

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

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

INITIAL COMMENTS

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SUMMARY

Procedural rules governing forbearance proceedings are urgently needed. They provide a framework for effective participation in the agency's proceedings by interested parties while protecting the integrity of the Commission's processes. Procedural rules are particularly important for forbearance proceedings because forbearance gives the Commission the extraordinary power to set aside statutes. Absent procedural rules, petitioning parties are able to dictate the agency's agenda in pursuit of parochial interests hindering an orderly approach to decision-making based on reasonable priorities and criteria. It is not likely that Congress intended Section 10 forbearance to supplant rulemaking as the primary way for the Commission to set telecommunications policy.

Along with establishing procedural rules, the Commission should establish an improved forbearance process by forbearing from aspects of Section 10 itself in certain circumstances. The Commission may forbear from Section 10 itself because that section permits the Commission to forbear from “any” regulation or provision of the Act, provided that the statutory standards for forbearance are met. The Commission should adopt rules in this proceeding that provide for forbearance on a case-by-case basis from considering forbearance petitions that are repetitious *or* that cover the same ground of pending rulemaking proceedings. This would permit the agency to engage in an orderly administration of its responsibilities and free up agency resources to work on important industry-wide policy making.

The Commission has the authority to establish procedural rules that govern forbearance proceedings. The Commission may apply any procedural rules it adopts to both future and pending forbearance petitions.

The procedural rules the Commission promulgates need to ensure interested parties have adequate notice and a meaningful opportunity to comment. The Commission should clarify that APA procedural rulemaking protections apply to forbearance proceedings. It should require that a forbearance petition be complete-as-filed with all supporting information submitted with the petition. The petition should:

- (a) Clearly set forth the rules for which the forbearance relief is sought;
- (b) State the original basis for the rules and potential impact if the Commission forbears from applying them;
- (c) Demonstrate that with specificity and empirical data that the request relief satisfies each of the three Section 10 forbearance criteria - based on actual data rather than mere speculations;
- (d) Include all arguments supporting the forbearance relief sought, *i.e.*, such arguments should not be set forth in collateral documents.

Consistent with the application of a complete-as-filed rule, the Commission should also clarify that the petitioner's reply to oppositions filed may only rebut arguments made and that any reply that raises new issues or showings will not be considered.

Additional procedural requirements should apply to ILECs seeking forbearance from Section 251 obligations. The Commission should require that ILECs: demonstrate that their rates for equivalent non-251 services, and other terms and conditions, are just and reasonable; satisfy a clear and convincing standard of proof; and provide geographic detail and supporting information of the areas in which forbearance relief is sought that is consistent with Commission precedent. In reviewing Section 251 forbearance petitions, the Commission should seek input from, and work closely with, states.

Moreover, the Commission should establish a policy in this proceeding that will limit information redacted from forbearance orders that will better comport with legal standards

governing disclosure of confidential information. In previous forbearance orders the Commission has redacted information that is not confidential. It should also provide that authorized persons should be able to use confidential and highly confidential information in related forbearance proceedings and that it will not accept CPNI or carrier confidential information obtained in violation of, or if its use would violate, Sections 222(b) and (c) of the Act.

The Commission should dismiss forbearance petitions that violate any of the procedural requirements it adopts in this proceeding. To bring procedural certainty and efficiency to the forbearance process, the Commission should set forth a standard timetable for: (1) the prompt issuance of protective orders; (2) an initial review of the forbearance petition for procedural defects and allowing the petitioner to cure minor defects; and (3) filing of and ruling on motions to dismiss. The Commission also should issue data requests before the beginning of the comment cycle and reject any *ex parte* filings made by the petitioner that seek to include new, substantive information on the record after the comment cycle has closed. Lastly, the Commission should establish a policy of issuing a written order, even for those petitions that have been “deemed granted,” to reduce industry uncertainty as to the scope of forbearance granted.

TABLE OF FREQUENTLY USED SHORT CITATIONS

Commission Decisions

<i>Anchorage Forbearance Order</i>	<i>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, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007), appeals dismissed, Covad Communications Group, Inc. v. FCC, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing)</i>
<i>Omaha Forbearance Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), aff'd, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007)</i>
<i>Updated 271 Filing Requirements</i>	<i>Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice, 16 FCC Rcd 6923, DA 01-734 (CCB rel. Mar. 23, 2001) (Mar. 23, 2001 Public Notice)</i>
<i>Verizon Six MSA Forbearance Order</i>	<i>Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007), appeal pending, Verizon v. FCC, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008)</i>

Other

CLEC Petition for Forbearance Procedural Rules	Covad, <i>et al.</i> 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)
Verizon Rhode Island Petition	Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24 (filed Feb. 14, 2008)

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INITIAL COMMENTS

The undersigned parties (collectively referred to as “Commenters”), by their counsel, respectfully submit these comments in the above-captioned proceeding.

