34. Instead, the Commission ruled that those access services (to the extent they were interstate

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (2002), cert. denied, 538 U.S. 1012 (2003).

services) were subject to the agency's general authority to regulate interstate access services. *Id.* ¶ 39 (citing 47 U.S.C. § 201). Finding that dial-up Internet-bound traffic involved interstate "information access" within the meaning of the section 251(g) "carve out," the Commission exercised its general section 201 authority to adopt interim intercarrier compensation rules for such traffic that differed from a reciprocal compensation regime under section 251(b)(5). *Id.* ¶¶ 42, 77-88.

In *WorldCom, Inc. v. FCC*, 288 F.3d 429, this Court concluded that the Commission had misconstrued section 251(g) as providing a basis for its interim rules. The Court found that although section 251(g) "is worded simply as a transitional device, *preserving* various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act," *id.* at 430 (emphasis added), the Commission's broad reading would allow it to "*override* virtually any provision of the 1996 Act so long as the [*new*] rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations," *id.* at 433 (emphasis added). Concluding, as a factual matter, that "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" to preserve, the Court found that section 251(g) provided no basis for the Commission's action. *Id.* at 433-34 (emphasis in original). The Court also stressed that "§ 251(g) speaks only of services provided 'to interexchange carriers and information service providers,'" not to "LECs' services to other LECs, even if en route to an ISP." *Ibid.* The Court remanded the *ISP Remand Order* for further Commission consideration of the statutory justification for its interim rules – stating expressly that it was not "decid[ing] the scope of the 'telecommunications' covered by § 251(b)(5)" independent of the Commission's flawed "carve out" analysis. *Id.* at 434.

In the meantime, in hopes of “mov[ing] forward from * * * transitional intercarrier compensation regimes to a more permanent regime,” the Commission has been conducting a broader proceeding to “fundamental[ly] reexamine * * * all currently regulated forms of intercarrier compensation” and to “test the concept of a unified regime for the flows of payments among telecommunications carriers.” *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (¶ 1) (2001) (“*Intercarrier Compensation NPRM*”).

That proceeding has generated broad interest and general agreement that the existing patchwork system of intercarrier compensation is outdated, but it also has provided “little consensus as to what type of unified regime we should adopt.” *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685 (¶ 37) (2005) (“*Intercarrier Compensation FNPRM*”). According to the Commission’s docket report for that proceeding, the initial *NPRM* generated more than 150 formal comments, 100 reply comments, and approximately 750 informal or *ex parte* filings. The record includes nine different proposals or governing principles for comprehensive reforms, on which the Commission has now sought additional comment. *Intercarrier Compensation FNPRM* ¶¶ 37-59. Among other things, the Commission has stated that any unified system that may be adopted should be competitively and technologically neutral, and should encourage the development of efficient competition. *Id.* ¶¶ 31, 33. At the same time, the Commission has stressed in that ongoing proceeding the need to preserve universal service. Noting, for example, that many LECs collect a “significant percentage of their revenue from interstate and intrastate access charges,” the Commission has stated that “[a]ny proposal that would result in significant

reductions in intercarrier payments” must “address the universal service implications, if any, of such reductions.” *Id.* ¶ 32.

Universal Service. From its inception, the Communications Act of 1934 has had a central purpose – embodied in section 1 of the Act, 47 U.S.C. § 151 – “to make available to all the people of the United States a * * * communications service with adequate facilities at reasonable charges,” and the Commission adopted rate averaging and rate integration requirements long before 1996 to implement that policy. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 9564 (¶¶ 2-5) (1996) (“*Geographic Rate Averaging Order*”). When the 1996 Act was enacted to promote competition in telecommunications markets, Congress recognized that there might be some tension between the policies of competition and universal service, and the codification of the Commission’s longstanding rate averaging and rate integration requirements in section 254(g) reflects that insight.

In particular, although the 1996 Act contains many provisions designed to promote competition in telecommunications markets, the purpose of the rate averaging and rate integration requirements of section 254(g) is to promote universal service. As the Conference Report for the 1996 Act explained, section 254(g) was enacted “in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers.” H.R. Conf. Rep. No. 104–458, at 132 (1996). Consistent with this congressional purpose, the Commission, when it implemented section 254(g), rejected claims that the existence of competitive long-distance markets alone was sufficient justification to forbear from enforcing section 254(g)’s requirements. *See Geographic Rate*

Averaging Order ¶¶ 39 & 52. The Commission stated that, even in a competitive market, forbearance from section 254(g) “could produce unreasonably high rates for some subscribers,” particularly those residing in rural and high-cost areas. *Id.* ¶ 39.

III. The Proceedings Below

Core filed its forbearance petition with the Commission on April 27, 2006. Core sought forbearance from enforcement of section 251(g) and “related implementation rules” to the extent that they “appl[ie]d to or regulate[d] the rate for compensation for switched ‘exchange access, information access and [related services]’ * * * pursuant to state and federal access charge rules.” Forbearance Pet. 2 (J.A. 4) (quoting section 251(g)). Core also sought forbearance from “[a]ny limitation * * * on the scope of [47 U.S.C. § 251(b)(5)] that is implied from section 251(g).” Forbearance Pet. 2 (J.A. 4). Core argued that, if the Commission forbore from rate regulation preserved under section 251(g), all telecommunications traffic, including access services, would automatically “default * * * into section 251(b)(5)” without the need for a separate rulemaking proceeding. Forbearance Pet. 18 (J.A. 20); *see also* Core Reply 2 (J.A. 133). With respect to section 254(g), Core argued that forbearance would serve the public interest by eliminating allegedly “unnecessary [and] unwise” “implicit subsidies for rural carriers and rural consumers at the expense of carriers providing long distance service to non-rural customers.” Forbearance Pet. 20 (J.A. 22).

In response, commenters almost uniformly opposed Core’s request for forbearance from section 251(g) and related regulations, and most opposed forbearance from section 254(g), as well. Opponents of Core’s petition charged that “neither intercarrier compensation

nor rate integration lend themselves to resolution through forbearance,”² that Core’s petition was vague and confusing,³ that it would “create massive uncertainty” if granted,⁴ and would likely threaten telephone company revenue streams and consumer protection/universal service goals.⁵

On March 1, 2007, the Commission’s Wireline Competition Bureau (“Bureau”) released an order extending the period for acting on Core’s forbearance petition under section 10(c) by 90 days. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 4121 (“*Extension Order*”), corrected, 22 FCC Rcd 6722 (2007) (J.A. 169). The extension order explained that Core’s petition “raises significant questions regarding whether forbearance from sections 251(g) and 254(g) and their implementing rules for all telecommunications carriers meets the statutory requirements set forth in section 10(a).” *Extension Order* ¶ 4 (J.A. 170). Accordingly, the Bureau concluded that “a 90-day extension is warranted under section 10(c).” *Ibid.* On March 28, 2007, Core filed an application for review of the *Extension Order* with the full Commission, asserting that the Bureau lacked delegated authority to extend the section 10(c) deadline and that its attempt to do so “was ineffective.” App. for Review 1 (J.A. 171).

² Qwest Opposition 2 (June 5, 2006) (J.A. 63).

