ORAL ARGUMENT SCHEDULED FOR OCTOBER 27, 2005

BRIEF FOR RESPONDENTS

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

NO. 04-1368
(CONSOLIDATED WITH NOS. 04-1423 AND 04-1424)

IN RE CORE COMMUNICATIONS, INC.,

Petitioner

ON COMPLAINT FOR DECLARATORY RELIEF
AND ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

CLEC	**Competitive local exchange carrier**
DSL Service	**Digital subscriber line service**
FCC	**Federal Communications Commission**
ISP	**Internet service provider**
J.A.	**Joint Appendix**
ILEC	**Incumbent local exchange carrier**
LEC	**Local exchange carrier**

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), requires the Federal Communications Commission to "forbear from applying any regulation or any provision of [the Communications Act]" to telecommunications carriers or telecommunications services if it determines that: (1) enforcement of such regulation or provision is "not necessary" to ensure just, reasonable and non-discriminatory charges and practices; (2) such enforcement is "not necessary for the protection of consumers;" and (3) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a). The statute also authorizes "any telecommunications carrier" to file a petition with the Commission asking the agency to exercise its forbearance authority. *Id.* § 160(c). In such a case, the Commission "shall explain its decision [on the petition] in writing," and the petition "shall be deemed granted" if the Commission does not deny it within one year (or, upon extension, 15 months). *Id.*

In the *Order* on review,[1] the FCC granted in part and denied in part a petition filed by Core Communications, Inc. ("Core") asking the Commission to forbear from applying certain interim intercarrier compensation rules. Those rules govern the compensation for telecommunications traffic that is carried from an originating local exchange carrier ("LEC") (usually an incumbent carrier) to a second LEC (usually a competitive LEC) and then is handed off by the second LEC to an Internet service provider ("ISP"). The Commission had adopted those interim rules in 2001 to control regulatory arbitrage opportunities while, in another proceeding, it considered a more comprehensive "unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers." *Order*, para. 2 (J.A. 10).

In acting on Core's forbearance petition, the Commission concluded, among other things, that the "rate cap" and "mirroring" components of the interim rules – which limit the intercarrier compensation *rates* that the second LEC may charge the originating LEC in connection with Internet-bound traffic – did not qualify for forbearance under the standards of section 160(a), because those rules remained necessary to prevent market distortions. *See Order*, paras. 6, 18, 23, 25 (J.A. 11, 15, 17, 18). By contrast, because, among other things, "[m]arket developments since 2001 have eased * * * concerns about growth of dial-up [Internet-bound] traffic," the Commission determined that forbearance was warranted with respect to the "growth cap" and

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[1] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order* (WC Docket No. 03-171), FCC 04-241, 19 FCC Rcd 20179 (adopted October 8, 2004; released October 18, 2004) ("*Order*") (J.A. 9).

"new markets" components of the rules, which limited the *volume* of such traffic on which the originating LEC paid intercarrier compensation. *Order*, para. 20 (J.A. 16); *see also id*., paras. 21, 24, 26 (J.A. 16, 17, 19).

Core (a competitive LEC) challenges the Commission's action insofar as it denied Core's forbearance request. BellSouth (an incumbent LEC) challenges the Commission's action insofar as it granted Core's forbearance request. The case presents the following issues for review:

(1) Whether the Commission's vote on October 8, 2004, to grant Core's forbearance petition in part and deny it in part constituted action on the petition within the 15-month period established by Congress in 47 U.S.C. § 160(c).

(2) Whether Core's claim that the FCC lost jurisdiction to act on its forbearance petition when the agency failed to release the full text of the *Order* within 15 months is barred under 47 U.S.C. § 405(a), because Core did not first present the issue to the Commission in a petition for reconsideration.

(3) Whether the Commission acted reasonably in granting Core's forbearance petition with respect to the growth cap and new markets rules.

(4) Whether the Commission acted reasonably in otherwise denying Core's forbearance petition.

(5) Whether the Court should dismiss Core's "Complaint for Declaratory Relief."

JURISDICTION

The Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations in addition to those appended to the petitioners' briefs are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT

A. Regulatory Background

1. *Internet Access*. High-speed broadband offerings, such as cable modem service and telephone company digital subscriber line ("DSL") service, recently have become the primary means by which consumers in the United States gain access to the network of interconnected computers that make up the Internet.[2] Traditionally, however, consumers gained Internet access primarily through "dial-up" connections provided by local telephone companies. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2695 (2005). Under dial-up arrangements, the calling party (typically a telephone service subscriber of an incumbent local telephone company) dials the seven-digit number of an ISP in the local calling area and the ISP, in turn, links the call to the Internet network. In most instances, the ISP itself is not a subscriber of the incumbent telephone company, but instead leases lines in the local calling area from a competitive LEC ("CLEC") that interconnects with the incumbent. Thus, when a telephone subscriber makes a dial-up Internet call, the originating incumbent carrier typically must deliver the call to a CLEC, which then carries the call to the ISP.

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[2] *See* Jeffrey Halpern, *et al.*, Bernstein Research Call, *Broadband Competition Intensifies as Penetration Advances; Price and Speed Define Main Battle Lines* (June 15, 2005), at 2 (observing that "U.S. broadband providers added a record 2.4M subscribers in the first quarter, pushing broadband's share of online households above 50%," and concluding that broadband penetration "is trending towards near complete substitution of dial-up"); www.nytimes.com/2005/06/21/technology "Dial-Up Internet Going the Way of Rotary Phones" (noting that "[i]n the first quarter of this year, broadband connections for the first time overtook dial-up," and that some industry analysts predict that dial-up "is expected to drop to 40 percent at the end of this year").

2. ***Carrier Compensation for Internet-Bound Traffic***. The collaboration of multiple carriers in providing customers with dial-up Internet access raises the question of how each carrier is compensated for the cost of its role in providing such access. The 1996 Act imposes on local exchange carriers obligations that include "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under that provision, "[w]hen a customer of carrier A makes a local call to a customer of carrier B, and carrier B uses its facilities to connect, or 'terminate,' that call to its own customer, the 'originating' carrier A is ordinarily required to compensate the 'terminating' carrier B for the use of carrier B's facilities." *SBC Inc. v. FCC*, 414 F.3d 486, 490 (3d Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 254 (D.C. Cir. 2001)).

The FCC first addressed the application of section 251(b)(5) in the *Local Competition Order*,[3] construing that provision to "apply only to traffic that originates and terminates within a local area…." *Local Competition Order*, para. 1034; *see also* 47 C.F.R. §§ 51.701(a) & (b) (1997). The Commission distinguished such "local" traffic from conventional long-distance calls carried by interexchange carriers, which the Commission determined were not subject to the reciprocal compensation obligation of section 251(b)(5). *Local Competition Order*, para. 1034.

The Commission did not directly address at that time whether dial-up Internet traffic that is carried from an LEC to another LEC and then handed off to an ISP en route to distant locations on the Internet should (like conventional long-distance calls) be considered non-local

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket Nos. 96-98, *et al.*), 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part and aff'd in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

and thus excluded from the coverage of section 251(b)(5). However, a number of state commissions, in arbitration proceedings conducted under 47 U.S.C. § 252,[4] construed section 251(b)(5) and the Commission's implementing rules to cover such traffic, and thus determined that the reciprocal compensation obligation applies.

a. In its 1999 *ISP Ruling*,[5] the FCC sought to clarify the status of Internet-bound traffic under section 251(b)(5) and the Commission's implementing rules. The Commission determined that such traffic was not "local" telecommunications traffic subject to section 251(b)(5) principally because such traffic, considered “end to end” from the calling party to distant websites on the Internet, is largely interstate and interexchange. *ISP Ruling*, para. 23; *see generally id*., paras. 9-20. The FCC concluded that such traffic was instead subject to the Commission's traditional regulatory jurisdiction over interstate communications under 47 U.S.C. § 201. The FCC nevertheless permitted states to continue to impose reciprocal compensation obligations on such traffic on an interim basis until the Commission could complete a rulemaking proceeding addressed specifically to the compensation methodology that would apply when two LECs collaborate to provide end users access to the Internet via an ISP. *ISP Ruling*, paras. 24-27.

b. In *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, this Court vacated and remanded the *ISP Ruling.* Addressing the scope of section 251(b)(5), the *Bell Atlantic* Court accepted the

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[4] Under the 1996 Act, incumbents and new entrants can, pursuant to section 252, “petition the state commission that regulates local phone service to arbitrate open issues” related to the interconnection and access obligations imposed under section 251. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 373.

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Ruling*”), *vacated and remanded*, *Bell Atlantic Telephone Cos. v. FCC,* 206 F.3d 1 (D.C. Cir. 2000).

dichotomy between local and non-local traffic that the Commission had drawn in the *Local Competition Order*. Indeed, the Court determined that "[t]he issue at the heart of this case is whether a call to an ISP is local or long-distance." 206 F.3d at 5. However, the Court held that the Commission had not adequately explained why Internet-bound calls should be treated like long-distance calls for purposes of section 251(b)(5). 206 F.3d at 7-8.

c. Responding to the *Bell Atlantic* decision in the *ISP Remand Order*,[6] the FCC did not rely on the "local versus long-distance" dichotomy in section 251(b)(5) that it had discerned in the *Local Competition Order*. *ISP Remand Order*, paras. 26, 34, 54. Instead, the Commission looked to 47 U.S.C. § 251(g) as an independent interpretive tool regarding the scope of section 251(b)(5). Section 251(g) requires local exchange carriers, after enactment of the 1996 Act, to continue to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" in accordance with the same restrictions and obligations "(including receipt of compensation) that appl[ied] to such carrier[s] on the date immediately preceding the date of enactment * * * until such restrictions and obligations are explicitly superseded by [Commission] regulations …." The Commission stated that section 251(g) "'carve[d] out' from § 251(b)(5)" various categories of calls, including "calls made to internet service providers * * * located within the caller's local calling area." *WorldCom*, 288 F.3d at 430; *see ISP Remand Order*, paras. 36, 42-47. Because the compensation for such traffic was thus "carved out" of section 251(b)(5) and such traffic was

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

largely interstate in nature, the Commission determined that ISP-bound traffic is subject to the FCC's regulatory authority under section 201. *ISP Remand Order*, paras. 1, 30, 52-65.

