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EX PARTE

February 14, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Communications International Inc. for  
Forbearance from Enforcement of the Commission's Dominant Carrier  
Rules As They Apply After Section 272 Sunset Pursuant To 47 U.S.C.  
§ 160, WC Docket No. 05-333*

Dear Ms. Dortch:

On February 6, 2007, oral argument was held before the United States Court of Appeals for the District of Columbia Circuit in the case of *Qwest v. FCC*, related to Qwest's petition for forbearance in the Omaha MSA.<sup>1</sup> Qwest argued in that case that the failure of the Commission to take legally binding and meaningful action on the forbearance petition within the 12 or 15 month deadline specified in Section 10(c) of the Act resulted in the forbearance petition being "deemed granted" as a matter of law, even if the Commission had taken a vote on the item and released a press notice announcing that fact. Qwest's position on this issue is fully explicated in its appellate brief in that case, which is attached hereto.

Please associate this submission with the pending Qwest forbearance docket captioned above.

Respectfully submitted,

/s/ Melissa E. Newman

Attachment

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<sup>1</sup> *Qwest Corporation v. FCC*, No. 05-1450, petition for review filed December 12, 2005 (D.C. Cir.), argued February 6, 2007.

Ms. Marlene H. Dortch  
February 14, 2007  
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In the United States Court of Appeals  
for the District of Columbia Circuit

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**No. 05-1450 *et al.***

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**QWEST CORPORATION,**  
*Petitioner,*

v.

**FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,**  
*Respondents.*

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**ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION**

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**BRIEF FOR PETITIONER QWEST CORPORATION**

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August 7, 2006  
November 20, 2006 (Final Version)

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Counsel of record for Qwest Corporation hereby certifies the following information to be true and correct, upon information and belief:

(1) *Parties and Amici.* The following parties participated in the proceedings below, the Federal Communications Commission's WC Docket No. 04-223:

Association for Local Telecommunications Services  
AT&T Corp.  
BellSouth Corporation  
CompTel/ASCENT  
Cox Communications, Inc.  
Independent Telephone & Telecommunications Alliance  
Iowa Utilities Board  
McLeodUSA Telecommunications Services, Inc.  
MCI, Inc.  
Nebraska Public Service Commission  
Qwest Corporation  
SBC Communications Inc.  
Sprint Corporation  
Time Warner Telecom  
United States Telecom Association  
Verizon Telephone Companies

In addition, the Federal Communications Commission and the United States of America are respondents before this Court.

(2) *Disclosures pursuant to D.C. Cir. Rule 26.1.* Pursuant to D.C. Cir. Rule 26.1, Qwest Corporation ("QC") discloses that it is a local exchange carrier that provides local exchange telecommunications, exchange access, information access, data, wireless (via resale) and intraLATA long distance services pursuant to tariff and contract within Qwest Corporation's 14-

state incumbent local exchange region. U S WEST, Inc. was formerly the parent and sole shareholder of U S WEST Communications, Inc. U S WEST, Inc. merged with and into Qwest Communications International Inc. (or “Qwest”) on June 30, 2000. On July 6, 2000, U S WEST Communications, Inc. was renamed Qwest Corporation.

QC is owned by Qwest Communications International Inc. Qwest is a publicly held corporation that has no parent company. Qwest, through its operating subsidiaries, provides a variety of broadband Internet-based data, voice, and image communications for businesses and consumers. Legg Mason Capital Management, Inc. (a/k/a Investment Adviser Subsidiaries of Legg Mason, Inc.), a wholly owned subsidiary of Legg Mason, Inc., a publicly traded company, owns more than 10% of the stock of Qwest. No other publicly held company owns more than 10% of the stock of Qwest.

(3) ***Rulings Under Review:*** The order under review is *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, *Memorandum Opinion and Order*, 20 F.C.C.R. 19415 (2005) (JA0051).

(4) ***Related Cases:*** The decision under review has not previously been before this Court. There are no related cases beyond those consolidated for review.

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## GLOSSARY

FCC	Federal Communications Commission
MSA	Metropolitan Statistical Area
<i>Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, 20 F.C.C.R. 19415 (2005) (JA0051)</i>
Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) (filed June 21, 2004) (JA0125)
Qwest	Qwest Corporation

In the United States Court of Appeals  
for the District of Columbia Circuit

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**No. 05-1450 *et al.***

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**QWEST CORPORATION,**  
*Petitioner,*

*v.*

**FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,**  
*Respondents.*

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**ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION**

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**BRIEF FOR PETITIONER QWEST CORPORATION**

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### **JURISDICTIONAL STATEMENT**

The Federal Communications Commission (“FCC”) had authority pursuant to 47 U.S.C. § 160(c) to grant or deny Qwest’s Petition for Forbearance (“Petition”) (JA0125) through September 16, 2005. The statute provides that if the FCC did not deny the Petition by that date, it would be deemed granted by operation of law. The FCC took no action to effectuate a grant or denial of the Petition within the statutory period. For the reasons stated in Section I, the Petition was deemed granted by 47 U.S.C. § 160(c) when September 16, 2005 passed with no legally effective denial of the Petition; as a result, the FCC no longer had delegated authority. Nevertheless, long after the deadline the FCC released an *Order* on December 2, 2005 (JA0051) that purported to deny the Petition in part, backdated to September 16.

Qwest timely filed its petition for review of the *Order* on December 12, 2005 (JA0112). This Court has jurisdiction to entertain the petition for review pursuant to 47 U.S.C. § 402(a), 5 U.S.C. § 702, 28 U.S.C. § 2341 *et seq.*, and FRAP 15. Venue is proper in this Circuit pursuant to 28 U.S.C. § 2342.

## STATUTES AND REGULATIONS

The statutory provision that is central to this case is Section 10 of the Communications Act, 47 U.S.C. § 160, which provides, in relevant part:

160. Competition in provision of telecommunications service.

(a) Regulatory flexibility. Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

\* \* \*

(c) Petition for forbearance. Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

\* \* \* \* \*

Other relevant statutory provisions and regulations are set forth in the Addendum.

## ISSUE PRESENTED FOR REVIEW

Congress established in 47 U.S.C. § 160(c) a mandatory deadline for the FCC to deny a petition for forbearance, after which the petition shall be deemed granted absent a timely FCC denial. As of the statutory deadline, the FCC here had merely voted to adopt an order partially granting Qwest's petition for forbearance; it provided virtually no details of how it had ruled and no indication when the decision would be effective; it took no steps to give actual legal effect to its decision. Months later, the FCC first revealed the terms of its decision, as well as its intention that the decision become effective as of the long-past statutory deadline.