³ See, e.g., Qwest Opposition 2 n.3, 3-4 & n.5 (J.A. 63, 64-65); USTA Comments 1 (June 5, 2006) (J.A. 265).

⁴ E.g., USTA Comments 4 (J.A. 268); Verizon Comments 3 (June 5, 2006) (J.A. 85); Comments of Independent Telephone and Telecommunications Alliance, *et al.* (“ITTA”) 8 (June 5, 2006) (J.A. 55).

⁵ E.g., Western Telecommunications Alliance Comments ii-iii, 10-12 (June 5, 2006) (J.A. 102-03, 113-15); USTA Comments 5 (J.A. 269); ITTA Comments 8-11 (J.A. 55-58); Verizon Comments 14-15 (J.A. 96-97); Hawaii Opposition ii, 7-10 (June 5, 2006) (J.A. 34, 42-45).

IV. The *Order On Review*

On July 26, 2007, the Commission issued the *Order* on review denying both Core's application for review of the *Extension Order* and its request for forbearance from sections 251(g) and 254(g).

The Commission rejected Core's argument that the Bureau lacked authority to extend the time by which the Commission must act to deny a forbearance petition to prevent the petition from being "deemed granted" under section 10. *See Order* ¶ 9 (J.A. 253-54). The Commission stated that it had decided in a prior order that the Bureau had delegated authority to exercise the Commission's power under section 10 because "extensions of time do not raise novel questions of fact, law or policy."⁶ The Commission explained that, when the Bureau extends the time for acting under section 10, it does not "address the substance of the issues raised by the petition or any other novel question." *Ibid.*

The Commission also rejected Core's argument that the extension order "fails to offer any analysis of why such an extension is necessary and fails to use the word 'necessary.'" *Order* ¶ 10 (J.A. 254). Noting that section 10 permits an extension of time if it is "necessary to meet the requirements of subsection (a)," *ibid.* (quoting 47 U.S.C. § 160(c)), the Commission stated that the Bureau may extend the statutory period "whenever an extension is necessary to complete the analysis required under section 10(a)," *ibid.* The Commission

⁶ *Order* ¶ 9 (J.A. 253-54) (quoting *Fones4All Corp. Petition for Expedited Forbearance under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, 21 FCC Rcd 11125 (¶ 6) (2006) ("*Fones4All Order*"), *pet. for review filed, Fones4All Corporation v. FCC*, No. 06-75388 (9th Cir. filed Nov. 21, 2006)).

concluded that the Bureau need not “quote any particular statutory text” in order to satisfy that standard. *Ibid.*

The Commission next turned to the merits of Core’s forbearance petition.⁷ The Commission concluded that Core’s four-paragraph request that the Commission forbear from enforcing section 251(g) (*see* Pet. 18-20 (J.A. 20-22)) failed to satisfy the forbearance standard set forth in section 10(a). *Order* ¶ 13 (J.A. 256-57). The Commission found that the first prong of the section 10(a) forbearance standard was not satisfied because section 251(g) remained necessary to ensure that rates for access services remain just and reasonable. *Id.* ¶ 14 (J.A. 257-58). The Commission explained that, if it “were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.” *Ibid.* In reaching this conclusion, the Commission rejected Core’s claim that forbearance from section 251(g) would automatically cause access services to “default” to the reciprocal compensation regime under section 251(b)(5), concluding instead that section 251(g) permits the Commission to transition from section 251(g) to another regulatory regime only through “affirmative Commission action in the form of new regulation.” *Ibid.* For similar reasons, the Commission concluded that forbearance from section 251(g) would not be in the public interest. *Order* ¶ 16 (J.A. 258-59). Because granting Core’s petition would result “in the absence of rate regulation,” the Commission rejected Core’s argument that forbearance would “result in a unified intercarrier regime,” “‘level the intercarrier compensation playing field,’ and promote competition.” *Ibid.*

⁷ The Commission found it unnecessary to address whether section 10(c) permits a carrier (as Core had done in its petition) to request forbearance on behalf of other carriers that it does not represent. *Order* ¶ 11 (J.A. 255).

In addition, the Commission concluded that enforcement of section 251(g) remained necessary to protect consumers. *Order* ¶ 16 (J.A. 258). The administrative record, the Commission explained, showed that “many LECs depend on access revenues to maintain affordable rates and service quality to consumers, especially in rural areas” and, therefore, that “changes to access revenue streams without more comprehensive intercarrier compensation reform may harm consumers.” *Ibid.* Indeed, the Commission noted, Core provided “no analysis” of how grant of its forbearance request might affect consumers, particular those living in rural areas. *Ibid.*

The Commission likewise denied Core’s four-paragraph request (*see* Pet. 20-21 (J.A. 22-23)) that the Commission forbear from enforcing the rate averaging and integration requirements of section 254(g). *Order* ¶ 18 (J.A. 260). The Commission found that section 254(g) continued to be necessary to protect consumers. “[I]ncreased competition,” the Commission explained, might “bring long distance rates closer to cost,” but “section 254(g) was intended to make rates equally affordable to all consumers.” *Ibid.* Core had “fail[ed] to provide any analysis of the potential impact” of forbearance from section 254(g), and “the only consumer impact analysis in the record” indicated that “significant pricing disparities and high interstate toll rates for consumers in insular areas” would result if the Commission were to grant Core’s petition. *Ibid.*

The Commission also found that Core had failed to show that section 254(g) was no longer necessary to ensure just and reasonable rates or that forbearance would be in the public interest. *Order* ¶ 19 (J.A. 260-61). The Commission observed that Core made no showing that “sufficient competition exists in all markets, and particularly in rural areas, such that rates will be constrained to just and reasonable levels.” *Ibid.* Likewise, although Core

suggested without details that the Universal Service Fund the Commission had established could be augmented to ensure that retail rates for consumers remain affordable, the Commission found that Core failed to make any showing as to the “likely impact of forbearance from section 254(g) on retail rates and universal service flows.” *Order* ¶ 20 (J.A. 261); *see also id.* ¶ 20 & n.84 (J.A. 261-62). Accordingly, the Commission concluded that the first and third parts of the section 10(a) forbearance test had not been satisfied.

STANDARD OF REVIEW

Judicial review of the Commission’s interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then “the court, as well as the agency, must give effect to [that] unambiguously expressed intent.” *Id.* at 842–843. If, however, “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. “*Chevron* requires a federal court to accept the agency’s [reasonable] construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). These principles apply to the Commission’s construction of its obligations under the forbearance statute, *CTIA*, 330 F.3d at 504, 507, as well as to its reading of the statutory provisions (sections 251(g) & 254(g)) from which Core sought forbearance.

With respect to the question of whether the FCC properly applied its own regulations, the Court must give the Commission’s interpretation “‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *MCI WorldCom Network Services v. FCC*,

274 F.3d 542, 547 (D.C. Cir. 2001) (quoting *Associated Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1254 (D.C. Cir. 1999)). The Court's task "is not to decide which among several competing interpretations best serves the regulatory purpose," but rather to "defer to the [agency's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000) (internal quotation omitted). Under this "exceedingly deferential standard of review," *id.*, the Court accords the Commission's construction of its own regulations "even greater deference" than it does, under *Chevron*, to an agency's "interpretations of ambiguous statutory terms," *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

Under the Administrative Procedure Act (APA), the Commission's analysis must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where the "subject matter * * * is technical, complex, and dynamic." *Brand X Internet Servs.*, 545 U.S. at 1002-03 (quoting *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

SUMMARY OF ARGUMENT

The Court should dismiss Core's petition for review for lack of Article III standing. If the Court finds that Core has standing to present its challenge, the Court should deny the petition for review.