The Commission also detailed the competitive distortions – including regulatory arbitrage opportunities for competitive LECs and ISPs, and potentially subsidized prices for Internet-bound calls – that would be the practical consequence of applying a reciprocal compensation regime to high-volume, one-way Internet-bound traffic. *ISP Remand Order*, paras. 2, 4-6, 21, 67-76.[7] The Commission noted, for example, that evidence in the record indicated that CLECs, "on average, terminate eighteen times more traffic than they originate," with some CLECs terminating "more than forty times more traffic than they originate." *ISP Remand Order*, para. 5. The Commission concluded that this imbalance was not the result of the normal operation of a competitive market, but rather was "driven by regulatory opportunities [*i.e.*, the ability to receive intercarrier compensation] that disconnect costs from end-user market decisions." *Id.* The Commission noted that, "under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers," a result that would "distort[] competition by subsidizing one type of service at the expense of others." *Id*. *See also WorldCom*, 288 F.3d at 431 (acknowledging "flaws in the prevailing intercarrier compensation mechanism for ISP calls"); *SBC Inc. v. FCC*, 414 F.3d at 492 (noting that the intercarrier compensation mechanism "encouraged some competitive carriers to 'game the system'").

The Commission noted that these market distortions had been "exacerbated by the prevalence of excessively high reciprocal compensation rates" that encouraged competitive

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[7] Because of the nature of their business, ISPs typically receive far more calls than they place.

LECs to target ISP customers that would yield substantial intercarrier compensation receipts from the originating LEC without imposing reciprocal payment obligations. *ISP Remand Order*, para. 75; *see also id.*, para. 87 (finding that "there may be a considerable margin between current reciprocal compensation rates and the actual costs of transport and termination").

At the same time, the Commission found that the market distortions could not as a practical matter "be cured by regulators or carriers simply attempting to 'get the rate right.'" *Id.*, para. 76.[8] In the FCC's judgment, even if the regulator were able to overcome the practical difficulties associated with setting intercarrier compensation rates that accurately reflected the costs that the competitive LEC incurs in delivering Internet-bound traffic to an ISP, market distortions would remain. The Commission noted that "because the originating LEC typically charges its customers averaged rates, the originating end-user receives inaccurate price signals as the costs associated with the intercarrier payments are recovered through rates averaged across all of the originating carrier's end-users." *ISP Remand Order,* para. 68. A customer "with extensive Internet usage" thus may cause its originating LEC "to incur substantial reciprocal compensation obligations" to the LEC that serves the ISP, but the originating customer "receives no price signals reflecting those costs because they are spread over all of [the originating] LEC's customers." *Id*.

[8] The Commission found, among other things, that it would be virtually impossible to set intercarrier compensation rates that accurately reflected "the costs incurred by any particular carrier for providing service to a particular customer." *ISP Remand Order,* para. 76. As a result, carriers still would be encouraged "to target customers that are, on average, less costly to serve." *Id.* The Commission also noted the difficulty of accurately recovering, through per-minute charges, costs that may not be entirely traffic sensitive. *Id*. The Commission, finally, expressed "reluctance" to force new entrants to incur the burden of performing cost studies that might offer the best chance of yielding an accurate rate. *Id*.

The Commission posited that one possible solution to these economic distortions would be the adoption of a "bill-and-keep" regime whereby each carrier that participates in carrying Internet-bound traffic would recover its costs from its own end-user customer rather than from other carriers. Thus, under such a regime, if an Internet-bound call were originated by a caller on the ILEC's network, delivered by the ILEC to a CLEC, and then delivered by the CLEC to an ISP (for continuing transmission to the Internet), the originating ILEC would recover its costs from the caller on its network who initiated the call, and the CLEC would recover its costs from the ISP customer to which it delivered the call. The Commission recognized, however, that the existing regulatory framework included a number of different pricing regimes, including a regime of intercarrier access charges paid by long-distance carriers to LECs. The agency, accordingly, deferred final resolution of the regulatory treatment of Internet-bound traffic to a broader proceeding, contemporaneously announced, that was designed to establish a comprehensive and unified regulatory solution for all offerings in which two (or more) carriers collaborate to provide service. *ISP Remand Order*, paras. 6-7. Invoking its flexible section 201 authority, *see*, *e.g.*, *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) ("[t]he generality of [section 201(b)] * * * opens a rather large area for the free play of agency discretion"), the Commission thus adopted a hybrid interim regime – with both intercarrier compensation and bill-and-keep components – to curb the existing market distortions, while providing "a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives." *ISP Remand Order*, para. 80; *see also id*., para. 77 (interim "hybrid mechanism" would protect "legitimate business expectations," while "produc[ing] more accurate price signals and substantially reduc[ing] current market distortions * * * pending our consideration of broader intercarrier compensation issues").

The interim regime that the Commission adopted had four components – a "rate cap," a "mirroring rule," a "growth cap," and a "new markets" rule. The rate cap consisted of a gradually declining limit on the charge for intercarrier compensation for Internet-bound traffic, resulting after two years (and lasting until further Commission action) in a maximum rate of $.0007 per minute of use. *ISP Remand Order,* para. 78. The Commission explained that, although the rate caps were not based upon a finding of actual costs associated with the delivery of Internet-bound traffic, they were nevertheless in line with the downward trend in reciprocal compensation rates that had been specified in recent interconnection agreements. *ISP Remand Order*, paras. 84-85. To the extent that the rate caps were below the cost of delivering traffic to ISPs, the Commission noted that CLECs were free to recover any additional costs from their own end-users. *Id*., para. 80. The rate cap, however, would "provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives." *Id*.

The "mirroring rule" provided that the capped rates that originating incumbent LECs would pay to CLECs with respect to Internet-bound traffic would apply only if the incumbents also offered to charge CLECs the same low rates to terminate local traffic that originated on CLEC networks. *ISP Remand Order*, para. 89. Otherwise, the reciprocal compensation rates for local traffic set by state commissions would apply to both local and Internet-bound traffic. *Id*. The record had "fail[ed] to establish any inherent differences" in the cost of delivering local voice traffic subject to section 251(b)(5), on the one hand, and Internet-bound traffic, on the other, and the Commission thus included the mirroring rule to avoid imposing a system that would allow incumbents to charge CLECs a higher rate for the local traffic that the incumbents terminate than CLECs were permitted to charge incumbents in connection with the traffic CLECs delivered to ISPs. *Id.*, para. 90.

The "growth cap" imposed a limit on the total Internet-bound minutes for which a LEC may receive intercarrier compensation, equal to the LEC's existing level of minutes plus a 10 percent annual growth factor for each of the first two years under the interim regime. *ISP Remand Order*, para. 86. The Commission explained that it was imposing this growth cap "in order to ensure that growth in dial-up Internet access does not undermine our efforts to limit intercarrier compensation for this traffic" pending the adoption of a permanent regime. *Id*.

Finally, the "new markets" rule – which denied intercarrier compensation for Internet-bound traffic in markets where the LEC seeking such compensation was not already exchanging traffic with an originating LEC at the time the interim regime was adopted – was designed to serve a purpose similar to that of the growth cap. *ISP Remand Order*, para. 81. The rule sought, pending adoption of "an appropriate long-term resolution," to prevent significant *expansion* of the "opportunities for regulatory arbitrage" and the market distortions posed by intercarrier payments for Internet-bound traffic. *Id*.

Contemporaneously with the release of the *ISP Remand Order*, the FCC commenced a separate proceeding to "fundamental[ly] reexamin[e] … all currently regulated forms of intercarrier compensation" and to "test the concept of a unified regime for the flows of payments among telecommunications carriers." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (para. 1) (2001) ("*Intercarrier Compensation NPRM*"). The Commission stated its intent to replace the *ISP Remand Order*'s interim rules for

Internet-bound traffic with permanent rules at the conclusion of the unified *Intercarrier Compensation* proceeding. *ISP Remand Order*, paras. 77-78.[9]

d. On review of the *ISP Remand Order* in *WorldCom*, this Court addressed only one issue on the merits: It rejected the FCC's conclusion in the *ISP Remand Order* that section 251(g) supplies a basis to exclude Internet-bound traffic from the scope of section 251(b)(5). *WorldCom*, 288 F.3d at 430. Having found that section 251(g) does not provide a basis for "carving out" Internet-bound calls from section 251(b)(5), the Court "ma[de] no further determinations." *Id.* at 434. The Court did not state a view about the proper construction of section 251(b)(5) itself. Nor did it state a view about the applicability of section 201 as a source of authority for imposing the interim cost recovery regime adopted in the *ISP Remand Order*. The Court emphasized that the issues it was declining to decide consisted of “all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)." *Id.*

Finding that "there is plainly a non-trivial likelihood that the Commission has authority to elect * * * [the bill-and-keep] system" reflected, in part, in the Commission’s interim cost recovery regime, the Court declined to vacate the *ISP Remand Order* and instead "simply remand[ed] the case to the Commission for further proceedings." *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm.*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). The Court

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[9] The Commission recently sought additional public comment in the *Intercarrier Compensation* docket – including comment on several industry proposals that were submitted in response to the initial notice of proposed rulemaking. *See Developing a Unified Intercarrier Compensation Regime* (CC Docket No. 01-92), Further Notice of Propose Rulemaking, 20 FCC Rcd 4685, 70 Fed. Reg. 15030 (2005).

subsequently denied a request by Core for rehearing of the decision not to vacate the interim rules,[10] and the Supreme Court denied Core's petition for a writ of certiorari on that issue.[11]

B. The Core Forbearance Proceeding

On July 14, 2003, Core filed a petition asking the Commission to forbear, under 47 U.S.C. § 160, from applying the rate cap, mirroring, growth cap and new market provisions of the *ISP Remand Order*. *See* Core Communications, Inc.'s Petition for Forbearance, WC Docket No. 03-171, at 9-11 (filed July 14, 2003) (J.A. 32-34); *see also* Reply Comments of Core Communications, Inc., WC Docket No. 03-171, at 5 (filed September 22, 2003) (J.A. 53). After extending the statutorily-prescribed time for action on Core's petition by 90 days (to October 11, 2004),[12] the FCC, on October 8, 2004, adopted the *Order* on review granting in part and denying in part Core's petition. The Commission informally announced its action that day with a press release. FCC News Release, "FCC Grants Partial Forbearance from ISP Remand Order" (October 8, 2004) (J.A. 135). The Commission released the text of its decision 10 days later. Invoking a procedural rule that allows the agency to "designate an effective date that is either earlier or later in time than [the release date]," 47 C.F.R. § 1.103(a), the Commission specified that its action "shall be effective" as of the October 8, 2004 adoption date. *Order*, para. 30 (J.A. 19).

In the *Order*, the Commission found that "none of the three prongs [of the forbearance standard were] satisfied with respect to the rate caps and mirroring rule, but that all three prongs [were] met with respect to the growth caps and new markets rule." *Order*, para. 15 (J.A. 14).

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[10] Order, *WorldCom, Inc. v. FCC*, D.C. Circuit Nos. 01-1218, *et al*. (filed June 14, 2001).

