

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Petition of Core Communications, Inc. for)
Forbearance Under 47 U.S.C. § 160(c) from) WC Docket No. 03-171
Application of the *ISP Remand Order*)

RESPONSE OF QWEST CORPORATION

Qwest Corporation (“Qwest”) respectfully submits its response to the opposition filed by Core Communications, Inc. (“Core”) concerning Qwest’s Petition for Reconsideration, filed on November 10, 2004.¹

I. INTRODUCTION

Core appears to totally misunderstand Qwest’s positions. Worse, the opposition that Core has filed misconstrues the applicable law.

Qwest’s Petition for Reconsideration is predicated on the theory that if the Federal Communications Commission’s (“Commission”) *Order*² did not deny the Core forbearance petition in a timely fashion under Section 10(c) of the Communications Act, as amended, – and Qwest makes no such concession – then Core’s petition was indeed granted by operation of law. This is the only reasonable reading of the Communications Act, as amended. Qwest submits that no such grant took place because the Commission acted within the statutory period. But Qwest’s contingent petition is predicated upon the assumption that such a grant did in fact take place. If this happened, the grant of Core’s forbearance petition is then clearly subject to reconsideration pursuant to Section 405(a) of the Communications Act, as amended.

¹ Opposition of Core Communications, Inc. to Qwest Corporation’s Petition for Reconsideration, filed Nov. 18, 2004.

² *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, Order*, WC Docket No. 03-171, FCC 04-241, rel. Oct. 18, 2004.

Section 405(a) permits reconsideration of any “order, decision, report or action . . . taken in any proceeding by the Commission. . . .” As a result, there is absolutely nothing in the statute that precludes Qwest, whose interests are adversely affected by any grant of the petition, either directly or by operation of law, from seeking reconsideration of the grant of Core’s forbearance petition that occurred by operation of law.

It is also clear that the putative grant of Core’s forbearance petition occurred under the Communications Act, as amended, and that it therefore constituted an “action” by the Commission that is subject to reconsideration. Put another way, a grant of forbearance under Section 10(c) is not itself a “statute” and is not unreviewable simply because it was triggered by a Commission action. As noted above, Core is absolutely correct that if the Commission did in fact miss Section 10(c)’s statutory deadline for action on its petition, the petition has been granted. However, such a grant is not insulated from the reconsideration provisions of Section 405 because it was made by operation of law instead of by actual written order of the Commission.

Another clarification is necessary concerning the scope of Qwest’s contingent petition for reconsideration. Qwest is not seeking a determination that the Commission may ignore the time limits of Section 10(c) (although Qwest does not concede that these time limits were violated). All Qwest seeks is that, if the grant of the Core forbearance petition was indeed made, this action of the Commission be reconsidered under Section 405 of the Communications Act, as amended.³

With these facts in mind, Qwest turns to the specifics of Core’s opposition.

³ Core cites several court decisions that could be interpreted as holding that Qwest could not appeal a grant of a forbearance petition that had been made by operation of law under Section 10(c). As is discussed below, this fact has no relevance to Qwest’s right to seek reconsideration of a grant under Commission authority that adversely affects Qwest’s interests.

II. THE COMMISSION STILL HAS THE JURISDICTION TO CONSIDER QWEST'S PETITION

Qwest's Petition for Reconsideration is conditional, and is premised on the possibility that a reviewing court might find that Core's forbearance petition was "deemed granted" on October 12, 2004, pursuant to Section 10(c) of the Communications Act, as amended. Qwest's Petition for Reconsideration points out that grant of the Core forbearance petition would significantly adversely affect the public interest and would materially interfere with the Commission's efforts to create a rational intercarrier compensation regime. Qwest's Petition for Reconsideration assumes that the Commission failed to deny Core's forbearance request in a timely manner, and that it was granted through operation of Section 10(c), but that the grant is subject to reconsideration.

