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September 5, 2007

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147.

Dear Ms. Dortch:

Today, Dee May and Will Johnson of Verizon spoke with Scott Deutchman, Commissioner Copp's Legal Advisor, to discuss the above proceedings. The positions set forth are consistent with those placed on the record. Verizon provided the attached documents as part of the discussion.

Sincerely,

A handwritten signature in black ink that reads "Dee May".

Attachments

cc: S. Deutchman
T. Navin
D. Stockdale
M. Maher
W. Kehoe
W. Dever
C. Shewman

- In the *Cable Modem Declaratory Ruling* the Commission “consider[ed] the broad issue of the appropriate *national* framework for the regulation of cable modem service” and adopted rules for cable modem service on a nationwide basis, without considering individual geographic areas. Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 56 (2002).
 - The Supreme Court upheld that decision in full, including the Commission’s consideration of national “market conditions.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2711 (2005).
- In the *Triennial Review Order*, the Commission likewise concluded — on a nationwide basis — that incumbent LECs did not have to unbundle certain broadband elements, irrespective of the type of customer served using those elements. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 210, 241-246, 255-263, 272-280, 285-295 (2003).
 - The D.C. Circuit upheld the Commission’s decision not to require unbundling of these elements on a nationwide basis. *United States Telecom. Ass’n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004).
 - The Commission itself later noted that “the D.C. Circuit upheld the Commission’s findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a national basis for the broadband elements at issue.” Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 23 (2005) (“*271 Broadband Forbearance Order*”).
- In the *271 Broadband Forbearance Order*, the Commission then granted forbearance, “on a national basis,” from § 271 insofar as it applied to the “broadband elements” as to which the Commission refused to require unbundling in the *Triennial Review Order*. *271 Broadband Forbearance Order* ¶ 12.
 - The D.C. Circuit upheld this decision in full as well. *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).
 - That court held that § 160 permits the Commission to “forbear on a nationwide basis — without considering more localized regions individually” and rejected the argument that § 160 requires the Commission to consider “market conditions in particular geographic markets,” holding further that the forbearance statute “imposes no particular mode of market analysis or geographic rigor.” *Id.* at 8 (internal quotation marks omitted).
 - The D.C. Circuit similarly found that the Commission “reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear” based on its “view of the broadband market as still emerging and developing” and rejected claims that “competition can only . . . be assessed by focusing on . . . specific . . . geographic markets.” *Id.* at 9.

- In reaching these rulings, the D.C. Circuit accepted the Commission's arguments on appeal.
 - In particular, the Commission argued to the D.C. Circuit that it was appropriate to "evaluate[] the broadband marketplace . . . on a nationwide basis to determine whether the statutory criteria for forbearance were satisfied." Brief for Respondents at 21-22, *EarthLink, Inc. v. FCC*, No. 05-1087 (D.C. Cir. Feb. 6, 2006).
 - The Commission, in defending its review of a nationwide broadband market also pointed to the fact that the record in the *271 Broadband Forbearance* proceeding "contained ample evidence that, although the broadband market was still emerging, facilities-based broadband competition existed widely across the nation." *Id.* at 23.
- In the *Wireline Broadband Order*, the Commission again considered a nationwide broadband marketplace and rejected arguments that it is required to consider narrower geographic areas, because those arguments are "premised on data that are both limited and static," which is inappropriate in light of the "[c]ontinuous change and development [that] are likely to be the hallmark of the marketplace for broadband Internet access at both the retail and wholesale levels over the next several years." Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶¶ 50, 56 (2005).
- The Commission is currently defending those conclusions before the Third Circuit, where it has argued that the decision not to "distinguish[] between specific geographic and product markets" in the context of broadband services was appropriate, because "static marketplace dominance analysis" is not useful in the context of "an emerging market that will likely experience rapid technological and competitive changes before it reaches maturity." Brief for Respondents at 50-58, *Time Warner Telecom v. FCC*, Nos. 05-4769 *et al.* (3d Cir. oral arg. Mar. 16, 2007) (internal quotation marks omitted).
- In two subsequent orders extending the Commission's treatment of cable modem and wireline Internet access service to other broadband platforms — namely, broadband over power line and wireless broadband — the Commission again ruled on a nationwide basis, without considering narrower geographic regions. See Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

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Opportunity Knocks at Cable's Door

As wireless carriers look for more backhaul capabilities at less cost, Multiple Service Operators (MSO) arrive with plenty of options.