[11] *Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003).

[12] *See Order*, para. 1 n.1 (citing 47 U.S.C. § 160(c)) (J.A. 9).

Rate Cap and Mirroring Rules. Addressing the public interest standard first (*see* 47 U.S.C. § 160(a)(3)), the FCC concluded that Core's principal arguments failed to support forbearance from the interim intercarrier compensation regime, taken as a whole, or from the rate cap and mirroring rules, in particular. *Order*, para. 16 (J.A. 14-15). The Commission rejected Core's assertion that this Court's *WorldCom* decision compelled forbearance, noting that the Court, in that narrow ruling, expressly had not vacated the interim rules and had found, instead, a "'non-trivial likelihood'" that the Commission would be able to justify the regime that it had adopted. *Order*, para. 17 (J.A. 15) (quoting *WorldCom*, 288 F.3d at 434). The FCC also rejected – as "unsupported" – Core's allegations that the interim rules had damaged telecommunications competition. *Id.*, para. 18 (J.A. 15-16). With respect to the rate caps, specifically, the Commission reaffirmed its prior judgment from the *ISP Remand Order* that those limits "help avoid arbitrage and market distortions that otherwise would result," *id.*, and the Commission stated that the mirroring rule continued to be justified as promoting "a more unified intercarrier compensation regime by requiring LECs to offer similar rates for like traffic," *id.*, para. 19 (J.A. 16).

Addressing the prong of the forbearance test that asks whether a regulation is necessary to ensure just, reasonable, and nondiscriminatory rates and terms (*see* 47 U.S.C. § 160(a)(1)), the FCC rejected Core's claim that the Commission should forbear from the rate caps and mirroring rule because those rules allegedly discriminated unfairly against CLECs. The Commission determined, to the contrary, that the mirroring rule limits the potential for discrimination, because it provides that the rate caps will apply to Internet-bound traffic "only if an incumbent LEC offers to exchange *all*" local traffic at the same rate. *Order*, para. 23 (J.A. 17) (emphasis added).

Addressing, finally, the "protection of consumers" prong of the forbearance test (section 160(a)(2)), the Commission noted that Core had made "no specific arguments to demonstrate that forbearance from the rules at issue would satisfy this standard." *Order*, para. 25 (J.A. 18). The Commission determined that the rate cap and mirroring rules continued to help consumers by limiting the market-distorting arbitrage opportunities associated with intercarrier compensation for Internet-bound traffic. *Order*, para. 25 (J.A. 18).

Growth Cap and New Markets Rules. Addressing the application of the three parts of the forbearance test to the growth cap and new markets rules, the FCC concluded, first, that those rules no longer were in the public interest. *Order*, paras. 20, 21 (J.A. 16-17). Examining the record, which contained studies that showed recent declines in dial-up Internet access (in favor of broadband offerings) and that predicted further declines in the future, the Commission concluded that "[m]arket developments since 2001 have eased the concerns about growth of dial-up ISP traffic that led the Commission to adopt these rules." *Order*, para. 20 & n.56 (J.A. 16). Because an increase in aggregate dial-up usage was unlikely, the Commission concluded that the policy objective "favoring a unified compensation regime" that would treat all CLECs alike "outweigh[ed] any remaining concerns about the growth of dial-up Internet traffic." *Id.*, para. 20 (J.A. 16); *see also id.*, para. 21 (J.A. 16-17) (applying the same analysis with respect to new markets rule).

Addressing the part of the test that asks whether a rule is necessary to ensure just, reasonable and nondiscriminatory rates and terms, the Commission concluded, once again, that the decline in dial-up Internet usage made retention of the growth cap and new markets rules unnecessary to prevent an expansion of arbitrage opportunities. *Order*, para. 24 (J.A. 17-18). Given that conclusion, the agency determined that forbearance from applying those rules would promote the statutory non-discrimination objective reflected in section 160(a)(1) by removing differences in treatment among CLECs and between CLECs and the incumbents with which they exchange traffic. *Id.*

Finally, as it had done under the other two prongs of the forbearance test, the Commission found that the growth cap and new markets rules – which were "directly related to intercarrier compensation, and were not implemented specifically for the protection of consumers" – qualified for forbearance under the "protection of consumers" prong. *Order*, para. 26 (J.A. 19).

Having found that forbearance from application of the growth cap and new markets rules was warranted with respect to Core, the FCC further concluded that its analysis "applie[d] with equal force to other telecommunications carriers." *Order*, para. 27 (J.A. 19). The Commission accordingly "extend[ed] the grant of forbearance with respect to those rules to all telecommunications carriers." *Id.*

C. Court Proceedings Regarding the *Order*

On October 27, 2004, Core filed in this Court a "Complaint for Declaratory Relief," along with an accompanying "Motion for Summary Judgment," seeking from this Court an order "declaring that * * * [Core's] entire Petition for Forbearance was granted by operation of law." Complaint at 9. Core and BellSouth subsequently filed petitions for review of the *Order* on December 17, 2004. By order dated March 25, 2005, this Court consolidated Core's complaint with the two petitions for review and denied Core's "Motion for Summary Judgment."

SUMMARY OF ARGUMENT

I.A. The Commission validly denied Core's forbearance petition in part within the 15-month period prescribed in section 160(c), when the agency voted to adopt the *Order* on October

8, 2004. Section 160(c) provides that a petition for forbearance "shall be deemed granted if the Commission does not *deny* the petition" within the prescribed 15-month time period. 47 U.S.C. § 160(c) (emphasis added). A separate sentence of section 160(c) requires the Commission to "explain its decision in writing." The two sentences in section 160(c) impose separate and independent obligations on the Commission, and Core points to nothing in the text of the statute to suggest that Congress linked the two requirements such that a vote to deny in part a forbearance petition within the statutory period is insufficient to forestall a "deemed" grant unless it is accompanied during that period by the release of a written order. The Commission's view that it validly acted within the statutory period is consistent with its precedent and with 47 C.F.R. § 1.103(a), which enables the agency, "on its own motion," to "designate an effective date that is either earlier or later in time" than the release date of an order.

B. Even if the Court were to accept Core's assertion that the FCC's failure to release the *Order* within 15 months caused Core's forbearance petition to be "deemed granted," that would not answer the question whether, as Core asserts, the Commission thereafter lost authority to issue the *Order*. The statute is ambiguous with respect to that question, and the Court should not consider it because Core did not first present the question to the Commission in a petition for administrative reconsideration. *See* 47 U.S.C. § 405(a) (the filing of a petition for reconsideration is a condition precedent to judicial review where the party seeking review "relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass").

II. The Commission reasonably granted Core's forbearance petition with respect to the growth cap and new markets rules, and reasonably denied the petition with respect to the rate cap and mirroring rules.

A. The Commission had adopted the growth cap and new markets rules in the *ISP Remand Order* primarily "to ensure that *growth* in dial-up Internet access d[id] not undermine" the Commission's "efforts to limit intercarrier compensation for this traffic" while it considered comprehensive reforms in another proceeding. *ISP Remand Order*, para. 86 (emphasis added); *accord id.*, para. 81. In the *Order*, the Commission concluded that those rules were no longer necessary, because market developments since 2001 had "eased the concerns about growth of dial-up ISP traffic." *Order*, para. 20 (J.A. 16). In particular, "the number of end users using conventional dial-up to connect to ISPs [was] declining" in favor of users of broadband access, and market trends indicated that an expansion of arbitrage opportunities was "not likely to occur [in the future] given declining usage of dial-up ISP services." *Order*, para. 20 (J.A. 16). Substantial evidence – including detailed industry analyst reports and the FCC's own records – supported the Commission's conclusions about current market conditions, as well as its predictive judgment about future trends. *E.g.*, *Order*, para. 20 & n.56 (J.A. 16).

BellSouth's argument that there is no logical connection between a steep decline in dial-up subscribership and a decline in dial-up traffic is predicated upon anecdotal and otherwise unreliable record submissions that do not negate the substantial support in the record for the Commission's conclusions. Moreover, contrary to BellSouth's assertion, the Commission fully considered competitive conditions in its analysis and explained why its original justification for the growth cap and new markets rules no longer applied. *See Order*, paras. 21-22 (J.A. 16-17).

B. The Commission reasonably denied Core's forbearance petition insofar as it sought forbearance from the rate caps.[13] To prevail in a request for forbearance, a petitioner

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[13] Core also nominally challenges the Commission's decision not to forbear from the mirroring rule, but offers no substantive argument in its brief on that issue.

must establish that *each* of the three standards set out in section 160(a) is satisfied. Core's request for forbearance from the rate caps, however, did not satisfy *any* of the three standards.

First, the Commission properly rejected Core's claim that the rate caps discriminate against CLECs in violation of section 160(a)(1) because – operating in concert with the mirroring rule – the lower rates for Internet-bound traffic apply only where an incumbent offers to exchange non-ISP-bound traffic at the same low rate. *Order*, para. 23 (J.A. 17). Core, in any event, never explains how the rate caps could cease to be necessary to ensure "just and reasonable" rates under section 160(a)(1) when, without the caps, CLECs might well resurrect the "excessively high reciprocal compensation rates" that prevailed before the caps were adopted. *See ISP Remand Order*, paras, 75, 87. *Second*, the FCC reasonably rejected Core's assertion that the rate caps harmed consumers in violation of section 160(a)(2) by reducing telecommunications investment and limiting consumer choices, because Core "provide[d] no evidence to support" that claim. *Order*, paras. 18, 25 (J.A. 15, 18). *Third*, the Commission reasonably found that forbearance from the rate caps would not serve the public interest in light of the well-documented arbitrage opportunities and market distortions that existed without those caps. *Order*, para. 18 (J.A. 15-16). Core's response is composed largely of colorful rhetoric and pejorative labeling that do not satisfy its burden under section 160(a)(3). *See* Core Br. 39-40.

Apart from the rate cap issue, Core mischaracterizes its own forbearance petition in claiming that it sought forbearance from the *entire ISP Remand Order* rather than the four components of the interim intercarrier compensation regime adopted in that order. The Commission fairly interpreted the petition to apply only to those four components. *Order*, para. 11 (J.A. 12). Its silence with respect to other unnamed parts of the *ISP Remand Order* does not result in a "deemed" grant of forbearance by operation of law.

III. The Court should dismiss Core's "Complaint for Declaratory Relief." The provisions for judicial review in the Communications Act, 47 U.S.C. § 402(a), and the Hobbs Act, 28 U.S.C. § 2342(1), which Core invoked by filing its petition for review, are the exclusive means of seeking review of the *Order*. Such review is fully capable of providing Core with all the relief to which it may be entitled. There is no jurisdictional basis for this Court to consider Core's separate "complaint" in these circumstances.

