IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 06-75388

FONES4ALL CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Federal Communications Commission issued the order on review on September 29, 2006. The petition for review was filed within the time period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) to review final orders of the Commission. In this case, however, as we explain in Part I of the Argument below, the Court lacks jurisdiction because the petitioner does not have Article III standing.

STATUTES AND REGULATIONS

Pertinent statutes and regulations in addition to those appended to the petitioner's brief are set forth in an addendum to this brief.

STATEMENT OF ISSUES

A 1996 amendment to the Communications Act directs the Federal Communications Commission to forbear from enforcing telecommunications regulations in certain circumstances. In adopting this explicitly deregulatory provision, Congress envisioned that the FCC would use forbearance to *reduce* unnecessary regulatory burdens. But the petitioner in this case, Fones4All Corporation, perversely tries to use the forbearance process to *expand* the regulatory obligations of other companies.

In an attempt to restore certain network unbundling requirements that the FCC had recently rescinded, Fones4All filed a petition asking the agency to forbear from enforcing a rule that eliminated those requirements. The Commission denied the petition. It found that it could not reinstate unbundling requirements merely by forbearing from a rule that removed them. Because the Commission could not require network unbundling without taking additional steps beyond forbearance, it concluded that forbearance would not give Fones4All any real relief. In addition, the Commission determined that Fones4All had not satisfied the statutory prerequisites for forbearance.

Fones4All now seeks judicial review of the Commission's denial of its forbearance petition.[1] This case raises the following issues:

(1) whether the Court should dismiss Fones4All's petition for review because Fones4All lacks Article III standing;

(2) whether (assuming that Fones4All has not waived the issue) the Commission acted on Fones4All's forbearance petition within the statutorily prescribed time period; and

(3) whether the Commission reasonably explained why it denied the petition.

STATEMENT OF FACTS

A. The Telecommunications Act Of 1996

In 1996, Congress substantially amended the Communications Act of 1934 in an effort to "promote competition and reduce regulation." Telecommunications Act of 1996 ("1996 Act"), Preamble, Pub. L. No. 104-104, 110 Stat. 56. This case involves two key provisions of the 1996 Act that were designed to advance these overarching goals: section 251 (the network unbundling provision) and section 10 (the forbearance provision).

(1) Unbundled Access To Network Facilities: Section 251

The 1996 Act "fundamentally restructured local telephone markets to promote competition." *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1107 (9th Cir. 2006). Through section 251, it imposed on incumbent local exchange carriers

[1] The Commission previously filed a motion to dismiss this case for lack of standing. By order dated March 22, 2007, the Court denied the motion "without prejudice to raising the [standing] issue in the briefs."

("ILECs") "a host of duties intended to facilitate market entry" by competitive local exchange carriers ("CLECs"). *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999). "Foremost among these duties," each ILEC must "share its network with competitors." *Ibid.* (citing 47 U.S.C. § 251(c)).

Section 251(c)(3) of the Communications Act – a provision added by the 1996 Act – requires each ILEC to provide requesting CLECs with "nondiscriminatory access" to certain elements of the ILEC's network "on an unbundled basis." 47 U.S.C. § 251(c)(3). This "unbundling" provision is not self-executing, in that it does not identify any network elements that must be unbundled. Instead, section 251(d)(2) directs the FCC to define the scope of the network unbundling obligation by deciding which elements an ILEC must unbundle and make available to CLECs. "In determining what network elements should be made available …, the Commission shall consider, at a minimum," whether "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B) (emphasis added).

In addition, section 252(d)(1) directs state regulatory commissions to establish "just and reasonable" rates for any network elements that the FCC requires ILECs to unbundle. 47 U.S.C. § 252(d)(1). The rate for each unbundled network element must be "based on the cost … of providing the … network element." *Id.* § 252(d)(1)(A)(i).

Section 251(d)(1) required the FCC, within six months after the 1996 Act became law, to adopt rules implementing the requirements of section 251,

including rules identifying the network elements that ILECs must unbundle. 47 U.S.C. § 251(d)(1). In compliance with this directive, the agency issued its first set of local competition rules in August 1996.[2]

In its first attempt to implement section 251(c)(3), the FCC adopted rules requiring ILECs to unbundle a wide range of network elements, including local circuit switches – "equipment directing calls to their destinations." *AT&T,* 525 U.S. at 371. Those rules also required state commissions to set the rates for unbundled network elements by using a forward-looking cost methodology known as Total Element Long Run Incremental Cost ("TELRIC"). Although the ILECs contended that TELRIC produced below-cost rates, the Supreme Court upheld the FCC's authority to require states to use TELRIC. *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 497-528 (2002). In a separate case, however, the Supreme Court vacated the FCC's original unbundling rules, holding that the Commission had failed to consider the limits on unbundling that were implicit in the access standards prescribed by section 251(d)(2). *AT&T,* 525 U.S. at 387-92.

In response to the Supreme Court's remand, the Commission revised its unbundling rules.[3] The new rules continued to require unbundling of local switching. The D.C. Circuit vacated those rules in May 2002; it held that the

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1996) (subsequent history omitted).

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999), *vacated and remanded, United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied,* 538 U.S. 940 (2003).

agency had not reasonably applied the "impairment" standard set forth in section 251(d)(2)(B). *USTA I,* 290 F.3d at 421-28.

Following the *USTA I* remand, the FCC eliminated unbundling requirements for local switches that serve "enterprise" customers (*i.e.,* larger businesses). It found that CLECs' ability to serve enterprise customers was not impaired without unbundled access to ILEC switches.[4] The D.C. Circuit upheld that determination. *USTA II,* 359 F.3d at 586-87. As for switches that serve "mass market" customers (residential subscribers and small businesses), the Commission concluded that unbundling requirements should remain in place until state commissions conducted impairment inquiries in specific markets.[5] The D.C. Circuit struck down those requirements. It ruled that the FCC lacked authority to delegate impairment determinations to the states; and it further held that the record did not support the Commission's provisional finding of nationwide impairment vis-à-vis mass market switching. *USTA II,* 359 F.3d at 564-71.

In light of *USTA II,* the FCC revisited its impairment analysis with respect to mass market switching. On the basis of recent technological developments and data showing widespread deployment of non-ILEC switches, the Commission determined that CLECs generally were not impaired without unbundled access to

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17257-63 (¶¶ 451-458) (2003) ("*Triennial Review Order*"), *aff'd in part and rev'd in part, United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied,* 543 U.S. 925 (2004).

[5] *Triennial Review Order*, 18 FCC Rcd at 17263-17318 (¶¶ 459-532).

ILECs' mass market switching. While acknowledging that some CLECs might potentially be impaired without access to unbundled switching in a limited number of cases, the Commission concluded that the costs of switch unbundling even in those cases – in particular, its disincentive effects on investment and innovation – outweighed its benefits. Consequently, the Commission amended its rules to terminate mandatory unbundling of mass market switching under section 251(c)(3).[6] As amended, FCC Rule 51.319(d)(2) provides: "An [ILEC] is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops [*i.e.,* mass market customers]." 47 C.F.R. § 51.319(d)(2)(i).

To ease the transition to the new regulatory regime, the amended rule gave CLECs 12 months to move their embedded customer base from unbundled ILEC switching to alternative arrangements. 47 C.F.R. § 51.319(d)(2)(ii). During this period, the rule required ILECs to provide unbundled switching at a specified above-TELRIC transitional rate, so that CLECs could continue to use unbundled switching to serve their existing mass market customers. *Id.* § 51.319(d)(2)(iii). At the same time, the rule made clear that CLECs "may not obtain new local switching as an unbundled network element" to serve new customers during the transition. *Ibid.* The transition period expired in March 2006.

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[6] *Unbundled Access to Network Elements,* 20 FCC Rcd 2533, 2641-61 (¶¶ 199-228) (2005) ("*Triennial Review Remand Order*"), *aff'd, Covad Communications Co. v. FCC,* 450 F.3d 528 (D.C. Cir. 2006).

Numerous parties challenged the FCC's decision to eliminate unbundling requirements for mass market switching. The D.C. Circuit in 2006 rejected those challenges and upheld the agency's action. *Covad,* 450 F.3d at 546-49.