By M.J. Richter

The mobile communications industry, one of the technology world's biggest success stories of all time, is discovering new meaning behind the old saying that "success has a price." For most of the past 25 years, the price in question has been that of building wireless networks to keep up with explosive customer growth. Today, wireless operators are focused on increasing their network efficiencies, particularly in wireless backhaul, to minimize Operating Expenses (OpEx) costs — both those incurred by their current networks and those that will be required to support new wireless applications and services.

On average, transport costs account for nearly 25% of wireless operators' OpEx costs, and 60%-75% of those transport costs are attributed to backhaul. Those numbers translate into a U.S. backhaul market valued at slightly more than \$2 billion in 2006 and could reach \$16 billion by 2009, according to the Cellular Telecommunications & Internet Association. GeoResults, a research firm, estimates that between 2005 and 2009, wireless operators around the world will spend \$31 billion on backhaul.

Since the wireless industry's inception, wireless carriers typically have leased T-1 lines from local exchange carriers to backhaul their cell-site TDM traffic. As their customer base has grown, so too have their backhaul needs. In 2005, wireless operators needed an average of three T-1s per cell site, according to GeoResults. By 2009, the average number of T-1s required to handle backhaul will be at least nine per cell site, a 200% increase. The number of voice Minutes of Use (MoU) continues to grow at a rapid pace (see Figure 1).

In addition to the growth of voice traffic, new, high-bandwidth Third-Generation (3G) data and multimedia services, such as mobile video, music downloads, news and mobile gaming, will continue to push mobile carriers' bandwidth requirements even higher. As a result, carriers are migrating their infrastructures towards IP-based networks, both to support new high-bandwidth data services and scale bandwidth as customers require. Growth of these new services is causing mobile carriers to look at alternate technologies, such as Ethernet, for transport and cell-site backhaul.

Backhaul: "Up For Grabs"

For wireless carriers, a dual challenge is to accommodate growth in the number of customers, MoU and bandwidth while finding out how to reduce OpEx. Keeping OpEx in check is critical — it better positions wireless carriers to price services at a competitive point while still turning a profit.