STANDARD OF REVIEW

The FCC's interpretations of the Communications Act generally, *see*, *e.g.*, *Cellco Partnership v. FCC*, 357 F.3d 88, 94 (D.C. Cir. 2004) (citation omitted), and of section 160 in particular, *see Cellular Telecomms. & Internet Assn. v. FCC*, 330 F.3d 502, 504, 507 (D.C. Cir. 2003), are governed by the principles set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[14] Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *See also National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. at 2699 (under *Chevron*, "ambiguities in

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[14] Contrary to Core's suggestion (Core Br. at 17 n.1), it is now settled law in this Circuit that *Chevron* principles apply even if the question is whether the statute authorizes the agency to do a particular act. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005) (observing that "the deferential interpretive canon announced in *Chevron* * * * applies to our review of FERC's construction of the [Natural Gas Act's] jurisdictional provisions"); *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 540-41 (D.C. Cir. 2004) ("The Court typically defers * * * to an agency's interpretation of its own jurisdiction under a statute that it implements."); *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (expressly following the "Supreme Court['s] * * * practice [of] defer[ring] even on jurisdictional issues") (citations omitted).

statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

To the extent that petitioners challenge the reasonableness of the Commission's application of the forbearance statute, the Court must uphold the Commission's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action"; the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d at 1202-08. Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

<u>ARGUMENT</u>

I. THE COMMISSION HAD JURISDICTION TO ISSUE THE *ORDER* ON REVIEW.

After extending (through October 11, 2004) the statutorily prescribed period for acting on Core's forbearance petition, the Commission adopted the *Order* within that extended period (on October 8, 2004). When the Commission released the text of the *Order* 10 days later, it specified that the action it had taken "shall be effective" as of the adoption date. *Order*, para. 30 (J.A. 19).

Core contends that, notwithstanding the FCC's timely *adoption* of the *Order*, its action did not meet the 15-month deadline specified in section 160(c), because the Commission released the text of the *Order* a week after the deadline had passed. Core Br. 21-29. Core further contends that, because the Commission assertedly failed to comply with the 15-month deadline, the Commission lost jurisdiction to issue the *Order* and Core's forbearance petition was "deemed granted" in its entirety by operation of law. Core Br. 18-20. The Commission's decision correctly contemplates that timely adoption of the *Order* satisfied the statutory time period. Moreover, even if Core were correct that release of the text of the *Order* within the statutory time period was required to avoid a "deemed" grant of its petition, Core's further claim that the Commission lost jurisdiction to issue the *Order* is barred because Core did not first present that claim to the Commission in a petition for administrative reconsideration. *See* 47 U.S.C. § 405(a) (requiring reconsideration proceedings prior to judicial review if the judicial challenge "relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass").

A. The FCC's Vote to Adopt the *Order* Was Sufficient to Deny Core's Forbearance Petition in Part Within the Statutory Time Frame.

The Court should reject Core's claim that its petition for forbearance was "deemed granted" by operation of law when the Commission failed to release the text of its *Order* by October 11, 2004. *See* Core Br. 16, 18-20. The Commission's vote on October 8, 2004, to grant Core's petition in part and deny it in part was sufficient to constitute action on the petition within the period established by Congress in 47 U.S.C. § 160(c). Neither the statute nor the Commission's rules support Core's claim that its petition could be denied only by the *release* of an order – as opposed to its adoption – within the statutory period.

1. Section 160(c) provides that any petition for forbearance "shall be deemed granted if the Commission does not *deny* the petition * * * within one year after the Commission receives it, unless the one-year period is extended by the Commission." 47 U.S.C. § 160(c) (emphasis added). Two sentences later, section 160(c) states that the "Commission may grant or deny a petition in whole or in part and shall explain its decision in writing." Core contends that a petition is not "den[ied]" under § 160(c) until the Commission "explain[s] its decision in writing." Core is wrong.

Section 160(c), by its terms, specifies the date by which a petition must be *denied,* and states that the petition is "deemed granted" unless it is denied by that date. Congress did not say, however, that the FCC's denial of a petition is effective only as of the date on which it issues a written order. Rather, the requirement that the Commission provide a written explanation is an independent instruction, appearing in a separate part of the provision. Core points to nothing in the text of section 160(c) indicating that a vote to deny a petition for forbearance within the statutory period is insufficient unless it is accompanied at that time by the release of a written order. In effect, Core would have the Court add the words "within the one-year and 90-day period" after the final sentence of section 160(c). The FCC's reasonable determination that the deadline established by § 160(c) is satisfied by a vote to deny a petition for forbearance within the statutory period is entitled to judicial deference.

The FCC typically does not release the text of its orders on the same day that it votes to adopt those orders,[15] and there is no reason to think that Congress was unaware of that longstanding practice. Core attempts to read the last sentence of section 160(c) – which requires that the Commission explain its decision in writing – as defining what the Commission must do to deny a petition. To be sure, in other provisions of the statute, Congress *expressly* has tied

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[15] Commission orders routinely bear two dates in their captions: an adoption date and a release date. Core's argument would make the adoption date a matter of no significance. Consistent with its typical practice, the Commission in the *Order* on review here identified both an adoption date and a release date.

deadlines for action to the issuance of a final reviewable order. *See* 47 U.S.C. §§ 204(a)(2)(A) & (C), 208(b)(1) & (3). But where, as here, Congress has not specified a deadline for the release of an order, the Court should not read one into the statute. *Cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. * * * If * * * Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."); *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 937 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) ("Because Congress knew how to state that it was establishing an advisory committee and did not do so here, the reasonable inference is that it did not intend for [the statute] to apply to guideline panels.").

2. Not only is Core's claim unsupported by the text of § 160(c), nothing in the Commission's rules or case law supports the view that a petition is not denied until the FCC releases an order setting forth the reasons for the decision reached in its vote. The Commission has traditionally maintained that a vote is sufficient to constitute FCC action. For example, in *Improvement Leasing*,[16] the Commission was asked to order applicants to rescind a transfer of control of a television station, in a case where the transfer had occurred before the Commission issued its written order but after the Commission had voted to approve the transfer. *See Improvement Leasing*, paras. 1-2. The Commission, however, rejected the argument that its vote was "insufficient, by itself, to constitute a grant of an application in a contested proceeding." *Id.*, para. 3; *see id.*, para. 20; *see also id.*, para. 6 ("It was our intent that this action was effective as

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[16] Memorandum Opinion and Order, *In re Application of Improvement Leasing Company (Transferor) and Taft Broadcasting Company (Transferee) For Consent to the Transfer of 100% Control of Channel 20, Inc.*, 73 FCC 2d 676 (1979), *aff'd sub nom., Washington Assn. for Television and Children v. FCC,* 665 F.2d 1264 (D.C. Cir. 1981) ("*WATCH*").

of that date even though the written order incorporating the views of the Commission * * * was to be released at a future time. It was plainly our intent that the action of the Commission [at the meeting] constituted an official action."). The Commission further rejected the claim that it is unlawful for there to exist a "hiatus" during which the Commission will have acted but its action would not yet be effective for purposes of triggering the period for seeking judicial review. *Id.*, para. 21 ("[W]e fail to see that * * * statutory and constitutional provisions are in any way implicated if such a 'hiatus' exists," where "applicants * * * who act in reliance on a Commission action such as the August 16th vote, do so at their own risk that the Commission may reverse its course on reconsideration or that the Commission's action may be reversed on judicial review. This is true regardless of whether applicants act on the basis of the Commission's vote or on the basis of the release of a written order."). This Court, on review, found that the challenges to the timing of the transfer were moot, but in any event stated that it was "unconvinced that the statute requires a written order before FCC action becomes effective." *WATCH*, 665 F.2d at 1273 & n.24.[17]

The Commission's regulations similarly confirm that the FCC's denial of a petition for forbearance may be made effective as of the vote to deny, even if the written order is issued subsequently. The FCC's rules provide that, "[u]nless otherwise specified by law or Commission rule[,] * * * the effective date of any Commission action shall be the date of public notice [*i.e.*, release] of such action." 47 C.F.R. § 1.103(a). The rule goes on, however, to

[17] This Court also noted that "the issue of the effective dates of orders has * * * been clarified" by the Commission's "recently adopted regulations providing that *absent a specific statement to the contrary by the Commission*, the effective date of an order is the date on which public notice of the action is provided." *WATCH*, 665 F.2d at 1273 & n.24 (emphasis added) (citing 47 C.F.R. §§ 1.4(b), 1.103). As explained below, the Commission's action here is fully consistent with those regulations.

provide that "the Commission may, on its own motion * * * , designate an effective date that is either earlier or later in time than the date of public notice [release] of such action." *Id.* Although such a designation of an earlier or later effective date does not affect pleading periods or the date on which the action is considered final for purposes of triggering the time period for judicial review, *see id.* §§ 1.103(a), (b), the Commission's rules plainly permit the action it took here – the designation of the date of its vote as the effective date, even though that is earlier than the release date.[18]

Core, however, relies on the opening clause of § 1.103(a) ("[u]nless otherwise specified by law") and contends that § 160(c) prevents the FCC from deciding that the effective date of its partial denial of Core's petition was prior to the release date of the text of the *Order*. Core Br. 26-28. Core simply misreads both the FCC's regulation and section 160(c). The opening clause of the regulation is not a self-imposed limitation on the FCC's authority. Instead, the first sentence establishes a default rule – orders are normally effective when released – but provides that this default rule may be modified by statute, by Commission regulation, or (in a part of the regulation Core ignores) by the Commission on its own motion. Here, nothing in § 160(c) speaks one way or the other to the question whether the Commission may specify the date of its vote as the effective date of its decision. The Commission could (as it did) properly act on its own motion to hold that the effective date of the *Order* was the date on which it voted to deny Core's petition in part.

[18] Although the Commission's action clearly falls within the scope of § 1.103, if there were any ambiguity about the matter, the Commission's interpretation of its own regulations would be entitled to substantial deference. *See, e.g.*, *National Med. Enters., Inc. v. Shalala*, 43 F.3d 691, 696-97 (D.C. Cir. 1995) ("Insofar as the Hospital's challenge calls into question the Secretary's interpretation of her own regulations, we apply a still more deferential standard than that afforded under *Chevron*.").

