

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

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

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Notice of Proposed Rulemaking (“NPRM”) in the above-referenced docket.¹ Advocacy commends the Commission for initiating a rulemaking to consider the adoption of procedural rules to better govern the FCC’s forbearance process under Section 10 of the Communications Act of 1934 (“The Act” or “Telecom Act”), as amended.² The FCC’s recent forbearance proceedings created significant uncertainty for telecommunications providers in the affected markets. Because forbearance essentially removes existing regulations, the forbearance process warrants close analysis. Deregulation is a laudable goal; however, the decision to proceed must consider how forbearance may significantly impact small telecommunications providers. Data from industry indicates that deregulation via forbearance has been arbitrary in recent years.³ As such, it is critical that the Commission examine ways to alleviate this uncertainty.⁴

¹ See *Notice of Proposed Rulemaking*, WC Dkt. No. 07-267 (rel. November 30, 2007) [hereinafter, NPRM].

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ See, e.g. The Petition For Procedural Rules to Govern the Conduct of Forbearance Proceedings, filed on behalf of Covad Communications Group, NuVox Communications, XO Communications, LLC, and Cavalier Telephone Corp. (September 19, 2007) [hereinafter COVAD].

⁴ See OPASTCO’s comments, WC Docket No. 06-125, at 2 (August 16, 2006) (stating that there is “substantial uncertainty throughout the industry as to the scope and effect of regulatory forbearance which Verizon was granted

Introduction and Summary

Congress created Section 10 forbearance to provide the FCC with the flexibility to remove regulations from telecommunications carriers once the Commission determines that an adequate level of competition is present in the market.⁵ The factors considered in this analysis are at the Commission's discretion. In recent years, the number of forbearance requests made by incumbent carriers has increased, and industry players and Congress have criticized the FCC's grants of regulatory relief under Section 10. Therefore, to assist the FCC in analyzing these concerns, Advocacy has solicited input from small entities, reviewed their recommendations, and prepared these comments to examine what procedural changes may improve the Section 10 forbearance process.

Our comment letter is based on information collected from state public utility commissions (PUCs) and data received from small businesses that believe that the current forbearance regime should be revised so that in deciding forbearance petitions, the FCC will properly analyze and reduce the burden on small telecommunications entities.⁶

1. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the

as well as the potential scope and effect of outstanding petitions in the instant proceedings") [hereinafter, OPASTCO]. More specifically, OPASTCO's membership wanted clarification over whether Verizon's broadband services that received forbearance were exempt from their Universal Service (USF) obligations. *See Id* at 3.

⁵ 47 U.S.C. § 160 (b) listing competition as a factor to weigh when examining a forbearance petition.

⁶ The Report and Order and Further Notice of Proposed Rulemaking combines WT Docket No. 06-150, CC Docket No. 94-102, WT Docket No. 01-309, WT Docket No. 03-264, WT Docket No. 06-169, PS Docket No. 06-229, and WT Docket No. 96-86. The Commission states that it is re-examining the rules "due to the significant changes that have occurred over the past several years in the statutory framework governing [the] spectrum." FNPRM, *supra* note 1 at 3.

Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.⁷ Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁸

On August 13, 2002, President George W. Bush signed Executive Order 13272 that highlights the President’s goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies properly consider the impact of their regulations on small entities.

2. The Forbearance Process Directly Impacts a Significant Number of Small Entities

The Commission has noted in its NPRM that the proposed adoption of the procedural rules filed by the petitioners will significantly impact a host of various small telecommunications businesses.⁹ According to FCC data incorporating statistics from the U.S. Small Business Administration, most incumbent local exchange carriers (ILECs), interexchange carriers, competitive local exchange service providers (CLECs), competitive access providers, international service providers, wireless service providers, and common carrier paging providers qualify as small businesses.¹⁰ While these small businesses generally do not apply for forbearance themselves, the Commission’s decision to grant or deny a forbearance petition directly affects their operations. One area where forbearance generally negatively impacts small carriers is in its application to broadband services. For example, rural ILECs are concerned

⁷ Pub. No. 96-354, 94 Stat. 1164 (1980).

⁸ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

⁹ NPRM, *supra* note 1, at 9.

¹⁰ *Id.*

about the potential long-term impact that deregulation of some broadband services may have on their access to the Internet backbone.¹¹ While many U.S. carriers provide broadband Internet access in the retail market, few have the market presence needed to provide rural ILECs with wholesale access to high-capacity backbone facilities.¹² Moreover, the recent telecommunications mergers have further compromised reasonable rates to this backbone access for rural telecommunications companies. Another group that tends to be negatively affected by forbearance is CLECs. With respect to CLECs, unbundled network elements (UNEs) are primary inputs in their production function that are required for them to compete in the market place. Because the language of Section 10 directs the Commission to consider how a forbearance grant will impact competition in the market,¹³ the potential economic burden imposed on rural ILECs and other small providers by such grants warrants close review.¹⁴

3. The Forbearance Process Should be Subject to Notice and Comment Procedures

The Commission first seeks comment on whether the Administrative Procedure Act (APA) notice and comment requirements govern the forbearance petition process under Section 10.¹⁵ The forbearance process should be subject to notice and comment procedures.¹⁶ Section 10 of the Telecom Act grants the FCC deregulatory authority with broad discretion; substantive procedures are needed to prevent arbitrary and capricious deregulation with the potential to

¹¹ OPASTCO, *supra* note 3, at 3.