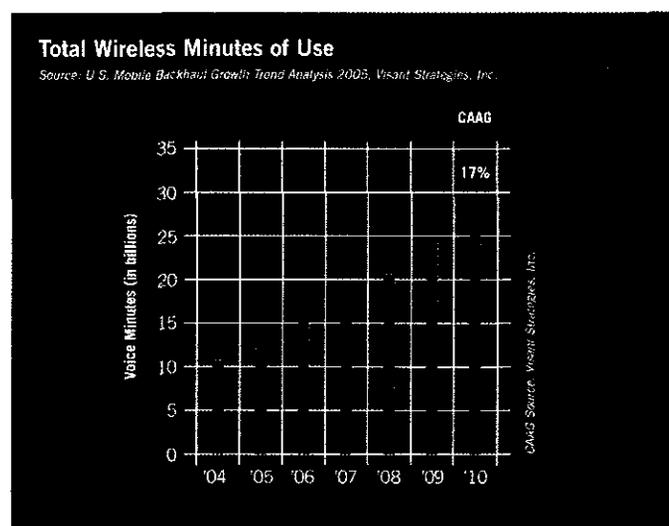
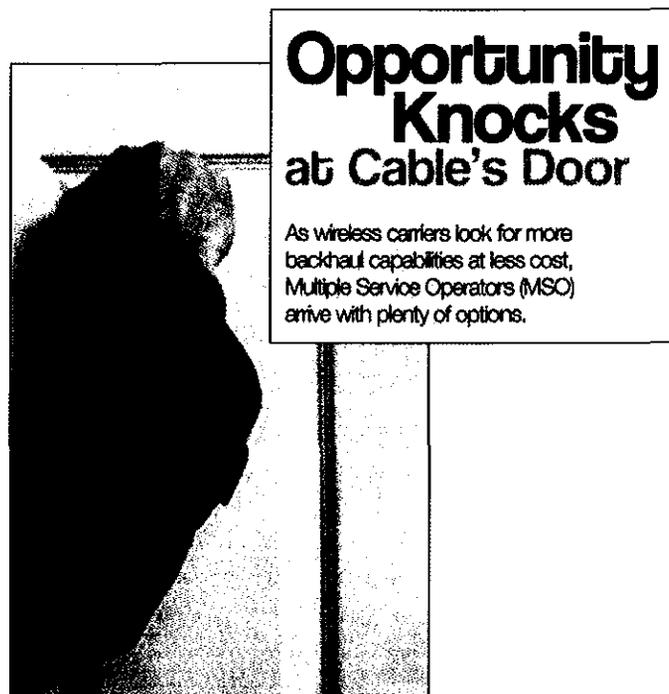


Figure 1. Total wireless minutes of use

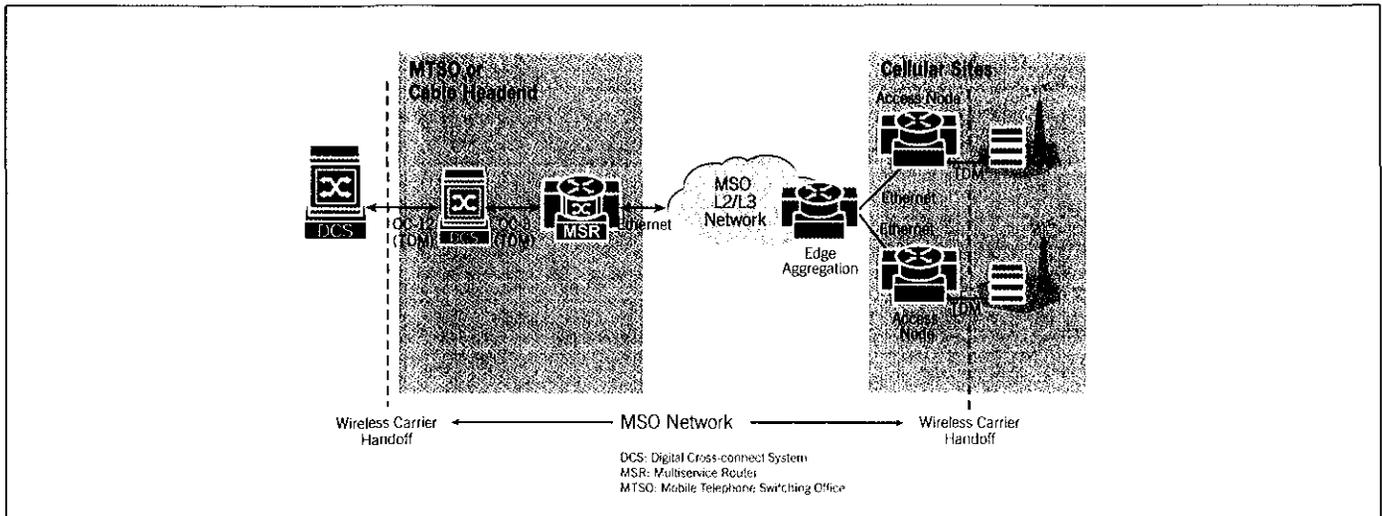


Figure 2. Ethernet backhaul network

"There is no question that wireless carriers are looking to grow revenue-generating service offerings while curbing OpEx, thereby increasing profitability," said Iyad Tarazi, vice president of network development at Sprint Nextel. "The amount of bandwidth required will, in many cases, require an alternative to traditional T-1 leased lines in order for this to make sense."