Thus, the only question before the Court is whether the taking of a mere vote on the deadline, without more, constitutes the legally effective denial intended by Congress. If not, the FCC lost its delegated authority and the *Order* must be vacated.

## STATEMENT OF THE FACTS

### A. Overview of the Case

On June 21, 2004, Qwest filed a “petition for forbearance”<sup>1</sup> with the FCC pursuant to Section 10(c) of the Communications Act, 47 U.S.C. § 160(c), seeking relief from certain regulations and statutory provisions concerning its telephone operations in the Omaha, Nebraska market. *See* Petition (JA0125). In Section 10(c), Congress gave the FCC one year in which to grant or deny the petition, a period that could be extended by no more than 90 days. The FCC timely granted itself a 90-day extension, making September 16, 2005 the last day on which the FCC had authority to grant or deny the Petition.

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<sup>1</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) (filed June 21, 2004) (JA0112) (“Petition”).

On that extended deadline, September 16, 2005, the FCC announced in a News Release (JA0652) that it had adopted an order granting the Qwest Petition in part. The News Release, which stated that it was only an “unofficial announcement,” did not indicate the extent to which the Petition was denied, and it mentioned a six-month transition period without providing any information about what rules would govern during that transition or when it would begin running.. It indicated that “official action” would not occur until the release of the text of the decision, giving no notice that the vote was intended to be effective on the statutory deadline, which expired that day.

The “official action” promised by the News Release did not occur until 77 days later, on December 2, 2005, when the FCC released the *Order*, which bore an effective date backdated to September 16. ¶ 112 & n.282 (JA0107). The *Order* provided the first clear indication of what parts of the Petition the Commission had voted to deny. It also revealed for the first time what the provisions of the transition plan were and that the six-month transition period had started on the *Order*’s designated effective date more than two months earlier.

## **B. The Statutory Scheme**

In 1996, Congress enacted the Telecommunications Act, Pub. L. 104-104, 108 Stat. 56 (1996), which was intended to be “a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .” H.R. Conf. Rep. No. 104-230, at 1 (1996). One of the many deregulatory provisions of the Telecommunications Act was new Section 10 of the Communications Act, 47 U.S.C. § 160. Entitled “Competition in Provision of Telecommunications Services,” Section

10 had two key provisions to eliminate regulation rendered unnecessary and counterproductive by the growth of competition:

- Section 10(a) delegated authority to the FCC to “forbear from applying any regulation or any provision of [the Communications Act] to a telecommunications carrier or telecommunications service, . . . in any or some of its . . . geographic markets” when it finds it no longer necessary to protect consumers.
- Section 10(c) delegated authority to the FCC to act on petitions by telecommunications carrier to exercise its forbearance authority within one year of filing (plus a single 90-day extension), but also provided 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” by the deadline.

Section 10(c) also requires the FCC to provide written explanations for its decisions.

### **C. The Petition for Forbearance**

Qwest filed its Petition on June 21, 2004 seeking forbearance from certain regulations applicable to Qwest as a dominant incumbent local exchange carrier in the Omaha, Nebraska Metropolitan Statistical Area (“MSA”). In Omaha, Qwest has in recent years seen its market share decline dramatically as competition from the local cable operator and others has increased. At this point, Qwest is no longer the predominant provider of telephone service in the MSA, yet it continues to be regulated as though it is the holder of a monopoly. Because Section 10(c) was specifically designed to allow carriers to seek relief from traditional forms of regulation when they are no longer needed due to competition, Qwest sought forbearance from the requirements of certain sections of the Communications Act and FCC rules, specifically asking the FCC:

- To forbear, in the Omaha MSA, from applying “the requirements of [47 U.S.C.] Section 251(c) and the requirements that it provide nondiscriminatory access to unbundled network elements pursuant to [47 U.S.C.] Section 271(c)(2)(B)” (Petition at 22, JA0153)

- To “forbear from regulating it as a dominant carrier<sup>[2]</sup> in the Omaha MSA market for telecommunications services. In particular, Qwest seeks a declaration that it is not dominant in the provision of telecommunications services in the Omaha MSA and, consequently, for forbearance from dominant carrier regulation in the Omaha MSA pursuant to Section 10(c) of the 1996 Act. This forbearance request includes the following Commission regulations: (1) the requirements and procedures under [47 U.S.C.] Section 214 that apply to dominant carriers, (2) [47 C.F.R.] Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days notice with cost support; and (3) [47 C.F.R.] Sections 61.41-61.49, and [61.]65, which impose price cap and rate of return regulation on dominant carriers.” (Petition at 31-32 (footnotes omitted), JA0162-63);
- To forbear in that MSA from “regulation as an [incumbent local exchange carrier] pursuant to [47 U.S.C.] Section 251(h)(l).” (Petition at 38, JA0169).

Relief was sought from these requirements throughout the portion of the Omaha MSA in which Qwest provides local exchange telephone service. (Qwest Reply Comments at 17, JA0414). With respect to each requirement from which forbearance was sought, Qwest demonstrated that the three requirements of Section 10(a) of the Communications Act had been met.

A substantial record was developed in response to Qwest’s Petition, including submissions by Qwest and others in response to FCC staff inquiries.<sup>3</sup> Qwest provided extensive evidence regarding competition in the Omaha MSA, including from competitive LECs, cable operators, wireless carriers, and providers of Voice over Internet Protocol (“VoIP”) services, each providing service to a significant number of subscribers via their own network facilities in direct competition with Qwest. (Petition at 8-14, JA0139-45.) Qwest demonstrated that, it no longer holds a dominant market share within the Omaha MSA. (Petition at 15-18, JA0146-49). It filed

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<sup>2</sup> A dominant carrier is defined by the FCC as a “carrier found by the Commission to have market power (*i.e.*, power to control prices).” 47 C.F.R. § 61.3(q).

<sup>3</sup> A protective order was entered to allow consideration of competitively sensitive information submitted under seal by the Commission and those agreeing to its terms. *Petition of Qwest Corporation for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket 04-233, Order, 19 F.C.C.R. 11377 (WCB 2004) (JA0229), *erratum* (released July 7, 2004) (correcting docket number to read 04-223).

extensive data regarding market share, an economic analysis by Strategic Policy Research concerning the effect of competition on Qwest's financial stability, results of a study by TNS Telecoms concerning the dramatic downward trend in Qwest's market share, and other data.