1. To satisfy Article III, a party must demonstrate an "injury in fact"; a causal connection between the injury and the conduct of which the party complains; and that it is "likely" a favorable decision will provide redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). This Court's rules, moreover, provide that a petitioner's opening brief "must set forth the basis for the claim of standing," and provide further that "[w]hen the * * * petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." D.C. Circuit Rule 28(a)(7). Core has not satisfied this burden.

Core does not identify the specific services it offers. Although Core is known to act as a competitive LEC in delivering incumbent LEC-originated Internet-bound traffic to ISPs, this Court has held that section 251(g) does not provide a legal justification for the Commission's current rules regulating such traffic. *WorldCom*, 288 F.3d at 430, 433. Nor does section 254(g), which applies only to retail long-distance service, bear on such traffic. Core has not identified any other service it offers that would be affected by a grant of forbearance from either section 251(g) or section 254(g).

2. On the merits, this Court should reject Core's claim that the *Order* is void and that its forbearance petition was "deemed granted" because the Commission's Wireline Competition Bureau allegedly lacked authority to extend the section 10(c) deadline for action on that petition. The Bureau's extension of the deadline was consistent with the agency's regulations regarding delegated authority, with long-standing administrative practice, and

with specific guidance provided by the Commission in the *Fones4All Order*. Moreover, even if the Court were to find that the Bureau erred in some manner in its order extending the deadline, it would not follow that Core's petition was deemed granted. This Court has held under similar circumstances that there is "no basis [for extending] Congress's remedy for delay into a similarly radical remedy for error." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).

3. The Commission reasonably found that forbearance from section 251(g) and pre-1996 Act regulations preserved by that section would not satisfy any of the three parts of the forbearance test set out in section 10(a). Because section 251(g) expressly provides that such pre-1996 Act regulations may be superseded only "by regulations prescribed by the Commission," forbearance from such regulations would not have resulted automatically in regulation under 47 U.S.C. § 251(b)(5), but instead would have left a regulatory void that would neither prevent unreasonable or discriminatory rates, protect consumers, or serve the public interest. *Order* ¶¶ 13-16 (J.A. 256-59). Moreover, even if regulation under section 251(b)(5) would automatically have resulted from a grant of Core's petition, forbearance would not have been warranted, given the Commission's reasonable conclusion that "changes in access revenue streams without more comprehensive intercarrier compensation reform may harm consumers." *Id.* ¶ 16 (J.A. 258). The Commission's reading of the statute and its application of the forbearance test were reasonable and consistent with its precedents.

4. The Commission lawfully denied Core's request for forbearance from the rate averaging and rate integration requirements of section 254(g). *Order* ¶¶ 17-20 (J.A. 259-62). Addressing the administrative record, the Commission determined that rate averaging and rate integration remained necessary to bring consumers in high cost insular areas the benefits

of the robust long-distance competition that exists elsewhere and to assure that rates in such areas remained equally affordable. Core's assertion that the Commission's analysis misapplied the burden of proof is not properly before the Court, because Core did not first present that claim to the agency. *See* 47 U.S.C. § 405(a). And that claim provides no basis to reverse the Commission fully-supported decision in any event.

ARGUMENT

I. Core Lacks Standing To Present Its Challenges To The *Order*

Because Article III of the U.S. Constitution extends the judicial power only to "Cases" and "Controversies," a party invoking the jurisdiction of the federal courts must demonstrate that it has standing to bring the case under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006). To satisfy Article III, a party must demonstrate an "injury in fact"; a causal connection between the injury and the conduct of which the party complains; and that it is "likely" a favorable decision will provide redress. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-561. This showing "is an essential and unchanging predicate to any exercise of [this Court's] jurisdiction." *American Chemistry Council v. Department of Transportation*, 468 F.3d 810, 814 (D.C. Cir. 2006) (internal quotations omitted).

This Court, moreover, has made clear that a party seeking review of an agency order has the burden of establishing that it has standing. *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002). The Court's rules, therefore, state that a petitioner's opening brief "must set forth the basis for the claim of standing," and provide further that "[w]hen the * * * petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." D.C. Circuit Rule 28(a)(7)

(citing *Sierra Club*, 292 F.3d at 900-01). A petitioner's failure to make such a showing in its opening brief properly warrants dismissal. See *International Brotherhood of Teamsters v. Transportation Security Administration*, 429 F.3d 1130 (D.C. Cir. 2005) (dismissing a petition because the petitioner failed to establish its standing in its opening brief); *KERM, Inc. v. FCC*, 353 F.3d 57 (D.C. Cir. 2004) (same).

Pursuant to that precedent, the Court should dismiss Core's petition here. Although Core makes a conclusory assertion that it is harmed (Br. 17-18), Core has not, either before the Commission or in this Court, specifically identified the services it offers or how the rules from which it seeks forbearance affect them. To the extent information can be gleaned from other litigation before this Court and public sources – which are hardly a substitute for evidence of record – Core is a competitive LEC engaged in delivering large quantities of incumbent LEC-originated Internet-bound dial-up traffic to Internet service providers.⁸ FCC rules governing inter-carrier compensation for that type of traffic were the subject of this Court's decision in *WorldCom*, 288 F.3d 429, and Core's attempt to seek forbearance from those rules as they apply to its own service offerings was the subject of this Court's decision in *In re: Core Communications*, 455 F.3d 267. As discussed below, however, the Commission's decision not to forbear from sections 251(g) and 254(g) has no justiciable bearing on such services. And, beyond such services, Core provides barely a hint – either before the Commission or in its opening brief – regarding the nature of its telecommunications service offerings, how those services are affected by the *Order*, or how

⁸ At its website (<http://www.coretel.net/ourcompany.htm>), Core describes itself as a “Competitive Local Exchange Carrier (CLEC) based in the Mid-Atlantic, United States, with a focus on bridging the gap between Carriers/Internet Service Providers (ISPs) and their end users.”

this case could provide Core with any redress. Core thus fails to bear its burden to explain how it has standing to challenge the Commission's decision to reject its forbearance petition.

The Commission's decision not to forbear from section 251(g) or from rate regulation preserved by that provision does not affect the rates Core may charge another LEC in connection with the delivery of Internet-bound traffic to ISPs. This Court in *WorldCom* confirmed that, although section 251(g) may serve as a "transitional device" that preserves certain pre-1996 Act LEC duties to provide access services *to ISPs* and *to IXC*s, it was irrelevant to the assessment of inter-carrier compensation *between LEC*s in connection with Internet-bound traffic, which had not been the subject of pre-1996 Act regulations. 288 F.3d at 430, 433-34. The Court thus held that section 251(g) provided no basis for the interim inter-carrier compensation rules for such traffic that the Commission had adopted in the *ISP Remand Order*. 288 F.3d at 430, 433. Those interim rules remain in place today and continue to apply to Core's inter-carrier compensation for the delivery of Internet-bound traffic to ISPs, because the *WorldCom* Court remanded (without vacating) those rules after concluding that there was a "non-trivial likelihood that the Commission ha[d] authority" to sustain them on *some other basis*. *Id.* at 434 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). However, in light of the Court's statutory analysis in *WorldCom*, forbearing from section 251(g) and regulations preserved by that provision clearly would not affect the application of the current interim inter-carrier compensation rules to Core. And, except for a vague one-sentence assertion below,⁹ Core has never identified any service it offers which would be affected by the section

⁹ See Written Ex Parte of Core Communications, Inc. at 12 (July 6, 2007) (J.A. 219) (alleging that "[w]hen Core sends traffic to ILECs, ILECs charge non-cost based 'access' charges").