¹² See OPASTCO, *Action Issue: Broadband/ Network Access* (2006), available at: <http://www.opastco.org/site/resources/library?category=Position+Papers>.

¹³ *Id.*

¹⁴ 47 U.S.C. § 160 explaining what factors the Commission must weigh when deciding whether to grant a carrier's request for regulatory forbearance. The Commission must determine: 1) that enforcement of the regulation is not necessary to ensure that rates and other practices are "just and reasonable;" 2) that enforcement of the regulation is not needed to protect consumers; 3) that the forbearance grant is "consistent with the public interest;" and finally stating that 4) the FCC must weigh "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services."

¹⁵ See NPRM, *supra* note 1, at 2.

¹⁶ See Comments of the Office of Advocacy, WC Dkt. No. 04-440 (August 13, 2007) (classifying "forbearance under Section 10 of the Communications Act as a deregulatory action and a logical component of the broader regulatory process").

destabilize markets.¹⁷ Much like the analysis conducted under the RFA, under Section 10 the FCC is required to analyze the impact that a grant of forbearance will have on small telecommunications providers.¹⁸ Moreover, providing small businesses with the opportunity to submit data prior to final regulatory decisions increases the information available to the Commission when conducting what can potentially be a complicated analysis.¹⁹ Because the forbearance process impacts not only the petitioning parties but the entire telecommunications market in the affected region, receiving input from industry is critical to well-reasoned decisions consistent with the APA and the RFA.

In addition, a clear analytical process must be established to indicate what requirements are necessary to prove that there is adequate competition to support a forbearance grant. Promoting competition is a goal that is furthered by various portions of the Act; Section 10 (b) specifically requires that the FCC consider whether “forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”²⁰ However, the statutory language does not delineate what specific requirements a carrier must meet in a forbearance proceeding in order to demonstrate that the level of competition supports a grant of deregulation. This is where the Commission should establish a framework which would bring clarity to the forbearance process, and provide small carriers with a better understanding of

¹⁷ The removal of regulation that took years to implement cannot be handled lightly. While reducing the amount of regulation is a laudable goal, the process must be conducted in a constrained environment.

¹⁸ Small market competitors, particularly new market entrants, and consumers, are two key groups that Congress intended the Telecom Act to protect.

¹⁹ Congress crafted the APA to ensure that “administrative policies affecting individual rights and obligations [are] promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.” Morton v. Ruiz, 415 U.S. 199, 232 (1974), Nat’l Tour Brokers Ass’n v. Interstate Commerce Commission, 591 F. 2d 896, 902 (D.C. Cir. 1978) (“The purpose is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of ‘final’ rules.”). The RFA further addresses the economic impact that these rules may have on small businesses.

²⁰ 47 U.S.C. § 160 (b).

what they must show in order to support or oppose a forbearance grant. Additionally, it will provide an added level of transparency as to how each forbearance grant is consistent with the public interest, and it will enhance competition under Section 10 (b).²¹

4. The Commission Should Establish Complete-as-Filed Requirements and Fully Enforce Them

The Commission next seeks comment on whether a complete-as-filed requirement should be implemented in forbearance proceedings.²² Forcing carriers to present the requisite data at the outset will better enable all interested parties to present their view in an accurate manner before the Commission. Complete-as-filed requirements already exist for other FCC proceedings such as the Section 271 complaint system.²³ Section 271 requirements may be waived; if complete-as-filed requirements are similarly waivable, it would be important that the requirements are not easily waived for companies, or the intended benefits will be lost.²⁴

5. The FCC Should Institute a Rule to Clarify Whether the Petitioner Maintains the Burden of Proof in Forbearance Proceedings

The Commission also seeks comment on whether the burden of proof in a forbearance proceeding rests with the petitioner.²⁵ Section 10(c) of the Act provides for telecommunications carriers to submit a petition to the FCC to request regulatory relief with respect to an offered service.²⁶ However, the statutory language fails to indicate whether the petitioner must carry the

²¹ 47 U.S.C. § 160 (b).

²² NPRM, *supra* note 1 at 2.

²³ See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice 16 FCC Rcd 6923, 6925 (2001) (March 23 Public Notice”).

