



August 27, 2007

EX PARTE

The Honorable Kevin Martin, Chairman
The Honorable Michael Copps, Commissioner
The Honorable Jonathan Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Robert McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Petitions for Forbearance From Title II and *Computer Inquiry*
Requirements for Enterprise Broadband Services, WC Docket Nos.
06-125, WC 06-147

Dear Chairman and Commissioners:

On Thursday, August 23, the Wireline Competition Bureau asked the Petitioners in the above-captioned broadband forbearance proceedings on an *ex parte* basis to submit market specific data in support of their petitions no later than August 31, 2007.¹ COMPTEL objects strenuously to the Bureau's last minute effort to solicit additional evidence from the Petitioners. All of the petitions have been pending for over one year, and the Commission is under a statutory obligation to act on them within 15 months. For the Qwest petition, the extended deadline expires on September 11, 2007, for AT&T on October 11, 2007, for Embarq on October 24, 2007 and for Frontier on November 2, 2007. Soliciting additional data now, with a return date only five business days before the statutory deadline for the first Petition, from parties who bear the burden of proving that they are entitled to the relief requested emphasizes the disarray plaguing the Commission's consideration of forbearance petitions. If petitioners are allowed to submit

¹ Letter from Thomas J. Navin, Chief Wireline Competition Bureau to Susanne Guyer, Verizon; Melissa Newman, Qwest; Robert Quinn, AT&T; Jeffrey S. Lanning, Embarq; Gregg Sayre, Frontier Communications, WC Docket Nos. 04-440, 06-125, 06-147, August 23, 2007 (attached).

last minute data to prove their cases for nationwide relief from statutory and regulatory obligations, data submitted well after the one year statutory deadline, no other interested party will have a reasonable opportunity to review their submissions or present contrary views. The Commission will have turned the fifteen month statutory forbearance proceeding into a one week (or one month for the later petitions) proceeding, denying the public a meaningful opportunity to be heard.

As explained in the remainder of this letter, COMPTTEL respectfully submits that—

- The Commission should direct the Bureau not to accept, and not to consider, any newly-filed evidence from Petitioners in support of their forbearance petitions, because these Petitioners had the burden of submitting such evidence with their petitions months ago;
- The Commission should adopt and enforce a “complete when filed” rule for forbearance petitions modeled on the rule successfully applied to Section 271 applications; and
- If the Commission fails to take these steps, its decisions on the pending forbearance petitions will violate the procedural requirements of the Administrative Procedure Act.

The Bureau’s Invitation To Submit Additional Evidence On the Eve Of A Decision Gives Petitioners An Advantage Not Contemplated By The Statute

The Bureau’s request undermines the Commission’s well established rule that petitioners in forbearance proceedings have “the obligation to provide evidence demonstrating with specificity why they should receive relief under the applicable substantive standards.”² Petitioners must present detailed showings regarding both the

² *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers under Rule Section 20.18(h)*, 18 FCC Rcd. 24648, 24658 ¶ 24 (2003) (rejecting claim that petitioners’ burden in a forbearance petition is “lower” than the burden applicable in a waiver petition); *See also In re Core Communications*, 455 F.3d 267, 279 (D.C. Cir. 2006) (stating that the FCC found that the Petitioner provided “no evidence” in support of arguments for forbearance); *Policy and Rules Concerning the Interstate Interexchange Marketplace*, 14 FCC Rcd. 391, 405 ¶ 28 (1998) (denying forbearance because “petitioners have not met their burden with respect to the first and second prongs of the forbearance standard”); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, 15 FCC Rcd 7066, 7070 ¶ 7 (1999) (petitioner “must explain” benefits of forbearance).

services and facilities for which they seek forbearance and the statutory and regulatory provisions from which they seek forbearance.³

Petitioners know they ignore this command at their own peril. The Commission has not hesitated to deny forbearance where petitioners have failed to carry their burden. Most recently in the *ACS Forbearance Order*, the Commission denied ACS' request for forbearance from certain regulations applicable to its retail special access services because "the available data do not allow us to calculate precise market shares."⁴ The Commission explained that the "absence of such market share evidence to use as a starting point for our analysis significantly hinders [its] ability to analyze on this record whether there is sufficient competition for interstate special access services throughout the Anchorage MSA." *Id. See also id.* at ¶ 91.