251(g)-related forbearance it sought. Core thus has failed to establish any harm, traceable to the *Order*, that could be redressed in this review proceeding.

Core's request for forbearance from section 254(g) suffers from the same jurisdictional defect. Section 254(g) requires *interexchange carriers* that serve both urban and rural areas to charge their rural customers rates that are no higher than the rates they charge their urban customers, and it prohibits interstate IXCs from charging customers in one state rates that are higher than those charged to customers in another state. But Core does not allege that it provides IXC services to both urban and rural customers or that it provides interstate IXC services to customers in more than one state. Indeed, before the Commission, Core only alleged that section 254(g) "limits the ability of Core to *deploy new services*, as it prevents Core from recovering costs that result from immensely varying termination charges * * * for the exact same function."¹⁰ Core's reference to its ability to "deploy new services" strongly suggests that it does not currently provide the types of services that section 254(g) regulates.¹¹ And if Core is not currently subject to section 254(g), the Commission's decision to continue enforcing section 254(g)'s requirements cannot have caused Core to suffer any injury.

To be sure, it is true that a "present injurious effect on a petitioner's business decisions is a cognizable injury in fact." *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 20 (D.C. Cir. 2006) (internal quotes and brackets omitted). But Core

¹⁰ Letter from Michael B. Hazzard, Womble, Carlyle, Sandridge & Rice, to Marlene H. Dortch, Secretary, FCC (filed May 18, 2007) ("Core May 18 Letter"), Second Attachment at 10 (emphasis added, formatting and capitalization modified) (J.A. 199).

¹¹ Similarly, in the "Statement of Standing" section of its brief (at 18), Core cryptically says that the application of "section 254(g)'s rate averaging and integration rules * * * preclude Core from utilizing differentiated pricing for long distance services," but Core nowhere states that it actually provides such services.

has not made such a demonstration. Even assuming that section 254(g) “limits [its] ability * * * to deploy new services,” Core May 18 Letter, Second Att. at 10 (J.A. 199), to establish standing, Core also must put forth evidence that it had “concrete plans” to offer IXC services subject to section 254(g) if the Commission had granted its forbearance request.¹² Core has not done so.

II. The Commission Had Authority To Deny Core’s Forbearance Petition

If the Court finds that Core has standing, it should deny its petition for review. Core devotes the bulk of the Argument section of its brief to claiming that the *Order* is invalid because its forbearance petition had already been “deemed granted” under section 10(c). In Core’s view, the “deemed grant” occurred because the Wireline Competition Bureau’s order extending the statutory period by 90 days was ineffective. *See* Br. 18-27. This argument is flawed for two reasons. First, as the Commission found, the Bureau properly exercised its delegated authority when it extended the statutory period under section 10(c). Second, even if Core’s challenge to the Bureau’s *Extension Order* had merit, the Commission would retain the authority to issue the order on review.

A. The Communications Act authorizes the FCC to “extend the initial one-year period” for reviewing a forbearance petition “by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of” section 10(a). 47 U.S.C. §

¹² *See, e.g., Defenders of Wildlife*, 504 U.S. at 564 (“Such ‘some day’ intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the ‘actual or imminent’ injury that our cases require.”); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999) (“[T]he mere desire to hunt or fish in the future, supposedly limited in some unspecified way, falls short of demonstrating the type of actual or imminent injury sufficient under Article III to constitute an injury in fact.”).

160(c). With specified exceptions not applicable here,¹³ the Act also expressly empowers the Commission, “by published rule or by order,” to delegate “any of its functions” to its staff. 47 U.S.C. § 155(c)(1). Pursuant to that authorization, the FCC’s rules broadly delegate power to the Wireline Competition Bureau to “act[] for the Commission under delegated authority, in all matters pertaining to the regulation and licensing of communications common carriers,” unless those functions are specifically withdrawn from the Bureau by statute or regulation. 47 C.F.R. § 0.91; *see also* 47 C.F.R. § 0.291. Neither the general authority to extend deadlines, nor the specific authority to extend the section 10 forbearance deadline by 90 days is included in the list of functions denied to the staff. Accordingly, the Bureau properly exercised its delegated authority when it ordered a 90-day extension of the period for reviewing Core’s forbearance petition.

In the *Extension Order*, the Bureau found that Core’s petition “raise[d] significant questions” regarding whether forbearance in this case would meet the requirements of section 10(a). *Extension Order* ¶ 4 (J.A. 170). On the basis of that finding, the Bureau reasonably concluded that “a 90-day extension is warranted under section 10(c).” *Ibid.* The Commission subsequently denied Core’s application for review of the *Extension Order*, finding that the Bureau had acted within its delegated authority, and rejecting Core’s claim that the Bureau had not established why an extension was “necessary.” *Order* ¶¶ 9-10 (J.A. 253-54).

Core argues that the FCC’s rules did not authorize the Bureau to adopt the *Extension Order*. In support of this claim, Core cites FCC Rule 0.291(a)(2), which states: “The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests

¹³ *See, e.g.*, 47 U.S.C. § 155(c)(1) (denying the staff authority to conclude certain tariff investigations under section 204 and certain complaint investigations under section 208).

which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.” 47 C.F.R. § 0.291(a)(2). According to Core, this rule prohibited the Bureau from extending the time for reviewing the forbearance petition, because the question of whether an extension of the deadline for action under section 10(c) is “necessary” allegedly “remains ‘novel.’” *See* Br. 19-20.

The Commission properly rejected this claim. As an initial matter, extensions of time, generally, involve “routine and well-adjudicated procedural question[s]” that have never been viewed as “novel” within the meaning of Rule 0.291(a)(2).¹⁴ And, as Core acknowledges (Br. 26), in the years since the forbearance statute was enacted in 1996, the Bureau frequently has issued section 10(c) extensions without rebuke from the Commission. That consistent practice belies Core’s assertion that the *Extension Order* exceeded the Bureau’s delegated authority.

