FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

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| In the Matter of the Claim of<br><br>5 U.S.C. §552(b)(6)<br><br>Against the Great Socialist People's Libyan Arab Jamahiriya | Claim No. LIB-I-044<br><br>Decision No. LIB-I-017 |

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

Oral Hearing held on July 28, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by 5 U.S.C. §552(b)(6) based upon physical injuries allegedly sustained at Fiumicino Airport in Rome, Italy on December 27, 1985. By its Proposed Decision entered September 23, 2009, the Commission denied the claim for lack of jurisdiction on nationality grounds because the claimant was not a U.S. national at the time of the alleged injury, and did not become a national of the United States until 1993.

On October 8, 2009, the claimant filed a notice of intent to file an objection to the Commission's Proposed Decision. On November 24, 2009, the claimant filed the objection, along with a brief and a request for an oral hearing. The oral hearing was initially scheduled for January 13, 2010, but was postponed at claimant's request. On

July 7, 2011, claimant made an additional submission in support of his objection. The hearing on the objection was conducted on July 28, 2011. At that time, claimant submitted additional documentation in support of his claim.

Claimant's fundamental objection is to the Commission's application of the "continuous nationality" rule to his claim, which resulted in the denial of the claim for lack of jurisdiction. In his brief in support of his objection to the Proposed Decision, claimant asserts that the Commission made three errors of law in rejecting the underlying claim. First, that the Commission erred by "looking beyond the criteria set forth in the Department of State's [December Referral Letter[1]] . . . in applying a 'continuous nationality' requirement to the claim." Second, that the Commission erred in applying the continuous nationality requirement to his claim in contravention of the Libyan Claims Resolution Act.[2] Third, that the Commission erred "by applying the 'continuous nationality' requirement in contravention of the international agreement entered into between the governments of the United States and Libya on August 14, 2008. . . ."[3]

At the hearing, counsel for the claimant raised an alternative argument, namely, that the Commission erred in failing to distinguish between U.S. citizens and U.S. nationals. Counsel argued that U.S. nationals may be persons who owe "permanent allegiance" to the United States, and that permanent allegiance is a subjective quality, whereby aliens can become nationals without becoming citizens. Counsel argued, and claimant provided testimony during the oral hearing in support of his contention that,

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[1] December 11, 2008, *letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral Letter").

[2] Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008) ("LCRA").

[3] *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement" or "CSA"), 2008 U.S.T. Lexis 72.

claimant acquired U.S. nationality without having formally attained citizenship. These arguments are addressed below.

DISCUSSION

As to the claimant's assertions of various errors of law in applying the "continuous nationality" rule, the Commission's application of that rule in the Libyan Claims Program was recently addressed in the *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-049, Decision No. LIB-I-019 (2011) (Final Decision).[4] In its Final Decision in that claim, the Commission first noted that, although the President's October 31, 2008 Executive Order[5] settled *all* claims against Libya, it only provided a mechanism for compensation, through procedures established by the Secretary of State, for claims of U.S. nationals against Libya. No such provision was included for the claims of foreign nationals; therefore, "only the settled claims of U.S. nationals were to be the subject of compensation by the referrals from the State Department." 5 U.S.C. §552(b)(6) *supra*, at 5.

Second, in determining "when" a claimant must have been a U.S. national in order to be eligible for the compensation procedures established by the Secretary of State, the Commission determined that, contrary to claimant's argument that the CSA, the LCRA, and the December Referral Letter must be read in the present tense, "the term 'U.S. nationals' does not, by ordinary meaning, denote any specific time at which to measure whether a claimant is a U.S. national." *Id.* at 4. Given the absence of specific guidance on this point in the Referral, the Commission is required to apply applicable

[4] Indeed, given the nearly identical issues raised in the objections to the Proposed Decisions in the claims of 5 U.S.C. §552(b)(6) the oral hearing for these claims was consolidated. The first three arguments discussed above were made by counsel on behalf of both claimants in the oral hearing and in the briefs filed prior to the hearing.