In opposition, Core asserts that when the Commission permits a forbearance petition to be granted by operation of law pursuant to Section 10(c), the petition is transformed into a set of "rights" that "cannot be disturbed through reconsideration" thereafter, since they are "granted by Congress." Core therefore argues that since the one-year deadline for action on a forbearance petition is "rigid," the Commission has been "divested of jurisdiction," now and forever, and that it can never consider Qwest's Petition for Reconsideration.⁴

The Commission must reject these legal arguments. Core's assertions are based upon a strange interpretation of the Communications Act that is both circular and self-referential. Core is stretching the time limit specified in Section 10(c) to lengths that are far beyond the breaking point of statutory construction. A close examination of the statutory language of Section 10(c) as well as its legislative history shows that the Commission does have the jurisdiction to consider Qwest's Petition for Reconsideration if the conditions for reconsideration are met. In fact, Qwest

⁴ See Core opposition at 3.

has a statutory right to such reconsideration. If the Core forbearance petition has been granted by operation of law, Qwest has a right to seek reconsideration of this grant and the Commission has both the right and the obligation to act on that petition.

As Core correctly notes, Congress intended the one-year deadline specified in Section 10(c) to spur the Commission to action, and to issue timely rulings.⁵ However, Core unduly extends this basic and non-controversial principle by arguing that a default ruling under Section 10(c) is therefore an immutable act of Congress, with the vested force of the Communications Act itself,⁶ and that such a “grant” establishes a set of rights that cannot be “defeated or otherwise disrupted” by the Commission for any reason, presumably until the end of time.⁷ Section 10(c) says no such thing. Nor does the legislative history of the provision. There is no indication in any language in the Communications Act or otherwise that would exempt a grant by operation of law under Section 10(c) from the reconsideration provisions of Section 405.

A decision granted by operation of a statute is not a statute itself. As a consequence, a default grant under Section 10(c) is still an act by the Commission, rather than a statute or a divestiture of the Commission’s authority, and it is necessarily treated like any other Commission ruling. If Congress intended otherwise, it clearly would have said so. But it did not. Nothing in the statute or the legislative history to Section 10(c) states – much less implies – that the timing mechanism specified in Section 10(c) is intended to be anything other than a procedural limit. As the Joint Conference Committee stated in the legislative history to Section 10(c):

⁵ See *Telecommunications Act of 1996*, Conference Report, 104-H. Rpt. 458 at 184-85 (Jan. 31, 1996).

⁶ See Core opposition at 3 (claiming that the “rights arising from that grant are statutory”).

⁷ *Id.* at 4.

New subsection (c) permits carriers to petition for forbearance and these petitions shall be deemed granted if the Commission does not deny such petition within one year of the Commission's receipt of the petition. The Commission may only extend this one-year time period for 90 days. The Commission can also approve or deny the petition in whole or in part.

This statement is not written in code. It means what it says. By its own words, Congress requires timely decisions by the Commission, and obligates the Commission to act on forbearance petitions within the specified time limit. If action is not taken in a timely fashion, a grant is made. That grant is subject to the same reconsideration rules as are applied to all other Commission actions.⁸

In this context, what Congress does not say in the statute or in the legislative history is also significant. Pointedly, Congress did not state at any time that a “grant” under Section 10(c) is different than any other decision by the Commission, either by operation of law or by specific action. Likewise, Congress did not state that it intended to carve a substantive exception in the fabric of the Commission's rulemaking authority, under which Section 10(c) decisions are separate, sacrosanct and forever fixed (which would permit the Commission to enact new rules without going through the processes spelled out in the Administrative Procedure Act, or to even do so without the Commission issuing a decision at all). Since Congress did not provide, it is clear that forbearance decisions issued under Section 10(c) are like any other type of administrative rule issued under the Communications Act, as amended, and may be changed by subsequent Commission rulemaking that comports with the Communications Act and the Administrative Procedure Act. These facts do not render Section 10(c) meaningless, as Core claims, nor do they destroy a set of vested statutory rights provided as a “remedy” by Congress.

⁸ See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of the Private Land Mobile Radio Stations, 6 FCC Rcd 7297, 7300, n.40 (1991).

If Core is correct that the Commission missed the deadline for denying its petition, the petition has indeed been granted. However, this grant is not shielded from reconsideration.