Most wireless carriers have identified backhaul as an important area in which to reduce expenses, by considering alternatives to leased T-1 backhaul lines, such as native Ethernet service. The wireless backhaul network currently is "up for grabs," says Peter Jarich, principal analyst for wireless infrastructure with Current Analysis, a research firm. Jarich believes MSOs are capable of capturing a significant share of the wireless backhaul market.

To do that, MSOs must have the facilities in place and be able to match the service-assurance capabilities and reliability that wireless operators currently get from the telcos, Jarich says. "They're in a pretty good competitive spot. It's something they're going to have to show they can do, but if they can, then clearly it's a nice market opportunity [for them]."

That opportunity coincides with a major strategic objective on the part of many MSOs: They have invested heavily in their fiber or Hybrid Fiber-Coax (HFC) infrastructures over the past several years to provide broadband and voice services to residential customers. Now, with these networks upgraded and enhanced, they are looking to leverage this base and utilize it to offer Ethernet services to enterprise customers, carriers and wireless providers.

The majority of wireless operators today seek more affordable T-1 services for their backhaul, while others prefer to buy native Ethernet services to handle backhaul. MSOs can readily position themselves to satisfy both requirements with fiber and/or coax facilities in place

near many cell sites. Oftentimes, MSOs only need to build short spurs to certain towers and deploy Ethernet access interfaces to create a unified data network to provide scalable backhaul service. In fact, many of the largest MSOs already are making forays into the market.

An example is Cox Business Services, a subsidiary of Cox Communications, the third-largest U.S. cable operator. Cox Business Services has been providing fiber-based wireless backhaul for more than a decade to most major wireless carriers. Additionally, Comcast, Time Warner Cable and other major MSOs offer Ethernet-based services today and are tailoring them to meet the demand of wireless carriers.

Putting it All Together

An MSO can provide T-1-over-Ethernet services by deploying a multiservice edge device that offers both TDM and Ethernet interfaces at the cell site (see Figure 2). Using circuit emulation, this TDM traffic can be transported over an MSO's Layer 2/Layer 3 network. Additionally, an MSO can offer native Ethernet backhaul from the same device as Ethernet interfaces become more prevalent at the cell site. By pairing this multiservice edge device with a carrier-class multiservice router, MSOs can also offer guaranteed Quality of Service (QoS) for any type of access traffic over a Multiprotocol Label Switching (MPLS) network, along with verifiable Service Level Agreements (SLA). These factors help deliver the availability, reliability and scalability that wireless operators require.

Because wireless operators want to protect their embedded investments, they will continue to require an OC-3/12 handoff from the cell site. The MSO can address that need by deploying a Digital Cross-connect System (DCS) to function as an efficient, centralized headend. The DCS offers a central location to manage and troubleshoot T-1 circuits and collect statistics for SLA reporting.

“As long as we can get carrier-class Ethernet, using an Ethernet-based backhaul is a great solution,” said Tarazi. “This goes a long way toward solving both the backhaul cost issue and migrating toward a more IP-based network, and companies that can offer that Ethernet pipe will be well-positioned.”

Depending on its infrastructure, an MSO can pursue the wireless backhaul market right away by using its SONET-based network, or it can leverage its embedded Ethernet investments with incremental upgrades to edge devices that support T-1-over-Ethernet service. Either way, by implementing solutions that support guaranteed Ethernet and/or MPLS, MSOs have a significant opportunity to capture a share of the booming wireless backhaul market and generate significant new revenue streams. By leveraging the flexible solutions that Tellabs offers, MSOs can tap into these revenue streams with the efficiency and carrier-class reliability that wireless providers have come to expect.