More importantly, the Commission, prior to the issuance of the Bureau’s *Extension Order* in this case, had itself expressly confirmed the Bureau’s delegated authority to implement extensions under section 10(c). In the *Fones4All Order*, the Commission held that “[e]xtensions of time [under section 10(c)] do not raise ‘novel questions of fact, law or policy’ [under Rule 0.291(a)(2)], * * * and therefore the Bureau is within its discretion to extend by 90 days the date by which a forbearance petition shall be deemed granted.” *Fones4All Order* ¶ 6. The Commission, in *Fones4All*, also held that the requirement of section 10(c) that extensions be “necessary” is satisfied when the petition before the agency

¹⁴ *Order* ¶ 9 (J.A. 254); *Fones4All Order* ¶ 6 n.17; *see also* *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended*, 15 FCC Rcd 7066, 7072 (1999) (Separate Statement of Chairman Kennard) (“[T]ime extensions are anything but novel. In a wide variety of contexts, the * * * Bureau has extended time periods, as well as denied extension requests, as appropriate, and has never, to my knowledge, been reversed by the Commission.”).

raises “significant questions” or “complex issues” warranting additional time for consideration. *Id.* ¶ 6 n.17. The Bureau’s *Extension Order* in this case relied on the Commission’s *Fones4All Order* for the proposition that the Bureau had delegated authority to issue the extension. *Extension Order* ¶ 3 & n.10 (J.A. 170).

In affirming the Bureau’s authority to extend the section 10(c) deadline in this case, the Commission relied upon the *Fones4All* precedent as a basis for the Bureau’s action. *Order* ¶¶ 9-10 (J.A. 253-55). That precedent, the Commission stressed, did not just confirm the Bureau’s power to issue extensions under section 10(c). *Id.* ¶ 9 (J.A. 253-54). Core’s extended verbal gymnastics notwithstanding (*see* Br. 19-27), that precedent also plainly provided guidance as to when an extension is “necessary.” *See id.* ¶ 10 (J.A. 254-55) (stating that the *Fones4All* guidance provides, in effect, that an extension is authorized when the Bureau determines that additional time is needed “to complete the [forbearance] analysis required under section 10(a)”). *Fones4All* thus properly qualified as “outstanding precedent[.]” that the Bureau could apply without running afoul of Rule 0.291(a)(2). The Bureau having properly implemented that guidance, *see Order* ¶ 10 (J.A. 254-55) (holding that the Bureau’s justification for the extension “was adequate”), there is no plausible basis for Core’s contention that the *Extension Order* addressed “novel” questions beyond the Bureau’s delegated authority. That is particularly so where, as here, the Commission’s conclusion that the Bureau acted within its delegated authority is predicated upon the agency’s construction of its own rules and prior orders on the subject, which must be given “controlling” weight, unless “clearly erroneous.” *MCI WorldCom*, 274 F.3d at 547; *accord Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

Core also argues that, even if the Bureau's decision (affirmed by the Commission) to extend the deadline fell within the boundaries of Commission precedent – and, therefore, was not “novel” – the extension nevertheless was invalid, because it was predicated upon an impermissible reading of the statutory term “necessary” in section 10(c). Br. 27-31. In particular, Core contends that the Commission equated “necessary” with “routine” and that this interpretation was contrary to Congress's intent that the agency act “very rapidly.” Br. 27, 28; *see generally id.* at 27-31. This claim fundamentally mischaracterizes the Commission's statutory analysis.

Contrary to Core's claim, the Commission did not construe “necessary” in section 10(c) to mean “routine.” When the Commission stated in paragraph 9 of the *Order* (J.A. 254) that deadline extensions involve “routine and well-adjudicated procedural question[s],” it was merely explaining why the type of action that the Bureau took in the *Extension Order* was not “novel” and thus was within its delegated authority. The Commission was not construing the statutory standard – *i.e.*, “necessary to meet the requirements of [section 10(a)]” – that the Bureau applied in extending the section 10(c) deadline.

The Commission reasonably addressed that statutory standard in the *Order*'s next paragraph, when it concluded that extensions under section 10(c) are permissible “whenever * * * necessary to complete the analysis required under section 10(a).” *Order* ¶ 10 (J.A. 254) (emphasis added). That reading, tied expressly to the agency's ability in a timely manner to carry out its analytical duties under section 10(a), was reasonable and fully consistent with other cases construing the term “necessary.” The Supreme Court, for example, has ruled that “necessary” can mean “conducive to” or “plainly adapted” to serving a certain purpose. *Jinks v. Richland County*, 538 U.S. 456, 462 (2003) (quoting *McCulloch v. Maryland*, 4

Wheat. 316, 417, 421 (1819)). Similarly, this Court, in *CTIA*, 330 F.3d at 510, held that the FCC could reasonably construe the ambiguous term “necessary” in section 10(a)(2) to describe “something that is done, regardless of whether it is indispensable, to achieve a particular end.”¹⁵ The Commission’s construction of “necessary” in section 10(c) easily satisfies those standards and is entitled to this Court’s deference under the *Chevron* doctrine.

Quoting this Court’s decision in *GTE Service Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000), Core urges the Court to adopt a stricter reading of the term that is allegedly “consistent with the ordinary and fair reading of the word.” Br. 29. Core does not explain how the Commission’s deadline extension in this case would fail that standard. In any event, this Court has stressed that “necessary” does not have “precisely the *same* meaning in every statutory context.” *CTIA*, 330 F.3d at 510-11 (emphasis in original). The relatively strict reading of the term in *GTE Service Corp.*, the Court has explained, resulted from the fact that the physical collocation obligations at issue there (47 U.S.C. § 251(c)(6)) might have raised constitutional questions regarding “an *unnecessary* taking of private property.” *CTIA*, 330 F.3d at 511 (internal quotation omitted) (emphasis in original). No such concern is presented by section 10(c), which involves only a short, statutorily circumscribed 90-day deadline extension. Without in any way minimizing Congress’ evident concern for speedy Commission action, it seems unlikely that Congress would have intended a strict reading of “necessary” that curtails the agency’s ability adequately to apply the substantive forbearance criteria of section 10(a) and increases the chances that the draconian “deemed grant” remedy

¹⁵ The Commission in that case had denied a request for forbearance from wireless number portability rules on the grounds that such rules remained “necessary” – in the sense that there existed “a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve” – to protect consumers. 330 F.3d at 512.

of section 10(c) would occur – particularly where a lenient reading of the term would result in only a short delay in Commission action.

Core suggests, finally, that even if the Commission’s interpretation of “necessary” in section 10(c) is permissible, neither the Commission nor the Bureau adequately explained in this case how the present circumstances met the standard it articulated. *See* Br. 30 (complaining of the agency’s “terse” justification for the extension). As an initial matter, it is noteworthy that section 10(c) does not state that the Commission must provide a written justification for an extension. By contrast, whenever the Commission grants or denies a forbearance petition, section 10(c) explicitly requires the agency to “explain its decision in writing.” 47 U.S.C. § 160(c). But even assuming that section 10(c) required a written explanation for the extension in this case, the Bureau provided one in the *Extension Order* (at ¶ 4 (J.A. 170) when it found that Core’s forbearance petition “raised significant questions regarding whether forbearance from sections 251(g) and 254(g) * * * meets the statutory requirements set forth in section 10(a)” – circumstances that made an extension “necessary to complete the analysis required under section 10(a),” *Order* ¶ 10 (J.A. 254).