III. THE CASES CITED BY CORE ARE NOT RELEVANT

Core cites two court decisions in support of its positions. One is *Tri-State Bancorporation* (“*Tri-State*”), a case involving a default grant of a holding company authorization by the Federal Reserve Board. The other is *Lac Du Flambeau Band of Chippewa Indians* (“*Chippewa Indians*”), a decision involving a default decision by the Department of the Interior. Neither case is relevant to Qwest’s position, however, nor does either case support the massive weight that Core places upon it. Most significantly, the cases deal with appellate review of agency action by an Article III federal court, not with agency reconsideration of a grant under the auspices of that same agency. The fact that an agency grant through inaction may not be appealed to a court has absolutely nothing to do with the ability of an injured party to seek reconsideration of that decision through the reconsideration process.

In the *Tri-State* decision, the Seventh Circuit Court of Appeals (“Seventh Circuit”) addressed a 91-day limit in the federal Bank Holding Act, as amended, 12 U.S.C. § 1841, *et seq.* The statute imposes a time limit by which the Federal Reserve Board was obligated to rule on particular applications, after which the applications “shall be deemed to have been granted.” In turn, the court’s decision involves an application to form a bank holding company by Tri-State Bancorporation, and it turns on a determination of when the 91-day time limit in the statute began to run under the statute.

In evaluating when the Federal Reserve Board “received” the application and started the countdown towards the statutory deadline, the Seventh Circuit ruled that:

We hold that the 91-day period of § 1842(b) begins to run when the final material needed for the Fed’s decision is received from the various interested sources

outside the Fed, which ordinarily would be the applicant and government entities other than the Fed. The crucial date here is July 23. In our opinion, staff reports and recommendations of the Fed are no part of the “complete record” within the statutory contemplation.⁹

Based on this ruling, the Seventh Circuit found that 91 days after the final materials concerning the application were submitted, the proceeding ended, and Tri-State Bancorporation’s application was granted as a matter of law.¹⁰

Core claims that the *Tri-State* decision stands for the principle that “where Congress prescribes a specific consequence for agency inaction by a certain deadline, that consequence will be enforced.”¹¹ Qwest agrees with this interpretation, but Core’s ultimate conclusion is faulty. There is nothing in the decision that supports Core’s claim that *Tri-State* stands for the proposition that “rigid deadlines” cannot be “defeated or otherwise disrupted by reconsideration.”¹² That is simply not what the Seventh Circuit says. While the court held that the Federal Reserve Board’s proceeding ended within 91 days of the final submissions to the record, and the bank’s application was thereafter “deemed approved by operation of law,” the Seventh Circuit did not say that the Federal Reserve could not engage in reconsideration of any rules or precedents adopted in the proceeding (although how such rules might have been adopted in legal action approving the particular application is not entirely clear), much less that the Federal Reserve was divested of all subsequent jurisdiction of the resulting bank holding company.¹³

⁹ See *Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562, 566 (7th Cir. 1975).

¹⁰ *Id.* at 567.

¹¹ Core opposition at 4.

¹² *Id.*

¹³ In fact, the Seventh Circuit said precisely the opposite, and reasoned that the public interest would be served by the Federal Reserve’s continuing oversight of the holding company after the application was deemed granted through the government’s default. See *Tri-State*, 524

Core also relies on the *Chippewa Indians* case to support its claim that when an application is deemed granted due to the passage of a statutory deadline, the administrative agency suffers a “divestiture of [] jurisdiction,” and cannot engage in “further reconsideration without interfering in the congressional scheme.”¹⁴ Once again, however, the case itself fails to support the legal principles for which it is cited in Core’s filing. *Chippewa Indians* is a case that principally involves issues of sovereign immunity, but it also addresses whether a casino license granted under the Indian Gaming Regulatory Act becomes “final” when the Department of the Interior fails to approve or deny the application within 45 days of an amendment, and whether such a grant is subject to challenge in federal court on grounds that could not have been raised before the administrative agency.¹⁵ In ruling that the application was deemed granted after the passage of the deadline, the District Court ruled that:

More of an obstacle than the lack of a category, however, is the unsuitability of judicial review to the kind of inaction at issue. When Congress says expressly that it wants amendments not approved within 45 days to be deemed approved, it has provided a remedy and left nothing for a court to review. The court cannot send the matter back to the agency for further consideration without interfering with the Congressional scheme.¹⁶

The “scheme” described in *Chippewa Indians*, however, is a narrowly-drawn system of approving or disapproving gaming applications by Native American tribes. It is not a broad rulemaking in which the Department of the Interior has countervailing responsibilities, or in which the rights of an entire industry are implicated. And as such, Core is mistaken in claiming

F.2d at 567. While *Tri-State* involved an application rather than a rulemaking, the ongoing oversight and enforcement role recognized by the Seventh Circuit militates against the extreme position claimed by Core, which is that a missed deadline forever divests a regulator of authority over the object of the default.

