

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition to Establish Procedural)	WC Docket No. 07-267
Requirements to Govern Proceedings For)	
Forbearance Under Section 10 of the)	
Communications Act of 1934, as Amended)	

COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these comments, pursuant to the Commission’s Notice of Proposed Rulemaking (“*NPRM*”) released on November 30, 2007 (FCC 07-202) in the above-referenced docket. In this *NPRM* the Commission seeks comment on the need for procedural rules to govern the filing of and the Commission’s consideration of petitions for forbearance pursuant to section 10 and/or section 332 (collectively, forbearance petitions). The *NPRM* addresses a Petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (“Petitioners”).¹ COMPTTEL supports the Petitioners’ request for the adoption of procedural rules specifically applicable to forbearance petitions.

The Commission has been inundated with petitions for forbearance that have consumed a substantial amount of Commission resources, particularly from incumbent local exchange carriers (“ILECs”) seeking to escape from key competitive statutory

¹ Covad, *et al.* Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267 (filed Sept. 19, 2007)(“Petition”).

provisions and Commission rules. These forbearance petitions, for the most part, have far reaching impacts on the industry as a whole, not just the specific carrier seeking forbearance. As such, procedures that afford other carriers, state agencies, consumer groups and other parties a sufficient and meaningful opportunity to comment on the petitions are imperative to sound decision-making. As Petitioners point out, a “procedure-less” regulatory environment undermines the integrity of the process.²

THE COMMISSION NEEDS TO ESTABLISH PROCEDURAL RULES TO GOVERN FORBEARANCE PROCEEDINGS

Congress, through Section 10 of the Act, 47 U.S.C. § 160, (“Section 10”), has bestowed the Commission with significant power – essentially the ability to eliminate the applicability of certain provisions of the Communications Act without Congressional involvement. Moreover, Section 10(c) provides that any “telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under [Section 10] with respect to that carrier or carriers.” If the Commission fails to act within a one year period from the date the petition is received, or within a one time additional 90 days if the deadline is extended by the Commission, the petition is deemed granted.

This ability to petition for forbearance, with the potential of a default grant, has resulted in petitioners dictating the Commission’s agenda and use of resources. There have been dozens of petitions for forbearance pending before the Commission. Resolution of these petitions has been consuming substantial Commission and industry resources, while issues critical to the industry - such as universal service and intercarrier compensation reform - remain unresolved. As opposed to when the Commission initiates

² Petition at 7.

a rulemaking proceeding to consider the appropriateness of certain rules, a grant of forbearance typically only addresses the applicability to a single carrier and, therefore, routinely leads to more forbearance petitions and the depletion of more resources. As Commissioner Copps has indicated, significant Commission resources were expended on adjudication of the Verizon petitions for forbearance from unbundling requirements for six cities.³ And, regardless of the inadequacy of a petition, impacted parties must expend already scarce resources to refute the petition.

The Commission asks whether the forbearance provision is being utilized for the purpose intended by Congress. The provision was meant to provide the Commission with a tool to eliminate unnecessary rules, consistent with the public interest.⁴ As expressed by members of Congress: “It was understood that this would be judiciously used to address acute problems – it should not be used to remove administrative laws processes and protections.”⁵ It is undeniable that the provision has been used in a manner that goes beyond its intended purpose.

Undoubtedly because of the required timeframe for a Commission decision, carriers use forbearance as a means to get the Commission to decide matters better suited for a rulemaking, declaratory ruling or a clarification proceeding. As one example, although the statutory provision specifically states that “[a]ny telecommunication carrier

³ Statement of Commissioner Copps, *Concurring, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 06-172, FCC 07-212 (2007).

⁴ See Letter of Senators Bryon L. Dorgan, Daniel K. Inouye, John F. Kerry, John D. Rockefeller IV, Ron Wyden, Amy Klobuchar, to the Honorable Kevin J. Martin, Chairman, FCC, dated Nov. 20, 2007.