[5] Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008) ("E.O. 13477").

principles of international law, justice and equity. The Commission noted in this regard that the continuous nationality requirement, including the requirement that a claimant be a U.S. national at the time of injury, is a "long-standing principle[] of international law consistently applied and advocated by the United States to the present day." *Id.* at 6. The Commission further noted that the rule "is recognized by the United States as customary international law, and . . . has been applied by both this Commission and its predecessors[.]" *Id.* at 8. Therefore, the Commission held that "a derogation from this rule will not be assumed by . . . the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has been no such express derogation in this program." *Id.*

For these reasons, the Commission in 5 U.S.C. §552(b)(6) determined that the "continuous nationality" rule would apply in the Libyan Claims Program. On this same basis, the Commission rejects claimant's contentions that the Commission made errors of law in applying the "continuous nationality" rule to deny the present claim.

As noted, claimant's alternative argument regarding "permanent allegiance" as a test of U.S. nationality separate from U.S. citizenship was raised by counsel during the oral hearing in this claim.[6] Claimant's argument derives from the definition of "U.S. national" set forth in the Commission's authorizing statute, which defines the term "nationals of the United States" as "(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens." 22 U.S.C. § 1621(c) (2006).[7] Claimant

[6] This argument was not raised, in writing or orally, during the oral hearing, in 5 U.S.C. §552(b)(6)

[7] In its Proposed Decision, the Commission also noted that both the LCRA and Executive Order No. 13477 define the term "national of the United States" by reference to the Immigration and Nationality Act, 8

contends that the Commission erroneously "presupposed" that the only method by which an alien can acquire U.S. nationality is by becoming a U.S. citizen. He argues that, as the definition cited above makes clear, "U.S. nationals" may also be persons who owe "permanent allegiance" to the United States. Claimant further contends that "permanent allegiance" has been determined by federal courts to be a subjective quality that will most likely be found where a person has taken "affirmative steps . . . toward becoming a U.S. citizen." On this point, claimant asserts that he obtained U.S. nationality by demonstrating "permanent allegiance" to the United States prior to and through the date of the terrorist incident.

Specifically, claimant testified that he entered the United States in 1983 with a business visa, married a U.S. citizen in June 1985, and immediately applied for Lawful Permanent Residence (LPR) status, at which time he also discussed the process of becoming a U.S. citizen with the Immigration and Naturalization Service (INS). Claimant further testified that he obtained his LPR status in September 1985, three months before the terrorist incident. He subsequently filed an application for U.S. citizenship some seven years later in 1992, and eventually became a U.S. citizen in April 1993.[8] In light of the authority cited, claimant argued that the actions he had taken prior to the incident demonstrated his "permanent allegiance" to the United States; therefore, he was a "national of the United States" at the time of the incident in December 1985.

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U.S.C. § 1101(a)(22) (2006), which likewise defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13477, 73 Fed. Reg. at 65,965.

[8] During the oral hearing, the Commission asked claimant whether he had ever renounced his Italian citizenship. Claimant replied that he had not, because it was not required and because he did not want to relinquish it.

The Commission has addressed the concept of "permanent allegiance" on numerous occasions in previous claims programs, and has consistently held that the phrase "persons who, though not citizens of the United States, owe permanent allegiance to the United States" applies only to persons from certain outlying possessions of the United States. *Claim of FARSHAD HAGHI*, Claim Nos. IR-0945, IR-0947, Decision No. IR-1487 (1994) (Final Decision) (citing *Claim of EDWARD KRUKOWSKI*, Claim No. PO-9532, Decision No. PO-927 (1964)); *Claim of MOUCHEGH YEREVANIAN*, Claim No. E-038, Decision No. E-009 (1986); *Claim of WALTER LUDWIG KOERBER*, Claim No. W-3917, Decision No. W-1322, at 6-7 (1965) (Final Decision).[9] In so holding, the Commission is in agreement with both the majority of federal circuit courts and the Board of Immigration Appeals. *See Abou-Haidar v. Gonzalez*, 437 F.3d 206, 207 (1st Cir. 2006) (citations omitted); *Moises Navas-Acosta*, 23 I. & N. Dec. 586, 587 (B.I.A. 2003). Moreover, the legislative history of the International Claims Settlement Act of 1949 suggests that Congress shared this understanding. *See Claim of FAJBUS ZAKRZEWSKI*, Claim No. PO-1695, Decision No. PO-83 (1961).

