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Regulatory Studies Program

Public Interest Comment on
Establishing Procedural Requirements to Govern
Section 10 Forbearance Petition Proceedings¹

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WC Docket No. 07-267; FCC No. 07-202

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, it conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Federal Communications Commission's Notice of Proposed Rulemaking on procedural requirements for forbearance proceedings does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Commission's proposals on overall consumer welfare and other public interest values.

I. INTRODUCTION

The Commission seeks comment on the need for procedural requirements to govern forbearance under Section 10 of the Communications Act of 1934 as amended, and specifically the proposals made by Covad Communications Group, NuVox Communications, XO Communications, Cavalier Telephone, and McLeodUSA Telecommunications (hereinafter "Covad") in their joint petition.² We appreciate the opportunity to comment in this proceeding. As the Commission notes, Covad suggests in its petition that the Commission may adopt the rules without first seeking comment from the public.³ While this may be true, we applaud the Commission for allowing public comment, which is in fact what Covad seeks in its own petition.

¹ Prepared by Jerry Brito, senior research fellow, and Andrew Perraut, research associate. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University.

² Covad et al., Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings, FCC WC Docket 07-202 (Sept. 19, 2007) [hereinafter "Covad"].

³ FCC, NOTICE OF PROPOSED RULEMAKING, *In the Matter of 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 (released Nov. 30, 2007) at ¶ 4; Covad at 6.

Section 10 was enacted as part of the Telecommunications Act of 1996 (“1996 Act”) and it established a new deregulatory mechanism by which the Commission would forbear from enforcing regulations that were no longer necessary to ensure competition and the public interest.⁴ It mandates that the Commission forbear from applying any regulation or section of the Act to a communications carrier if the Commission finds that three criteria have been met. These criteria are:

- (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.⁵

While it is the Commission’s responsibility to forbear under Section 10, the Act also allows carriers to file petitions with the Commission asking for forbearance.⁶ Under the Act, the Commission must make a decision on a forbearance petition within one year or the petition is “deemed granted.”⁷ The Commission may also extend the one-year period by 90 days if it finds it necessary.⁸

The Commission asks for comment on whether forbearance has been an effective tool for making changes to regulations. This question is substantially beside the point because, as we will see, the Commission was not only given the statutory authority to forbear from regulation not in the public interest, but the obligation to do so. Since Congress did not give the Commission an option, the effectiveness of this policy is not relevant to the question of whether procedural rules are needed. Even if forbearance were an ineffective policy tool, the petitioners would need to address this concern to Congress.

The Commission further asks whether Section 10 is being used for the purpose intended by Congress. In the Act, Congress clearly stated its intent to “promote competition and reduce regulation.”⁹ As former FCC Chairman Dennis Patrick has said about the Act, “[t]he intention of the Congress . . . seems quite obvious: to move as quickly as possible

⁴ 47 U.S.C. 160.

⁵ 47 U.S.C. 160(a).

⁶ 47 U.S.C. 160(c).

⁷ *Id.*

⁸ *Id.*

⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, pmbll., 110 Stat. 56.

toward an open, competitive and largely unregulated marketplace.”¹⁰ Congress created forbearance as a deregulatory mechanism and, as a result, whenever the Commission declines to enforce a regulation as a result of forbearance in the public interest, it is essentially axiomatic that the provision is being used as intended.

Finally, the Commission asks for comment in general on the need for procedural rules to govern the Commission’s forbearance petition proceedings, and in particular the procedures proposed by Covad. The balance of this comment will address those questions. It should be noted, however, that Covad’s concerns center on the potential of Section 10 forbearance petitions to allow the Commission’s agenda to be driven by private parties. While it is not clear that Covad has proven that the Commission’s decision-making power can be hijacked via the forbearance process, if it were the case, one solution would be for the Commission to take a more active role advancing forbearance.

Thomas J. Hall has noted this power, which he calls “proactive forbearance,” in a paper published in the *Harvard Journal of Law and Communication Technology*.¹¹ While the Commission has historically issued grants of forbearance in response to petitions from telecommunications carriers, Hall argues Section 10 does not prevent the Commission from acting on its own in the absence of a petition.¹² The specific language regarding petitions is intended to assure corporate stakeholders that they will have a voice in the process, but the law does not say that a petition must be filed for the Commission to initiate forbearance proceedings.¹³ In fact, since Congress has placed a positive duty on the Commission to forbear from enforcing regulations that meet the criteria outlined in Section 10, the Commission should more actively seek to advance forbearance on its own, thus lessening any potential worries of an agenda set by corporate stakeholders.