Finally, the cases on which Core relies are inapposite. For example, Core (Br. 23) cites *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), which it claims stands for the proposition that, "[i]n agencies as in courts, votes are not final until decisions are final; and decisions do not become final until they are released, accompanied by an explanation of the reasons for the results," *id.* at 489. In *Checkosky*, the question was whether a party could obtain discovery of internal SEC draft opinions, notes of SEC meetings, and records of votes taken by the SEC Commissioners shortly after oral argument. *See id.* at 489. This Court explained that such a preliminary vote, like a vote taken by judges after oral argument, was merely tentative and could not be called a final "decision." *See id.* (explaining that "it is a misnomer to call the vote after oral argument an agency's 'decision'"). In contrast, the Commission's October 8, 2004 one and only vote was its action on Core's petition for forbearance; it was neither preliminary nor tentative, and Core does not contend otherwise. *See Order* at 1 (J.A. 9) (stating that the *Order* was "Adopted: October 8, 2004").

Core claims that the Court must interpret § 160(c) to require the Commission to release an order to deny a petition for forbearance, asserting that otherwise the Commission could vote within the statutory period but then wait years before issuing such an order. Core Br. at 23. In this case, of course, the FCC released its order explaining its vote just 10 days after that vote. In any event, the appropriate course if the FCC were to delay unreasonably in releasing an order would be for an aggrieved party to file a petition for mandamus to compel the FCC to release its order, not to conclude that a Commission vote does not constitute agency action for purposes of § 160(c). Nor is there any merit to Core's suggestion that the Commission could seek to manipulate the statute by using its rules to designate an "effective date" that was earlier than the date on which the Commission had actually adopted the *Order* by voting. *See, e.g.*, *Citizens to*

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (government action is entitled to "a presumption of regularity") (citations omitted).[19]

B. Core's Further Claim that the Commission Lost Jurisdiction to Issue the *Order* Is Barred Under 47 U.S.C. § 405(a) Because Core Did Not First Present the Challenge to the Commission in a Petition for Reconsideration.

Even if the Court were to accept Core's assertion that the Commission's failure to *release* the *Order* within 15 months caused its forbearance petition to be "deemed granted," such acceptance would not answer the question of whether the Commission thereafter lost authority to issue the *Order*. The Court should not consider that jurisdictional question, because it never was presented to the Commission before the agency issued its *Order*, and because Core did not provide the Commission with an opportunity to address that issue on administrative reconsideration before filing its petition for judicial review.

"It is black-letter administrative law that 47 U.S.C. § 405 bars [the Court] 'from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass.'" *American Family Ass'n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir.), *cert. denied*, 125 S.Ct. 634 (2004) (citations omitted). This bar applies even though the parties may have had no reason to anticipate the question – and thus to present it to the Commission – before the agency acted. *AT&T Corp. v. FCC*, 86 F.3d 242, 246 (D.C. Cir. 1996). Even where the

[19] Core devotes much of its brief (Br. 21-25) to arguing against a strawman. No party is claiming that the Commission's *press release*, announcing the results of the vote on October 8, 2004, was an order denying Core's petition for forbearance in part. For this reason, the cases Core cites for the proposition that a press release does not constitute public notice triggering the statutory period for seeking judicial review are simply beside the point. *See* Core Br. 21 (citing, *e.g., Microwave Communications, Inc. v. FCC,* 515 F.2d 385 (D.C. Cir. 1974)). The press release, which was released on October 8, does provide conclusive evidence that the Commission actually voted on that date, and thus defeats Core's implication that the agency might have fabricated the adoption date.

Commission, on its own, mentions an issue, but no party subjects it to the adversarial process before the agency, that issue may not be preserved. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997); *AT&T Corp. v. FCC*, 317 F.3d 227, 235 (D.C. Cir. 2003). The controlling question is "whether a reasonable Commission *necessarily* would have seen the question raised before us as part of the case presented to it." *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998) (emphasis added); *accord American Family Ass'n*, 365 F.3d at 1167-68. That is not the case here with respect to Core's jurisdictional claim, where neither the *Order* on review (which is premised on the assumption that Core's petition never was "deemed granted"), nor any comments from the parties, addressed the issue.

Presenting the jurisdictional issue first to the Commission for its consideration is particularly important in this case precisely because the issue is not addressed directly in the governing statute itself. As we show briefly below, Core's interpretation of the FCC's jurisdiction under the "deemed granted" clause is not unambiguously required. Congress thus "left a gap for the agency to fill." *Chevron*, 467 U.S. at 843. There is, accordingly, a particularly strong basis to require the parties to exhaust administrative remedies before the Commission to permit the Commission to perform the necessary interpretive gap-filling. The issue currently is before the Commission in proceedings on reconsideration of the *Order*,[20] so dismissal of Core's claims here would not enable the issue to evade review.

The language of section 160(c) does not unambiguously provide that the Commission is disabled from acting on a forbearance petition if it fails to release a denial order by the statutory deadline. That subsection states that a forbearance petition shall be "deemed granted" if the FCC "does not deny" the petition within the statutory deadline. This language clearly provides that forbearance petitions may be granted by operation of law in the absence of Commission action, but it does not speak directly to the agency's jurisdiction thereafter to act. Although the Commission has not addressed the issue, it is open to the agency to conclude that section 160(c) provides for an *interim* "deemed" grant of a forbearance petition that the Commission fails to deny within the statutory deadline, but that the agency retains the authority thereafter to deny or grant the petition in whole or in part, and to "explain its decision in writing."

Such a reading of section 160(c) would be reasonable in light of other subsections of section 160. Subsections (a) and (b), for example, set out detailed forbearance standards that bind the Commission's rulings on forbearance petitions. It is at least questionable whether

[20] Qwest Corporation ("Qwest") filed an administrative reconsideration petition arguing that, "contrary to the premise of the Core Complaint to the D.C. Circuit, the passage of time without action by the FCC on a forbearance petition does not 'divest' the Commission of jurisdiction, it merely operates to effectuate a grant of the petition subject to the normal rules regarding reconsideration and judicial review." Qwest Conditional Petition for Reconsideration, WC Docket No. 03-171, at 4 (Nov. 10, 2004) (copy attached as Appendix II). To avoid the possibility that Core's forbearance petition may have been deemed granted in its entirety, Qwest asked the Commission on reconsideration to reaffirm the *Order* insofar as it had denied Core's forbearance petition in part. *Id.* at 6. Core in response directly joined issue with Qwest, contending before the Commission that its (Core's) forbearance petition was "deemed granted by operation of law" and that "the Commission may not reach back in time on reconsideration to take away what was granted by Congress by operation of law." Opposition of Core Communications, Inc. to Qwest Corporation's Petition for Reconsideration, WC Docket No. 03-171, at 3 (Nov. 18, 2004) (copy attached as Appendix III).

Congress would have provided those detailed standards if it also intended to permit those standards to become irrelevant when the agency does not deny a petition within the deadline. Under Core's interpretation, a Commission that desired to forbear from regulation but was unable to justify forbearance under the statutory standards could simply allow the deadline to pass, thus rendering the statutory requirements meaningless.

Interpretation of the statute also must take account of the fact that section 160 makes no distinction between forbearance from regulations and forbearance from provisions of the Communications Act. Particularly given that section 160(c) permits private parties (rather than the Commission or some other body with congressionally assigned responsibilities) to select what provisions of the Act will be the subject of forbearance consideration under the 12-month (or 15-month) statutory deadline, it is at least plausible that Congress viewed the deadline and the "deemed granted" provision simply as mechanisms to force timely action by the Commission, and not as a process for wholesale revision of the Act through inaction.

The statute's legislative history bears out this view. Although the legislative history suggests congressional concern about the pace of FCC decisionmaking,[21] it principally reflects Congress's desire that the agency be given new authority – previously denied it by the courts – to forbear from applying statutory provisions (as well as regulations) where such forbearance is in

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[21] *See* 141 Cong. Rec. S 7898 (June 7, 1995) (remarks of Sen. Dole) (noting that "[c]urrently there is no guarantee that the Commission will ever act on" forbearance requests, and that the deadline will "force the Federal Communications Commission to eliminate outdated regulations, and do so in a timely manner").

the public interest.[22] Construing section 160(c) to preserve the Commission's authority to rule on forbearance requests after the deadline has passed would vindicate a congressional intention that forbearance be granted when it is in the public interest. Because the Commission would temporarily be disabled from enforcing provisions that are subject to a "deemed" grant, this reading also would encourage the Commission to carry out Congress's separate objective that the Commission act upon forbearance petitions in a timely manner.

As Core notes (Br. at 18-20), some federal courts have held or suggested that particular administrative agencies lost (or would lose) jurisdiction to deny applications if they missed statutory deadlines where the governing statute provided that the applications would be deemed granted if the deadlines are missed. *See, e.g.*, *TriState Bancorporation, Inc. v. Federal Reserve Bd.*, 524 F.2d 562, 566-68 (7th Cir. 1975); *Kickapoo Tribe of Indians v. Babbitt*, 827 F.Supp. 37, 44 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995). In the Communications Act setting, however, this Court has recognized that an analogous provision poses no jurisdictional bar to Commission action after a failure to meet a deadline has resulted in a "deemed" status. Section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3), provides that certain tariff filings proposing rate increases "shall be deemed lawful" unless the Commission suspends them within 15 days. If the Commission fails to suspend the tariff and the rates are thus "deemed lawful," the agency retains the power, on "later reexamination," to set aside the rate "prospectively." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002). The

[22] *See* 141 Cong. Rec. S 7888 (June 7, 1995) (remarks of Sen. Pressler) (noting that the law "will make it possible for the FCC immediately to forbear from regulating each and every competitive long-distance operator," thus overruling federal court decisions holding that the "FCC cannot deregulate"); S. Report No. 104-23 (accompanying S. 652), at 5 (March 30, 1995) (noting that "[t]he bill gives the FCC greater regulatory flexibility by permitting the FCC to forbear from regulating carriers when it is in the public interest").

tariff's "deemed lawful" status operates to bar the Commission from ordering refunds for the period before the Commission acts to set aside that status, but it does not bar further investigation of those rates and the imposition of prospective remedies. *Id.*

In any event, none of the cited cases involved a law as sweeping as the section 160 forbearance provision – authorizing forbearance from all statutory as well as agency regulatory requirements – and we are aware of no provision of the United States Code that is analogous to what Core's reading of the "deemed granted" clause in section 160(c) would produce. Section 160 authorizes, *inter alia*, telecommunications carriers to seek Commission forbearance from applying or enforcing "*any* provision of this Act" to a carrier or class of carriers. 47 U.S.C. §§ 160(a) & (c) (emphasis added). If the logic of the cited cases were applied to section 160, Commission inaction on a pending forbearance petition could effectively repeal the entire Communications Act as it applies to petitioning telecommunications carriers, without a written order for a court to review. Such a result is at least in tension with the Supreme Court's general observation on the subject of statutory deadlines that a "great principle of public policy * * * forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (internal quotation omitted).