(2) Regulatory Forbearance: Section 10

"Critical to Congress's deregulation strategy," the 1996 Act added to the Communications Act a new provision governing regulatory forbearance. *AT&T Inc. v. FCC,* 452 F.3d 830, 832 (D.C. Cir. 2006). Section 10 of the Communications Act, codified at 47 U.S.C. § 160, requires the FCC to forbear from applying any FCC regulation or provision of the Act to any telecommunications carrier or telecommunications service if the Commission determines that: (1) enforcement of the rule or statute "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory"; (2) enforcement of the rule or statute "is not necessary for the protection of consumers"; and (3) "forbearance from applying" the rule or statute "is consistent with the public interest." 47 U.S.C. §§ 160(a)(1)-(3). In assessing the public interest under section 10(a)(3), "the Commission shall consider whether forbearance from enforcing" the rule or statute "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).

Section 10(c) permits any telecommunications carrier (or class of carriers) to petition the FCC for forbearance. "Any such petition shall be deemed granted if

the Commission does not deny the petition for failure to meet the requirements for forbearance under [section 10(a)] within one year after the Commission receives it, unless the one-year period is extended by the Commission." 47 U.S.C. § 160(c). The statute authorizes the agency to "extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of" section 10(a). *Ibid.* The Commission "may grant or deny" a forbearance petition "in whole or in part and shall explain its decision in writing." *Ibid.*

Congress regarded forbearance as a powerful deregulatory tool that would enable the FCC to remove outdated or unnecessary regulations that might otherwise stifle the growth of competition. Senator Pressler, a leading sponsor of the 1996 Act, stated that forbearance would "allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

B. The Order On Review

This case concerns a forbearance petition filed by Fones4All, a California-based CLEC. Fones4All describes itself as a carrier that provides single-line residential telephone service to low-income households that qualify for federal

and/or state assistance under the FCC's Lifeline program.[7] On July 1, 2005, Fones4All petitioned the Commission to forbear from applying Rule 51.319(d) – which had relieved ILECs of the obligation to provide unbundled switching – so as to permit CLECs to use unbundled ILEC switching to provide single-line residential phone service to Lifeline-eligible customers. ER 2-22.[8] The petition presumed that if forbearance from the rule were granted, Fones4All and other CLECs serving Lifeline customers would be able to use unbundled switching pursuant to section 251(c)(3). Fones4All contended that its petition satisfied all three of the prerequisites for forbearance under section 10(a). Several ILECs filed comments opposing the petition.

In June 2006, the Chief of the FCC's Wireline Competition Bureau issued an order extending by 90 days the date on which Fones4All's forbearance petition would be "deemed granted" if the Commission failed to deny the petition. *Fones4All Corp. Petition for Expedited Forbearance,* 21 FCC Rcd 6480 (Wireline Comp. Bur. 2006) (ER 96) ("*Extension Order*"). The Bureau found that an extension was "warranted under section 10(c)" because Fones4All's petition raised "significant questions" concerning the need for forbearance in this case. *Id.* at

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[7] Lifeline, which the FCC introduced in 1985, provides subsidies to reduce the monthly phone bills of low-income consumers. *See Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8952-53 (¶ 329) (1997), *aff'd in part and rev'd in part, Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999), *cert. dismissed,* 531 U.S. 975 (2000).

[8] All citations in this brief to the Excerpts of Record ("ER") refer to the record excerpts filed by Fones4All.

6480 (¶ 2) (ER 96). According to the *Extension Order,* the date on which Fones4All's petition would be "deemed granted" was "extended to September 28, 2006." *Id.* at 6481 (¶ 3) (ER 97).

Fones4All applied to the FCC for review of the staff's *Extension Order.* ER 98-103. It maintained that the Wireline Competition Bureau lacked authority to grant an extension under section 10(c). Fones4All also asserted that the Bureau had not explained why an extension was necessary.

The FCC voted to adopt an order denying Fones4All's forbearance petition on September 28, 2006, the deadline established by the *Extension Order.* On the same day, the agency issued a press release announcing its action. ER 106. One day later, it released the text of the order denying Fones4All's petition. *Fones4All Corp. Petition for Expedited Forbearance,* 21 FCC Rcd 11125 (2006) (ER 107) ("*Order*").[9]

The Commission found that Fones4All's forbearance petition was "procedurally defective" because "forbearance from [Rule] 51.319(d) would not give [Fones4All] the relief it seeks." *Order*, 21 FCC Rcd at 11129 (¶ 7) (ER 111). The Commission pointed out that Fones4All was seeking to use section 10 forbearance not to remove regulatory obligations, but rather "to create new section

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[9] In the same order, the Commission also denied the application for review of the *Extension Order.* It found that the Wireline Competition Bureau had acted "within its discretion to extend by 90 days the date by which a forbearance petition shall be deemed granted." *Id.* at 11128 (¶ 6) (ER 110). The Commission also concluded that "in the circumstances of this proceeding," the Bureau's "justification for this extension was adequate." *Id.* at 11129 n.17 (ER 111).

251 unbundling obligations – attempting to revisit, in effect," the agency's decision to end mandatory unbundling of mass market switching under section 251. *Ibid.* The Commission said that it could not "expand section 251 unbundling through section 10 forbearance," explaining that "sections 251(c)(3) and 251(d)(2) require an *affirmative* Commission decision to require unbundling" – a determination that "*must* include an analysis of whether impairment exists." *Id.* at 11129-30 (¶¶ 7-8) (ER 111-12).

The Commission concluded that forbearance from applying Rule 51.319(d) "would still not result in a Commission decision to require [ILECs] to unbundle" mass market switching. *Order*, 21 FCC Rcd at 11130 (¶ 9) (ER 112). The Commission explained that forbearance would serve no purpose because, even if the agency forbore from applying the rule, there would be no rule in place affirmatively requiring ILECs to provide unbundled switching under section 251. Granting Fones4All's forbearance petition, the Commission said, "would simply create a vacuum rather than confer any rights upon requesting carriers or obligations upon [ILECs]." *Ibid.*

In addition to finding that forbearance would not produce the relief that Fones4All sought, the Commission determined that Fones4All's petition satisfied none of the preconditions for forbearance under section 10(a). The agency explained that its earlier decision not to require switch unbundling was "calculated to promote reasonable charges for consumers and investment by carriers in new facilities." *Order*, 21 FCC Rcd at 11131 (¶ 10) (ER 113). After reviewing an extensive evidentiary record in the *Triennial Review Remand Order,* the

Commission had determined that "the costs associated with unbundling mass market local circuit switching outweigh the benefits" because "continued unbundling" of switching "would seriously undermine infrastructure investment and hinder development of genuine, facilities-based competition." *Ibid.* (¶ 11). This cost-benefit analysis provided the foundation for the FCC's decision to eliminate unbundling requirements for mass market switching – a decision that the D.C. Circuit affirmed in *Covad*. *Ibid.* Finding no new evidence in this proceeding that might alter its assessment of the costs and benefits of mandatory switch unbundling, the FCC concluded that Fones4All's petition did not satisfy sections 10(a)(1) and (2). *Id.* at 11131-32 (¶¶ 11-13) (ER 113-14).

The Commission also found that forbearance would not be "consistent with the public interest," as required by section 10(a)(3). *Order*, 21 FCC Rcd at 11132-33 (¶¶ 14-15) (ER 114-15). Because forbearance in this case would not give Fones4All "the unbundling relief it seeks," the Commission concluded that Fones4All had not demonstrated that forbearance would serve the public interest. *Id.* at 11132 (¶ 14) (ER 114). The agency further observed that even if it could require unbundling in this proceeding, Fones4All had not shown how the public interest would be "furthered by revisiting the Commission's carefully calibrated approach to unbundling or by evaluating one carrier's particular business strategy." *Ibid.* As the Commission saw it, Fones4All had presented "no new evidence" of competitive impairment, but instead had based its forbearance petition on arguments that the agency had "already carefully assessed" in the *Triennial Review Remand Order*. *Id.* at 11132-33 (¶ 14) (ER 114-15).