**D. The Extension Order**

Long before the expiration of the one-year statutory deadline for FCC action on the Petition, the FCC determined that it needed more time. Accordingly, on February 11, 2005, the FCC took advantage of the single 90-day extension permitted by Section 10(c) and issued an order extending the deadline from June 21, 2005 to September 16, 2005. *Qwest Corp.*, 20 F.C.C.R. 2531 (WCB 2005) (*Extension Order*) (JA0439). The *Extension Order* recognized the statutory limit on the FCC's delegated authority, if the FCC failed to act: "the date on which the petition seeking forbearance filed by [Qwest] shall be deemed granted, in the absence of a Commission denial of the petition for failure to meet the statutory standards for forbearance." *Id.* at ¶ 4 (JA0440).

**E. The News Release**

On the last day of the extended forbearance period, the FCC issued a one-page News Release reporting that the FCC had, on that date, adopted an order that "grants in part a petition for forbearance filed by Qwest" and that "[b]ecause of the particular market characteristics of the Omaha MSA, including the substantial infrastructure investment made by Cox Communications, Inc. in its competitive network, the Commission has determined to relieve Qwest of certain legacy monopoly regulations." News Release, *FCC Grants Qwest Forbearance Relief in Omaha MSA* (Sept. 16, 2005) (JA0652) ("News Release").

The News Release never stated which requests were denied. In fact, it never explicitly gives notice of any denials, leaving that to be inferred from the fact that the FCC voted to grant the Petition in part. It did not state the disposition of each of the requests for forbearance from

specific rules or statutory requirements, or the geographic areas where particular types of relief was granted or denied. It further stated that the relief granted with respect to unbundled network elements would be subject to a six-month transition period, but did not describe what the transition would entail or when the period would start. Finally, the News Release carried a disclaimer of any legal effect, stating that the FCC’s “official action” would occur upon the release of the full text of the *Order*.

**F. The *Order***

On December 2, 2005, 77 days after the terminal date for action, the FCC released its *Order*. In it, the FCC gave notice for the first time of its specific rulings, some of which were buried in footnotes, including the geographic areas where forbearance was granted.<sup>4</sup> Recognizing the statutory requirement to take effective action by the statutory deadline, the FCC back-dated the effectiveness of its decision to September 16, stating:

Consistent with Section 10 of the Act and our rules, the Commission’s forbearance decision shall [sic] be effective on Friday, September 16, 2005.<sup>282/</sup>

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<sup>282/</sup> See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

*Order* at ¶ 112 & n.282 (JA0107).<sup>5</sup> Thus, the *Order* attempted to change the statutory rights and obligations of affected parties 77 days before the rulings were ever disclosed.

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<sup>4</sup> See *Order* at ¶ 59 n.155 (“The 9 wire centers in which we grant Qwest forbearance from the application of section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA are: Omaha Douglas, Omaha Izard Street, Omaha 90th Street, Omaha Fort Street, Omaha Fowler Street, Omaha O Street, Omaha 78th Street, Omaha 135th Street, and Omaha 156th Street.”) (JA0080).

<sup>5</sup> In like manner, the ordering clause states that, “pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. § 160, and section 1.103(a) of the Commission’s rules, 47 C.F.R. (continued on next page)

Qwest timely filed its petition for review on December 12, 2005.

### SUMMARY OF ARGUMENT

Pursuant to the deregulatory objective of the 1996 Telecommunications Act, Section 10(c) gives telecommunications carriers the right to file a petition with the FCC for forbearance from FCC regulations and provisions of the Communications Act. If such a petition is filed, the FCC is forced to examine whether the regulation at issue is necessary within a set period. The statute further provides that a forbearance petition is “deemed granted” if within one year, which can be extended only once by 90 days, the petition is not denied. Once the petition is deemed granted, Congress has spoken and the FCC loses delegated authority to act on the petition.

The *Order* recognizes that the statutory deadline is mandatory, not permissive, and that if the FCC fails to take legally effective action before the deadline, it is granted by operation of law and the FCC loses delegated authority to act on the petition. Thus, the only question before the Court is whether the taking of a mere vote on the deadline constitutes the legally effective denial intended by Congress.

Given the deregulatory purpose of the statute and clear desire to put the FCC on a real timetable, Congress meant the word “denial” to have its plain meaning: actually refusing forbearance in a legally binding manner. This requires that the FCC take affirmative action, give the public notice of the action, and put its denial into legal effect by the deadline, even if that is the date on which the FCC votes.

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(footnote continued)

§ 1.103(a), the Commission’s forbearance decision SHALL [sic] BE EFFECTIVE on September 16, 2005.” *Order* at ¶ 114 (JA0108).

In the instant case, the FCC had merely voted on the Petition as of the statutory deadline, but the action taken and when it would become effective was officially kept secret, and even the unofficial News Release did not state what specific parts of the Petition were denied or when the ruling would go into effect. Under the Commission's own rules, the APA, and case law, a mere vote does not constitute legally effective and binding action. Under FCC rules, the decision would not go into effect until released, unless the FCC timely announced an earlier effective date and explained how it had ruled. There was no such announcement. As a result of the FCC's failure to take any steps before the deadline to give its vote a binding legal effect, there was no denial, and the Petition was granted by operation of law.

The grant by operation of law left no role for the FCC, as it had no delegated authority to deny the Petition after it had been granted by Congress. Nevertheless, 77 days after the deadline for FCC action the agency released its *Order*, which purported to grant the Petition in part and deny it in part. The December 2 *Order* provided the first notice to the public or the parties of what, specifically, had been denied and granted; which specific geographic areas in the market received, or were denied, particular types of relief; and the details of the six-month transition plan. The *Order* also stated for the first time that the FCC intended its decision to become effective on the September 16 deadline, and that the six-month transition period had already nearly half expired, having run for two and a half months without anyone knowing it.

In the *Order* the FCC attempted to satisfy Section 10(c) by backdating its effective date to the statutory deadline. This ploy guts the purpose of the statute — to put real FCC action “on the clock.” If the FCC could merely vote on a petition on the deadline and issue a notice of the rulings or the *Order* itself whenever it chose while backdating its effectiveness, the statutory deadline would be purposeless. Real action on petitions would be completely at the discretion of

the FCC — the exact result Congress tried to avoid. Moreover, because a mere vote (which was all that happened as of the deadline) does not constitute a legally effective denial, the FCC lost its authority to take the actions described in the *Order*. Thus, by the time the FCC backdated the *Order*, it was simply too late.

In a recent Section 10(c) case involving Core Communications, the Court found the petitioner's failure to exhaust fatal because the issue it had raised required initial FCC consideration. The Court observed that the question was not plainly resolved by the statute, and thus the Court owed *Chevron* deference to the agency's reasonable interpretation, which was unavailable due to the failure to exhaust. In contrast, the issue here is whether the statute required the FCC to actually deny, in a legally effective way, the forbearance petition within the deadline set by Congress, and whether the FCC did so. This is settled by the plain words and objective of the statute, obviating any need for *Chevron* deference. Moreover, the FCC specifically addressed the issue here in the *Order* and has recognized that a legally effective denial is required by the deadline.