B. Even if the Court were to conclude that the Commission inadequately justified its delegation of extension authority to the Bureau, that the Commission misconstrued the “necessary” standard in section 10(c), or that the Bureau and Commission inadequately explained how that standard applied to the current facts, it does not follow that Core’s forbearance petition was “deemed granted” under section 10(c). As this Court observed in *Ethyl Corp. v. Browner*, 989 F.2d at 524, “[a]utomatic [grant] is itself a dramatic, even extreme, penalty for agency delay.” In that case, the petitioner argued that the Court could not grant a motion for voluntary remand, and instead was required to consider the lawfulness

of an agency's denial of a waiver application, because the application would be "treated as granted" if the agency's decision were found to be invalid. *Ibid.* (quoting 42 U.S.C. § 7545(f)(4)). The Court rejected petitioners' attempt to "equate[] unlawful denial with inaction," concluding that there was "no basis [for extending] Congress's remedy for delay into a similarly radical remedy for error." *Ibid.*¹⁶

Like the statute in *Ethyl Corp.*, the "deemed grant" provision in section 10(c) is designed to encourage the agency to act, not to ensure that it "act[s] with perfection." *Ethyl Corp.*, 989 F.2d at 524. Thus, this Court has never declared a forbearance petition automatically granted simply because the Commission failed to satisfy APA standards in a timely order denying the petition.¹⁷ The result here should be no different. The Bureau unquestionably acted within the statutory period to extend the deadline under section 10 for resolving the merits of Core's forbearance petition. Although, as explained above, the *Extension Order* and the Commission's affirmance of that order were lawful, if the Court concludes that the Bureau did not "act with perfection," it should nonetheless reject Core's claim that it is entitled to the "extreme" penalty of a deemed grant, which Congress reserved only for cases of "agency delay." *Ethyl Corp.*, 989 F.2d at 524.

¹⁶ By contrast, the cases upon which Core relies for claiming that its forbearance petition was "deemed granted" involved the failure by agencies to act at all within the statutory deadline. See Br. 33 (citing *Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562, 568 (7th Cir. 1975); *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 43-44 (D.D.C. 1993)).

¹⁷ See, e.g., *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (remanding for further consideration FCC decision to deny petition for forbearance from Title II common carrier regulation of "IP platform" services); *Verizon Telephone Cos. v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004) (remanding for further consideration FCC decision to deny petition for forbearance from certain network element unbundling obligations imposed by 47 U.S.C. § 271).

III. The Commission Reasonably Declined To Forbear From Enforcing Section 251(g)

If the Court finds that Core has standing to present its claim that the Commission erred in denying its request for forbearance from section 251(g), the Court should nevertheless reject Core's challenge. Core devoted a scant four paragraphs in its forbearance petition to arguing that the statutory forbearance criteria of section 10(a) were satisfied as to section 251(g). Specifically, Core argued before the Commission that if the agency forbore from enforcing rate regulation under section 251(g), all telecommunications would automatically be subject to the rules governing reciprocal compensation under section 251(b)(5). *Order* ¶ 13 (J.A. 256-57). The Commission denied Core's forbearance request because it rejected that reading of the Communications Act. The Commission concluded instead that forbearing from section 251(g) would leave a regulatory void, a result that would neither protect against unjust and unreasonable rates nor promote the public interest. *Id.* ¶¶ 14, 16 (J.A. 257-59). In addition, the Commission found that forbearing from access charge regulation would not protect consumers because it could deprive LECs, particularly rural LECs, of revenues needed to maintain affordable rates and service quality. *Id.* ¶ 16 (J.A. 258-59). To prevail, Core must demonstrate that the Commission erred in its analysis of all three forbearance factors. *CTIA*, 330 F.3d at 509. In this case, Core cannot make this showing as to any of them.

A. Section 251(g) states that LECs must continue to abide by certain pre-1996 Act "restrictions and obligations" until they "are *explicitly superseded by regulations* prescribed by the Commission." 47 U.S.C. § 251(g) (emphasis added). In the *Order*, the Commission interpreted that clause as "explicitly contemplat[ing] affirmative Commission action in the form of new regulation" as the sole means of replacing the pre-1996 Act access regulations

preserved under section 251(g) with another regulatory regime. *Order* ¶ 14 (J.A. 257). The Commission thus concluded that, although a forbearance petition might, upon a proper showing, result in forbearance from the *carrier* “restrictions and obligations” preserved by section 251(g), such a petition could not remove the obligation – imposed upon the *agency* under section 251(g) – to adopt by rule any superseding system of regulation. *Ibid.* And absent such superseding regulations, the Commission concluded, the forbearance Core sought would result in a regulatory gap that would fail to ensure reasonable rates, protect consumers, and serve the public interest, as required under section 10(a). *Id.* ¶¶ 14-16 (J.A. 257-59).

Core does not dispute that a regulatory gap for section 251(g) services would fail the forbearance standards of section 10(a). It claims, however, that the Commission erred in concluding that a gap would result from the grant of its petition. First, Core argues that, although section 10(d) of the Act, 47 U.S.C. § 160(d), places limitations on the Commission’s authority to forbear from specified provisions of the statute, section 251(g) is not among them. Br. 35. That statutory argument was never presented to the Commission and thus is barred under 47 U.S.C. § 405(a), which precludes claims on which the Commission was given “no opportunity to pass.” *See In re Core*, 455 F.3d at 276-77. It is baseless in any event, since section 10(a), by its terms, authorizes forbearance from applying “regulation[s]” or “provision[s]” “to a telecommunications carrier or telecommunications service” or to classes thereof. 47 U.S.C. § 160(a) (emphasis added). It does not purport to authorize forbearance from obligations imposed on the agency, as Core is requesting here.

Core also argues that the Commission’s conclusion that a regulatory gap would result from a grant of its petition is inconsistent with Commission precedent in which “the

Commission [allegedly] has explicitly recognized that forbearing from a specific set of regulatory obligations does nothing to disturb general regulatory obligations, which act as a backstop.” Br. 37-38 (citing *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, 22 FCC Rcd 5207 (¶ 49) (2007) (“*Qwest 272 Sunset Forbearance Order*”), and *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (¶ 1) (2004)). In neither of those cited cases, however, did the petitioner seek forbearance from all rate regulation preserved by section 251(g); as a result forbearance from some regulations left other regulations in place.¹⁸ Here, by contrast, grant of Core’s request for forbearance from all rate regulation preserved by section 251(g) would leave no regulatory “backstop,” since

¹⁸ In the cited *Qwest 272 Sunset Forbearance Order*, the petitioner sought forbearance from “dominant carrier” regulation, leaving “non-dominant carrier” regulation automatically in place under the plain terms of the existing rules, which apply non-dominant regulation by default to carriers that are not found to be dominant. See 47 C.F.R. § 61.3(y) (defining “non-dominant” to mean “[a] carrier not found to be dominant”). In the cited *Core* order, the Commission granted Core’s request for forbearance with respect to two of four components of the interim inter-carrier compensation rules adopted in the *ISP Remand Order*, leaving, among other things, the rate cap component of those rules in place. Moreover, since the cited “new market” component of those interim rules (from which the Commission forbore in the *Core* order) acted as a *limitation* on the right of carriers such as Core to recover revenues under the interim rules, lifting of that particular rule had the effect of increasing such carriers’ ability to recover revenues under those rules and, contrary to Core’s suggestion (Br. 38-39), did not shift ISP-bound traffic to a section 251(b)(5) regime. See *generally In re: Core*, 455 F.3d at 280-83.

forbearance could not relieve the FCC of the statutory obligation to supersede the existing regulations only through rulemaking.¹⁹

Core contends finally that the Commission's conclusion that a regulatory gap would result from a grant of its petition is inconsistent with prior Commission statements that section 251(g) "carved out" access services from section 251(b)(5). Br. 39-40. In Core's view, such prior statements mean that if the Commission eliminated that "carve out" through forbearance, section 251(b)(5) automatically should apply. However, these prior decisions merely reiterate that section 251(g) preserves pre-existing regulations *until explicitly superseded by new Commission regulations*. See, e.g., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (¶ 47) (1999) (stating that section 251(g) "is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission"). Such cases do not address the question of whether the Commission may, through forbearance, eliminate the obligation to adopt superseding regulations and cause section 251(b)(5) automatically to apply.