At the same time, the Commission stressed that the object of Fones4All's business plan – providing phone service to low-income consumers – was "laudable." *Order,* 21 FCC Rcd at 11133 (¶ 15) (ER 115). The agency recognized that the promotion of universal telephone service through programs such as Lifeline was "clearly in the public interest." *Ibid.* Nonetheless, in the FCC's view, these considerations did "not compel the relief requested here." *Ibid.* The Commission concluded that "nothing in the record here provides any basis to reconsider" the rule eliminating switch unbundling requirements. *Ibid.*

SUMMARY OF ARGUMENT

Congress adopted the 1996 Act in order to "promote competition and *reduce regulation.*" Telecommunications Act of 1996, Preamble, Pub. L. No. 104-104, 110 Stat. 56 (emphasis added). The statute established "a pro-competitive, *de-regulatory* national policy framework." S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.) (emphasis added). The cornerstone of that deregulatory framework is the statute's forbearance provision. Congress considered forbearance an essential tool for reducing the impact of costly regulations that had outlived their usefulness – regulations that might impede the development of competition in the telecommunications industry. The primary Senate sponsor of the 1996 Act declared that the forbearance provision would "allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

Fones4All's petition for forbearance flies in the face of Congress's deregulatory objectives. Rather than request relief from its own regulatory burdens, Fones4All tries to use section 10 to "expand" the regulatory obligations of other carriers. *Order,* 21 FCC Rcd at 11125 (¶ 1) (ER 107). Because section 10 cannot provide Fones4All with the relief it seeks, the company lacks standing to bring this lawsuit. In any event, Fones4All's attacks on the FCC's *Order* are wholly without merit.

I. Fones4All lacks standing because its alleged injury is neither fairly traceable to the *Order* nor likely to be redressed by this litigation. Fones4All complains that it can no longer obtain unbundled ILEC switching at TELRIC rates. The source of that injury is not the *Order*, but rather an earlier FCC decision to remove circuit switching from the list of unbundled elements – a decision that the D.C. Circuit affirmed on review. The remand that Fones4All requests from this Court will not give the company the switching it wants. Its forbearance petition is an inadequate vehicle for achieving that end, which could come about only if the FCC revisits its recent order implementing section 251(c)(3) and determines that CLECs would be impaired without ILEC switching.

II. The FCC's Wireline Competition Bureau properly exercised its delegated authority to extend by 90 days the statutory deadline for FCC review of Fones4All's forbearance petition. The Bureau reasonably found that such an extension was "necessary" under section 10(c). The Commission subsequently denied Fones4All's petition by the extended deadline.

Fones4All contends that its petition was "deemed granted" under section 10(c) because the FCC failed to release a written decision within the statutory deadline. That argument is not properly before the Court because Fones4All never presented it to the Commission. In any event, the claim lacks merit. All the statute required was a timely denial of the petition. The Commission satisfied that requirement here.

III. The Commission's denial of Fones4All's petition was fully justified. Because the petition could not produce the outcome Fones4All sought, the Commission reasonably decided to deny it. Even assuming that the relief sought by Fones4All was available under section 10, the Commission reasonably determined that Fones4All had not met any of the statutory prerequisites for forbearance.

STANDARD OF REVIEW

Insofar as Fones4All challenges the FCC's interpretation of the Communications Act, the standard of review is articulated in *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). 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." *Id.* 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. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what

the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005); *see also New Edge Network,* 461 F.3d at 1110-12 (deferring to the FCC's reasonable interpretation of an ambiguous provision of the Communications Act). Whenever Congress leaves a statutory "gap" for an agency to fill, "a court is obliged to accept the agency's position" on how the statute should be construed so long as "the agency's interpretation (or the manner in which it fills the gap) is reasonable." *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.,* 127 S. Ct. 1513, 1522 (2007) (internal quotations omitted).

Fones4All also challenges the reasonableness of the FCC's decision to deny its petition for forbearance. Under the Administrative Procedure Act, that decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Family Inc. v. United States Citizenship & Immigration Services,* 469 F.3d 1313, 1315 (9th Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)). Judicial review under this standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Northwest Ecosystem Alliance v. United States Fish & Wildlife Service,* 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotations omitted). The scope of review "is narrow"; the Court may not "substitute its judgment for that of the agency." *J & G Sales Ltd. v. Truscott,* 473 F.3d 1043, 1051 (9th Cir. 2007) (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983)). The Court's task is simply "to

ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance,* 475 F.3d at 1140 (internal quotations omitted).

ARGUMENT

I. FONES4ALL LACKS ARTICLE III STANDING

"Article III's case-or-controversy requirement ... provides a fundamental limitation on a federal court's authority to exercise jurisdiction." *Nuclear Information & Resource Service v. Nuclear Regulatory Commission,* 457 F.3d 941, 949 (9th Cir. 2006) ("*NIRS*"). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno,* 126 S. Ct. 1854, 1860-61 (2006).

Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). To establish standing, a party must show (among other things) that its alleged injury is both "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler,* 126 S. Ct. at 1861 (quoting *Allen v. Wright,* 468 U.S. 737, 751 (1984)). Fones4All cannot make either showing here.

Fones4All challenges the FCC's denial of a petition to forbear from enforcing Rule 51.319(d), which eliminated certain unbundling requirements that the Commission had previously adopted under section 251. Even if the Court were to grant Fones4All's petition for review, the company would not obtain any relief. Fones4All's objective here (as it was before the Commission) is to restore in part

the FCC's earlier section 251 unbundling requirement for mass market switching so that Fones4All can use unbundled ILEC switching to serve low-income households. But forbearance from applying Rule 51.319(d) would not achieve that purpose because there is no Commission rule that requires such unbundling. Forbearance in this case would merely produce "a void" rather than the switch unbundling requirement Fones4All wishes to resurrect. *Order,* 21 FCC Rcd at 11129 (¶ 7) (ER 111).

Fones4All incorrectly assumes that ILECs have a "default" unbundling obligation that will spring to life if the Commission forbears from applying Rule 51.319(d). *See Order,* 21 FCC Rcd at 11129 (¶ 8) (ER 111). No such "default" obligation exists. Indeed, the Supreme Court rejected the notion that ILECs have "some underlying duty to make all network elements available" under section 251(c)(3). *AT&T,* 525 U.S. at 391. Instead, the Court held in *AT&T* that section 251(d)(2) "requires the Commission to determine on a rational basis *which* network elements must be made available" before it may require unbundling under section 251(c)(3). *Id.* at 391-92. Similarly, the D.C. Circuit ruled in *USTA I* that the Commission must find the existence of competitive "impairment" before it can require the unbundling of any network element under section 251(c)(3). *USTA I,* 290 F.3d at 425.

As these cases make clear, the unbundling provisions of section 251 are not self-executing. By the statute's own terms, the FCC must take affirmative steps to establish (or *re*-establish) any unbundling requirement for a particular network element. Thus, even if this Court concluded that the FCC did not correctly apply

the forbearance standards and required the agency to consider forbearance again, or even if the Court accepted Fones4All's contention that forbearance had already been "deemed granted" in this case, any such forbearance "would simply create a vacuum rather than confer any rights upon requesting carriers or obligations upon [ILECs]." *Order*, 21 FCC Rcd at 11130 (¶ 9) (ER 112). Fones4All thus has failed to establish redressability.

For the same reasons, Fones4All cannot show that its injury is "fairly traceable" to the challenged FCC decision. *See Allen,* 468 U.S. at 751. In this case, it made no difference whether the Commission granted or denied Fones4All's forbearance petition. In either event, Fones4All would not have access to unbundled switching under section 251. Therefore, Fones4All cannot establish a causal link between its alleged injury and the *Order* on review. Without such a link, Fones4All lacks standing. *See Pritikin v. Department of Energy,* 254 F.3d 791, 797-99 (9th Cir. 2001), *cert. denied,* 534 U.S. 1133 (2002).

Fones4All seems to recognize that its injury did not result from the *Order* on review. In its opposition to the Commission's motion to dismiss this case, Fones4All described the FCC as "the regulatory body that implemented *the rule that has caused Fones4All's injury.*" Opposition to Motion to Dismiss, December 28, 2006, at 2 (emphasis added). By Fones4All's own account, the source of its injury is *not* the FCC's denial of its forbearance petition, but rather the agency's prior decision to adopt a rule eliminating switch unbundling requirements – a decision that the D.C. Circuit upheld last year in *Covad,* 450 F.3d at 546-49. Of course, it is too late for Fones4All to seek review of that decision.