Finally it would have been a futile act to have sought reconsideration here because the FCC has engaged in a pattern of stretching or exceeding the limits imposed by Section 10(c), as this Court has recognized in case after case. Moreover, the *Order* represents the FCC's considered opinion on what the statute requires, and there would have been no purpose served by petitioning for reconsideration.

## **STANDING**

The *Order* purports to deny Qwest's Petition in part. Thus, it adversely affects Qwest by continuing to subject it to requirements of the Communications Act and FCC rules that cause it injury-in-fact, and its standing is readily apparent.

## ARGUMENT

### **I. BECAUSE THE FCC FAILED TO TAKE LEGALLY EFFECTIVE ACTION TO DENY THE QWEST PETITION BEFORE THE STATUTORY DEADLINE, THE PETITION WAS GRANTED BY OPERATION OF LAW, DEPRIVING THE FCC OF DELEGATED AUTHORITY**

Section 10 of the Communications Act, 47 U.S.C. § 160, allows any telecommunications carrier to file a petition with the FCC to forbear from applying “any regulation or any provision of this Act” to that carrier or any service offered by that carrier. The statute allows only a limited time for the FCC to act on such a petition. Failure to do so ends the FCC’s authority, because the statute provides for an immediate Congressional grant by operation of the statute in the absence of an FCC denial by the deadline. By deeming a forbearance petition granted automatically if the FCC does not act, Congress carried out the Telecommunications Act’s purpose of “reduc[ing] regulation in order to . . . encourage the rapid deployment of new telecommunication technologies,” Telecommunications Act, Pub. L. 104-104, preamble, 110 Stat. 56 (1996); *see also* H.R. Conf. Rep. No. 104-230, at 1 (Telecommunications Act establishes a “pro-competitive and de-regulatory policy framework”).

The FCC has chafed under this 15-month deregulatory mandate. As this Court is well aware, the agency has repeatedly tried to avoid its impact. *See AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (“Congress has established § 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.”); *Verizon Telephone Companies v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (FCC denied forbearance “without ever considering” the statutory requirements); *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (Court found that the FCC had violated the plain language of the statute in several respects, that the FCC’s “reasoning, if extended, could gut section 10,” and that the approach followed by the FCC “runs counter to

the Telecommunications Act's purpose — ‘reduc[ing] regulation in order to . . . encourage the rapid deployment of new telecommunication technologies,”) (citation omitted).

Most recently, in *In re Core Communications, Inc.*, 455 F.3d 267, 2006 U.S. App. LEXIS 16444, \*24 (D.C. Cir. 2006), *rehearing denied*, 2006 U.S. App. LEXIS 25686 (Oct. 13, 2006), the Court, while not reaching the merits, roundly criticized the FCC's delaying tactics when acting on forbearance petitions:

Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.

The instant case involves an order that took more than seven times as long to release as the “thirteenth hour” order in *Core* — and, unlike in *Core*, the FCC here did not even fully disclose what it had voted to do until the *Order* was released.

Again, the FCC has ignored the mandate of Section 10. The Petition was *not* “denied” by the FCC, as that term is commonly understood, within the statutory deadline. A vote to deny is not a denial without steps to give that vote legal effect, and the FCC did not legally effectuate a denial within the time allowed by Congress. Thus, the Petition was deemed granted by operation of law and the FCC lost delegated authority to act. Nevertheless, 77 days later the FCC released its *Order* purporting to dispose of the Petition. Recognizing the limit on its delegated authority once the deadline had passed without legally effective action, the FCC backdated the effective date to the statutory deadline. Such action guts the statute's purpose, tramples on the rights of the parties to forbearance proceedings, and, most importantly, occurred after the FCC lost all delegated authority to act on the Petition. The *Order* should be vacated as *ultra vires*.

### A. Standard of Review

The standard of review in this case is whether the FCC’s decision is “otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C). The interpretation of statutes involving agency authority is governed by the two-step analysis set forth in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). Only the first step of the *Chevron* analysis is relevant here: The Court must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the *court* . . . must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43 (emphasis added).

The *Court* makes the determination whether Congress has spoken clearly to the issue, “giving no deference to the agency’s interpretation.” *AFL-CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (citing *SBC Communications Inc. v. FCC*, 138 F.3d 410, 418-19 (D.C. Cir. 1998)); accord *Rettig v. PBGC*, 744 F.2d 133, 141 (D.C. Cir. 1984) (“Thus, in ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency’s parsing of statutory language or its interpretation of legislative history.”).

Here, the Congress has spoken in no uncertain terms, and has not “explicitly left a gap for the agency to fill,” *Chevron*, 467 U.S. at 843, and thus there is no need to proceed to the deferential second step of the *Chevron* analysis. See *Railway Labor Executives’ Association v. National Mediation Board*, 29 F.3d 655, 670-71 (D.C. Cir. 1994) (*en banc*).<sup>6</sup>

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<sup>6</sup> Deference is “due only when the agency acts pursuant to delegated authority.” *NTEU v. Chertoff*, No. 05-5436, 2006 U.S. App. LEXIS 16083, \*42 (D.C. Cir. June 27, 2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Thus, where the issue is whether the agency has delegated authority, “*Chevron* requires a reviewing court to ask . . . whether an agency’s *specific course of action* is permitted by statute,” *NTEU v. Chertoff*, at \*42 (emphasis in original; citation and internal quotation marks omitted), and that is an issue for the Court to de-

(continued on next page)

**B. There was No Legally Effective Denial by the Statutory Deadline;  
Thus, the Petition Was Deemed Granted by Operation of Law**

The statute requires the FCC to deny a petition, if it intends to do so, by a date certain. There are two essential elements of an FCC denial: First, the FCC must vote to deny. The equally important second element is that the FCC must give that vote legal effect, causing the actual denial to occur as a matter of law. If true denial has not occurred by the deadline, Congress has determined that thereafter the FCC's role is over and the petition is deemed granted. That is what occurred here.

**1. The Plain Meaning of the Statute Requires a Real, Legally Effective Denial No Later Than the Deadline**

Section 10(c) gives the FCC delegated authority to grant or deny a petition for forbearance within a specified time. The consequence of the FCC's failure to meet the deadline set by the statute is that the petition is deemed granted by operation of law. This time limit is mandatory, not merely a directory guideline, "in the sense that the statute prescribes the effect of the [agency's] failure to act, *i.e.*, the application is deemed approved." *Tri-State Bancorporation v. Board of Governors*, 524 F.2d 562, 565-66 (7th Cir. 1975).<sup>7</sup> When an agency purports to take action *after* a mandatory deadline, and the application has already been granted by operation of law, the agency's action must be vacated, regardless of the merits of the decision, because it has acted in excess of its delegated authority. *North Lawndale Economic Development Corp. v. Board of Governors*, 553 F.2d 23, 27 & n.8 (7th Cir. 1977).

