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

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

COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX, AND XO COMMUNICATIONS, LLC

Covad Communications Group, NuVox, and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), through counsel and pursuant to the Notice of Proposed Rulemaking ("NPRM" or "Notice") released by the Federal Communications Commission ("FCC" or "Commission") on November, 30, 2007,[1] hereby provide their comments on the matter of whether the Commission should adopt procedural rules to govern the Commission's consideration of petitions for forbearance pursuant to Section 10 of the Communications Act of 1934, as amended ("Act").[2] As discussed below, the Commenters enthusiastically support the NPRM and urge the Commission to immediately adopt procedural rules to ensure that all forbearance petitions, including those currently pending before the Commission, are considered fairly and fully.

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1 *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, FCC 07-202 (rel. Nov. 30, 2007).

2 47 U.S.C. § 160.

I. IT IS ESSENTIAL THAT THE COMMISSION APPLY ORDER TO THE FORBEARANCE PROCESS THROUGH THE ADOPTION OF PROCEDURAL RULES

As noted in the NPRM, this proceeding was precipitated by the petition filed by the Commenters and several other competitive carriers asking the Commission to consider the adoption of procedural rules to govern the conduct of Section 10 forbearance proceedings.[3] The Commenters indicated that in the current unstructured environment, forbearance proceedings are often free-for-alls.[4] Petitioning parties routinely file incomplete or insufficient petitions that they amend later, sometimes well after initial comments and reply comments have been submitted. Petitioning parties commonly late-file empirical information that is needed to determine whether the statutory prerequisites for forbearance have been met. And important questions regarding access to and use of highly relevant confidential information frequently arise and are rarely resolved. Such conduct and occurrences are well outside the regulatory mainstream and lead to outcomes that are not based on sound decision-making. It is imperative that the Commission bring some order to the forbearance process through the adoption of procedural rules.

It is particularly critical that the Commission expeditiously adopt procedural rules since the volume of forbearance petitions has been steadily increasing over the past several years. In 2005, six forbearance petitions were filed. By 2007, that number had increased to thirteen. Indeed, since 2005, a total of thirty-three forbearance petitions have been presented to the Commission for consideration. Moreover, the use to which petitioners are putting the forbearance process has changed. In the first years following enactment of Section 10, petitioners typically sought forbearance as a means to clear "regulatory underbrush" or to

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3 *NPRM*, at ¶ 1. *See Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings*, WC Docket No. 07-267 (filed Sept. 19, 2007) ("*Rules Petition*").

4 *Rules Petition*, at 4-6.

eliminate particular Commission rules or statutory obligations that did not impact the key purposes or goals of the Act. In most cases, the rules and provisions for which forbearance was sought were narrow in scope and were unrelated to the Act's core requirements.[5]

In contrast, today the forbearance process increasingly is being invoked as a means to resolve far-reaching policy questions that go to the heart of the purposes and objectives of the Act. The forbearance process has effectively become the incumbent local exchange carriers' ("ILECs") vehicle of choice for addressing fundamental competitive telecommunications policy issues. This is not the role Section 10 was intended by Congress to play. Nor is it a role that should be encouraged by the Commission, as it routinely forces the agency (and the industry) to expend significant time, energy, and monetary resources to address issues of potentially wide-ranging applicability in an ill-defined, virtually rule-free environment.[6]

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5 Examples of these types of petitions include petitions seeking forbearance from application of the separate affiliate requirements of Section 272 of the Act to E911 and reverse search directory services (CC Docket No. 96-149), petitions seeking forbearance from local number portability ("LNP") requirements for CMRS carriers until completion of the five-year build-out period for broadband PCS carriers (WT Docket no. 98-229), and forbearance from *pro forma* transfer and assignment procedures for wireless telecommunications services (WT 98-2).

6 For example, currently there are two petitions before the Commission that raise the fundamental issue of the application of interstate access charges to Internet-based communications services. *See Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b),* WC Docket No. 07-256 (filed Oct. 23, 2007); *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 the ESP Exemption,* WC Docket No. 08-8 (filed Jan. 11, 2008). Further, the ILECs repeatedly have sought (or are in the process of seeking) forbearance as a means to eliminate critical pro-competitive provisions of the Act such as Section 251(c)(3) unbundling requirements and dominant carrier rules. *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, 20 FCC Rcd 19415 (2005), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007); *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*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007); *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*, WC Docket No. 06-172, Memorandum Opinion

That said, the Commission can (and should) exert some control over the uses to which Section 10 is being put by adopting rules to govern the handling of forbearance petitions. It is especially appropriate for the Commission to exercise oversight through the adoption of procedural rules since critical issues that could fundamentally affect the future of competition are increasingly being decided through the forbearance process. Those issues warrant full participation by all potentially-affected parties and the utmost scrutiny by the Commission.