Nonetheless, Fones4All maintains that the forbearance it requests would restore its rights under contracts with ILECs to obtain unbundled switching at TELRIC-based rates. Br. 49-51. The Court should not consider this claim because Fones4All never presented it to the Commission. Section 405(a) of the Communications Act makes clear that the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405(a). Fones4All gave the Commission "no opportunity to pass" on whether forbearance would permit Fones4All to purchase unbundled switching under its contracts with ILECs. Indeed, Fones4All did not even place those contracts in the administrative record. As a result, section 405 bars Fones4All from raising the contract issue here.[10]

Even if Fones4All had not waived its contractual claim, the argument lacks merit. The contracts to which Fones4All refers (also known as interconnection agreements) were generally premised on unbundling requirements that the FCC

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[10] *See Washington Utilities & Transportation Commission v. FCC,* 513 F.2d 1142, 1167-69 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975); *Neckritz v. FCC,* 446 F.2d 501, 503 (9th Cir. 1971); *Great Falls Community TV Cable Co. v. FCC,* 416 F.2d 238, 239, 242-43 (9th Cir. 1969).

had established under section 251.[11] Insofar as Fones4All's contractual rights flowed from the Commission's switch unbundling requirements, Fones4All lost any such rights once those unbundling requirements were eliminated. It can regain those rights only if the FCC takes affirmative action to restore switch unbundling requirements – action that goes beyond mere forbearance.

Fones4All apparently assumes that the FCC can reinstate the section 251 switch unbundling requirements by invoking section 10 to forbear from Rule 51.319(d), regardless of the statutory unbundling standards whose importance has been underscored by the Supreme Court and the D.C. Circuit. To the contrary, as this Court has observed, section 10 "obviously comes into play only for requirements that exist." *New Edge Network,* 461 F.3d at 1114 (quoting *USTA II,* 359 F.3d at 579). It would make no sense for the Commission to forbear from enforcing a rule that *removed* unbundling requirements.

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[11] The courts have generally recognized that interconnection agreements typically reflect the rules that the FCC has adopted to implement the requirements of section 251. *See, e.g., Verizon Maryland, Inc. v. Global Naps, Inc.,* 377 F.3d 355, 364 (4th Cir. 2004) ("interconnection agreements are the 'tools through which [section 251] is [implemented and] enforced'") (quoting *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.,* 317 F.3d 1270, 1278 (11th Cir. 2003) (en banc)); *see also ibid.* ("an interconnection agreement … sets forth the 'terms and conditions … to fulfill the duties' mandated by" sections 251(b) and 251(c)) (quoting 47 U.S.C. § 251(c)(1)); *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.,* 229 F.3d 457, 465 (4th Cir. 2000) ("many so-called 'negotiated' provisions" of interconnection agreements "represent nothing more than an attempt to comply with the requirements of the 1996 Act" as reflected in the FCC's rules).

In an attempt to identify a requirement that the FCC could forbear from enforcing, Fones4All points to Rule 51.319(d)(2)(ii). It characterizes this transition rule as "a requirement for Fones4All to get off [the ILECs'] unbundled local circuit switching by March 11, 2006, in spite of the contracts it had in place at the time." Br. 49-50. Contrary to Fones4All's suggestion, this rule benefits CLECs. It was designed to give competing carriers more time to negotiate new arrangements than they otherwise would have received under their existing interconnection agreements. Those agreements typically contain "change of law" provisions that would have permitted the ILECs to terminate CLECs' access to unbundled switching long before March 2006 if the FCC had not adopted Rule 51.319(d)(2)(ii). In the event that Fones4All's interconnection agreements included such provisions, Fones4All would have lost its access to ILEC switching even sooner under the terms of its contracts with ILECs.

On the other hand, if those contracts provided for the continued availability of unbundled switching regardless of the status of FCC unbundling requirements, Fones4All would have no need for relief from the Commission. The *Order* makes clear that Fones4All is free to negotiate commercial agreements with ILECs that would ensure the same sort of access to unbundled switching that FCC rules previously required. *See Order,* 21 FCC Rcd at 11132 n.30 (ER 114).

In any event, forbearance from enforcing the transition rule's March 2006 deadline would no more restore the switch unbundling requirements that previously existed than would forbearance from the rule that no longer requires switch unbundling. Unbundling requirements could only be reinstated if the

Commission took the affirmative steps prescribed by section 251. Even if the Commission were to extend the transition period indefinitely, Fones4All would still not win the relief it is seeking here. Fones4All wants to continue "obtaining unbundled mass market switching at TELRIC rates." Br. 50. The rules governing the transition, however, set the rates for unbundled mass market switching above the level prescribed by TELRIC. *See* 47 C.F.R. § 51.319(d)(2)(iii). In addition, the transition rules only permit CLECs to purchase unbundled switching to serve their existing customers: "Requesting carriers may not obtain new local switching as an unbundled network element" in order to serve new customers. *Ibid.*

Fones4All seems to hope that a remand from this Court would lead the FCC to reinstate the unbundling requirements that the company desires. That possibility is speculative at best. The Supreme Court rejected similar speculation last year in *DaimlerChrysler*. The plaintiffs in that case, some Ohio taxpayers, challenged certain tax credits that had been granted to an automobile manufacturer. Apparently, they believed that if the tax credits were invalidated, Ohio legislators would respond by reducing taxes assessed on other taxpayers, including the plaintiffs. The Supreme Court held that the plaintiffs' theory, which rested on unsupported assumptions about how legislators might exercise their broad discretion to make policy judgments, was too speculative to establish the redressability component of Article III standing. *DaimlerChrysler,* 126 S. Ct. at 1862-63; *see also Arakaki v. Lingle,* 477 F.3d 1048, 1062-65 (9th Cir. 2007).

Fones4All's assertion of standing demands a similar leap of faith. Fones4All appears to assume that if the Court rules in the company's favor, the

Commission will not only grant Fones4All's forbearance petition (which, as we have shown, will not give Fones4All access to unbundled ILEC switching), but will also take the affirmative steps necessary to adopt a new switch unbundling requirement under the standards set forth in section 251. It is far from certain that the agency would (or even lawfully could) adopt a new switch unbundling requirement under section 251 – the sort of requirement that the courts vacated in 1999, 2002, and again in 2004. Such a "'purely speculative' favorable outcome will not suffice to establish ... redressability" for purposes of Article III standing. *See Rubin v. City of Santa Monica,* 308 F.3d 1008, 1020 (9th Cir. 2002) (quoting *Linda R.S. v. Richard D.,* 410 U.S. 614, 618 (1973)), *cert. denied,* 540 U.S. 875 (2003).

Ultimately, Fones4All cannot show that the challenged FCC order is the source of its alleged injury; nor can it demonstrate "a likelihood that the injury [it has] suffered will be redressed by a favorable outcome to the litigation." *See Glanton v. AdvancePCS Inc.,* 465 F.3d 1123, 1125 (9th Cir. 2006). The Court should dismiss this case for lack of standing. *See ibid.*; *NIRS,* 457 F.3d at 955; *Rubin,* 308 F.3d at 1020; *Pritikin,* 254 F.3d at 797-801.

II. THE COMMISSION ACTED ON FONES4ALL'S FORBEARANCE PETITION WITHIN THE STATUTORILY PRESCRIBED TIME FRAME

Fones4All maintains that its forbearance petition was "deemed granted" because the FCC did not deny the petition within the time allotted by section 10. Fones4All bases this claim on two different theories. First, it contends that the Wireline Competition Bureau's attempt to extend the one-year forbearance review

period by another 90 days was unavailing, and that the forbearance petition was therefore deemed granted when the FCC failed to issue a ruling by July 1, 2006. Br. 20-32. Second, Fones4All asserts that even if the review period was extended by 90 days, the petition was deemed granted because the Commission failed to release an order denying the petition before the extended review period expired. Br. 32-46. The second argument is not properly before the Court. In any event, neither contention has merit.