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(footnote continued)

side without deference to the agency. *See Railway Labor Executives*, 29 F.3d at 670-71; *NRDC v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993).

<sup>7</sup> *See Gottlieb v. Peña*, 41 F.3d 730, 733 (D.C. Cir. 1994) (a time limit is merely "directory," rather than mandatory, when the statute requires an agency to act within a specified time, but does not set the consequences for the agency's failure to act within that time); *see also Brock v. Pierce County*, 476 U.S. 253, 262-66 (1986); *Fort Worth National Corp. v. FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972).

It is undisputed that any FCC denial of a petition for forbearance must be legally effective no later than the mandatory statutory deadline to avoid a grant by operation of law. The FCC indicates in the *Order* that to be “[c]onsistent with Section 10,” it needed to make its decision effective as of September 16 to prevent the Petition from being deemed “granted as of the forbearance deadline.”<sup>8</sup> Thus, the only statutory interpretation issue remaining is what the FCC must do by the deadline to “deny” a petition, given that the agency “loses its power to act after the statutory deadline.”<sup>9</sup>

The determination of what Congress meant “begins with a plain language analysis of the statutory text. That is, we assume that the legislative purpose is expressed by the ordinary meaning of the words used.” *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (internal quotation marks and citation omitted). The plain and ordinary meaning of “deny” a petition is “to turn down or give a negative answer” or “to refuse to grant.”<sup>10</sup> What this means in the context of Section 10(c) is clear when the term is read together with the other possible outcomes described therein, consistent with the canon of statutory construction *noscitur sociis*, *i.e.*, “a word is known by the company it keeps.” *Id.* The word “deny” occurs as one of three alternative dispositions of a petition: (1) an FCC “grant,” (2) an FCC “de-

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<sup>8</sup> *Order* at ¶ 112 & n.282; *accord Petitions for Forbearance of Verizon Telephone Companies, et al.*, WC Docket No. 01-338, *Memorandum Opinion and Order*, 19 F.C.C.R. 21496, 21513 & n.105 (2004); *Petition for Forbearance of Core Communications, Inc.*, WC Docket 03-71, *Order*, 19 F.C.C.R. 20179, 20189 & n.74 (2004), *aff’d sub nom. In re Core Communications, Inc.*, No. 04-1368, 2006 U.S. App. LEXIS 16444 (D.C. Cir. June 30, 2006).

<sup>9</sup> *2000 Biennial Review*, GC Docket 02-390, *Report*, 18 F.C.C.R. 4726, 4740 n.70 (2002); *cf.* News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264436A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf)> (March 20, 2006) (announcing that “pursuant to section 10(c), the relief requested in Verizon’s petition was deemed granted by operation of law”).

<sup>10</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 603 (Merriam-Webster 1965) (definitions 3(a), (b)).

nial,” and (3) a “deemed grant” by operation of law. What these three dispositions have in common is that they have direct effects on the law. A grant, either by the FCC or by operation of law, means that the FCC must “cease” or “desist from” the application of the subject laws to the petitioning carrier.<sup>11</sup> Consequently, a denial of forbearance must be a *refusal* to cease and desist from applying those laws.

That refusal must occur before the deadline, and it must be explicit and legally effective, because there can be no denial by implication or inaction. A denial must be an affirmative act, refusing to grant the petition “for failure to meet the requirements for forbearance under subsection (a) of this section within [the deadline],” 47 U.S.C. § 160(c), with the legal effect of continuing to apply the laws at issue before and after the deadline, or else the laws will cease to apply at 12:01 a.m. after passage of the deadline, when a deemed grant occurs by operation of law.

Whether the disposition is an FCC grant, an FCC denial, or a deemed grant by operation of law, Congress intended that disposition would settle the applicability *vel non* of the laws at issue in the petition no later than the deadline. The deemed grant alternative makes clear that Congress did not intend to leave the issues open after the deadline. Given that any disposition must be one that settles which laws apply, any FCC denial must have a legal effect and make that legal effect known to those affected no later than the deadline.

In the absence of a clear, specific, and affirmative grant or denial meeting these criteria no later than the deadline, the petition is granted by operation of law. If the FCC is not yet finished effectuating a decision when the deadline passes, it cannot finish the job later, because its role comes to an end with passage of the deadline. Any other reading would “thwart the obvious purpose of the statute,” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (internal

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<sup>11</sup> *AT&T Inc. v. FCC*, 2006 U.S. App. LEXIS 16068 at \*8

quotations omitted). Congress could not possibly have meant to allow the FCC to avoid a deemed grant and effectuate a denial at some indeterminate time after the deadline is past. This would gut the statute, nullifying the mandatory deadline and the grant by operation of law that Congress said would occur if the FCC had not denied the petition by that deadline. There is no indication that “Congress did not mean what it appears to have said.” *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

The fact that Congress imposed a mandatory deadline and followed it with an automatic grant as the consequence for the FCC missing the deadline indicates that Congress was determined not to allow forbearance determinations to be characterized by prolonged delay. As this Court recently held, the “very purpose” of Section 10 “is to force the Commission to *act* within the statutory deadline.” *AT&T Inc.*, 452 F.3d at 836 (emphasis added). The FCC must do *something* before the deadline passes to give its decision to grant or deny official standing and binding legal effect, even if it does not release the full explanation of its decision until later. Certainly, parties cannot begin to exercise private rights due to the FCC’s grant or denial of a forbearance petition until the FCC has given notice of both the terms of its decision and the date on which parties can rely on those terms.

## **2. There Was No Legally Effective Denial by the Deadline**

In light of what Congress intended by “deny,” the FCC had not denied the Petition by the statutory deadline. As of September 16, 2005, the FCC had taken no steps to actually deny the Petition beyond taking a mere vote to grant it in part. It kept secret what relief had been granted or denied, as well as the date when its decision would be legally effective.

When the deadline expired, the only indication from the Commission of what it had done was its release of the explicitly “unofficial” News Release, and it is well established that “[a]

news release and its release date have no legal significance whatsoever.” *Addition of New Section 1.103 to the Commission’s Rules*, Gen. Docket 80-488, *Memorandum Opinion and Order*, 85 F.C.C.2d 618, 621 (1981). Even the News Release told very little. It did not say which specific requests for forbearance were granted or denied, nor did it say the Commission denied any part of the petition for failure to satisfy the statutory criteria. It said that Qwest had been granted limited relief from having to supply unbundled network elements in certain areas, but it did not identify the areas, and indicated this relief was subject to some sort of six-month transition plan, but did disclose the plan’s terms nor tell anyone that the clock had already started. Thanks to the unofficial news release, the fact that the FCC had voted was no secret. Officially and legally, however, what the FCC had voted to do, and when it would be legally effective, was completely shrouded in secrecy.