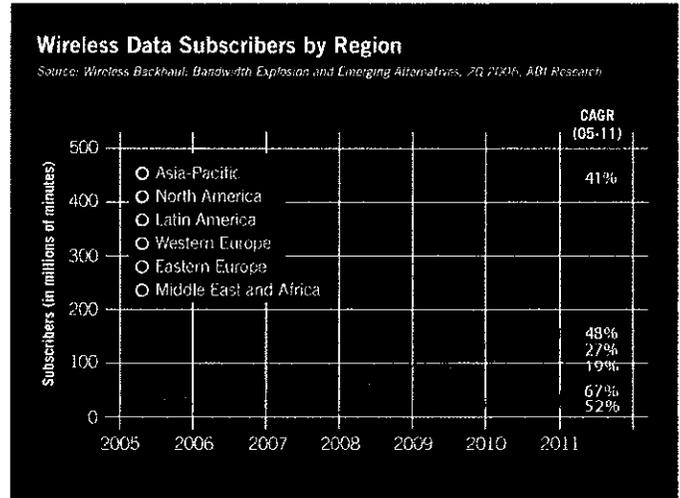


Figure 3. Wireless data subscribers by region

North America

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Enterprise Broadband Services vs. Special Access Services

Enterprise Broadband Services

1. Packetized services capable of 200 Kbps or more in each direction, such as:
 - IP-Based Services
 - Ethernet Services
 - ATM/Frame Relay
2. Optical-Level Services, such as:
 - WDM and DWDM-based services, like IOTS
 - SONET

These services do not include traditional TDM-based special access services.

Basis for Commission Analysis

- Nationwide

Traditional Special Access Services

All TDM-based high capacity services, including DS1s and DS3s.

Basis for Commission Analysis

- MSA for Pricing Flexibility

In the TRO and TRRO, the Commission's Orders Established These Two Categories of Enterprise Broadband Services.

For packetized services, the Commission recognized that “the record shows that a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets.” The Commission noted that allowing unbundled access to packetized facilities and services would “blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized by section 706.”

Likewise, with respect to optical services and facilities, the Commission found that there is “substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them.” Competing carriers are able to deploy new OCn-level facilities without significant difficulty because these types of facilities “produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs of loop construction.”

The Commission Lacks Legal Authority to Issue an Order on Verizon’s Broadband Forbearance Petition That Was Deemed Granted by Operation of Law.

The Commission Cannot Issue an Initial Order Now on Verizon’s Petition

When the March 19, 2006 statutory deadline for ruling on Verizon’s petition for forbearance passed without Commission action, that petition was “deemed granted” by operation of law, thus terminating the proceedings on Verizon’s petition. 47 U.S.C. § 160(c).

The Commission has held, in the analogous context of the “deemed lawful” provision in § 204(a)(3) that “[a]ppellate cases . . . have consistently found that the term ‘deemed,’ in this context, is not ambiguous” and “must be read” to mean “conclusive.” *Streamlined Tariff Order*, 12 FCC Rcd 2170, ¶ 19 (1997).

The D.C. Circuit expressly upheld that determination. *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 412 (D.C. Cir. 2002).

The Commission later found that, “[g]iven the Court’s conclusion,” the Commission “cannot adopt [a] reading” of “deemed lawful” as “ambiguous” and as creating merely a “presumption” of lawfulness that “may be rebutted.” *Streamlined Tariff Reconsideration Order*, 17 FCC Rcd 17040, ¶¶ 4-5 (2002).

Therefore, for the Commission to act after a tariff has been “deemed lawful” or a petition has been “deemed granted,” the Commission must conduct a new, separate “proceeding based on a preponderance of the evidence presented in [the new] proceeding.” *Streamlined Tariff Order* ¶ 23.