⁵ *Id.*

...may submit a petition to the Commission requesting that the Commission [forbear from applying any regulation or provision of the Act] *with respect to that carrier...* or any service offered by *that carrier...*” Embarq recently filed a petition asking the Commission to “forbear from any application of the ESP exemption to IP-to-PSTN voice traffic.”⁶ Embarq is not seeking relief from the application of the regulation to itself or one of its services, as provided for by Section 10(c). Embarq is trying to prevent the rule or exemption from applying to *other carriers* in a particular situation so that Embarq can recover access charges for terminating calls on the PSTN that originated with a service provider that uses IP technology.⁷ Indeed, Embarq does not even believe the regulation/exemption currently applies to IP-to-PSTN voice calls. Yet, rather than file a petition for declaratory ruling or clarification, which would be the proper route for such a matter, but which could linger at the Commission unresolved, Embarq is inappropriately using Section 10 so as to get an expedited answer from the Commission. This is just one example of misuse of the provision.

Carriers have also been filing petitions with inadequate evidentiary support. Instead of denying the petitions, the Commission has granted forbearance based on evidence not submitted in the original petitions - even evidence that was submitted within a month of its decision⁸ - thereby, denying interested parties sufficient opportunity to

⁶ Petition for Forbearance, *In the Matter of Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on ESP Exemption*, WC Docket No. 07-204 (filed Jan. 11, 2008).

⁷ *Id.* at iii.

⁸ See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order,

evaluate and respond. Indeed, the Wireline Competition Bureau has even requested last minute data to assist applicants in making their case.⁹ The Commission's acceptance of incomplete or insufficient filings by the petitioning party, which are subsequently amended with late filings of empirical information needed to satisfy their burden of proof, presents the profound appearance of unfairness and it threatens to undermine the integrity of the decision-making process.

The Commission needs to take control of the process to the extent permissible under the Act. Specifically, when the Commission is considering a petition for forbearance, the Commission should leave no doubt that, by filing the petition, the petitioner assumes the burden of proof for demonstrating the statutory criteria for forbearance are met, that the petitioner must meet this burden in the initial filing, and that the requested relief the petitioner seeks is abundantly clear.

THE COMMISSION SHOULD CONFIRM THAT THE APA NOTICE-AND-COMMENT RULES APPLY TO PETITIONS FOR FORBEARANCE

Forbearance petitions typically seek to eliminate a well established statutory and/or regulatory requirement - requirements on which many in the industry rely. As such, procedures that afford other carriers, state agencies, consumer groups and other parties sufficient opportunity to comment on the petitions are imperative to sound decision-making. As the petitioners for this rulemaking stated, “[i]n forbearance

WC Docket No. 04-223, FCC 05-170, n. 167 and 171 (2005)[The Commission used an August 22, 2005 letter of Cox Communications to support its Order, adopted September 16, 2005, granting Qwest Communications forbearance in Omaha.]

⁹ 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, Aug. 23, 2007.

proceedings, it is essential that all parties be afforded due process, since grave harm could result from an unwarranted grant of forbearance.”

The potential reach of the matters addressed in forbearance proceedings is well documented. For example, in the pending petitions for forbearance from certain recordkeeping and recording requirements numerous State Commissions filed comments stressing their reliance on requirements to perform the duties that Federal and State law, as well as decisions of the Commission, require of them. Thirteen million Americans or 4.6 million households would be impacted by a grant of the pending petitions of Qwest for forbearance from unbundled loop and transport obligations for the Seattle, Minneapolis, Denver and Phoenix MSAs. As one government entity pointed out, a grant of forbearance “[a]cross the six markets for which Verizon [had] requested a special exemption from the pro-competition rules established by Congress in the 1996 Telecommunications Act, [] would [have] cost Americans \$2.4 billion a year in monopoly rents.”¹⁰

The Commission should adopt a policy of applying the APA’s notice-and-comment procedures to all Section 10 forbearance proceedings. While not a rulemaking proceeding per se, forbearance proceedings have the same effect, i.e., altering the application of rules to carriers. Thus, as with rulemaking proceedings, the Commission should not rely on information on which interested parties are not given adequate time, access and opportunity to comment. Integral to the notice requirement is the agency’s duty to “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

¹⁰ Letter of Daun S. Hester, Councilwoman, Super Ward 7, City of Norfolk, Virginia, to Chairman Martin and FCC Commissioners, dated Nov. 27, 2007.

procedural error when it fails to reveal portions of the technical basis for a proposed rule in time allow for meaningful commentary.”¹¹

Given the impact on other parties and the public in general, the Commission cannot determine whether to grant the petitions solely based on the information provided in these petitions. Other parties must be afforded sufficient opportunity to evaluate and, if necessary, refute the evidence and legal arguments presented in the petition.