Under the FCC’s own rules, the mere vote was not enough to constitute a legally effective denial. The reason for the FCC’s refusal to give legal effect to mere votes is that any vote is only tentative until it has been finalized.<sup>12</sup> Accordingly, the FCC has held that an action voted by the agency becomes legally effective only when parties can “begin to exercise private rights” or “comply with obligations imposed” by that action — and the FCC uses the term “effective date” to describe that time. *Addition of New Section 1.103*, 85 F.C.C.2d at 619.

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<sup>12</sup> *Addition of New Section 1.103*, 85 F.C.C.2d at 625-26 (“Oftentimes, an Order adopted at a Commission meeting becomes subject to editorial changes after its adoption but prior to its release. In extreme cases, the Commission might adopt an Order at a meeting, send back the Order to the staff for editorial changes prior to release, only to have the Order so substantially changed that Commission consideration becomes necessary again. In one actual case, . . . [w]hen the text of [the] Order was returned to the staff for editorial changes prior to release, it soon became apparent that the matter was wrongly decided. The Order was never released. Instead, the staff redrafted the Order, recommended a different conclusion, and returned it to the Commission for fresh consideration. The Commission adopted the new conclusion . . . and the Order was released thereafter.”). Given that the *Order* was released months after the vote, there must have been extensive “editorial revisions.”

The courts have specifically held that more than a mere vote is required to give legal effect to an agency decision. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Supreme Court considered whether the Federal Power Commission had “issued” a certificate of public convenience and necessity to a particular company by a certain date. In words that are equally applicable here, it held that “surely a certificate cannot be said to have issued for purposes of defining rights . . . if its substance is merely in the bosom of the Commission. Knowledge of the substance must to some extent be made manifest.” *Id.* at 676.

Relying on *Skelly Oil*, this Court held in *Horsehead Resource Development Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997), that an official’s “mere[] signing” of a decision did not constitute “promulgation” of that decision for purposes of meeting a court-ordered deadline. The Court there also relied on Judge Leventhal’s concurring opinion in *Industrial Union Department, AFL-CIO v. Bingham*, 370 F.2d 965, 969 (D.C. Cir. 1977), for the proposition that “signing [a] regulation, without communication of its substance to interested members of the public,” was of no legally effective significance. 130 F.3d at 1093. There is another reason why a mere vote cannot be legally effective: Without additional action to give it legal effect, a vote is only tentative, and the order that the agency votes to adopt remains only a draft, until the final version has been released. As this Court has recognized, “[i]n agencies as well as courts, votes are not final until decisions are final; and decisions do not become final until they are released . . . .” *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994).

Obviously, before affected parties can exercise rights or be bound by an FCC decision, they need to have notice of the terms of the FCC’s decision and they need to know when the FCC intends to give those terms legal effect. Thus, to give legal effect to any vote to grant or deny a petition, the FCC has to take further action — *no later than the statutory deadline* — to

inform those affected, in a legally binding way, of how and in what respects the laws are being forborne or will continue to apply. Without some legally effective notice of a grant or denial before the deadline, an FCC vote does not have any effect on the laws. As a result, the FCC's rules specify that the effective date of an FCC decision is generally the date of "public notice" — *i.e.*, the date when the full text of the decision is released. 47 C.F.R. §§ 1.103(a), 1.4(b)(2).

Section 1.103(a) allows the FCC to designate an earlier effective date than the public notice date, but, in adopting the rule, the Commission acknowledged the need to give those affected notice of such a designation, by "separate order" or otherwise.<sup>13</sup> As a result, agencies cannot bind parties to a proceeding without giving notice of what has been decided and when it is effective — they cannot establish "secret law."<sup>14</sup>

Thus, if the FCC was unable to issue the full text of the decision but wanted to make it effective as a matter of law prior to the deadline expiring, it had to (1) timely advise those affected of the designated effective date and (2) fully disclose how the FCC had ruled on all of the requests for forbearance, so that parties could rely on, and be bound by, its ruling. As of the Sep-

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<sup>13</sup> *New Section 1.103*, 85 F.C.C.2d at 620 n.2, 628 (examples 2, 4 following para. 24). The FCC also stated that what constitutes "public notice," and thus determines the effective date of its actions, is "legal notice, namely, the notice to the public that is required by the Administrative Procedure Act." *Id.* at 620; *see* 5 U.S.C. § 555(e) (requiring "[p]rompt notice . . . of the denial in whole or in part of a . . . petition"); *see also* 5 U.S.C. § 552(a)(2) (requiring that agency decisions be made public).

<sup>14</sup> *See Tax Analysts v. IRS*, 117 F.3d 607, 616-17 (D.C. Cir. 1997), *citing Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *see also Checkosky*, 23 F.3d at 482 (agencies are "forbid[den] . . . from relying on, using, or citing as precedent, opinions or interpretations that have not been made available to the public in accordance with agency rules.").

tember 16 statutory deadline, however, the FCC had done neither.<sup>15</sup> All it did was vote on a draft order and issue a cryptic, legally irrelevant News Release.

As a result, by operation of the FCC's own rules, September 16 could not be the "effective date" of the FCC's action.<sup>16</sup> There plainly was neither a grant nor a denial as of the statutory deadline because there was no disposition legally in effect. Once the deadline had passed without any legally effective denial of the Petition, the Congressional "deemed grant" of the Petition immediately became final and legally effective. The FCC's delegated authority ended on September 16, and with it the FCC's ability to act on the Petition.

### **3. The FCC's Backdated *Order* Cannot Satisfy the Statutory Requirement that any Denial Occur by the Deadline, Coming After the FCC Lost Its Delegated Authority to Deny the Petition**

On December 2 the FCC released the *Order*, which states that its "effective date" was September 16. This hardly satisfies the statutory requirement for a real action by the mandatory deadline. It also demonstrates that the FCC recognized that it had to do more than merely vote by the deadline.