In addition, while the definition of "national of the United States" set forth in 22 U.S.C. § 1621(c) describes *who* is a U.S. national, it does not describe *how* a person may obtain this status.[10] Rather, the process by which an alien can become a citizen or national of the United States is set forth in Sections 301 through 348 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1401-1458 (2006). *See KRUKOWOSKI* at 3;

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[9] *See also Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("The distinction [between nationality and citizenship] has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island."); *INS Interp.* 308.1(g).

[10] *See Marquez-Almanzar v. I.N.S.*, 418 F.3d 210 (2d Cir. 2005) ("[T]he term "permanent allegiance" merely describes the nature of the relationship between non-citizen nationals and the United States, a relationship that has already been created by another statutory provision.").

*Abou-Haidar*, 437 F.3d at 207; *Moises Navas-Acosta*, 23 I. & N. Dec. at 587. Significantly, none of these provisions provides a method by which an alien can become a non-citizen national. *KRUKOWOSKI* at 5; *Moises Navas-Acosta*, 23 I. & N. Dec. at 587. A person may be born a non-citizen national, 8 U.S.C. § 1408, or may go through the process of naturalization, 8 U.S.C. § 1436; however, there is no intermediate step from alien to non-citizen national. *See KRUKOWOSKI* at 9; *Abou-Haidar*, 437 F.3d at 207. Thus, as the Commission has previously held, "[a]n alien does not assume the status of United States nationality until the procedure of naturalization has been fully complied with . . . ." *KRUKOWOSKI* at 8.

During the oral hearing, claimant cited *Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24 (D.D.C 2003), and *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243 (S.D. Fla. 2008), for the contrary proposition that an alien can, by taking certain steps that demonstrate "permanent allegiance" to the United States, achieve the status of "national of the United States" prior to becoming a U.S. citizen. Claimant argues that these cases demonstrate that the "permanent allegiance" referenced in 22 U.S.C. § 1621(c) is a subjective quality, and that an alien can acquire U.S. nationality by, for instance, taking concrete steps toward becoming a U.S. citizen.

The vast majority of the federal courts, however, have rejected claimant's theory that an alien can become a non-citizen national, and have instead held that one can become a U.S. national "only by birth or by naturalization under the process set by Congress." *Abou-Haidar*, 437 F.3d at 207;[11] *see also Miller*, 523 U.S. at 423 (1998)

[11] *See Marquez-Almanzar v. I.N.S.*, 418 F.3d 210 (2d Cir. 2005); *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003); *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004); *Carreon-Hernandez v. Levi*, 543 F.2d 637 (8th Cir. 1976); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003); *United States v. Jimenez-Alcala*, 353 F.3d 858 (10th Cir. 2003); *Sebastian-Soler v. U.S. Att'y Gen.*, 409 F.3d 1280 (11th Cir. 2005).

(Stevens, J., announcing judgment) ("There are 'two sources of citizenship, and two only: birth and naturalization.'" (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898))). Indeed, in *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 176-177 (D.D.C. 2006), which claimant's counsel cited as contrary, albeit distinguishable authority, the court rejected any suggestion that it had concluded otherwise in *Asemani*, which, as noted above, counsel had cited as support for his argument. The court said; "To the extent that this Court previously has suggested that a person who is neither a United States citizen nor born within a United States territory could acquire 'national' status by means other than completion of the naturalization process, *see [Asemani, supra]*, the Court now expressly rejects that position." Similarly, although the Fourth Circuit appeared to adopt claimant's theory in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), which claimant submitted as an exhibit during the hearing, the court, in an unpublished immigration decision, later distinguished *Morin* and held that an alien does not attain U.S. national status by merely applying for naturalization or residing in the U.S. for a lengthy period of time. *Daly v. Gonzalez*, 129 F. App'x. 837, 840 (4th Cir. 2005); *Abou-Haidar*, 437 F.3d at 207 n.4. The Commission itself has adopted the same conclusion. *See KOERBER*, *supra*; *Claim of KARL RICHTER & ROSALIA RICHTER*, Claim No. Y2-0074, Decision No. 594 (1968).

For the foregoing reasons, the Commission finds that claimant was not a person who owed "permanent allegiance" to the United States within the meaning of 22 U.S.C. § 1621(c) at the time of the terrorist incident, and as such was not a "U.S. national" as contemplated in the December Referral Letter.