A. The *Extension Order* Extended The Deadline For FCC Action On The Forbearance Petition

The Communications Act authorizes the FCC to "extend the initial one-year period" for reviewing a forbearance petition "by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of" section 10(a). 47 U.S.C. § 160(c). The Act also permits the Commission to delegate many of its functions to its staff. 47 U.S.C. § 155(c)(1). Accordingly, the FCC's rules broadly delegate authority to the Wireline Competition Bureau to perform a host of the Commission's functions subject to certain exceptions. *See* 47 C.F.R. §§ 0.91, 0.291. In essence, the Bureau or its Chief may perform any function unless the Act or the Commission specifically denies the staff such authority.[12] Neither the general authority to extend deadlines nor the specific

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[12] *See, e.g.*, 47 U.S.C. § 155(c)(1) (denying the staff authority to conclude certain tariff investigations under section 204 and certain complaint investigations under section 208); 47 C.F.R. § 0.291(c) (denying the Bureau Chief authority to impose, reduce, or cancel forfeitures under section 203 or section 503(b) in amounts of more than $80,000).

authority to extend the section 10 forbearance deadline by 90 days is included in the list of functions denied to the staff. In these circumstances, the Bureau properly exercised its delegated authority when it ordered a 90-day extension of the period for reviewing Fones4All's forbearance petition.

In the *Extension Order*, the Bureau found that "Fones4All's petition raises significant questions" regarding whether forbearance in this case would meet the requirements of section 10(a). *Extension Order,* 21 FCC Rcd at 6480 (ER 96). On the basis of that finding, the Bureau reasonably concluded that "a 90-day extension is warranted under section 10(c)." *Ibid.*

The Commission subsequently denied Fones4All's application for review of the *Extension Order*. It found that the Bureau had acted within its delegated authority, and it saw no reason to question the Bureau's judgment concerning the need for an extension. *Order,* 21 FCC Rcd at 11128-29 (¶ 6) & n.17 (ER 110-11).

Fones4All claims that the FCC's rules did not authorize the Bureau to adopt the *Extension Order*. Br. 21-25. In support of this argument, Fones4All cites FCC Rule 0.291(a)(2), which states: "The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 C.F.R. § 0.291(a)(2). According to Fones4All, this rule prohibited the Bureau Chief from extending the time for reviewing the forbearance petition because that petition involved "novel questions." Br. 24-25.

The Commission rightly rejected Fones4All's skewed reading of the agency's rules. As the Commission pointed out, the Bureau in this case did "not

address the substance of the issues" raised by Fones4All's forbearance petition "or any other novel question." *Order,* 21 FCC Rcd at 11128 n.17 (ER 110). In the Commission's view, the only matter addressed by the *Extension Order* – the need for an extension of time – involved "a routine and well-adjudicated procedural question." *Ibid.* "Extensions of time," the Commission reasonably concluded, "do not raise 'novel questions of fact, law or policy.'" *Id.* at 11128 (¶ 6) (ER 110). Moreover, the Commission observed that FCC Rule 0.291, which "lists the powers reserved to the Commission" and withheld from the Bureau, "does *not* reserve the right to grant extensions of time." *Id.* at 11128 n.17 (ER 110) (citing 47 C.F.R. § 0.291).

While Fones4All evidently disagrees with the FCC about how much authority the agency has delegated to its own staff, the Court must defer to the Commission's judgment on this question. Courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994); *see also Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 974 (9th Cir. 2006); *Carpenter v. Mineta,* 432 F.3d 1029, 1032 (9th Cir. 2005). The FCC's reading of its own rule governing the Wireline Competition Bureau's delegated authority "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *See Thomas Jefferson University,* 512 U.S. at 512 (quoted in *Providence Health System-Washington v. Thompson,* 353 F.3d 661, 665 (9th Cir. 2003), *cert. denied,* 543 U.S. 815 (2004)). Applying this highly deferential standard of review, the Court should uphold the FCC's determination that the Bureau was authorized to issue the *Extension Order.*

Fones4All also argues that the Bureau did not explain why an extension was "necessary." Br. 25-32. To the contrary, in the *Extension Order,* the Bureau adequately justified its action. Specifically, the Bureau stated that a 90-day extension was "warranted under section 10(c)" because "Fones4All's petition raises significant questions" concerning whether forbearance would meet the requirements of section 10(a). *Extension Order,* 21 FCC Rcd at 6480 (¶ 2) (ER 96). In other words, the Bureau reasonably found – and the Commission subsequently agreed – that an extension was necessary to give the agency sufficient time to address the complex issues presented by Fones4All's petition. *See Order,* 21 FCC Rcd at 11129 n.17 (ER 111).[13]

Fones4All questions whether an extension was "necessary" within the meaning of section 10(c). It asserts that the word "necessary" in section 10 means "absolutely required," not just "expedient." Br. 26-29. The D.C. Circuit, however, has rejected that narrow construction of the statute. *See Cellular Telecommunications & Internet Association v. FCC,* 330 F.3d 502, 509-13 (D.C.

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[13] Although Fones4All asserts that "the Commission cannot extend the forbearance deadline" without "a written explanation of why an extension is necessary" (Br. 32), section 10(c) does not state that the Commission must provide a written justification for an extension. By contrast, whenever the Commission grants or denies a forbearance petition, section 10(c) explicitly requires the agency to "explain its decision in writing." 47 U.S.C. § 160(c). Where (as here) Congress expressly imposes a writing requirement in one part of a statute but omits the requirement from another provision of the same statute, it is generally presumed that the latter provision does not require a writing. *See Camacho v. Bridgeport Financial Inc.,* 430 F.3d 1078 (9th Cir. 2005). But even assuming that section 10(c) required a written explanation for the extension in this case, the Bureau provided one in the *Extension Order.*

Cir. 2003) ("*CTIA*"). In *CTIA*, the court held that the FCC could reasonably construe the ambiguous term "necessary" in section 10(a) to describe "something that is done ... to achieve a particular end." *Id.* at 510.

The courts have adopted a similarly expansive definition of "necessary" in other contexts. For example, the Supreme Court has ruled that "necessary" can mean "conducive to" or "plainly adapted" to serving a certain purpose. *Jinks v. Richland County,* 538 U.S. 456, 462 (2003) (quoting *McCulloch v. Maryland,* 4 Wheat. 316, 417, 421 (1819)). And this Court has held that litigation expenses incurred in defending a business qualify as "necessary" expenses under the Revenue Act of 1932 because they are "appropriate and helpful." *Kanne v. American Factors, Ltd.,* 190 F.2d 155, 159 (9th Cir. 1951). When the Wireline Competition Bureau found it necessary to extend the period for FCC review of Fones4All's forbearance petition, it was acting consistently with these longstanding judicial understandings of what "necessary" means. Fones4All has given this Court no good reason to disturb the Bureau's reasonable determination that an extension was necessary.

B. The Commission Timely Denied The Petition

After the Bureau extended the deadline in this proceeding, the Commission acted in time to meet the deadline. On September 28, 2006, the deadline established by the *Extension Order,* the Commission voted to deny Fones4All's petition and adopted the *Order* on review. On the same day, the agency issued a press release announcing its decision to deny the petition. One day later, the Commission released the text of the *Order.*

Fones4All maintains that a forbearance petition is "deemed granted" under section 10 if the Commission does not release an order denying the petition within the statutorily prescribed review period. On the basis of this reading of the statute, Fones4All contends that its petition was "deemed granted" when the Commission failed to issue an order denying the petition on or before September 28, 2006. Br. 32-46. This argument fails for two reasons. First, Fones4All is precluded from raising this claim on appeal because it never presented the issue to the Commission. Second, Fones4All's reading of the statute is wrong.

(1) Fones4All Has Waived Any Claim That The FCC Must Release An Order Denying A Forbearance Petition Before The Section 10 Deadline

Under the terms of section 405, the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405(a). Although Fones4All now argues that section 10 required the FCC to release an order before the statutory deadline in order to avert a "deemed grant," the company never presented that contention to the Commission during the proceeding below. Nor did Fones4All try to raise this issue in a petition for FCC reconsideration of the *Order*. Consequently, section 405 bars judicial review of this claim.[14]

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[14] *See Washington Utilities,* 513 F.2d at 1167-69; *Neckritz,* 446 F.2d at 503; *Great Falls,* 416 F.2d at 239, 242-43.