The call for adoption of procedural rules to govern forbearance proceedings is not motivated by an intent to make the forbearance process more cumbersome or to create roadblocks to the granting of meritorious forbearance requests. Used properly, a reasonable forbearance process can be a useful tool to eliminate regulatory requirements that are no longer necessary to protect the public interest. Instead, the intent behind this call for procedural rules is to ensure that the Commission's forbearance process is as transparent and as inclusive as possible and that substantive determinations are based on full information.

The absence of procedural rules has led to some unfortunate situations in recent forbearance proceedings. For example, empirical information regarding the nature and extent of facilities-based competition is essential to the Commission's analysis of petitions seeking forbearance from Sections 251(c) and 271 network unbundling obligations.[7] The lack of procedural rules has meant, however, that petitioners are free to withhold critical empirical evidence until well after the formal comment cycle on their petition has closed, thereby curtailing interested parties' ability to review and respond to that information. This circumstance

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and Order, FCC 07-212 (rel. Dec. 5, 2007)("*Verizon 6-MSA Proceeding*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97 (filed Apr. 27, 2007)("*Qwest 4-MSA Proceeding*"); *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24 (filed Feb. 14, 2008)("*Verizon Rhode Island Proceeding*").

7 *See, e.g., Verizon 6-MSA Proceeding*, at ¶ 36.

occurred in the recent *Verizon 6-MSA Proceeding*, where Verizon failed to submit market-specific empirical data to support its request for forbearance from Section 251(c)(3) unbundling requirements in six major Metropolitan Statistical Areas ("MSAs") until the last day of the formal pleading cycle – when more than two-thirds of the statutory twelve-month clock had already run.[8]

The unavailability of procedures for the conduct of forbearance proceedings also has routinely resulted in the lack of notice to interested parties when critical information is filed. Currently, there is no requirement that parties file non-confidential materials electronically through the Commission's Electronic Comment Filing System ("ECFS"). Because the Commission does not require the service of *ex parte* filings on active or interested parties, those parties typically do not become aware that a filing has been made until it is posted on ECFS. Yet filings that are made by hand (rather than electronically) frequently do not show up on ECFS until a week or more after they are filed, especially if they are voluminous.[9] Consequently, interested parties frequently lose valuable time to review and respond to substantive filings. This situation is especially problematic when a highly substantive *ex parte* submission is made in the last weeks of a forbearance proceeding, as has occurred in numerous recent forbearance proceedings.[10]

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8 *See Motion to Dismiss or, in the Alternative, to Deny Petitions for Forbearance on the Basis of Late-Filed Data*, WC Docket No. 06-172 (filed May 22, 2007).

9 This situation recently occurred in the *Qwest 4-MSA Proceeding*. Qwest hand-filed an *ex parte* letter and attachments containing updated data for the Phoenix MSA on February 21, 2008. Qwest's filing was not posted to ECFS until February 28, 2008. *See* Letter from Melissa E. Newman, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Feb. 21, 2008).

10 Numerous substantive *ex parte* letters and accompanying data were filed by Verizon with less than one month remaining in the statutory 15-month period for review and disposition of its petitions in the *Verizon 6-MSA Proceeding*. *See, e.g.,* Letter from Joseph R. Jackson, Associate Director, Verizon to Marlene H. Dortch, Secretary, Federal

The need for forbearance procedures is immediate and the Commission should move quickly to adopt rules of conduct for these types of proceedings. There are at least a dozen forbearance petitions pending before the Commission and additional forbearance petitions are likely to be filed in the near future.[11] Many pending petitions request elimination of regulations and statutory provisions that go to the heart of the agency's regulatory regime. The time for the Commission to act is now and the rules the Commission adopts should apply to all forbearance petitions – including those currently before the Commission – to ensure that much-needed order is brought to the forbearance process.

II. THE COMMISSION SHOULD EXPEDITIOUSLY ADOPT EACH OF THE CATEGORIES OF RULES PROPOSED IN THE NPRM

The Commenters maintain that each of the categories of rules specified in the NPRM is important and should be subscribed to by the Commission. Specifically, the Commission should adopt rules: (a) confirming that Administrative Procedure Act ("APA") notice-and-comment rules apply to all petitions seeking forbearance; (b) specifying that the forbearance petitioner bears the burden of proof; (c) governing the format and content of petitions, including a complete-as-filed requirement and a requirement that the petitioner demonstrate that it has satisfied each and every component of the Section 10 test; (d) governing the use of protective orders and *ex parte* filings to ensure they are not employed as a means to limit interested parties' timely and complete access to highly relevant information; (e)

Communications Commission, WC Docket No. 06-172 (filed Nov. 6, 2007), *modified*, Letter from Joseph R. Jackson, Associate Director, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 7, 2007); Letter from Evan T. Leo, Counsel to Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 16, 2007); Letter from Evan T. Leo, Counsel to Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 28, 2007).

11 The most recent forbearance petition was filed by Verizon a mere three weeks ago and initial comments have yet to be filed on that docket. *See Verizon Rhode Island Proceeding*.

encouraging state commission and state consumer advocate input; and (f) establishing standard timetables for all filings.