In short, the arguments presented to the Commission in the pending reconsideration proceeding and to the Court in the parties' briefs suggest that there are at least three potential readings of the statutory "deemed granted" language – as granting a petition until the Commission acts, as rendering the agency's inaction a final order subject to reconsideration or review, or as depriving the Commission entirely of jurisdiction. Any such reading must be weighed against the language of the statute as a whole, including Congress's obvious intent to protect those who might be adversely affected by the grant, as well as the applicant for forbearance. The result is a significant gap in the statute that the FCC has not yet had an opportunity to fill. The Court, accordingly, should not consider the jurisdictional claim Core raises even if the Court rules that the Commission did not act in time.

II. THE FCC'S DECISION TO GRANT THE FORBEARANCE PETITION IN PART AND DENY IT IN PART WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

After considering Core's petition for forbearance and the record that the parties had generated in the forbearance proceeding, the Commission concluded that Core had not established that the rate cap and mirroring components of the interim intercarrier compensation regime for Internet-bound traffic met the standards for forbearance under section 160(a). *Order*, para. 15 (J.A. 14). The Commission, however, granted Core's request with respect to the growth cap and new markets components of the regime – finding that current and anticipated declines in dial-up Internet usage made those provisions unnecessary to prevent an aggregate expansion of arbitrage opportunities while it conducted proceedings to address intercarrier compensation issues in a unified and comprehensive way. *Order*, paras. 20-21 (J.A. 16-17).

BellSouth contends that the Commission acted unreasonably in granting forbearance with respect to the growth cap and new markets rules. BellSouth Br. 17-27. Core challenges as arbitrary and capricious the Commission's analysis with respect to the rate cap and mirroring rules. Core Br. 36-43.

A. The Commission Reasonably Determined that the Growth Cap and New Markets Rules No Longer Were "Necessary" Within the Meaning of Section 160(a).

(1) The Commission's Forbearance Decision Was Supported By Substantial Evidence.

In concluding that "developments since 2001 have eased the concerns about growth of dial-up ISP traffic," the Commission pointed to "[r]ecent industry statistics" showing that the expansion in arbitrage opportunities that the growth cap and new markets rules had been adopted to prevent was "not likely to occur given declining usage of dial-up ISP services." *Order*, para. 20 (J.A. 16). The Commission pointed specifically (*Order*, n.56 (J.A. 16)) to its own records showing a ten-fold increase in high-speed Internet access lines between 1999 and 2003,[23] and to an industry analyst's report. The report documented that dial-up Internet access subscribership by 2002 already was declining in absolute numbers; and it forecast that the percentage of on-line subscribers using dial-up access would decline from 76% to 25% between 2002 and 2008 as a result of broadband growth. *See* Jeffrey Halpern & Joshua W. Harrington, Bernstein Research Call, *DSL Economic I: Continued Broadband Adoption to Drive 22% DSL Revenue Growth Through 2008* (October 15, 2003) ("Bernstein Research Call") (attached as Tab E to Letter, dated October 4, 2004, from Michael Hazard to FCC Secretary) (J.A. 112). Other reports in the record were consistent with the cited sources. *See* Gary H. Arlen, ed., TR's Online Census, *7 Percent Growth in 2004 Puts Year-End Tally at 81 Million Online Users* (Fourth Quarter 2003) ("TR's Online Census") (showing that "[t]he shift toward broadband services accelerated during 2003" and that "[t]he strong increase in broadband usage is predictably balanced by a continuing erosion of the dial-up audience") (attached as Tab D to Letter, dated October 4, 2004, from

[23] *Federal Communications Commission Releases Data on High-Speed Services For Internet Access*, News, at Table 1 (rel. June 8, 2004).

Michael Hazard to FCC Secretary) (J.A. 96, 97); Victor Shvets, *et al.*, Deutsche Bank Securities Inc., *US Telecom Data Book – 3Q03* (November 2003) (showing achieved and projected growth in broadband penetration) ”) (attached as Tab D to Letter, dated October 4, 2004, from Michael Hazard to FCC Secretary) (J.A. 108).

BellSouth argues that the Commission arbitrarily ignored record evidence that dial-up ISP *minutes* were still increasing, even if dial-up subscribership was in decline. BellSouth Br. 17-18. BellSouth further contends that, because the Commission's analysis regarding the need for the growth cap and new markets rules allegedly was based upon "simple factfinding," the agency's failure to consider that evidence means that its findings are not supported by substantial evidence as required under the Administrative Procedure Act. BellSouth Br. 19. These contentions exaggerate the content and import of the record regarding dial-up minutes, and mischaracterize the nature of the Commission's inquiry.

As an initial matter, contrary to BellSouth's characterization, the Commission's conclusion that the growth cap and new markets rules were no longer necessary was not the product of "simple factfinding," but also included predictive judgments about market behavior that necessarily involve the agency's experience and expertise. The growth cap itself was not a growth freeze; it initially allowed increases in dial-up traffic of up to 10 percent a year. *ISP Remand Order*, para. 86. The question for the Commission, therefore, was not whether there would be any growth in the number of minutes, but whether it would be substantial enough to make the volume limitations worth enforcing. Relying on studies that both reported existing conditions and projected future trends, the Commission found that such a substantial expansion of arbitrage opportunities was "not likely to occur." *Order*, para. 20 (J.A. 16). In these circumstances, "[s]ubstantial evidence does not require a complete factual record," and courts must nevertheless accord the agency's conclusions "substantial deference." *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir.), *cert. denied*, 534 U.S. 1054 (2001). *Accord FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

Under the applicable "substantial evidence" test, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. FMC*, 383 U.S. 607, 620 (1966). Rather, even if the Court, addressing the issue *de novo*, might reach a different conclusion, the substantial evidence standard is satisfied so long as the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *AT&T Corp. v. FCC*, 86 F.3d at 247 (citations omitted). *Accord Kay v. FCC*, 396 F.3d 1184, 1188 (D.C. Cir. 2005), *pet. for cert. filed*, 74 U.S.L.W. 3042 (Jul. 5, 2005); *United Services Automobile Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004). The Commission's finding easily satisfies that standard.

The only industry-wide "evidence" that BellSouth relies upon for its contention that the growth caps and new markets rules remain necessary to prevent a continuing increase in dial-up Internet access minutes is its own October 1, 2004, ex parte letter, which described the results reflected in a one-page bar graph that, itself, contained no explanation of the source or methodology used to generate those results. *See* Letter, dated October 1, 2004, from Herschel L. Abbott, Jr., BellSouth, to FCC Secretary ("BellSouth ex parte") (J.A. 65-68). That skeletal submission provided no basis on which the Commission could assess its accuracy.[24] Even on its own terms, the BellSouth ex parte and accompanying graph provided no serious rebuttal to the

[24] Indeed, after the record had closed, BellSouth acknowledged that the original submission contained inadvertent errors. *See* Letter, dated December 17, 2004, from Bennett L. Ross, BellSouth, to FCC Secretary (attached as pages 10-12 of the addendum to BellSouth's brief).

Commission's conclusion that "[m]arket developments since 2001 have eased the concerns about growth of dial-up ISP traffic that led the Commission to adopt these [growth cap and new markets] rules." *Order*, para. 20 (J.A. 16). The BellSouth graph acknowledged that "[t]he U.S. residential dial-up market peaked in 2002, and the total subscriber base has gradually declined each year since." (J.A. 68). And far from reaffirming "the tremendous growth in dial-up Internet access since passage of the 1996 Act" that had caused the Commission to adopt the growth cap and new market rules in the first place,[25] the BellSouth submission projected very modest percentage increases in dial-up Internet minutes between 2004 and 2006, with steep declines thereafter. *See* BellSouth ex parte, Attachment (J.A. 68).

BellSouth also cites anecdotal claims by Qwest and a group of smaller rural LECs. BellSouth Br. 18. The rural carriers speculated that, because broadband penetration in rural areas lags behind that in urban regions, removing the growth cap and new markets restrictions would "disproportionately affect" rural LECs. Letter, dated October 7, 2004, from Karen Brinkman & Tonya Rutherford, representing the Independent Telephone & Telecommunications Alliance, to FCC Secretary, at 2 (J.A. 132). Qwest contended, without citation, that it "has experienced a 39% cumulative increase in known ISP-bound minutes of use" since the *ISP Remand Order* took effect in 2001. Letter, dated October 5, 2004, from Andrew Crain, Qwest, to FCC Secretary, at 3 (J.A. 124). At best, these unsupported claims logically are subsumed within the purported industry-wide results that BellSouth proffered – results that show essentially a plateau in dial-up minutes from 2004 through 2006, with an accelerating decline thereafter.

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[25] *ISP Remand Order*, para. 69; *see also id.*, para. 86.

They do not vitiate the Commission's reasonable, common sense conclusion that a decline in dial-up traffic would follow the steep and undisputed decline in subscribership.

Lacking meaningful empirical backing for its assertion that the growth cap and new markets rules remained necessary, BellSouth nevertheless complains that the Commission failed to address BellSouth's unsupported theories about why forbearance from those rules would substantially exacerbate arbitrage problems. BellSouth contends, for instance, that the Commission arbitrarily failed to consider the CLECs' alleged incentives and ability to increase dial-up traffic if the growth caps and new markets restrictions were removed and the CLECs were able to receive intercarrier compensation on additional traffic. BellSouth Br. 20. However, the rate caps remain in effect under the *Order*, thus curbing carriers' ability to engage in abusive strategies, such as "'pay[ing] their ISP customers for the privilege of completing the calls.'" BellSouth Br. 20 (quoting *WorldCom v. FCC*, 288 F.3d at 431). And the record suggested that dial-up pricing, in any event, had little to do with the growth in broadband usage that was eroding dial-up Internet access. It showed, rather, that broadband growth was driven by "two dynamics: (1) accelerating penetration rates driven by * * * price reductions" in DSL service, and "(2) a shift towards websites sporting bandwidth-demanding content (*e.g.*, streaming music videos and movie trailers) making the narrowband experience ever-more unpleasant." Bernstein Research Call at 2 (J.A. 113).

BellSouth speculates that, "[g]iven the increasing array of information and services available over the Internet since 2001, increased Internet usage per subscriber should be expected, *especially by dial-up users*, who must remain online longer than broadband users to receive the same content." BellSouth Br. 19 (emphasis added). But the only data in the record comparing the time spent online by dial-up and broadband users showed that broadband users spent significantly more time online per week than their dial-up counterparts. *See* TR's Online Census at 3 (J.A. 98) (showing dial-up subscribers with 10.93 hours online per week, DSL subscribers with 16.81 hours online per week, and cable modem subscribers with 19.76 hours online per week). The Commission thus had ample basis to respond to such speculation by concluding that it did "not anticipate * * * that the availability of compensation to carriers that serve ISPs will have any material impact on the migration of consumers from dial-up services to broadband services." *Order*, para. 20 (J.A. 16).