Petitioners should not be allowed to satisfy their burden by last minute submission of data that neither the Commission nor interested parties will have an opportunity to scrutinize. It strains credibility to suggest that, if the Commission receives new data at the eleventh hour, it can assess and verify that data in any meaningful manner before an order is adopted in the first forbearance preceding no later than September 11, 2007.⁵ Petitioners should have included data with their petitions sufficient to support compliance with the statutory forbearance criteria. If the information they have already filed is insufficient for that purpose, the Commission should deny their petitions, rather than bend the rules to give them a last second reprieve.

³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, 19438, ¶ 50 (2005) ("*Omaha Forbearance Order*") (denying Qwest's petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination); *id.*, ¶ 16 (rejecting forbearance request because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria).

⁴ *Petition of ACS Anchorage, Inc Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)) for Forbearance from Certain Dominant Carrier regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149 at ¶ 84 (rel. Aug. 20, 2007).

⁵ *Qwest Petition for Forbearance under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket 06-125, Order, DA 07-2399, (June 8, 2007) at ¶ 5 (extending to September 11, 2007 the deadline for Commission action before Qwest's petition is deemed granted.).

The Commission Should Impose A “Complete When Filed” Rule

The Commission has previously insisted on stricter pleading requirements for proceedings with statutory deadlines. In considering RBOC Section 271 applications, the Commission established a “complete when filed” policy.⁶ That policy required applications to “include all of the factual evidence on which the applicant would have the Commission rely in making its findings.” *Id.* New evidence, such as that requested here, was permitted “solely to rebut arguments made or facts submitted by other commenters,” and the applicant was prohibited from making “any part of its initial prima facie showing for the first time in reply comments or in ex parte submissions” as the Bureau now invites the Petitioners to do. *Id.*

The Commission’s rationale for this rule was compelling and applies equally to forbearance proceedings. As the Commission explained, “it is highly disruptive ... to have a record that is constantly evolving.” *Id.* This rationale flows from the principle that the Commission “need not sift pleadings and documents to identify” arguments and facts that are not “stated with clarity.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) *cert. denied*, 409 U.S. 1027 (1972). And in this proceeding, the argument is not merely stated with a lack of clarity — it is not stated at all. The Petitioners maintain they are entitled to sweeping nationwide relief, divorced from any market-specific analysis.

The Bureau’s approach renders the comments and reply comments, and indeed the first 14 months of these proceedings, an utter waste of the Commission’s and interested parties’ time and resources. As explained in the *Omaha Forbearance Order*, the Commission is “under no statutory obligation to evaluate [the] Petition other than as pled.” 20 FCC Rcd at 19445, ¶ 61 n.161. The Commission should impose the same “complete when filed” standard on forbearance petitions as it did on Section 271 applications.⁷ If the Commission finds that the petitions lack sufficient evidence to make a prima facie case under Section 10(a), the appropriate course of action is to deny the petitions not invite the petitioners on an *ex parte basis* to supplement the record at the last possible moment.

⁶ *Updated Filing Requirements for Bell Operating Company Applications under Section 271 of the Communications Act*, DA 01-734 (Mar. 23, 2001) at 3-4.

⁷ Petitions for forbearance should be required to contain all information necessary for the Commission to complete its review or the petition would be subject to dismissal. As with Section 271 applications, petitions for forbearance are subject to a statutory deadline and a complete when filed policy would promote efficient decision making by the Commission and efficient participation by interested parties. As with Section 271 applications, dismissal should be without prejudice, affording the petitioner an opportunity to file a more complete case in a subsequent petition and thereby restart the statutory clock.

The Bureau's Data Request is Inconsistent with the Administrative Procedure Act

The Commission treats forbearance petitions as rulemaking proceedings, accepting comments and reply comments pursuant to Sections 1.415 and 1.419 of the Commission's rules.⁸ The courts have concluded that, under the Administrative Procedure Act, an agency may not rely on any information on which interested parties are not given adequate time, access and opportunity to comment, particularly after the comment cycle has closed. The D.C. Circuit has held that an "agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Solite Corp. v. U.S. E.P.A.*, 952 F.2d 473, 485 (D.C. Cir. 1991), citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982).

In addition, the U.S. Court of Appeals for the Ninth Circuit has twice determined that a federal agency commits reversible error where it relies on material, post-comment information to support its final rule. See *Ober v. EPA*, 84 F.3d 304, 315 (9th Cir. 1996) ("petitioners were prejudiced when they did not have notice of or an opportunity to comment on the post-comment period justifications which were submitted by the State and were critical to the EPA's approval decision."); *Idaho Farm Bureau Fed'n v. Babbitt*, 5 F.3d 1392, 1403 (9th Cir. 1995) ("opportunity for public comment is particularly crucial when the accuracy of important material in the record is in question").