In identical circumstances, the D.C. Circuit has twice declined to consider this same argument, ruling that the FCC "has been afforded no opportunity to pass" on the issue.[15] In *Core,* the Commission voted by the statutory deadline to deny Core's forbearance petition in part, but it "issu[ed] a written order [partially] denying [the] petition" only after the deadline had passed. *Core,* 455 F.3d at 275. Core argued that its petition "must be 'deemed granted' in full" because no order had issued by the deadline. *Id.* at 276. The D.C. Circuit concluded that it lacked jurisdiction under section 405 to consider this claim because the argument had not first been presented to the Commission. *Id.* at 276-77.[16]

Similarly, in *Qwest,* the FCC "voted to deny [Qwest's] petition for forbearance [in part] and issued a press release within the statutory deadline, publishing its written order only after the deadline had passed." *Qwest,* 482 F.3d at 474. Like Core, Qwest claimed that "its petition should have been 'deemed granted' … because the Commission's actions (a vote and press release)" did not

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[15] *See Qwest Corp. v. FCC,* 482 F.3d 471, 474-77 (D.C. Cir. 2007) (quoting 47 U.S.C. § 405(a)); *In re Core Communications, Inc.,* 455 F.3d 267, 275-77 (D.C. Cir. 2006) (same).

[16] Fones4All makes much of the *Core* court's observation that "relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation." Br. 40 (quoting *Core,* 455 F.3d at 277). But that statement, which is dicta, says nothing to suggest that a vote to deny a forbearance petition would not suffice to satisfy the section 10 deadline. In any event, contrary to Fones4All's suggestion, the court in *Core* did not purport to interpret section 10(c). Rather, it ruled that it could not "construe the meaning of" section 10(c) before the Commission had "an opportunity to address the question." *Core,* 455 F.3d at 277.

constitute a timely denial of the petition under section 10(c). *Ibid.* In that case, as in *Core,* the D.C. Circuit held that it lacked jurisdiction to consider the argument because no party had presented the issue to the FCC. *Id.* at 474-77.

This Court should follow the same approach taken by the D.C. Circuit in *Core* and *Qwest.* Fones4All, like Core and Qwest, is attempting to raise a statutory claim that was never presented to the FCC. Section 405 plainly bars judicial review of any such claim.

To be sure, Fones4All "could not have known, when it filed the petition, that the FCC would wait to issue its written denial until after the [statutory] deadline had passed." *See Core,* 455 F.3d at 276. But that is no excuse for Fones4All's failure to comply with the requirements of section 405. As the D.C. Circuit has noted, "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Qwest,* 482 F.3d at 474 (quoting *Core,* 455 F.3d at 276-77).

(2) The Commission Averted A "Deemed Grant" When It Voted To Deny Fones4All's Petition By The Statutory Deadline

Even if Fones4All had not waived its claim that a written order was necessary to comply with the section 10 deadline, the argument is baseless. The FCC voted to deny Fones4All's petition and adopted the *Order* on September 28, 2006, the deadline established by the *Extension Order.* Fones4All does not seriously dispute that fact; a contemporaneous press release confirms it. *See* ER

106. The Commission's timely vote to deny the petition sufficed to prevent a "deemed grant" under section 10(c). Fones4All's assertion to the contrary rests on a misreading of the statute.

Section 10(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 10(c) states: "The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing." *Ibid.* Fones4All takes the position that a petition is not "den[ied]" under section 10(c) until the Commission "explain[s] its decision in writing." That is not what the statute says.

Section 10(c) states that a petition is "deemed granted" unless it is *denied* by a specified date. But that provision does *not* say that the FCC's denial of a petition is effective only as of the date on which the agency issues a written order. Rather, the requirement that the Commission provide a written explanation is an independent instruction set forth in a separate sentence of section 10(c). Fones4All points to nothing in the text of section 10(c) indicating that a vote to deny a petition for forbearance within the statutory period is insufficient unless a written order is released during that period. In effect, Fones4All would have the Court add the words "within the one-year and 90-day period" after the final sentence of section 10(c). "The short answer" to Fones4All's argument "is that Congress did not write the statute that way." *See United States v. Naftalin,* 441 U.S. 768, 773 (1979). There is "no reason" for this Court "to insert a requirement into the statute

that Congress did not insert itself." *United States v. Stewart,* 420 F.3d 1007, 1016 (9th Cir. 2005).

For more than three decades, FCC orders have routinely reflected two dates in their captions: an adoption date (*i.e.,* when the Commission votes to approve a proposed order) and a release date. The Commission often does not release the text of its orders on the same day that it votes to adopt them, and there is no reason to think that Congress was unaware of that well-established practice. Therefore, it is reasonable to conclude that the Commission "denies" a forbearance petition for purposes of section 10(c) when it votes to adopt a denial order within the statutory deadline, and that it fulfills the separate statutory requirement that it explain its decision in writing when it releases its adopted order. Under this reasonable interpretation, the Commission's timely vote to adopt the *Order* was sufficient to deny Fones4All's forbearance petition and thereby avoid a "deemed grant."[17]

Fones4All contends that the last sentence of section 10(c) – which requires that the Commission explain its decision in writing – defines what the Commission must do to deny a petition by the statutory deadline. But the statute does not say that. To be sure, in other provisions of the Communications Act, Congress *expressly* has tied deadlines for FCC action to the issuance of a reviewable final order. *See* 47 U.S.C. §§ 204(a)(2)(A)-(C), 208(b)(1)-(3). But where (as here)

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[17] On the same day that the FCC voted to deny Fones4All's petition, it also issued a press release announcing its decision. ER 106. Consequently, Fones4All cannot fairly contend that it lacked timely notice of the agency's action. *Cf. Qwest,* 482 F.3d at 475 (dismissing Qwest's claim that the FCC did not provide adequate notice of its disposition of Qwest's forbearance petition by the statutory deadline).

Congress has not specified a deadline for the release of an order, the Court should not read one into the statute.[18]

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In sum, the FCC's Wireline Competition Bureau properly extended by 90 days the deadline for agency action in this proceeding, and the FCC denied Fones4All's petition before that deadline passed. Fones4All cannot plausibly claim that its petition was "deemed granted" under section 10(c).

III. THE COMMISSION REASONABLY EXPLAINED WHY IT DENIED FONES4ALL'S PETITION

The *Order* amply justified the FCC's denial of Fones4All's petition. The Commission gave two reasons for its decision. First, it saw no reason to grant the petition because forbearance would not provide Fones4All with the relief it sought – access to ILECs' unbundled switching at TELRIC rates. *Order*, 21 FCC Rcd at 11129-30 (¶¶ 7-9) (ER 111-12). Second, the agency reasonably determined that Fones4All's petition did not satisfy the three-part test for forbearance under section 10(a). *Id.* at 11130-33 (¶¶ 10-15) (ER 112-15). Either of these rationales provided an adequate basis for denying the petition.

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[18] *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. But it did not."); *Conlan v. United States Department of Labor,* 76 F.3d 271, 274 (9th Cir.) ("Congress knew how to require scienter when it wanted to, and ... we will not write something into the statute which Congress so plainly left out.") (internal quotations omitted), *cert. denied,* 519 U.S. 980 (1996).

A. The Commission Reasonably Found That Forbearance Would Provide Fones4All With No Meaningful Relief

For the reasons discussed in Part I of this Argument, the Commission reasonably concluded that forbearance in this case would not produce the result Fones4All wanted. The Commission explained that forbearance "from the rule that prohibits local circuit switch unbundling would simply create a vacuum rather than confer any rights upon [CLECs] or obligations upon [ILECs]." *Order,* 21 FCC Rcd at 11130 (¶ 9) (ER 112). Having found that the relief sought by Fones4All was "unavailable through section 10," *ibid.,* the Commission properly denied Fones4All's petition as "procedurally defective." *Id.* at 11129 (¶ 7) (ER 111).