(2) The Commission Reasonably Explained Its Decision to Forbear from Applying the Growth Cap and New Markets Rules.

BellSouth argues (Br. 22-24) that the FCC's decision to grant forbearance with respect to the growth cap and new markets rules violates the requirement of section 160(b) that, in determining whether forbearance serves the public interest, the Commission must "consider whether forbearance * * * will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). BellSouth further contends that the Commission's decision departs without explanation from its earlier justification for the rules. BellSouth Br. 25-27. Both claims are insubstantial.

First, although the Commission did not specifically invoke section 160(b) in its forbearance analysis,[26] the entire inquiry that the Commission undertook dealt with competition – and more particularly, whether specific components of the hybrid regime were still necessary to curb the competitive distortions that they had been adopted to address. *See generally Order*,

[26] The Commission did mention section 160(b) in passing. *Order*, para. 15 n.42 (J.A. 14).

paras. 16-26 (J.A. 14-19).[27] The Commission reasonably concluded – on the basis of the administrative record (*see* pages 36-41, above) – that they were not, because the declining number of subscribers using conventional dial-up service to connect to ISPs "eased concerns about *growth* of dial-up ISP traffic that led the Commission to adopt th[ose] rules." *Order*, para. 20 (J.A. 16) (emphasis added); *see also id*., para. 21 (J.A. 16-17).

BellSouth questions "how competition could be promoted by *increasing* the amount paid" to competitors that target ISP customers. Br. 25. But even if removing the growth cap and new markets rules might permit some carriers to increase intercarrier compensation receipts, the Commission was entitled to conclude that forbearance would not undermine the intent of those rules to prevent an expansion of the problem in aggregate terms. As one commenter noted, "[t]he real impact of eliminating the growth caps would be an increase in competition to serve ISPs, as LECs attempted to gain a larger share of a *declining* market." Letter, dated October 6, 2004, from Tamar Finn and Patrick Donovan (on behalf of Pac-West Telecomm, Inc.) to FCC Secretary, at 2 (J.A. 129) (emphasis added). So long as the overall scope of the problem was unlikely to expand, the Commission reasonably could conclude that allowing all LECs to compete subject to rate cap limitations, rather than disabling some on the basis of their past performance (as the growth cap and new markets rules had done), should enhance rather than

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[27] Although the Commission's inquiry properly and emphatically focused on competition, BellSouth misstates the role of promoting competition in the application of section 160. Section 160(b) requires the Commission to "consider" whether forbearance "will promote competitive market conditions," and it links that consideration directly with the public interest part of the forbearance test. Under the statute, a determination that forbearance will promote competition "may be the basis for a Commission finding that forbearance is in the public interest." However, section 160(b) clearly permits the Commission to make a public interest finding and a determination whether to forbear regardless of whether the agency finds that competition will be promoted, so long as the agency satisfies the statutory mandate that it "shall consider" whether competitive market conditions will be promoted.

impede competition. And such a course also would advance the Commission's long-term objective of achieving a unified compensation regime that treats similar traffic alike. *Order*, paras. 20, 21 (J.A. 16-17).

Finally, there is no support for BellSouth's claim that the Commission impermissibly failed to address most of the policy rationales that it previously had identified in support of the growth cap and new markets rules. BellSouth Br. 26. The overriding rationale for the growth caps had been "to ensure that *growth* in dial-up Internet access d[id] not undermine [the Commission's] efforts to limit intercarrier compensation for this traffic" while it considered a permanent regime in the *Intercarrier Compensation* proceedings. *ISP Remand Order*, para. 86 (emphasis added). The new markets rule was intended principally to serve the same purpose of preventing "expan[sion]" of the intercarrier compensation regime pending further proceedings. *Id.*, para. 81. By contrast, Commission statements regarding the lack of "reliance" by carriers that had not previously entered the market (*see* BellSouth Br. 26), or the hope that "efficien[cy] and quality" – rather than a "desire to reap" intercarrier compensation – would motivate carriers to increase their customer base (*id.*), were not primary justifications for those limitations, but rather responses to claims that the respective limitations would unfairly harm CLECs.

The changed market circumstance of "*declining* usage of dial-up [Internet] services" (*Order*, para. 20 (J.A. 16) (emphasis added)) fully justified the Commission's conclusion that those rules were no longer necessary to serve their overriding purpose of preventing an *expansion* of intercarrier compensation for such services (*ISP Remand Order*, paras. 81, 86).

B. The Commission's Decision Not to Forbear From Enforcing the Rate Caps Was Correct.

In the *Order*, the Commission found that Core had not shown that *any* of the statutory criteria for forbearance were satisfied with respect to the rate caps. *See Order*, paras. 15, 22-23, 25 (J.A. 14, 17, 18). Indeed, the Commission expressly rejected each argument Core raised in support of its petition. *See id.*, para. 16 (J.A. 15) ("Core's arguments do not satisfy the requirements of section [160](a)(3)"); *id.*, para. 18 (J.A. 15) ("[w]e also reject Core's broad, unsupported allegations that the[] [*ISP Remand Order*] rules have brought about anticompetitive harm to CLECs") (internal quotation marks omitted); *id.*, para. 25 (J.A. 18) ("Core makes no specific arguments to demonstrate that forbearance from the rules at issue would satisfy th[e] standard [in § 160(a)(2)]."); *see also id.*, para. 16 (J.A. 14) ("Core has provided only a cursory analysis of how each of the three criteria [in § 160] is satisfied."). Although Core challenges the Commission's finding, it cannot prevail unless it can show that the FCC came to the wrong conclusion about *each* of the statutory prerequisites for forbearance as to the rate caps. *See Cellular Telecomms.*, 330 F.3d at 509. Core cannot make such a showing.[28]

[28] Core nominally challenges the Commission's decision not to forbear from the mirroring rule, but does not offer any substantive arguments with respect to the Commission's decision. Accordingly, its challenge with respect to that rule is waived. *See, e.g., Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 970 (D.C. Cir. 2003) (an argument not made in opening brief is waived). In any event, the Commission reasonably determined that forbearance from the mirroring rule would not serve the public interest. *Order*, para. 19 (J.A. 16). The Commission has recognized that although CLECs receive more Internet-bound traffic from other networks than they originate themselves, incumbents terminate more local voice traffic from other networks than they originate for termination on the networks of other carriers. *See ISP Remand Order*, para. 89 & n.176. Since there are no inherent cost differences between the two types of traffic, *ISP Remand Order*, para. 90, the Commission properly determined that the mirroring rule served the public interest by preventing incumbents from receiving intercarrier compensation at a higher rate for the local voice traffic with respect to which they have a net volume advantage, than CLECs are able to receive under the rate caps for ISP-bound traffic. *Order*, para. 19 (J.A. 16). Finally, Core has not shown how it is injured by a limitation on compensation to the ILECs.

Core argues that the rate caps discriminate against CLECs by capping the intercarrier compensation they receive for Internet-bound traffic at a lower rate than ILECs receive for the termination of local voice traffic, even though the cost of delivering both kinds of traffic is the same. Core Br. 37-38. Core appears to assert that this alleged discrimination required forbearance from enforcing the caps under each of the standards set out in section 160(a). Br. 37-39. Core's brief, however, provides no basis to set aside the Commission's reasonable conclusion that Core had not satisfied any of the forbearance criteria with respect to the rate caps. *Order*, paras. 15, 22-23, 25 (J.A. 14, 17, 18).

The Commission properly found "limited" potential for discrimination, because the lower rates for ISP-bound traffic apply only where, pursuant to the mirroring rule, an incumbent offers to exchange non-ISP-bound traffic that is subject to reciprocal compensation under section 251(b)(5) at the same lower rate. *Order*, para. 23 (J.A. 17). Moreover, the rate caps themselves were adopted in part to *prevent* the discrimination that occurred in the context of "the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service." *Order*, para. 25 (J.A. 18). Core does not explain how removing the rate caps would alleviate that discrimination.

In addition, section 160(a)(1) requires forbearance only where the Commission finds that a rule is not necessary to ensure that rates are "just and reasonable," a requirement Core ignores. 47 U.S.C. § 160(a). The FCC in the *ISP Remand Order* found a "prevalence of excessively high reciprocal compensation rates" that exceeded by "a considerable margin * * * the actual costs of transport and termination." *ISP Remand Order*, paras. 75, 87. Core never explains how the caps could cease to be necessary to ensure just and reasonable rates, given that forbearance from applying those caps would in many cases resurrect the application of those excessively high rates.

Core is also mistaken in arguing (Br. 37-38) that it satisfied the requirement of section 160(a)(2), which requires the Commission to determine whether enforcement of a rule is "necessary for the protection of consumers." 47 U.S.C. § 160(a)(2). The FCC found that Core had "provided no evidence to support" its allegations that the challenged rules had "'limited the service options available to telecommunications consumers.'" *Order*, para. 18 (J.A. 15)(quoting Core Forbearance Petition at 11 (J.A. 34)). The Commission further rejected – as mere "speculation" that did not satisfy section 160(a)(2) – Core's claim that the rate caps "'forced CLECs from the market and deterred investment.'" *Id.*, para. 25 (J.A. 18) (quoting Core Forbearance Petition at 10-11 (J.A. 33-34)).

Core has not even attempted to demonstrate that the rate caps are no longer necessary to protect consumers from the abuses identified in the *ISP Remand Order*. The FCC determined in the *ISP Remand Order* that, without caps on the rates for reciprocal compensation for ISP-bound calls, "the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical [subsidized] levels." *ISP Remand Order*, para. 21. If the rate caps were lifted, such perverse incentives presumably once again would act to distort the market and drive ISP rates to below cost at the expense of consumers of regular voice telephone service. As the FCC explained, there "is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access." *See id.*, para. 87. Thus, the caps remain necessary for the protection of consumers of regular telephone services by protecting them from subsidizing below-cost dial-up Internet access.

In the *Order*, the FCC also found that continued enforcement of the rate caps is in the public interest and that Core had not shown otherwise. *See* 47 U.S.C. § 160(a)(3). The Commission noted that Core had not even "challenge[d] the continuing validity of the public interest rationales provided by the Commission when it adopted" the caps. *Order*, para. 18 (J.A. 15). An important goal of the rate caps was to "send more accurate price signals and substantially reduce [the] market distortions" that had resulted from state commission decisions applying reciprocal compensation requirements to ISP-bound traffic. *Id.* The Commission had found that these "market distortions" had been "exacerbated by the prevalence of excessively high reciprocal compensation rates." *ISP Remand Order*, para. 75. Caps on these rates for ISP-bound traffic were aimed at addressing the problem of reciprocal compensation "encourag[ing] carriers to overuse competing carriers' origination facilities by seeking customers [such as ISPs] that receive high volumes of traffic." *Id.*, para. 73. *See WorldCom*, 288 F.3d at 431 ("Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls.").