II. THE NEED FOR PROCEDURAL RULES & COVAD’S PROPOSED RULES

Covad alleges that the Section 10 forbearance scheme contains two major defects: first are “flaws inherent the statute” itself,¹⁴ and second are “shortcomings in the Commission’s implementation of the provision[.]”¹⁵ Covad first presents a laundry list of grievances with the Act. These are out of place in a petition to the Commission, which can do nothing about them, and should be addressed instead to Congress. Covad then presents a series of grievances regarding Commission practice and these, in contrast, do deserve careful consideration. Covad rightly notes that the Commission’s *ad hoc* approach to forbearance petitions has stirred controversy and that everyone involved can benefit from greater procedural clarity. It proposes some sensible rules to deal with

¹⁰ Thomas Hall, *The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation*, 11 Harv. J.L. & Tech. 797, 808 (1998) (quoting Chairman Dennis Patirck).

¹¹ Hall, *The FCC and the Telecom Act of 1996*, at 815.

¹² *Id.*

¹³ *Id.*

¹⁴ Covad at 2

¹⁵ *Id.*

forbearance petitions. However, it also suggests some rules that are unnecessary and in some cases overreaching.

A. APPLYING APA NOTICE-AND-COMMENT RULES TO FORBEARANCE PETITIONS

Covad correctly notes that the forbearance procedure set forth in Section 10 is neither a rulemaking nor an adjudication that would “automatically fall under the procedural requirements of the APA and the extensive case law that has been developed to implement the APA.”¹⁶ The Commission has nevertheless allowed interested parties to comment on forbearance petitions on an *ad hoc* basis. This is a sensible policy given that the Commission should want to be as informed as it can be before it makes a decision. What Covad suggests is that if the Commission is going to accept comments, it should do so on a consistent—and not *ad hoc*—manner. To that end Covad proposes that the Commission adopt “a policy of applying the APA’s familiar notice-and-comment procedures to all Section 10 forbearance procedures.”¹⁷

If the Commission chooses to continue to accept comments on forbearance petitions, it is eminently sensible that it adopt consistent procedures for the sake of certainty and fairness. It is also a sensible suggestion that the APA’s notice-and-comment process should serve as the model for such procedural rules. This would mean publication of notice in the Federal Register and a comment period followed by a reply period.¹⁸ However, while the procedure should be modeled on the APA, the FCC should not find that forbearance proceedings are subject to the APA itself as Covad seems to imply.¹⁹ First, it is not clear that the Commission has the authority to bind itself in this way. Second, if Congress had intended the APA to apply to forbearance proceedings, it would have provided so.

Covad proposes a number of procedural rules modeled on APA-compliant procedures in what it calls a “timeline for Section 10 forbearance proceedings.”²⁰ Some of these are well-founded while others are not.

Covad first suggests that the Commission review any forbearance petition within 21 days of filing for procedural defects and allow the petitioner 14 days to correct any deficiencies if they are found.²¹ This is a sound suggestion as long as it is understood that the Section 10 “shot clock” begins running when the petition is filed and is not reset unless the petitioner must resubmit a corrected petition.

¹⁶ Covad at 8.

¹⁷ Covad at 11.

¹⁸ See 5 U.S.C. § 553.

¹⁹ Covad attached draft rules § 1.6.

²⁰ Covad at 24.

²¹ Covad at 24.

Second, Covad proposes a special 90-day comment period so that states may offer their views on the petition.²² Only after that 90-day state comment period would the petition be open to public comment.²³ Covad suggests an initial 45-day public comment period followed by a 30-day reply comment period.²⁴

The 45-day comment and 30-day reply comment periods are in line with widely understood and accepted APA-style procedures. It would be sensible for the Commission to adopt those time periods. However, given an ample comment and reply period during which anyone can make their views known, a special 90-day state comment period is redundant and unnecessary. It is also inconsistent with the normal APA process, which does not offer states a special comment period.

A special 90-day comment period also runs counter to one of Covad's central rationales for adopting such a timeline, namely that rules are needed to counteract the unique compressed nature of Section 10 forbearance petition proceedings.²⁵ Requiring a three-month state comment period before any other comments are allowed would leave little time for the Commission to consider those comments. A more sensible approach would be to allow states to file comments in the normal comment and reply comment periods. If the Commission finds that states would benefit from a longer period, then perhaps the comment period can be extended for all parties, including states.

B. COMPLETE-AS-FILED REQUIREMENT

Covad proposes a policy it calls "complete-as-filed" that would require a petitioner "in its initial filing to submit all evidence upon which it would have the Commission rely in evaluating whether the statutory requirements of Section 10 have been met."²⁶ The petitioner would not be allowed to amend materially its petition without restarting the statutory shot clock.²⁷ The purpose of this rule would be to address the concern that some petitioners may game the system by filing a weak petition and then waiting until after the comment and reply comment period, and perhaps until close to the statutory deadline, to supplement their filing with a large amount of evidence.²⁸ That would make it difficult or impossible for interested parties to respond, as well as strain the Commission to analyze the data before the statutory deadline.