The Commission's conclusion that a grant of Core's forbearance request would leave a regulatory gap was predicated upon a reasonable reading of the statute and should be affirmed.

¹⁹ See *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148-49 (D.C. Cir. 2002) (agency cannot act solely on a case-by-case basis in the face of a clear congressional command that it "proceed[] by regulation"); see also *ISP Remand Order*, 16 FCC Rcd at 9170 (¶ 40) (stating that section 251(g) contemplates "an affirmative determination [by the Commission] to adopt rules that subject such traffic to obligations different than those that existed pre-[1996] Act."); *WorldCom*, 288 F.3d at 430 (noting that section 251(g) is a "transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act").

B. Even if Core were correct that section 251(b)(5) automatically would apply to all telecommunications service traffic upon forbearance from section 251(g), the Commission properly concluded that the section 10 forbearance standard would not be met. The Commission stressed, for example, that “the record suggests that many LECs depend on access revenues to maintain affordable rates and service quality to consumers, especially in rural areas.” *Order* ¶ 16 & n.61 (cataloguing record evidence) (J.A. 258-59). Because “changes to access revenue streams without more comprehensive intercarrier compensation reform may harm consumers,” the Commission determined that the second prong of the forbearance standard was not satisfied. *Id.* ¶16 (J.A. 258-59).

Core’s only response is to recite generally from past Commission statements that “disparate intercarrier compensation regimes” are a source of “regulatory arbitrage,” and to claim that consolidating all of these regimes under section 251(b)(5) would eliminate such disparate treatment in a manner justifying the grant of its forbearance request. Br. 41-42. The Commission properly found, however, that such generalities did not adequately address the “real economics” of the offerings that would result from the consolidated section 251(b)(5) regime Core posited. *Order* ¶ 16 (J.A. 258). Indeed, Core’s contention (Br. 36, 41) that subjecting “all ‘telecommunications’ traffic” to section 251(b)(5) automatically would eliminate regulatory arbitrage is at odds with this Court’s *In re: Core* decision. The Court there emphatically endorsed as reasonable the Commission’s conclusion that the application of section 251(b)(5) reciprocal compensation rules to ISP-bound traffic “le[ads] to classic regulatory arbitrage.” 455 F.3d at 279 (emphasis added); *see also id.* (“quot[ing] at length” the Commission’s analysis from the *ISP Remand Order* to demonstrate that “[t]he FCC’s economic analysis [of the distorted economic incentives associated with the

application of such rules to ISP-bound traffic] is neither imprecise nor undefined”). The Commission properly rejected Core’s petition for forbearance from section 251(g).

IV. The Court Should Reject Core’s Challenge To The Commission’s Decision Not To Forbear From Enforcing Section 254(g)

If the Court concludes that Core has standing with respect to section 254(g), the Court should nevertheless affirm the Commission’s conclusion that “Core’s request for forbearance from the rate averaging and rate integration required by section 254(g) of the Act and related implementing rules fails to meet the statutory criteria contained in section 10(a).” *Order* ¶ 18 (J.A. 260). As with its request concerning section 251(g), Core devoted a mere four paragraphs of its forbearance petition to attempting to show that the statutory forbearance criteria were satisfied with respect to section 254(g). In the Commission’s reasoned judgment, Core’s vague and undeveloped forbearance request satisfied none of the statutory forbearance criteria.

The Commission began by rejecting Core’s argument that forbearance from section 254(g) would satisfy the second (protection of consumers) part of the forbearance test set out in section 10(a)(2). The Commission explained that “geographic rate averaging is intended to assist customers in rural and high cost areas by ensuring that interexchange rates charged to such customers do not reflect the disproportionate burdens associated with the high cost of providing service in these areas.” *Order* ¶ 18 (J.A. 260). It also observed that, while “[c]ompetition may bring long distance rates closer to cost, * * * section 254(g) was intended to make rates equally affordable to all consumers.” *Ibid.* It concluded that “although Core allege[d] that competition in the marketplace will help protect consumers, it fail[ed] to provide any evidence of such competition beyond mere conclusions and, more

importantly, fail[ed] to provide any analysis of the potential impact of its request on consumers.” *Ibid.* Accordingly, the Commission found that “enforcement of the section 254(g) requirements remains necessary for the protection of consumers.” *Ibid.*

The Commission also concluded that forbearing from § 254(g) would fail to meet the other two forbearance criteria. With respect to the test set out in section 10(a)(1), the Commission noted that while “Core has made broad statements regarding the state of competition in long distance services,” it did not provide “any actual evidence to establish that sufficient competition exists in all markets, and in particular in rural areas, such that rates will be constrained to just and reasonable levels.” *Order* ¶ 19 (J.A. 261). Similarly, with respect to the public interest criterion set out in section 10(a)(3), the Commission found that Core “fail[ed] to make any showing whatsoever of the likely impact of forbearance from section 254(g) on retail rates and universal service flows.” *Order* ¶ 20 (J.A. 261). Core also neglected to “address[] the affordability issues raised by its petition,” or make any “proposal to offset the reduction in implicit subsidies with an explicit universal service subsidy to ensure affordability.” *Ibid.*

In a challenge focused almost exclusively on the Commission’s analysis under the first and third parts of the forbearance test (*see* 47 U.S.C. § 160(a)(1) & (3)), Core alleges that the Commission improperly imposed the burden of proof on Core to demonstrate that competition in long-distance services would keep long-distance rates just, reasonable and non-discriminatory without rate averaging and rate integration and that forbearance would promote competitive market conditions. Br. 42-43; *see generally id.* at 42-48. Core argues, further, that the Commission ignored the evidence of competition that it did provide. Br. 44-48. These claims are baseless and, in any event, ignore completely the Commission’s

independently sufficient conclusion under section 10(a)(2) that the rate averaging and rate integration remained necessary to protect consumers.

As an initial matter, Core's assertion that the Commission unlawfully assigned the burden of proof with respect to its forbearance petition is not properly before the Court, because that claim was not first presented to the agency. 47 U.S.C. § 405(a); *In re: Core*, 455 F.3d at 276-77. Nevertheless, it is a general principle of administrative practice that the proponent of a rule or order has the burden of proof unless otherwise provided by statute. *See Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000). As pertinent here, section 10 provides that, if the Commission acts on a forbearance petition, it must make three separate affirmative findings (under section 10(a)(1) – (3)) in order to grant forbearance. A petitioner who fails to place the evidence necessary to support such findings before the Commission can have no expectation that the petition will be granted. *See In re: Core*, 455 F.3d at 279 (affirming the Commission's denial of Core's forbearance petition, among other things, because "*Core* provide[d] no evidence to support the[] claim[.]") (emphasis added) (internal quotations omitted).