A “COMPLETE-AS-FILED” RULE SHOULD APPLY TO ALL FORBEARANCE PETITIONS

The petitioner in a forbearance proceeding must assume the burden of proof and must present the data and legal theory to meet that burden in the petition. Section 10 requires a showing that “(1) enforcement of such regulation or provision 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 such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.” 47 U.S.C 160(a). The Petitioner should be required to separately demonstrate that each component of this standard is met. If the evidence submitted with the petition does not demonstrate these criteria, the Commission must deny the forbearance requested.

Unlike rulemakings or other types of proceedings, petitioners for forbearance have complete control as to when they file their petitions and from what they seek

¹¹ *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).

forbearance. On the other hand, the time period for the Commission to act and, consequently, other parties to respond, is dictated by statute. Thus the need for petitioners to provide an unambiguous and fully supported request at the start of the clock - when they file their petition - is imperative to a fair and sound process. While petitioners should be permitted to argue as to why they have met the burden of proof through their petition, in response to comments to the contrary, petitioners should not be allowed to satisfy their burden by subsequent submission of data, particularly last minute submissions that neither the Commission nor interested parties will have a meaningful opportunity to scrutinize.

There is precedent for stricter pleading requirements for proceedings with statutory deadlines. In considering RBOC Section 271 applications, the Commission established a “complete when filed” policy.¹² That policy required applications to “include all of the factual evidence on which the applicant would have the Commission rely in making its findings”¹³ 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.”¹⁴ 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.”¹⁵ This is particularly crucial when, as in the case of forbearance proceedings, there is a statutory deadline.¹⁶

¹² *Updated Filing Requirements for Bell Operating Company Applications under Section 271 of the Communications Act*, DA 01-734, at 3-4 (Mar. 23, 2001).

¹³ *Id.*

¹⁴ *Id.*

Those requesting forbearance will not be harmed by a “complete-as-filed” rule. If the petitioner finds, perhaps based on the responses to the petition the Commission receives from other parties, that they will need more data to support their case, the petitioner is free to withdraw the pending petition and re-submit with the necessary data. This will restart the clock and again give other parties and the Commission sufficient time to accurately evaluate the request.

COMMISSION PROCEDURES SHOULD ENCOURAGE STATE INPUT

There are an increasing number of petitions seeking forbearance from Sections 251 and 271, the resolution of which requires a thorough analysis of competition in the relevant local markets. State and city agencies are uniquely situated to provide valuable information concerning the markets, and have a strong interest in protecting the consumers, in their respective states. Accordingly, the Commission should adopt a rule that specifically seeks their input and ensures that they have complete access to the Confidential and Highly Confidential data.

The Commission should ask that the state and/or city agencies provide the Commission with an assessment of the availability and actual penetration of alternatives to competitive local exchange carriers (other than the incumbent’s ubiquitous network), the affordability of alternative services to the consumers of that state, the overall impact of the forbearance on the consumers of that state broken down by geographic and socioeconomic segments of the state, the demographics of the state, and the extent of the incumbent’s market power in both the retail and wholesale markets in that state for both

¹⁵ *Id.*

¹⁶ Similarly, section 208 complaints have been dismissed due to the petitioning party’s failure to produce the required evidence up front.

mass market and enterprise customers.¹⁷ If the state or city is unable to make a proper analysis due to the insufficiency of the evidence submitted by the petitioner, that agency should be asked to file comments to that affect.¹⁸ The Commission should establish the comment cycle such that states comment on the petition first, so that others' comments can reflect the state's analysis.

In conclusion, the Commission should establish procedural rules for the consideration of forbearance petitions, including rules confirming that the petitioner assumes the burden of proof for demonstrating the statutory criteria for forbearance are met, that stipulate that the petitioner must meet this burden in the initial filing and that the requested relief the petitioner seeks is unambiguous, and that incorporates state input in the process, in order to ensure sound decision-making.

Respectfully submitted,

/s/Karen Reidy

Karen Reidy
Vice President, Regulatory Affairs
COMPTEL
900 17th Street, NW, Suite 400
Washington, DC 20006

March 7, 2008

¹⁷ See e.g., Comments of the City of Philadelphia, *In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area*, WC Docket No. 06-172, filed Mar. 5, 2007.

¹⁸ See e.g., Reply Comments of the New York State Department of Public Service, *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area*, WC Docket No. 06-172, filed Apr. 18, 2007.