This is a sensible way of dealing with the problem if the Commission determines that in fact such gaming is a systemic problem. That said, the Commission should not tie its

²² Covad at 25-26.

²³ Covad at 27.

²⁴ *Id.*

²⁵ Covad at 11 ("Given the stringent timeframe within which the Commission must act on a petition, it is essential that there be a seamless process that facilitates review, analysis, and comment on forbearance petitions.").

²⁶ Covad at 18.

²⁷ *Id.*

²⁸ Covad at 18-20.

hands, and it should allow for the extraordinary situation in which a material amendment is warranted or when the scope of what constitutes a “material amendment” is in controversy. Covad suggests that the Commission should retain the authority to “permit a petitioner to correct a non-material deficiency in its petition,”²⁹ and that is a helpful suggestion. However, the Commission should make sure to retain the authority to allow material amendments as well. Later in its petition, Covad suggests that the Commission would retain such authority because “Section 1.3 of the Commission’s rules permits the Commission, on its own motion, to waive rules for good cause.”³⁰

C. BURDEN OF PROOF & PRIMA FACIE CASE

Covad makes several suggestions regarding the evidence a petitioner must provide in a forbearance petition. First, it asks the Commission to “specify that the petitioning party bears the burden of proof in a forbearance proceeding”³¹ and require petitioners to “fully demonstrate it has satisfied each of the substantive requirements of Section 10[.]”³² Second, Covad proposes that the Commission “require each petitioner to separately demonstrate that it satisfies each component of the Section 10 standard.”³³ Petitions that fail to make such a *prima facie* case would be dismissed outright without prejudice, but without any further analysis.³⁴ Finally, Covad suggests that petitions requesting forbearance from the network unbundling requirement of sections 251 and 271 of the 1996 Act be subject to additional evidentiary requirements, including a specification of the type of market data that must be included in such a petition.³⁵ Such rules are all unjustified and are predicated on a misunderstanding of Section 10.

Covad characterizes Section 10 as “delegat[ing] to the Commission the *authority* to waive statutory provisions[.]”³⁶ In fact, Congress did not merely give the Commission the authority to forbear, but mandated that it do so whenever certain criteria were met.³⁷ Section 10 reads in relevant part:

Notwithstanding section 332 (c)(1)(A) of this title, the Commission *shall* forbear from applying any regulation or any provision of this . . . if the Commission determines that— [criteria listed here.]³⁸

²⁹ Covad at 13.

³⁰ Covad at 17.

³¹ Covad at 12.

³² *Id.*

³³ Covad at 18.

³⁴ Covad at 19-20.

³⁵ Covad at 29.

³⁶ Covad at 3 (emphasis added). See also *Id.* at 2 (“As part of the Telecommunications Act of 1996, Congress enacted Section 10, giving the Commission the *authority* to “forbear[.]”) (emphasis added).

³⁷ 47 U.S.C. § 160.

³⁸ *Id.* (emphasis added).

The operative verb in the provision is “shall.” That is, Congress charged the Commission with forbearing whenever the relevant criteria came into being. Section 10 places an obligation on the Commission; it does not offer the Commission an option.

Not only is this obligation clear from a reading of the plain language of the Act, but its legislative history underscores it. The House report speaks of the Section 10 as “requiring the Commission to forbear[.]”³⁹ The Conference reports speak in similarly absolute tones of “require” and “must.”⁴⁰ Congress’s purpose was to ensure deregulation wherever competitive conditions attained. An understanding of this obligation to forbear is absent from Covad’s petition. This misunderstanding—and Covad’s characterization of the Section 10 as merely giving the Commission authority to forbear if it can be persuaded to—leads to some of Covad’s misguided suggestions.

First, the burden of proof cannot rest on the petitioner. The Act places on the Commission the obligation to forbear, and it is therefore up to the Commission to explain itself if it chooses not to forbear. This does not mean that a party can file a petition that contains no new evidence suggesting why the Commission must forbear and expect the Commission take action. The Commission can safely reject such a petition because it brings nothing new to the attention of the Commission.

With this in mind, it follows that a requirement for a *prima facie* case is equally unjustified. The burden of proof is on the Commission, not the petitioner, and it is the Commission’s obligation to show why the criteria outlined in Section 10 are not present. Covad proposes that each petitioner “separately demonstrate that it satisfies each component of the Section 10 standard,”⁴¹ but in fact, this is what the entire proceeding is about. That is, the point of the forbearance proceeding is precisely for the Commission to decide whether each component of the section 10 standard has been satisfied. Furthermore, a *prima facie* case requirement is unnecessary because a petitioner already has every incentive to provide as much evidence as it can to convince the Commission that it must forbear. This is doubly so if a “complete-as-filed” rule is adopted.⁴²

Finally, given a complete-as-filed requirement and the existing incentives for petitioners to be thorough in their presentations, there is no need to force petitioners to provide specific types of data before their petitions relating to Sections 251 or 271 will be considered. If the information supplied by the petitioner in its complete-as-filed petition is not sufficiently granular to demonstrate to the Commission that all elements of Section 10 are present, the Commission can safely reject the petition. There is no need to set a higher bar for any particular type of forbearance petition, and doing so would run counter to the deregulatory obligation Congress placed on the Commission.