The FCC cannot cure its lack of authority by simply backdating a decision released too late to meet the deadline. There was no effective grant or denial on September 16, and thereafter the FCC's authority lapsed. As the Court stated in *Core*, "relying on an informal press release

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<sup>15</sup> The FCC has, on other occasions, issued a brief order or public notice setting forth officially the terms of the decision that the Commission intended to be binding and stated that it voted to make its decision effective on the day of that notice, before the full text is ready for release. See, e.g., Public Notice, *Subject to Conditions, Commission Approves Transaction between General Motors Corporation, Hughes Electronics Corporation and the News Corporation Limited*, 18 F.C.C.R. 26512 (2003); Public Notice, *Subject to Conditions, Commission Approves Merger between America Online, Inc. and Time Warner, Inc.*, 16 F.C.C.R. 1289 (2001).

<sup>16</sup> See *Lopez v. FAA*, 318 F.3d 242, 246 (D.C. Cir. 2003) ("[A]n agency is bound to the standards by which it professes its action to be judged.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)).

and a backdating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.” *Core*, at \*25. The FCC can *never* exercise authority beyond the limits established by Congress. *Railway Labor Executives*, 29 F.3d at 670-71.

Moreover, the fact that the FCC backdated the Order’s purported “effective date” does not somehow actually make it effective *nunc pro tunc*. This is clear from what was first revealed in the *Order*: The nine specific rate centers where the FCC had voted to grant certain aspects of the Petition were never identified before December 2. There was no way the parties could have availed themselves of this ruling on September 16, or for the next 77 days. The details of the six month transition period — and the fact that it started on September 16 — were never revealed before December 2. Thus, the period had already run two and a half months by the time it was fully revealed. Again, the parties could not have acted consistent with a transition that they did not know was running.

Clearly, none of these previously unrevealed rulings were legally effective on September 16. Merely including magical “effective date” words in an order does not somehow give the order legal effect at some prior date when the order’s content and effectiveness were a closely held secret of the FCC. Otherwise, the FCC could wait as long as it wished — months, or even years — after its vote and then finally reveal both what it voted to do and that it was in effect all along. The FCC clearly cannot use its rules allowing the designation of an effective date earlier than the release date as a ploy to evade the express limits set by Congress on FCC authority. The FCC cannot ignore the deadline “whenever it finds the statutory deadline inconvenient.” *AT&T Inc.*, 452 F.3d at 836.

The FCC cannot roll back the clock by issuing a backdated order. The Petition was granted in its entirety by operation of law, and the *Order* must be vacated as exceeding the FCC's delegation of authority.<sup>17</sup>

## II. SECTION 405'S EXHAUSTION REQUIREMENT DOES NOT APPLY

In *Core*, the Court was faced with the FCC's disposition of a forbearance petition under Section 10(c), but found it lacked jurisdiction because Section 405(a) of the Communications Act, 47 U.S.C. § 405(a) required the petitioner to seek FCC reconsideration as a prerequisite to judicial review. *Core*, 2006 U.S. App. LEXIS 16444 at \*24. *Core* notwithstanding, Section 405's exhaustion requirement is not applicable here for several reasons.

First, the Court in *Core* needed the FCC's considered views because the issue there — whether the FCC must release the full text and explanation for a forbearance ruling by the statutory deadline — was not plainly answered by the statute. As a result, the statutory interpretation issue was governed by the deferential second step of *Chevron*, but *Core*'s failure to raise the issue before the FCC resulted in no official agency interpretation to which the Court could defer. Thus, the Court held, *Core*'s failure to seek reconsideration on this issue precluded judicial review under Section 405. *See Core*, 2006 U.S. App. LEXIS 16444 at \*24.

The issue in the present case is different from that in *Core*, however, and is governed by *Chevron* step one, because Congress spoke directly to it. The question here is whether the statute requires a denial that is real, legally effective, and binding before the deadline, or is satisfied by an act that is completely ineffectual — a mere vote, the substance of which is not even revealed

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<sup>17</sup> Section 10 does not on its face affect the FCC's delegated authority to conduct rulemaking proceedings to alter the regulatory structure applicable after a grant of forbearance, whether that grant occurred by operation of law or by action of the FCC.

informally, that has no actual legal effects within the deadline. On this question the statute has only one plain meaning consistent with its purpose, and “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43.

The FCC’s view is irrelevant. Moreover, a determination of whether this case is governed by the first or second step of *Chevron* is not within the FCC’s province. In *SBC Communications Inc. v. FCC*, 138 F.3d at 410, 418-19, the Court said that “we must determine on our own whether the statute is ambiguous without regard to the FCC’s reasoning.” Thus, a court owes “no deference to the agency’s interpretation” when the Court is determining whether Congress has spoken clearly to the issue. *AFL-CIO v. FEC*, 333 F.3d at 173. This is especially true, as here, where the issue is whether Congress has *expressly* granted or denied delegated authority to the agency. The *Court* must decide “whether an action exceeds an agency’s statutory authority” through “a firsthand *judicial* comparison of the claimed excessive action with the pertinent statutory authority.” *Steele v. FCC*, 770 F.2d 1192, 1194 (D.C. Cir. 1985) (emphasis added) (*quoting Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 354 (3d Cir.1976), *cert. denied*, 429 U.S. 1092 (1977)); *Railway Executives*, 29 F.3d at 671.

Second, unlike in *Core*, here the FCC *has* provided its official view on the statutory question before the Court. The *Order* specifically recognizes the FCC’s obligation to make any denial effective by the statutory deadline to be consistent with Section 10, or the Petition would be granted by operation of law. *See Order* at ¶ 112 n.282 (JA0107); *see also 2000 Biennial Review*, 18 F.C.C.R. at 4739 n.70 (stating that the agency loses the power to rule on a petition after passage of Section 10(c) mandatory deadline). Thus, the FCC availed itself of the opportunity to pass on the issue, and no petition for reconsideration was required.

Third, Section 405 is subject to exceptions including both patently *ultra vires* agency action and futility. *Washington Association for Television & Children v. FCC*, 712 F.2d 677, 681-82 (D.C. Cir. 1983); see *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994). For the reasons already discussed, the *Order* was patently *ultra vires*. The Court has an obligation, regardless of the FCC's views, to invalidate FCC actions that exceed its delegated authority. As the Court held in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992), “[i]t is central to the real meaning of the rule of law, [and] not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so. . . . Agency actions beyond delegated authority are *ultra vires*, and courts must invalidate them.” *Id.* at 621 (internal citations and quotation marks removed).

Moreover, a petition for reconsideration would have been futile. Congress imposed a strict 15-month time limit on the FCC for exercising its authority, and the FCC attempted to stretch this to nearly 18 months by delaying the release of its decision. By contrast, there is no time limit, much less a mandatory one, on FCC action on petitions for reconsideration, and the FCC has been known to leave such petitions pending for years. Thus, a petition for reconsideration would have left the Petition pending before the FCC without limit, when Congress had specifically intended the FCC's role to be at an end after one year plus 90 days.