Before the FCC adopts rules, the APA requires it "to provide notice of a proposed rule" and "an opportunity for comment." *AMA v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (citing 5 U.S.C. § 553(b)-(c)). In particular, the APA "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule." *Id.* at 1132-33. This requirement then allows parties to offer "criticism or formulation of alternatives." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). "Among the information that must be revealed for public evaluation are the "technical studies and data" upon which the agency relies." *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 899 (D.C. Cir. 2006) citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).

Further, the "necessity for notice and opportunity to comment [is] heightened" for data on which the agency decision "relied largely ... to support its final rule," and such data "was critical" to the agency's decision. *Idaho Farm Bureau*, 5 F.3d at 1403. "Integral to the notice requirement is the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.... An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful

⁸ See e.g., *Pleading Cycle Established For Comments On Qwest and AT&T Petitions For Forbearance Under 47 U.S.C. §160(c) From Title II and Computer Inquiry Rules With Respect To Broadband Services*, WC Docket No. 06-125. DA06-1464 (rel. July 19, 2006).

commentary.” *Solite*, 952 F.2d at 485, citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982).

As the D.C. Circuit explains, the sufficiency of the agency’s notice and comment procedure rests on whether “at least the most critical factual material that is used to support the agency’s position on review ... [has] been made public in the proceeding and exposed to refutation.” *Chamber of Commerce*, 443 F.3d at 900 citing *Association of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984). “By requiring the ‘most critical factual material’ used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.” *Id.* at 901 citing *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Soliciting market-place data after the one year statutory deadline has passed and asking that it be submitted with only five business days remaining in the extended statutory period is antithetical to the demands of the APA. It denies interested parties any meaningful opportunity to analyze and comment on the data and have that data “exposed to refutation” before the Commission reaches a decision. It is particularly problematic in light of the Commission’s practice of issuing written decisions on forbearance petitions weeks or months after voting on an order resolving the petitions.⁹ Following this practice, the Commission could vote on September 11 and weeks or months later issue a written order based on the Petitioners’ last minute data while other interested parties are left in the dark and unable to submit competing analyses or criticism of the Petitioners’ submissions. This is the antithesis of the courts’ directive that the Commission disclose the basis for its ruling “in time to allow for meaningful commentary.” *Solite*, 952 F.2d at 485.

The D.C. Circuit has recently rejected several agency attempts to short-circuit their notice and comment procedures by denying interested persons an opportunity to provide meaningful comment on “critical” factual information on which the agencies rendered their respective decisions. In *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, ___ F.3d ___, 2007 WL 2089740 (D.C. Cir. 2007), the court vacated a rule of the Federal Motor Carrier Safety Administration establishing hours of service for long-haul truck drivers. The court found that the agency “failed to provide an opportunity for comment on the methodology” it chose to determine the hours of service and that this “failure to disclose the methodology

⁹ See *In re Core Communications Inc.*, 19 FCC Rcd 20179 (adopted October 8, 2004, rel. Oct. 18, 2004); *Omaha Forbearance Order* (adopted Sep. 16, 2005, rel. Dec. 2, 2005); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (adopted Dec. 28, 2006, rel. Jan. 30, 2007).

of the ... model in time for comment was prejudicial.” *Id.* at 11, 14. Similarly, in *Chamber of Commerce*, the court vacated the SEC’s rules adopting independent board of directors requirements for mutual funds. 443 F.3d at 909. The Court found that the agency had impermissibly based its rules on material that, while “publicly available,” was nonetheless prejudicial to opponents of the rule because interested persons were not provided an opportunity to comment on the data. *Id.* at 906.

The Commission cannot extend the statutory deadlines for these petitions any further. If the record currently before the Commission does not satisfy the Petitioners’ burdens of proof, the petitions must be denied. Inviting the Petitioners to supplement their showings with market specific data for the entire country at this late date makes a mockery of the rights of interested parties under the Administrative Procedure Act. To prevent such procedural irregularities in future forbearance proceedings, the Commission must adopt a “complete when filed” policy for all forbearance petitions.

Respectfully submitted,

Mary C. Albert

cc: Thomas Navin
Ian Dillner
John Hunter
Scott Bergman
Scott Deutchman
Chris Moore