³⁹ *Report from the Committee on Commerce on H.R. 1555*, H.Rep. 104-204, at 89 (1995).

⁴⁰ *Conference Report on S. 652*, S. Rep. 104-458, at 184 (1996).

⁴¹ Covad at 18-19.

⁴² *See supra* Section II.B.

D. WRITTEN ORDERS

The final rule Covad proposes is that the Commission commit to issuing a written order on all forbearance petitions within seven days of the close of the statutory deadline.⁴³ It states that this “would facilitate any appeal of that order and expedite ultimate resolution of the relevant issues.”⁴⁴ This is a sensible proposal as it applies to those cases in which the Commission has made a decision either to grant or deny the petition. In either case, a written order would do much to provide transparency and, in the case of a denial, to explain which Section 10 elements are missing in the case.

However, Covad’s proposal would also require a written order for petitions that have been deemed granted under Section 10(c) because the Commission did not reach a decision before the statutory deadline—“including those petitions that have been previously ‘deemed granted.’”⁴⁵ It further suggests that if the Commission does not act before the deadline and a petition is deemed granted, it should nevertheless “maintain an open docket in that proceeding” in order to “permit the Commission [to] revisit the petition and issue an order granting or denying the petition if circumstances later warrant.”⁴⁶ Such a rule is completely unjustified.

As we have seen, the purpose of the Section 10(c) shot clock is to put pressure on the Commission to act. Congress’s intent would be eviscerated if the Commission could simply ignore the statutory deadline, wait six months or six years, and then deny the petition. In its wisdom, Congress determined that one year—plus an optional 90 day extension—was sufficient time for the Commission to make a decision on a petition. The Commission must make a decision to grant or deny a petition within that time if it wishes to make one at all.

Even if the Commission wished to grant a petition after the deadline, it cannot. By issuing a written grant after the deadline the Commission could narrow the scope of the forbearance, thus implicitly denying parts of a petition. This would ignore Congress’s intent just the same as if it had denied a petition after the deadline.

Not only does Covad propose that the docket remain open once the statutory deadline passes without Commission action, it proposes a rule that would “require the Chairman to poll the commissioners every 90 days to determine if circumstances permit the issuance of a written order on a forbearance petition previously deemed granted.”⁴⁷ Not only would this circumvent the intent of Congress, but the open-ended nature of the requirement would make it so that the petition would be revisited indefinitely until a Commission favorably disposed to denying (or granting) the petition were in place. If

⁴³ Covad at 32.

⁴⁴ *Id.*

⁴⁵ Covad at 32-33.

⁴⁶ Covad at 32.

⁴⁷ Covad at 37.

clarity and finality are sought, this type of rule is not the way to go about it. It is in fact anathema to the certainty that Section 10(c) offers.

It should be noted that if, after 12 or 15 months of consideration—aided by comment and reply comment filings—the Commission does not act within the statutory timeframe and a forbearance petition is deemed granted, the Commission is nevertheless not left without recourse to reimpose regulations. What it must do, however, is initiate a normal notice-and-comment rulemaking to achieve the result.

III. CONCLUSION

While it would be sensible to establish procedural rules to govern Section 10 forbearance proceedings in order to attain certainty and fairness, the rules should be carefully chosen. Covad’s suggestion that APA-style rules be adopted is a sound one, but some of the specific rules it proposes are overreaching and beyond the Commission’s authority to adopt. Rules establishing a simple “complete-as-filed” requirement and a normal comment period should be sufficient to address the concerns raised by the Covad petition.

The Commission should not adopt procedures that create a special comment period for states. States can file comments in the normal comment and reply comment cycle thus avoiding a 90-day delay before other parties are allowed to file comments.

The Commission should also reject procedures that would put the burden of proof on petitioners or require petitioners to show a *prima facie* case before their petition is considered. Section 10 places an obligation on the Commission to forbear, and it is therefore the Commission’s onus to find whether it must forbear. Additionally, the forbearance petition process itself is the test for determining whether the Section 10 criteria have been met.

Finally, it is sensible to require the Commission to issue written orders when it is granting or denying a petition within the statutory deadline. However, the Commission should not adopt any rules that would allow it to ignore Congress’s intent by issuing an order denying (or narrowly granting) a petition after the deadline has past. If a petition is deemed granted because the Commission did not take action before the statutory deadline, the Commission’s recourse to re-regulate should be to initiate a rulemaking.

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