One of the most critical of the proposed rules (each of which is important and should be adopted by the Commission) would impose a complete-as-filed requirement on all petitions seeking forbearance under Section 10. Consistent with this policy, the petitioner would be required 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 and the petitioner would not be permitted to materially supplement its petition without restarting the statutory clock. Requiring petitioning parties to file complete petitions would facilitate Commission review, minimize unnecessary use of resources, and would help ensure that all interested parties have a full and fair opportunity to review the materials the petitioner would have the Commission rely on and present their views to the Commission.

The Commission has long recognized the benefits of a complete-as-filed rule in other similar contexts. A Bell Operating Company ("BOC") seeking authority to provide in-region interLATA service under Section 271 was required to submit with its interLATA entry application "all of the factual evidence upon which [it] would have the Commission rely in making its findings."[12] The Commission also requires formal complaints to contain all information upon which the Commission could base its decision. Indeed, the Enforcement Bureau rejects as defective all formal complaints that do not meet the up-front filing requirements and requires complainants to re-file such complaints after the defects have been cured. In formal complaint proceedings subject to specific statutory deadlines,[13] the clock does

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

13 Formal complaints brought under Sections 208(b)(1) and 271(d)(6) are subject to statutory deadlines of five months and ninety days, respectively. Other types of formal

not begin to run until a complaint has been shown to meet all applicable procedural requirements.

Importantly, a complete-as-filed rule would not prevent the Commission from obtaining relevant data after the petition has been filed. It would, however, prevent petitioners from manipulating the forbearance process by withholding essential data until well into the statutory time period, thereby effectively turning an already abbreviated twelve-to-fifteen month process into a two-to-three month process. The language and intent of Section 10 do not grant a petitioning party this level of control over the forbearance process or the deployment of Commission resources. Consequently, the Commission should adopt a rule that prevents petitioners from engaging in this sort of gamesmanship and unilateral decision-making.

It is important for the Commission to clarify that it is not up to the agency to prove forbearance is not warranted merely because a petitioner initiates the statutory process through the filing of a petition, however deficient that petition may be. The party requesting forbearance bears the burden of proof. It is up to the petitioner to make a *prima facie* case that each of the statutory prerequisites for the forbearance it seeks exists, otherwise dismissal of the petition is the only warranted outcome. Adoption of a complete-as-filed rule would allow the Commission to effectively police this requirement since it would force the petitioner to present its best case in support of forbearance in its petition.

III. THE COMMISSION SHOULD ADOPT SEVERAL ADDITIONAL REQUIREMENTS TO HELP ENSURE THAT THE FORBEARANCE PROCESS OPERATES FAIRLY AND EFFICIENTLY

In addition to the proposed rules identified in the NPRM, there are several other steps the Commission can and should take to help ensure that the forbearance process is as

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complaints are not subject to statutory deadlines, but the Commission nonetheless applies a complete-as-filed standard to all formal complaints.

efficient as possible and permits all parties with an interest in the outcome of the proceeding a full and fair opportunity to participate. First, the Commission should require the petitioning party to serve its petition and all supporting materials, at the time they are filed with the Commission, on the public utility commission, office of the state attorney general, and consumer advocate office (if any) in each state that could be impacted by the grant of forbearance. These entities are in a unique position to identify the nature and extent of competition in their jurisdictions and to assess the impact of forbearance on consumers. Thus, the Commission should do as much as possible to afford them a full opportunity to participate in the forbearance process.

Second, the Commission should require the petitioner to include in its petition a summary of the history of each of the rules and/or statutory requirements from which it is seeking forbearance and to indicate whether a grant of forbearance would impact any other ongoing Commission docket or proceeding. In this way, the Commission can help ensure that all potential implications of a forbearance request can be taken into account in reaching a decision.

Third, the Commission should adopt penalties for violation of the procedural rules it adopts. The Commission (and interested parties) must devote considerable time and resources to the conduct of a forbearance proceeding. The Commission should do what it can to ensure that these valuable resources are not squandered. The standard penalty for violation of the complete-as-filed rule or the misuse of protective orders and *ex parte* filings should be dismissal of the petition without prejudice. Repeated and/or willful violations of the rules should be dealt with more forcefully, through referral to the Enforcement Bureau for investigation and disposition. The most effective means to make certain that the Commission's rules are followed is to impose tangible penalties on those that fail to comply with them.

Finally, the Commenters suggest that the Wireline Competition Bureau establish a tracking system for forbearance petitions that can be accessed by the public through the Commission's official website. Today, there is no efficient means to identify current or past forbearance petitions, track the status of a particular forbearance petition, or determine which rules and statutory provisions have been made subject to forbearance and which entities have been granted forbearance from those requirements. Establishment of a web-based forbearance tracking system would be of great assistance to all stakeholders in the forbearance process.

IV. CONCLUSION

The Commenters applaud the Commission for initiating this proceeding and undertaking the adoption of forbearance procedures. We urge the Commission to expeditiously adopt each of the rules proposed in the NPRM and to supplement those rules with the additional requirements discussed in these comments.

Respectfully submitted,

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