## CONCLUSION

In summary, therefore, the Commission concludes that it lacks jurisdiction under the December Referral Letter over the claimant's claim because he sustained his asserted injury in 1985 but did not become a national of the United States until 1993. Accordingly, while the Commission sympathizes with the claimant, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, October 17, 2011
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Orig.

FOREIGN CLAIMS SETTLEMENT COMMISSION
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| In the Matter of the Claim of<br><br>Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6)<br><br>Against the Great Socialist People's Libyan Arab Jamahiriya | Claim No. LIB-I-044<br><br>Decision No. LIB-I-017 |

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant at Fiumicino Airport in Rome, Italy on December 27, 1985.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

> receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable John B. Bellinger, III,*

*Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral Letter"). The category of claims referred consists of

> claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement") 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure "fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya . . . ." December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On July 22, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the claimant's claim, including evidence of: his United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and his physical injuries.

The claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) states that on December 27, 1985, he was present at the Fiumicino Airport in Rome, Italy, at the time of the terrorist attack, and that he suffered wounds to his chest from two machine gun bullets and a wound to the third finger of his left hand from a third machine gun bullet. He further states that the one of the bullets that entered his chest tore through his right lung before exiting out of his back and that the other bullet stopped one inch away from his heart. These injuries required immediate emergency surgery as well as hospitalization for 22 days.

The claimant has also provided evidence of his United States nationality. This evidence reflects that he was naturalized as a United States citizen in 1993 but that he was a citizen of Italy by birth, having been born there in 1960. In addition, the claimant has provided a copy of the Order of Dismissal in Cases No. 06-cv-727 and 08-cv-529, filed in the United States District Court

for the District of Columbia, which name him as a party and which show that these cases were ordered dismissed on December 24, 2008.

DISCUSSION

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who are: (1) United States nationals and (2) named parties in a Pending Litigation case which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

*Nationality*

In the *Claim of* Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Specifically, the Commission noted that the December Referral Letter tasked the Commission with adjudicating and certifying a category of claims of United States nationals. In order to determine who qualifies as a United States national, the Commission must look to the provisions of ICSA, the statute under which the referral is made. Under that statute, the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity" in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006).

Although the Claims Settlement Agreement states that it settles the claims of "United States nationals," it does not define that term. However, the Commission's authorizing statute

defines the term "nationals of the United States" as "(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens." 22 U.S.C. § 1621(c) (2006).* Accordingly, the Commission holds that it is authorized to adjudicate and certify the claims of persons who meet this definition with respect to their U.S. nationality.

The Claims Settlement Agreement is silent, however, as to *when* a claimant must be a United States national in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. *See, e.g.*, *Claim of EUGENIA D. STUPNIKOV against Yugoslavia*, Claim No. Y-2-0071, Decision No. Y-2-0003 (1967); *Claim of ILONA CZIKE against Hungary*, Claim No. HUNG-2-0784, Decision No. HUNG-2-191 (1976); *Claim of JOSEPH REISS against the German Democratic Republic*, Claim No. G-2853, Decision No. G-2499 (1981); *Claim of TRANG KIM against Vietnam*, Claim No. V-0014, Decision No. V-0001 (1982). This principle has also been recognized by the courts of the United States. *See, e.g.*, *Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir. 1957), *cert. denied* 355 U.S. 854 (1957). Indeed, in the statute authorizing the Second Czechoslovakian Claims Program, Congress reaffirmed "the principle and practice of the United States to seek compensation from

* The Commission notes that both the LCRA and Executive Order No. 13477 define the term "national of the United States" by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22) (2006), which similarly defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13466, Exec. Order No. 13477, 73 Fed. Reg. at 65,965.

foreign governments on behalf only of persons who were nationals of the United States at the time" of loss. 22 U.S.C. note prec. § 1642 (2006).

According to his Statement of Claim, the claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6), did not become a U.S. citizen until 1993. As such, he was not a "national of the United States" when his claim arose in 1985. Under United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, the Commission is accordingly constrained to conclude that the claimant's claim is not compensable under the December Referral Letter and the Claims Settlement Agreement. Therefore, this claim must be and it is hereby denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, and
entered as the Proposed Decision
of the Commission.

SEP 23 2009

Mauricio J. Tamargo, Chairman

Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2008).