It was entirely reasonable for the Commission to conclude that the first and third parts of the forbearance test were not satisfied with respect to Core's request for forbearance from section 254(g). One of the goals of the rate averaging and rate integration requirements is to ensure that consumers in rural or remote areas share in the benefits of the interexchange competition that exists elsewhere in the country. *Geographic Rate Averaging Order* ¶ 6. Given the specific focus of the rate averaging/rate integration requirements on customers in remote areas, and because forbearance from such requirements would leave consumers in remote areas at the mercy of market conditions in those areas alone, the Commission quite

properly insisted (notwithstanding the acknowledged existence of robust interexchange competition in most parts of the country) on some showing that market conditions in remote areas were conducive to significant interexchange competition, as well. *Order* ¶ 19 & n. 78 (J.A. 261).²⁰ In the Commission’s considered judgment, Core did not make that required showing. *Id.* ¶ 19 (J.A. 261) (noting the absence of “any actual evidence to establish that sufficient competition exists * * * in rural areas, such that rates will be constrained to just and reasonable levels” in the absence of rate averaging and rate integration).

Core’s challenge, moreover, reflects an exceedingly cramped view of the public interest under section 10. Nothing in section 10(b), which requires the Commission to “consider” competition, makes it the determinative factor in all cases. Not even efficient cost-based prices necessarily make telecommunication services affordable to people in the many remote areas of the country. In such circumstances, the Commission is entitled to find that the universal service policies embodied in sections 1 and 254(g) of the Act establish the controlling public interest in this case. Core, with its narrow focus on competition, only

²⁰ Core misinterprets the forbearance decisions cited in its brief when it argues that “[s]ince at least 2004, the Commission has not required parties to submit detailed market share information to demonstrate a market is ‘fully competitive.’” Br. 44. The cited cases stand for the proposition that, when considering *emerging* (e.g., broadband) markets, the Commission assesses competition in terms of broader trends, rather than static market share. *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705 (¶ 20) (2007). By contrast, four months before it issued the *Order* addressing Core’s petition, the Commission carefully considered detailed market share information regarding the retail long-distance market (the same market at issue in Core’s section 254(g) request) in considering a forbearance request by Qwest for forbearance from dominant carrier rules with respect to such established services. See *Qwest 272 Sunset Forbearance Order*, 22 FCC Rcd 5207 (¶¶ 31-46). And the Commission there found it necessary to maintain some regulation to address market power concerns. *Id.* ¶ 18 (low volume users), ¶ 47 (control of bottleneck facilities), ¶¶ 63-72 (conditioning forbearance relief on continuing safeguards).

dismissively acknowledged the universal service policy below.²¹ Neither in its brief, nor before the Commission, does Core provide any reason why it would be in the public interest to grant forbearance before an alternative regulatory system is in place that would guarantee affordable rates.

Finally, Core's complaints regarding evidentiary burdens with respect to the state of interexchange competition are irrelevant to the Commission's reasonable – and independently sufficient²² – conclusion under section 10(a)(2) that enforcement of section 254(g) remains necessary to protect consumers. As this Court has recognized, “the central purpose” of section 254(g) – to promote equally *affordable* interexchange service rates throughout the country – “by its nature” is not tied directly to competitive market conditions. *GTE Service Corp. v. FCC*, 224 F.3d 768, 773 (D.C. Cir. 2000). Thus, while “[c]ompetition may bring long distance rates closer to cost,” it does not further the consumer protection/universal service objective of section 254(g) to ensure that long-distance rates in *high-cost* areas equal those in *low-cost* areas. *Order* ¶ 18 (J.A. 260).

On that question, the Commission found that Core failed to provide any meaningful analysis in support of forbearance. *Ibid.* By contrast, the States of Hawaii and Alaska submitted evidence suggesting that “a failure to retain the rate averaging and rate integration requirements may result in significant pricing disparities and high interstate toll rates for consumers in insular areas.” *Order* ¶ 18 & n.74 (J.A. 260). Specifically, those states

²¹ See Forbearance Pet. 21 (J.A. 23) (“Even if the Commission were to determine that some subsidy is warranted, which it is not, the answer is to make such subsidies explicit through universal service, rather than bake an implicit subsidy into intercarrier compensation rates, which serves only to overtax interexchange carriers and consumers in non-rural areas.”).

²² See *CTIA*, 330 F.3d at 509 (the failure to meet *any* one of three prongs of the forbearance test requires denial of the petition).

introduced pricing data indicating that consumers could see long-distance rates as high as \$0.227 per minute in Hawaii and \$0.342 per minute in Alaska as compared with rates of \$0.025 elsewhere in the country. Letter from Bruce Olcott to FCC Secretary (filed February 6, 2007), Attachment at 1 (J.A. 167). Moreover, Core itself acknowledged that section 254(g) prevents long-distance carriers from “passing [the higher access charges in insular areas] on directly to consumers” in those areas, Forbearance Pet. 21 (J.A. 23), a concession that served to highlight the risk that forbearance from rate averaging and rate integration would cause “customers of those LECs with relatively high access rates [to] * * * face higher retail rates for interexchange services.” *Order* ¶ 20 (J.A. 261). The Commission had ample basis to find that section 254(g) remained necessary to protect consumers – and thus to deny Core’s forbearance petition – regardless of which party bore the burden of proof in this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review because Core lacks standing. If it does not dismiss the petition, the Court should deny it.

Respectfully submitted,



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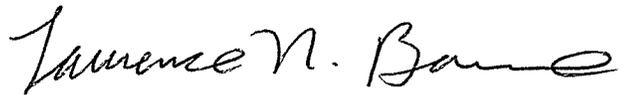
May 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

CORE COMMUNICATIONS, INC.,)	
)	
PETITIONER,)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION AND)	No. 07-1381
UNITED STATES OF AMERICA,)	
)	
RESPONDENTS.)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12455 words.



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July 8, 2008

STATUTORY APPENDIX

D.C. Circuit Rule 28

47 U.S.C. § 151

47 U.S.C. § 405

47 C.F.R. §61.3(y)

D.C. Circuit Rule 28

Briefs

(a) **Contents of Briefs: Additional Requirements.** Briefs for an appellant/petitioner and an Appellee/respondent, and briefs for an intervenor and an amicus curiae, must contain the following in addition to the items required by FRAP 28:

* * * * *

(7) **Standing.** In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. This section, entitled "Standing," must follow the summary of argument and immediately precede the argument. When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing. See Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002). If the evidence is lengthy, and not contained in the administrative record, it may be presented in a separate addendum to the brief.

* * * * *

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 405 (continued)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 61.3

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 61. TARIFFS
SUBPART A. GENERAL

§ 61.3 Definitions.

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(y) Non-dominant carrier. A carrier not found to be dominant. The nondominant status of providers of international interexchange services for purposes of this subpart is not affected by a carrier's classification as dominant under § 63.10 of this chapter.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Core Communications, Inc., Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Respondents" was served this 8th day of July, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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