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Court Conks Commission In Core Case

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In a ruling that was supremely satisfying to observers who watch the FCC avoid making decisions year after year, an exasperated U.S. Circuit Court of Appeals for the D.C. Circuit recently told the Commission enough is enough. Core Communications, a CLEC, had been battling the FCC for years over the issue of whether the caps imposed by the Commission in 2000 on termination charges for ISP-bound traffic were lawful. Twice before, the issue had gone to the same appeals court, and each time the court ruled that the FCC had not justified the lawfulness of the cap. The court nevertheless left the cap rules in place on the assumption that the FCC would promptly articulate a lawful basis for the rules. When the FCC failed to do so by 2004, Core filed a petition for a writ of mandamus with the court – an extraordinary and rarely successful method of compelling an administrative agency to do something. The FCC promised at that time that it would resolve the matter soon and the court declined to grant the writ. Three years later, when the FCC had still done nothing, Core renewed its mandamus petition and this time it struck pay dirt.

To justify a writ of mandamus, a petitioner must show that the agency has been guilty of “egregious delay.” The courts have traditionally construed this term liberally since they are reluctant to interfere with an agency’s administration of its own agenda. Here, however, the FCC’s inaction was almost contemptuous since it had the effect of indefinitely leaving in place rules which the court had determined to be unjustified. This was punching the court itself in the gut, and the court was not pleased.

The FCC took its usual tack in these circumstances of promising that it would look into the matter soon, that progress was being made, blah, blah, blah. It even took the unusual step of representing on the record that Chairman Kevin Martin “fully intends to respond to the [remand order] within six months.” This kind of carefully weasel-worded representation usually suffices to avoid a mandamus writ, but not here. In a strongly worded opinion, the court basically said: we don’t believe you any more. “We have heard this refrain before....At some point promises are not enough and we must end this game of ‘administrative keep-away’... Having repeatedly, and mistakenly, put our faith in the Commission, we will not do so again.”

The court then proceeded to hold the FCC Chairman to his word. The FCC was given exactly six months from the date in May when it said that action would be forthcoming in six months. No

extensions of time will be granted. If the FCC does not act by that date, the FCC's interim intercarrier compensation rules will be automatically vacated. Case closed.

There is nothing more frustrating than inaction by an administrative agency. We have known clients to say they'd rather get an adverse decision than no decision at all because then they'd at least know where they stand. This ruling by the court with primary responsibility for reviewing FCC decisions may serve to kindle a small but unpleasant flame under regulatory seats.