¹⁴ See Core opposition at 5, citing *Chippewa Indians*, 327 F. Supp.2d 995, 999 (W.D. Wisc. 2004).

¹⁵ See *Chippewa Indians*, 327 F. Supp.2d at 998-999.

¹⁶ *Id.* at 999.

that *Chippewa Indians* means that a regulatory agency loses all authority over the subject matter of a forbearance petition deemed granted under Section 10(c). The relief requested from the court (amendment of the filed amendment) was relief that the Secretary of the Interior was herself powerless to grant.¹⁷ The court did not hold that the Secretary could not reconsider a grant if such right was granted under the enabling statute. It merely held that the grant made by operation of law was not appealable.

In short, there is nothing in the law to support Core's position that, in the case of a grant of a petition made by operation of law, the Commission loses jurisdiction over the petition and all subsequent consequences of that grant. The cases cited by Core simply deal with questions of appealing agency decisions to Article III courts, and have nothing to do with Qwest's reconsideration rights under Section 405.

IV. CONCLUSION

Core's claim that there is "nothing" for the Commission to reconsider in this proceeding is flatly wrong. Section 10(c) does not divest the Commission of its ordinary power to reconsider a prior action when there is sufficient reason to do so, nor does it grant immutable "statutory" rights to a petitioner such as Core in the event that the Commission fails to take sufficient action within its stated time limit.

For the foregoing reasons, Qwest respectfully requests that the Commission consider the merits of Core's position that its petition has been granted as a matter of law pursuant to Section 10(c). If such action has indeed taken place, Qwest requests that this action be reconsidered and that the Core petition be denied on the basis of the logic in the *Order* itself. This denial would be effective on the effective date of the reconsideration order.

¹⁷ *Id.*

Respectfully submitted,

QWEST CORPORATION

By: Michael B. Adams, Jr.
Andrew D. Crain
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6652

Its Attorneys

December 6, 2004

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **RESPONSE OF QWEST CORPORATION** to be 1) filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 03-171, 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpweb.com and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

December 6, 2004

John Ingle
Nandan M. Joshi
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Richard M. Rindler.....Pac-West
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Alan Buzacott
MCI
1133 19th Street, N.W.
Washington, DC 20036

Brad E. Mutschelknaus.....Xspedius
John J. Heitmann
Kelley Drye & Warren LLP
Suite 500
1200 19th Street, N.W.
Washington, DC 20036

Stephen L. Earnest
Richard M. Sbaratta
BellSouth Corporation
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

Patrick W. Pearlman
West Virginia Public Service
Commission
Seventh Floor, Union Building
723 Kanawha Boulevard East
Charleston, WV 25301

Jim Lamoureux
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
4th Floor
1401 I Street, N.W.
Washington, DC 20005

Gary L. Field.....Telnet Worldwide
Loomis, Ewert, Parsley, Davis
& Gotting, PC
Suite 1000
232 S. Capitol Avenue
Lansing, MI 48933-1525

John M. Goodman
Verizon telephone companies
1515 North Courthouse Road
Arlington, VA 22201

Deborah J. Israel.....Core
Michael B. Hazzard
Louis J. Rouleau
Womble Carlyle Sandridge
& Rice, PLLC
7th Floor
1401 I Street, N.W.
Washington, DC 20005

Chris Van De Verg
Core Communications, Inc.
Suite 302
209 West Street
Annapolis, MD 21401

Karen Brinkmann.....ITTA
Latham & Watkins
Suite 1000
555 11th Street, N.W.
Washington, DC 20004

Frank Simone
AT&T Corp.
Suite 1000
1120 20th Street, N.W.
Washington, DC 20036

James W. Olson
United States Telecom Association
Suite 600
1401 H Street, N.W.
Washington, DC 20005

John T. Nakahata.....Level 3
Harris, Wiltshire & Grannis
Suite 1200
1200 18th Street, N.W.
Washington, DC 20036