Fones4All asserts that the agency lacked authority to deny the petition on procedural grounds. Br. 48-49. It bases that assertion on the D.C. Circuit's opinion in *AT&T Inc. v. FCC,* 452 F.3d 830. In that case, the court held "only that the Commission may not refuse to consider a petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations." *Id.* at 837. This case involves a very different question: whether the FCC may reasonably deny a forbearance petition that requests relief that is beyond the scope of section 10. The Commission sensibly concluded that it would be pointless to

grant such a petition because forbearance here would not enable Fones4All to gain access to unbundled ILEC switching.[19]

Fones4All quarrels with the Commission's conclusion that an impairment analysis under section 251 would be necessary to restore switch unbundling obligations. But that conclusion flows directly from the statutory language and the case law interpreting section 251.[20] Especially in light of that case law, the Commission reasonably determined that it could not, "consistent with the statute as interpreted by the Supreme Court and the ... D.C. Circuit, expand section 251 unbundling through section 10 forbearance." *Order,* 21 FCC Rcd at 11129 (¶ 7) (ER 111).

Fones4All points out that the FCC's approach in this proceeding differed from its treatment of Qwest's petition for forbearance in Omaha. Br. 46-47. But that is understandable, because Qwest's petition differed dramatically from Fones4All's. Qwest asked the Commission to forbear from enforcing rules that *required* Qwest to provide certain unbundled network elements under section

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[19] *Cf. Chinnock v. Turnage,* 995 F.2d 889, 893 (9th Cir. 1993) (a remand to the Veterans Administration for another hearing on a veteran's claim would be "pointless" because the additional hearing that the veteran requested "would not alter the VA's denial of his claim").

[20] *See AT&T,* 525 U.S. at 391-92 (section 251(d)(2) "requires the Commission to determine on a rational basis *which* network elements must be made available" before imposing an unbundling requirement); *USTA I,* 290 F.3d at 425 (the Commission must find the existence of competitive "impairment" before it can mandate the unbundling of any network elements under section 251(c)(3)).

251.[21] In that context, the Commission observed that its "unbundling analysis" under section 251 did "not bind" its "forbearance review" of Qwest's petition. *Qwest Omaha Order,* 20 FCC Rcd at 19446 (¶ 63). In other words, even though the Commission had made findings under section 251 that competitive impairment justified unbundling requirements, those findings did not bar the agency from granting Qwest's petition to forbear from enforcing the unbundling requirements in Omaha (assuming Qwest satisfied the statutory prerequisites for forbearance). That is precisely the kind of relief section 10 was designed to permit: forbearance from a regulatory requirement or burden that was not necessary to protect consumers or to ensure just and reasonable rates.

In contrast to Qwest, Fones4all seeks to misuse forbearance "to create new section 251 unbundling obligations." *Order,* 21 FCC Rcd at 11129 (¶ 7) (ER 111). As the courts have made clear, the FCC cannot establish new unbundling requirements under section 251 without performing an impairment analysis. *See AT&T,* 525 U.S. at 391-92; *USTA I,* 290 F.3d at 425. And as the Commission rightly recognized, section 10 neither requires nor contemplates an impairment analysis. *Order,* 21 FCC Rcd at 11129-30 (¶¶ 8-9) (ER 111-12).

More fundamentally, the relief requested by Fones4All is antithetical to the purposes of the forbearance statute. Congress plainly did not intend that section 10

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[21] *See Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Order*"), *aff'd, Qwest Corp. v. FCC,* 482 F.3d 471.

– a provision designed to *reduce* undue regulatory burdens – should become a vehicle for *expanding* regulatory requirements.[22]

Fones4All contends that the FCC previously expanded the ILECs' obligations through the forbearance process when it partially granted Core's petition for forbearance. Br. 51-52. Core had asked the FCC to forbear from enforcing four rules that placed "caps" or restrictions on the intercarrier compensation that Core received from ILECs for telephone calls to Internet service providers. *See Core,* 455 F.3d at 270-74. The Commission decided to forbear from enforcing two of the rules in question, effectively increasing the amount of ILECs' compensation payments to Core. In that case, however, forbearance did not create a new obligation. There was never any question that carriers had an underlying statutory obligation to pay intercarrier compensation. That obligation existed independently from the rules from which Core sought forbearance.

By contrast, ILECs are under no obligation to unbundle any network element under section 251(c)(3) unless the FCC makes an affirmative determination under section 251(d)(2) that such unbundling is warranted. Therefore, the FCC had good reason to conclude that the forbearance process could not provide the relief that Fones4All seeks. In view of the futility of Fones4All's request, the Commission was entirely justified in denying the petition.

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[22] *See* 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler) (the forbearance statute was designed to "allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest").

B. The Commission Reasonably Found That Fones4All Failed To Meet The Statutory Requirements For Forbearance

Even if Fones4All had requested the sort of relief that section 10 could provide, it was not entitled to such relief unless it satisfied all three of the prerequisites for forbearance under section 10(a). *See CTIA*, 330 F.3d at 509 (citing 47 U.S.C. § 160(a)). The Commission reasonably determined that Fones4All failed to meet any of these requirements.

With respect to the first two statutory preconditions for forbearance, 47 U.S.C. §§ 160(a)(1)-(2), the Commission rejected Fones4All's contention that enforcement of Rule 51.319(d) was not necessary to protect consumers or to ensure just and reasonable charges and practices. *Order,* 21 FCC Rcd at 11130-32 (¶¶ 10-13) (ER 112-14). The rule reflected the Commission's considered judgment – affirmed by the D.C. Circuit in *Covad* – that "the costs associated with unbundling mass market local circuit switching outweigh the benefits." *Id.* at 11131 (¶ 11) (ER 113). The agency had adopted the rule because it found that switch unbundling created a "significant disincentive" to infrastructure investment, thereby hindering the "development of genuine, facilities-based competition." *Ibid.* Given the magnitude of this problem, the Commission decided to eliminate switch unbundling requirements everywhere – even in "the limited number of cases in which requesting carriers may be impaired without access to unbundled switching." *Ibid.* In this proceeding, the Commission concluded that Fones4All had identified "no changed circumstances that would justify forbearance from this rule." *Ibid.*

In particular, the Commission noted that Fones4All had offered no evidence of "how customers have been harmed by Fones4All's departure from the market" – nor even any confirmation that Fones4All had left the market. *Order,* 21 FCC Rcd at 11132 (¶ 13) (ER 114). In the absence of any such evidence, the Commission reasonably found that enforcement of Rule 51.319(d) was "necessary for the protection of consumers" because "consumers benefit most" from the facilities-based competition that the rule would help to produce. *Ibid.* Similarly, the Commission determined that enforcement of the rule – rather than forbearance from its application – would help ensure just and reasonable charges and practices by promoting facilities-based competition in telecommunications markets. *Id.* at 11131-32 (¶¶ 11-12) (ER 113-14).

Finally, as to the third statutory prerequisite for forbearance, the Commission reasonably concluded that "forbearance in this instance would not be 'consistent with the public interest.'" *Order,* 21 FCC Rcd at 11132 (¶ 14) (ER 114) (quoting 47 U.S.C. § 160(a)(3)). Because forbearance in this case "would not provide" Fones4All with "the unbundling relief it seeks," Fones4All could not show how granting its petition would serve the public interest. *Ibid.* Furthermore, "even if the Commission could require unbundling in this proceeding," Fones4All failed to demonstrate how the public interest would be "furthered by revisiting the Commission's carefully calibrated approach to unbundling or by evaluating one carrier's particular business strategy." *Ibid.*

Fones4All complains that the FCC ignored its claims concerning the adverse impact of Rule 51.319(d) on carriers serving low-income consumers. Br. 54-55.

Those claims, however, were nothing new. Fones4All presented "no new evidence regarding how [CLECs] are constrained without access to unbundled local circuit switching." *Order,* 21 FCC Rcd at 11132-33 (¶ 14) (ER 114-15). Instead, Fones4All based its petition entirely on "arguments presented and already carefully assessed by the Commission in the *Triennial Review Remand Order*," which eliminated switch unbundling requirements. *Id.* at 11133 (¶14) (ER 115). Because the record in this proceeding reflected no new evidence or changed circumstances, the Commission reasonably refused to revisit its earlier analysis of the need for switch unbundling.