This interpretation, as the Commission recognized in the § 204(a)(3) context, is required in order to give effect to the language of the statute.” *Id.* ¶ 19.

If the Commission could, instead, adopt and release an order at any time after a petition has been deemed granted, it would “gut section 10” by treating “the statutory deadline [as] inconvenient,” which the D.C. Circuit made clear “cannot be correct.” *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006).

Petitioners that obtained the benefit of a deemed grant would rightly be reluctant to take advantage of that regulatory relief, in conflict with Congress’s intention that forbearance would result in the “eliminat[ion] [of] outdated regulations . . . in a timely manner.” 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole) (emphasis added).

Precedent in the context of the Bank Holding Company Act, which similarly provides that certain applications “shall be deemed to have been granted” when the agency “fail[ed] . . . to act on” them within a specified time period, is to the same effect. *See Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562, 564, 566-68 (7th Cir. 1975) (vacating agency order purporting to deny an application that had previously been deemed granted by operation of law pursuant to 12

U.S.C. § 1842(b)); *North Lawndale Econ. Dev. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 27 (7th Cir. 1977) (same).

The Commission, in its brief in *Core Communications*, suggested that it might be “open to the agency” to conclude that “deemed granted” is “ambiguous” and that the Commission could rule on a petition that already was granted by operation of law, though it conceded that the Commission had “not addressed th[at] issue.” Brief for Respondents at 31, *In re Core Commc’ns, Inc.*, Nos. 04-1368 *et al.* (D.C. Cir. July 25, 2005).

But a ruling that “deemed” is ambiguous, if reached by the Commission, would run squarely into the Commission’s own precedent holding that “deemed” is unambiguous and that it “cannot adopt [a] reading” of “deemed” as “ambiguous.” *Streamlined Tariff Order* ¶ 19; *Streamlined Tariff Reconsideration Order* ¶¶ 4-5.

It would also run afoul of the appellate decisions, including the D.C. Circuit’s decision in *ACS Anchorage*, that “have consistently found that the term ‘deemed,’ in this context, is not ambiguous” and “must be read” to mean “conclusive.” *Streamlined Tariff Order* ¶ 19.

In any event, in defending the tentative view expressed in its brief in *Core Communications*, the Commission expressly pointed to § 204(a)(3) and the Commission’s authority to conduct “further investigation” of a tariff that has been deemed lawful, and to “impos[e] . . . prospective remedies.” FCC *Core* Brief at 33-34. The Commission’s own precedent makes clear that such further investigation must occur in a new proceeding and on a new record, which the Commission has not done here.

The Commission Cannot Issue an Order on “Reconsideration” of the Deemed Grant

As the Commission has explained to the D.C. Circuit, when Verizon’s petition was deemed granted by operation of law, the Commission did not adopt or issue “a reviewable FCC order,” nor did it take “any reviewable agency ‘action.’” Brief for the FCC at 16, 21, *Sprint Nextel Corp. v. FCC*, No. 06-1111 *et al.* (D.C. Cir. oral arg. Oct. 15, 2007).

Reconsideration can occur only following “an order, decision, report, or action” by the Commission or by a designated entity within the Commission. 47 U.S.C. § 405(a); *see* 47 C.F.R. §§ 1.106(a), 1.429(a) (providing for reconsideration of “final” agency action only). Because the deemed grant of Verizon’s petition did not involve any agency action — as the Commission has told the D.C. Circuit — there is nothing to reconsider.

In any event, Congress set a strict 30-day time limit on the filing of petitions for reconsideration, and that time has long since passed, even assuming the deemed grant of Verizon’s petition could be treated as an action subject to reconsideration, which it cannot. *See* 47 U.S.C. § 405(a).

Similarly, the Commission’s rules establish a 30-day period in which the Commission can grant reconsideration on its own motion. *See* 47 C.F.R. § 1.108. Again, any such period has long since passed.