The FCC has made clear by its course of conduct in this and other forbearance cases that it simply does not want to be limited by Section 10(c). It has shown its willingness to stretch, and even flout, those limits time and again, as this Court's opinions show. The Court has accused the FCC of trying to “sweep [Section 10(c)] away,” *AT&T Corp.*, 236 F.3d at 738; denying petitions “without ever considering” statutory requirements, *Verizon*, 374 F.3d at 1235; and at-

tempting to “gut section 10,” *AT&T Inc.*, 852 F.3d at 836. Given the pendency of *Core* and *SBC* in this Court at the same time the FCC was adopting and releasing the *Order*, it would have been an exercise of utter futility to petition the FCC for reconsideration of whether it had authority to backdate its *Order*.

Because of *Core*, the FCC was well aware that there were questions concerning its ability to release a decision after the statutory deadline — and thus specifically considered the issue of when its forbearance order needed to be effective in the *Order*. Thus, the effective date provision of the *Order* (where the FCC found it necessary to backdate due to the statutory deadline) was the considered position of the FCC on a controversial issue. The FCC’s aggressive interpretation of its own authority here was fully consistent with its approach in other cases. Under these circumstances, a petition for reconsideration raising this issue for further examination faced no likelihood of success.

The Court would be in no better position to evaluate the FCC’s authority if Qwest had filed a petition for reconsideration, given the overwhelming likelihood that any ensuing reconsideration order, if and when issued, would assert the FCC’s plenipotentiary authority to backdate its decisions’ effectiveness to the deadline even when the decision was issued long after what the Court described in *Core* as the “thirteenth hour.”

## CONCLUSION

The FCC's decision should be vacated because the Qwest Petition was granted by operation of law.

Respectfully submitted,

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August 7, 2006  
November 20, 2006 (Final Version)

**CERTIFICATE OF COUNSEL**

Pursuant to F.R.A.P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(3)(C), I hereby certify that the final version of the foregoing brief contains 9027 words, in accordance with D.C. Cir. R. 32(a)(3)(B).

\_\_\_\_\_  
Michael Deuel Sullivan

November 20, 2006

**CERTIFICATE OF SERVICE**

I, Michael Deuel Sullivan, hereby certify that on this 20th day of November 2006, copies of the foregoing Brief of Petitioner Qwest Corporation were served by first class United States mail on the following:

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**ADDENDUM**

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5 U.S.C. § 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 10 of the Communications Act of 1934, 47 U.S.C. § 160, provides:

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility. Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that —

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance. Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation. Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance. A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), provides:

§ 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 5(c)(1), 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 5(c)(1), 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 action within ninety days of the filing of such petition. Rehearings 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) applies, or within which an appeal must be taken under section 402(b) 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.

\* \* \* \* \*

Section 1.4(b) of the FCC's rules, 47 C.F.R. § 1.4(b), provides:

§ 1.4 Computation of time.

\* \* \*

(b) General Rule — Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. *See* § 1.4(b) (1)-(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled “Public Notice” shall be calculated in accordance with this section. *See* § 1.4(b)(4) of this section for a description of the “Public Notice” document. Unless otherwise provided in § 1.4 (g) and (h) of this section, it is immaterial whether the first day is a “holiday.” For purposes of this section, the term “public notice” means the date of any of the following events: *See* § 1.4(e)(1) of this section for definition of “holiday.”

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the FEDERAL REGISTER, including summaries thereof, the date of publication in the FEDERAL REGISTER.

NOTE TO PARAGRAPH (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

Example 1: A document in a Commission rule making proceeding is published in the FEDERAL REGISTER on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period of time for action in response to the document is Thursday, May 7, 1987, the “day after the day” of public notice.

Example 2: Section 1.429(e) provides that when a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the FEDERAL REGISTER. Section 1.429(f) provides that oppositions to a petition for reconsideration shall be filed within 15 days after public notice of the petition's filing in the FEDERAL REGISTER. Public notice of the filing of a petition for reconsideration is published in the FEDERAL REGISTER on

Wednesday, June 10, 1987. For purposes of computing the filing period for an opposition, the first day to be counted is Thursday, June 11, 1987, which is the day after the date of public notice. Therefore, oppositions to the reconsideration petition must be filed by Thursday, June 25, 1987, 15 days later.

(2) For non-rulemaking documents released by the Commission or staff, including the Commission's section 271 determinations, 47 U.S.C. 271, the release date.

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

(3) For rule makings of particular applicability, if the rule making document is to be published in the FEDERAL REGISTER and the Commission so states in its decision, the date of public notice will commence on the day of the FEDERAL REGISTER publication date. If the decision fails to specify FEDERAL REGISTER publication, the date of public notice will commence on the release date, even if the document is subsequently published in the FEDERAL REGISTER. *See Declaratory Ruling*, 51 FR 23059 (June 25, 1986).

Example 4: An order establishing an investigation of a tariff, and designating issues to be resolved in the investigation, is released on Wednesday, April 1, 1987, and is published in the FEDERAL REGISTER on Friday, April 10, 1987. If the decision itself specifies FEDERAL REGISTER publication, the date of public notice is Friday, April 10, 1987. If this decision does not specify FEDERAL REGISTER publication, public notice occurs on Wednesday, April 1, 1987, and the first day to be counted in computing filing periods is Thursday, April 2, 1987.

(4) If the full text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

Example 5: At a public meeting the Commission considers an uncontested application to transfer control of a broadcast station. The Commission grants the application and does not plan to issue a full text of its decision on the uncontested matter. Five days after the meeting, a descriptive "Public Notice" announcing the action is publicly released. The date of public notice commences on the day of the release date.

Example 6: A Public Notice of petitions for rule making filed with the Commission is released on Wednesday, September 2, 1987; public notice of these petitions is given on September 2, 1987. The first day to be counted in computing filing times is Thursday, September 3, 1987.

(5) If a document is neither published in the FEDERAL REGISTER nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document sent (*e.g.*, mailed, telegraphed, etc.) to persons affected by the action.

Example 7: A Bureau grants a license to an applicant, or issues a waiver for non-conforming operation to an existing licensee, and no "Public Notice" announcing the action is released. The date of public notice commences on the day appearing on the license mailed to the applicant or appearing on the face of the letter granting the waiver mailed to the licensee.

\* \* \* \* \*

Section 1.103(a) of the FCC's rules, 47 C.F.R. § 1.103, provides:

§ 1.103 Effective dates of Commission actions; finality of Commission actions.

(a) Unless otherwise specified by law or Commission rule (e.g. §§ 1.102 and 1.427), the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules: Provided, That the Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action. The designation of an earlier or later effective date shall have no effect on any pleading periods.

\* \* \* \* \*