²⁴ See, e.g., Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization To Provide In-Region, InterLATA Service in Nevada (WC Docket No. 03-10; FCC 03-80) (April 22, 2003)(stating that the Commission would waive the complete-as-filed requirement due to outstanding evidence).

²⁵ NPRM, *supra* note 1 at 3.

²⁶ 47 U.S.C. §160 (c) stating 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 this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements

burden of proof through the forbearance proceeding. Because the forbearance analysis requires business and market data that is sometimes difficult to retrieve, it is important to confirm which party must provide complete information at the outset. Therefore, the FCC should clarify that the petitioner in a forbearance proceeding maintains the burden of presenting the requisite data in accordance with Section 10 (a) and (b), as this party is the one requesting regulatory change.²⁷ In legal and regulatory actions, the petitioner is responsible for bearing the burden of proof, and if the Commission must depart from this established procedure, they should explain the reasoning for such change.²⁸ For example, “with regard to petitions seeking Section 251(c)(3) and/or 271(c)(2)(b) forbearance, a *prima facie* case should include information provided at wire center level.”²⁹

6. The FCC Should Work Closely With Congress to Evaluate Whether Section 10 Serves as an Effective Means for the Commission to Make Changes to its Regulations

The Commission next seeks comment on the effectiveness of section 10 as an instrument for regulatory change in general.³⁰ The Section 10 forbearance process is unique to the FCC, and largely impacts the level of competition in the U.S. telecommunications market. Hence, as the agency tasked with conducting the forbearance analysis, the Commission has the appropriate authority to delineate the forbearance process and set certain requirements.

That being said, the Commission can establish a process in the current forbearance

for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.”

²⁷ 47 U.S.C. § 160 (a)-(b). These sections indicate that the Commission is responsible for determining whether forbearance should be granted or denied, and logically the party requesting forbearance would need to present the data to support that market conditions warrant a grant of regulatory reprieve.

²⁸ For example, a state that seeks to change procedures under the Voting Rights Act bears the burden of proof and must provide the Attorney General information sufficient to demonstrate that the change is not discriminatory in purpose or effect. Branch v. Smith, 538 U.S. 254 (2003); see also Canadian Lumber Trade Alliance v. U.S. (CA Fed. 2008).

²⁹ COVAD *supra* note 3, at 31.

³⁰ NPRM, *supra* note 1, at 4.

regime to better protect the underlying goals of promoting competition and furthering the public interest. Advocacy urges the FCC to create a system where once a forbearance petition is deemed worthy of approval, a notice of inquiry (NOI) or a rulemaking to review the merits is set in motion. By doing so, the Commission would ensure that each grant will be thoroughly investigated and substantiated, and all interested parties would have an opportunity to either provide evidence in support of or in opposition to such grant. The following notice of proposed rule making (NPRM) would actually propose granting forbearance given the data provided in the earlier stage. It is only by going through such a transparent process that the Commission can be positive that such action is fully justified. However, a more streamlined version of this process may be available if stricter evidentiary requirements can be established.

Because Section 10 is a statutory mechanism it presents difficulties for regulators with regard to updating the system on a broader scale. Ultimately, Congress must formally amend this portion of the Act if it is determined that substantive changes are needed. In that case, the Commission should work closely with legislators to amend outdated or unclear language to strengthen Section 10 or work to develop another structure in which deregulation may best be achieved.

7. The FCC Should Adopt Rules That Would Encourage Input From State Public Utilities Commissions (PUCs)

Collecting the requisite market data for forbearance determinations can be difficult, particularly because some of the information is company-specific and confidential in nature. In addition to analyzing this data at the federal level, Advocacy believes that input from state commissions could add a valuable level of granularity to the data in specific forbearance proceedings. State commissions are closer to the public interests and market conditions in their specific regions, because they are tasked with focusing on a particular geographic area of the

U.S. telecommunications industry. The statutory language of Section 10 (a) directs the Commission to make its forbearance decision based on the telecommunications carriers or services “in any or some of their geographic markets.”³¹ State input on the impact of deregulation in their regions would better enable the FCC to evaluate whether enforcement of the regulation being reviewed for forbearance for a carrier is consistent with the public interest and other Section 10 criteria.³² However, Advocacy recommends the Commission first investigate whether the relevant data is already being collected by state PUCs, whether the collection of this data would unnecessarily burden state PUCs, and what procedures for this data collection would best support the forbearance process.

8. Conclusion

Advocacy urges the FCC to consider the comments from the petitioners and other small businesses on how the Section 10 forbearance process may be updated. Advocacy recommends that the Commission analyze the above recommendations and other significant alternatives presented by commenters so that Congress’ goals in enacting Section 10 are realized.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or

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³¹ 47 U.S.C. §160 (a).

³² 47 U.S.C. § 160 (a)-(b).

Respectfully submitted,

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via electronic filing

Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this March 7, 2008, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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