Fones4All is simply wrong when it asserts (Br. 56) that "the Commission completely ignored Section 254" in this case. Section 254 concerns the promotion of "universal service" – *i.e.,* widespread subscription to reliable telecommunications services at affordable rates. 47 U.S.C. § 254. The Commission did not fail to consider that statutory goal. To the contrary, it recognized that one of the Act's goals "is to promote universal service," and it acknowledged that "universal service is clearly in the public interest." *Order,* 21 FCC Rcd at 11133 (¶ 15) (ER 115). But "that fact alone does not compel the relief requested" by Fones4All. *Ibid.* In the FCC's assessment, the public interest in eliminating unbundling requirements that stunt the growth of competition outweighed Fones4All's unsubstantiated claims that those requirements were necessary to promote universal service.

The "weighing of competing policies … under the public interest standard is a task that Congress has delegated to the Commission." *FCC v. WNCN Listeners*

Guild, 450 U.S. 582, 596 (1981) (internal quotations omitted). Consequently, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *Ibid.* "[O]nly the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision." *Melcher v. FCC,* 134 F.3d 1143, 1154 (D.C. Cir. 1998) (internal quotations omitted). In this case, the Commission found that its well-documented concerns about the deleterious effect of switch unbundling requirements on investment and competition outweighed Fones4All's unsubstantiated assertions that such requirements would help promote universal service. The Court should uphold the FCC's reasonable balancing of these competing considerations under the public interest standard.

Of course, in appropriate circumstances, universal service considerations may justify forbearance. That was the case when the FCC granted TracFone's forbearance petition. *See Federal-State Joint Board on Universal Service,* 20 FCC Rcd 15095 (2005). TracFone, a reseller of wireless telephone service, sought to become eligible for universal service subsidies to serve low-income consumers under the Lifeline program. But one of the statutory conditions for eligibility was that the company offer some or all of its service over its own facilities. TracFone owned no facilities, so it asked the FCC to forbear from enforcing that condition. The Commission found that "the statutory goal of providing telecommunications access to low-income consumers outweigh[ed] the requirement that TracFone own facilities" to become eligible for Lifeline support. *Id.* at 15104-05 (¶ 23).

Fones4All suggests that it should have obtained the same favorable outcome that TracFone did. Br. 56. But TracFone's case is clearly distinguishable from this one. That case "did not concern section 251(c)(3)," so "the Commission was not required to confront forbearance from a 'no impairment' determination" when it analyzed TracFone's petition. *Order,* 21 FCC Rcd at 11133 (¶ 15) (ER 115). That petition involved a conventional request for forbearance. TracFone asked the agency to excuse it from complying with a regulatory requirement that imposed an unnecessary burden on the company. Fones4All, on the other hand, wants the FCC to impose new regulatory burdens on other carriers. That request runs counter to the deregulatory goals underlying section 10. For that reason, and for all of the reasons set forth above, the Commission acted properly in denying Fones4All's petition for forbearance.

CONCLUSION

The Court should dismiss the petition for review because Fones4All lacks standing. Alternatively, the Court should deny the petition for review.

Respectfully submitted,

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May 21, 2007

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STATUTORY APPENDIX

47 U.S.C. § 251

47 U.S.C. § 252

47 U.S.C. § 405

47 C.F.R. § 0.291

UNITED STATES CODE
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 – WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART II – DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--
(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
(A) for the transmission and routing of telephone exchange service and exchange access;
(B) at any technically feasible point within the carrier's network;
(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--
(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--
(A) access to such network elements as are proprietary in nature is necessary; and
(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;
(B) is consistent with the requirements of this section; and
(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--
(A) is necessary--
(i) to avoid a significant adverse economic impact on users of telecommunications services generally;
(ii) to avoid imposing a requirement that is unduly economically burdensome; or
(iii) to avoid imposing a requirement that is technically infeasible; and
(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions

and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--
(A) on February 8, 1996, provided telephone exchange service in such area; and
(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--
(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252

UNITED STATES CODE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 – WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART II – DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;
(ii) the position of each of the parties with respect to those issues; and
(iii) any other issue discussed and resolved by the parties.
(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).
(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.
(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
(A) shall be--
(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
(ii) nondiscriminatory, and
(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--
(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or
(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any

marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject
(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--
(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90

days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--
(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or
(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

UNITED STATES CODE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 – WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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

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

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

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

47 C.F.R. § 0.291

CODE OF FEDERAL REGULATIONS

TITLE 47. TELECOMMUNICATION
CHAPTER I – FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A – GENERAL
PART O – COMMISSION ORGANIZATION
SUBPART B – DELEGATION OF AUTHORITY
CHIEF, WIRELINE COMPETITION BUREAU

§ 0.291 Authority Delegated

The Chief, Wireline Competition Bureau, is hereby delegated authority to perform all functions of the Bureau, described in § 0.91, subject to the following exceptions and limitations.

(a) Authority concerning applications.

(1) The Chief, Wireline Competition Bureau shall not have authority to act on any formal or informal common carrier applications or section 214 applications for common carrier services which are in hearing status.

(2) The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.

(b) Authority concerning section 220 of the Act. The Chief, Wireline Competition Bureau shall not have authority to promulgate regulations or orders prescribing permanent depreciation rates for common carriers, or to prescribe interim depreciation rates to be effective more than one year, pursuant to section 220 of the Communications Act of 1934, as amended.

(c) Authority concerning forfeitures. The Chief, Wireline Competition Bureau shall not have authority to impose, reduce or cancel forfeitures pursuant to Section 203 or Section 503(b) of the Communications Act of 1934, as amended, in amounts of more than $80,000.

(d) Authority concerning applications for review. The Chief, Wireline Competition Bureau shall not have authority to act upon any applications for review of actions taken by the Chief, Wireline Competition Bureau, pursuant to any delegated authority.

(e) Authority concerning rulemaking and investigatory proceedings. The Chief, Wireline Competition Bureau, shall not have authority to issue notices of proposed rulemaking,

notices of inquiry, or reports or orders arising from either of the foregoing, except that the Chief, Wireline Competition Bureau, shall have authority, in consultation and coordination with the Chief, International Bureau, to issue and revise a manual on the details of the reporting requirements for international carriers set forth in § 43.61(d) of this chapter.

(f) Authority concerning the issuance of subpoenas. The Chief of the Wireline Competition Bureau or her/his designee is authorized to issue non-hearing related subpoenas for the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, schedules of charges, contracts, agreements, and any other records deemed relevant to the investigation of matters within the jurisdiction of the Wireline Competition Bureau. Before issuing a subpoena, the Bureau shall obtain the approval of the Office of General Counsel.

(g) The Chief, Wireline Competition Bureau, is delegated authority to enter into agreements with the National Institute of Standards and Technology to perform accreditation of Telecommunication Certification Bodies (TCBs) pursuant to §§ 68.160 and 68.162 of this chapter. In addition, the Chief is delegated authority to develop specific methods that will be used to accredit TCBs, to designate TCBs, to make determinations regarding the continued acceptability of individual TCBs and to develop procedures that TCBs will use for performing post-market surveillance.

(h) Authority concerning petitions for pricing flexibility.

(1) The Chief, Wireline Competition Bureau, shall have authority to act on petitions filed pursuant to part 69, subpart H, of this chapter for pricing flexibility involving special access and dedicated transport services. This authority is not subject to the limitation set forth in paragraph (a)(2) of this section.

(2) The Chief, Wireline Competition Bureau, shall not have authority to act on petitions filed pursuant to part 69, subpart H, of this chapter for pricing flexibility involving common line and traffic sensitive services.

(i) Authority concerning schools and libraries support mechanism audits. The Chief, Wireline Competition Bureau, shall have authority to address audit findings relating to the schools and libraries support mechanism. This authority is not subject to the limitation set forth in paragraph (a)(2) of this section.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fones4All Corporation

v.

Federal Communications Commission and USA

Certificate Of Service

I, Andrew G. Edson, hereby certify that the foregoing "Brief for Respondents, " was served this 21st day of May, 2007, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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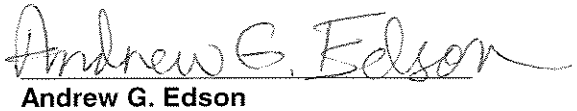

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