Nothing Core says in its brief here undercuts the FCC's findings. Instead of providing evidence to disprove those findings, Core resorts to pejorative labeling – disparaging the agency's findings as "econo-babble" and "buzz words." Core Br. 39-40. But rhetoric, however colorful, does not satisfy Core's burden under § 160(a)(3). Far from leaving terms like "arbitrage" undefined, the Commission explained the situation at length in the *ISP Remand Order*, finding that "the record [wa]s replete with evidence that reciprocal compensation provide[d] enormous incentives for CLECs to target ISP customers," para. 70, with the result that, for some entities, the "revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes," *id.*, para. 70.[29] ISPs received below-cost service from carriers that "compete[d], not on the basis of the quality and efficiency of the services they provide[d], but on the basis of their ability to shift costs to other carriers." *Id.*, para. 71.

Finally, Core accuses the Commission of trying to "have it both ways" by saying (in 1996) that bill-and-keep results in market distortions and then (in 2001) that reciprocal compensation for ISP-bound calls results in market distortions. Core Br. 39. The Commission fully explained in the *ISP Remand Order* that it was modifying its original understanding of the incentive effects of a bill-and-keep system. *See ISP Remand Order*, paras. 72-74 (explaining why the Commission had changed its earlier view of the way incentives operate in a bill-and-keep regime). Such an acknowledged and explained change in view is entitled to deference. *See, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (an agency's explained change in position is entitled to deference).

C. Core Is Wrong to Suggest That a Portion of Its Petition Was "Deemed Granted" Because the *Order* Addressed Only the Four Features of the Interim Compensation Regime.

Core asserts that it asked for forbearance from the entire *ISP Remand Order*, not just the four rules that the Commission addressed in response to Core's petition. *See* Core Br. 6-7. Specifically, Core accuses the Commission of "address[ing] four aspects of the *ISP Remand*

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[29] The Commission cited comments describing one kick-back scheme in which a CLEC generated millions of dollars per month in fraudulent reciprocal compensation billings by establishing originating connections with the incumbent's end users – including the equivalent of 92 telephone lines in a horse barn – and maintaining those connections on essentially a continuous basis. Comments of Verizon Communications, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68 (filed July 21, 2000), at 17-18 (cited at *ISP Remand Order*, para. 70 n.135).

Order, even though Core's Petition requested that the FCC forbear from applying the *ISP Remand Order* in its entirety, such that the *status quo ante* would apply." Br. 6. According to Core, the FCC denied forbearance only with respect to the rate caps and mirroring rule, and not with respect to "the other parts of the *ISP Remand Order*," as to which it contends that its petition was deemed granted. Br. at 7. The "other parts of the *ISP Remand Order"* with respect to which Core now claims it sought forbearance would include, presumably, the FCC's reaffirmation of its earlier rulings that ISP-bound calls are jurisdictionally interstate and that such calls are not subject to the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5), as well as its decision to replace its 1996 reciprocal compensation regulations with new regulations.

Core never sought forbearance from enforcement of these legal rulings. Thus, the FCC's silence on those questions in the *Order* does not mean, as Core now implies, that forbearance has been "deemed granted" as to those issues. Core's petition and reply before the FCC make clear that it sought forbearance from application of the specific "scheme promulgated under the *ISP Remand Order* to the exchange of ISP-bound traffic" between carriers, not from any other part of the *ISP Remand Order*. Core Petition for Forbearance at 2 (J.A. 25); *see also* Reply Comments of Core Communications Inc. at 9 (J.A. 57) (arguing for forbearance from "further application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order*"). As Core itself appeared to recognize,[30] this "interim intercarrier compensation regime" consisted of four, and only four, elements, each of which the FCC addressed in its

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[30] *See* Core Forbearance Petition at 6 (J.A. 29) (focusing on "the reduced rates for reciprocal compensation, new market bar, and growth cap provisions of the *ISP Remand Order*").

Order: the rate caps, the growth caps, the new markets rule, and the mirroring rule.[31] There is thus no merit to Core's claim that it sought forbearance from the entirety of the *ISP Remand Order*, or its implication that its petition was deemed granted with respect to any other aspect of that order.

In any event, section 160 would appear not to envision the type of forbearance petition that Core now claims it filed. Section 160 addresses forbearance "from applying any regulation or any provision" of the statute. 47 U.S.C. § 160(a). Core's petition for forbearance, even if "deemed granted," would not result in the creation of a reciprocal compensation obligation for ISP-bound calls by extending § 251(b)(5) to such calls if, as the Commission has found in the past, that section does not apply to ISP-bound calls. An authority to forbear from a rule or a statute is not a vehicle for determining the applicability of the statute in the first instance. The Court should reject Core's suggestion to the contrary.

III. THE COURT SHOULD DISMISS CORE'S "COMPLAINT FOR DECLARATORY RELIEF."

In our Preliminary Response to Core's "Complaint for Declaratory Relief," we argued that the Court should not entertain Core's complaint because Core offered "no justification for bypassing established procedures for obtaining judicial review." FCC Preliminary Response, filed November 1, 2004, at 1. This remains the case, particularly now that Core has filed the

[31] This is also clearly how the Commission read Core's petition. *See Order,* para. 11 (J.A. 12) ("Core * * * request[s] that the Commission forbear from enforcing the provisions of the *ISP Remand Order* with respect to the exchange of ISP-bound traffic between telecommunications carriers. More specifically, Core asks the Commission to forbear from applying the rate caps, growth caps, new market rule, and mirroring rule of the *ISP Remand Order*.") (citations to Core's petition and reply omitted).

petition for review that this Court consolidated with the complaint. This Court should address that petition for review and dismiss Core's complaint.

It is a fundamental principle of federal jurisprudence that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by the Constitution and statute, * * * which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "It is to be presumed," moreover, "that a cause lies outside this limited jurisdiction, * * * and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. Review of final FCC orders is subject to 47 U.S.C. § 402(a), which provides that "*[a]ny proceeding* to enjoin, set aside, annul, or suspend any [FCC] order * * * shall be brought as provided by *and in the manner prescribed in*" the Hobbs Act. 47 U.S.C. § 402(a) (emphasis added). The Hobbs Act, in turn, grants the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to *determine the validity of* * * * all final orders of the [FCC] made reviewable by" 47 U.S.C. § 402(a). 28 U.S.C. § 2342(1) (emphasis added).

In its brief, Core relies solely on these judicial review provisions to claim that this Court has jurisdiction to consider its "complaint." Core. Br. 1, 29-35. But these provisions do not permit review of an FCC order through a complaint for declaratory ruling. Instead, the sole method provided under the Hobbs Act for challenging an FCC order is the filing of a "petition to review," as Core eventually did. 28 U.S.C. §§ 2341(2), 2344, 2347. Indeed, 28 U.S.C. § 2342 makes clear that this Court's jurisdiction under the Hobbs Act "is invoked by filing a petition as provided by" 28 U.S.C. § 2344, which permits a "party aggrieved by [a] final order * * * [to] file a petition to review the order." *Id.* §§ 2342, 2344; *see* Fed. R. App. P. 15(a)(1) ("[r]eview of an agency order is commenced by filing * * * a petition for review"); *see also FCC v. ITT World*

Communications, Inc., 466 U.S. 463, 468 (1984) ("The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals *as provided by statute*.") (emphasis added). Neither the Hobbs Act nor the Federal Rules of Appellate Procedure make any provision for the filing of a "complaint" in these circumstances, whether for declaratory relief or otherwise.

Core cites *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*") for the proposition that this Court's exclusive jurisdiction under § 402(a) and § 2342(1) extends to "'any suit seeking relief that might affect the Circuit Court's future jurisdiction.'" Core Br. at 29 (quoting *TRAC*, 750 F.2d at 75). In *TRAC*, however, the Court's jurisdiction was based on the All Writs Act, 28 U.S.C. § 1651, which allows a court to issue "all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Core does not claim section 1651 as a basis for jurisdiction here. Nor is there a question of *future* jurisdiction, because Core is challenging an already issued order that is reviewable now under § 402(a) and § 2342(1). Accordingly, neither *TRAC* nor the Hobbs Act itself provides a jurisdictional basis for the Court to hear Core's complaint, as opposed to its petition for review.

Contrary to its arguments (Br. 35), Core can obtain any relief to which it is entitled if it prevails on its petition for review. As Core states repeatedly, what it is seeking is a judicial determination that, as of October 11, 2004, its petition for forbearance "was granted by operation of law" and that the FCC's subsequently issued *Order* is a nullity. If Core were correct on this point, the Court would grant its petition for review, thereby giving Core precisely what it claims to be seeking: a declaration that its petition was deemed granted by operation of law and thus that the FCC acted unlawfully in purporting to deny it in part. *See* 28 U.S.C. §§ 2342 and 2349 (court in which record on review is filed has exclusive jurisdiction to adjudicate validity of agency order). Moreover, if Core is, in the future, aggrieved by any Commission order, including a decision on one of the pending petitions for reconsideration, Core may seek review of such a decision in due course. *See* Core Br. 33-35. Because there is no impediment here to Core's obtaining relief through an ordinary petition for review proceeding, this case presents no occasion for the Court to exercise jurisdiction under *TRAC*.

Ukiah Adventist Hospital v. FTC, 981 F.2d 543 (D.C. Cir. 1992), *cert. denied*, 510 U.S. 825 (1993), which Core cites (Br. 31-32), is entirely consistent with this conclusion. There, the Court affirmed a district court's determination that it lacked jurisdiction to review Ukiah's challenge to an ongoing agency proceeding because "Ukiah will be free to mount a challenge to the FTC's jurisdiction on review of any final cease and desist order the FTC might issue." *Ukiah*, 981 F.2d at 550. The same is true here, where Core has petitioned for review of the FCC's *Order* and could petition for review of any future order that might be issued in response to the pending reconsideration petitions. Moreover, Core could not derive any meaningful support from *Ukiah*, in any event. That case, like *TRAC*, addressed remedies available under the All Writs Act, which Core's brief does not assert as a basis for jurisdiction here.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint for declaratory relief and deny the petitions for review.

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July 25, 2005

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

IN RE Core Communications, Inc., PETITIONER	))))))))))))	NO. 04-1368

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 16831 words.

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