I. PROCEDURAL RULES GOVERNING SECTION 10 FORBEARANCE PROCEEDINGS ARE URGENTLY REQUIRED

Orderly administrative decision-making is facilitated when proceedings are subject to some procedural rules.¹ Procedural rules provide a framework for effective participation by interested parties, while reining in possible abuses of the agency’s deliberative processes.²

¹ See, e.g., *One Hundred and One Broadcasting, Inc.*, Order, 3 FCC Rcd 4353, ¶ 2 (1988) (“These procedural rules are intended to facilitate the smooth, orderly flow of the Commission’s business.”).

² See, e.g., *Amendment of Section 73.202(b)*, Memorandum Opinion and Order, 3 FCC Rcd 2336, ¶ 10 (1988) (“The Commission’s procedural rules are designed to provide adequate time and opportunity for interested parties to fully participate in the decision making process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. They also permit the Commission to conduct its business within a reasonable period of time so as to avoid undue delay in the provision of service to the public. Accordingly, the Commission has required adherence to appropriate administrative standards.”), citing *Radio Athens, Inc.*, 401 F.2d 398 (D.C. Cir. 1968).

Procedural rules are particularly important when proceedings are subject to a statutory deadline.³

The Commission has generally established procedural rules governing proceedings subject to statutory deadline such as Section 208 complaints,⁴ Section 271 applications,⁵ and rulemaking proceedings.⁶

The Commission has no rules, however, governing forbearance proceedings. Nor are there any applicable statutory procedural safeguards. In spite of concerns about the forbearance

³ See, e.g., *Application by Verizon Virginia, Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia, Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc. for Authorization to Provide In-Region, InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880, at ¶ 18 (2002) (“we emphasize that we will continue to enforce our procedural requirements in future section 271 applications, in the absence of such special circumstances, in order to ensure a fair and orderly process for the consideration of section 271 applications within the 90-day statutory deadline.”); *Hercules Inc. v. Environmental Protection Agency*, 598 F.2d 91, 129 (D.C. Cir. 1978) (acknowledging that a statutory deadline may require an administrative agency to follow relatively streamlined procedures).

⁴ 47 C.F.R. § 1.711-1.736; see *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497 (1997) (“*Formal Complaints Rulemaking Order*”), Order on Reconsideration, 16 FCC Rcd 5681 (2001).

⁵ See *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (1996); *Revised Comment Schedule For Ameritech Michigan Application, as amended, for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of Michigan*, Public Notice, DA 97-127 (rel. Jan. 17, 1997); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (1997); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 99-1994 (rel. Sept. 28, 1999); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (“*Updated 271 Filing Requirements*”).

⁶ See 47 C.F.R. §§ 1.399-1.430.

process expressed by congressional offices⁷ and even Commissioners,⁸ the Commission has chosen heretofore to proceed on an entirely *ad hoc* basis in considering forbearance petitions.

Section 10 grants the Commission an extraordinary power – the ability to set aside legislation, a judgment usually left to Congress. Congress might take years developing and enacting important legislation such as the 1996 Act. Section 10 authorizes the Commission to abolish that legislation virtually as soon as it is enacted. The Commission’s authority is heightened because Section 10 provides only very general guidelines that give the Commission considerable discretion. It also provides that forbearance petitions are “deemed granted” unless denied by the Commission within twelve months, subject to a single three-month extension.

The combination of the unusual power granted to the Commission and the statutory “deemed granted” provisions of Section 10 creates the potential for important, but undesirable regulatory outcomes. Absent reasonable procedural rules and practices, petitioning parties are able to dictate the agency’s agenda and compel it and parties opposing the forbearance to dedicate resources in pursuit of parochial interests, hindering an orderly approach to decision-making based on reasonable priorities and criteria. This is particularly disruptive where forbearance petitions raise issues or request relief that are already the subject of pending rulemaking proceedings, or effectively act as a means to reverse recently decided matters. The “deemed granted”

⁷ See, e.g., United States Senate Committee on Commerce, Science, & Transportation, Press Release, “Inouye Introduces Bill to Correct Flawed FCC Forbearance Process,” (Dec. 13, 2007).

⁸ See, e.g., Separate Statement of Commissioner Michael J. Copps, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-627, *Notice of Proposed Rule-making*, FCC 07-202 (rel. Nov. 30, 2007) (“My experience with forbearance over the last two and a half years has been that it is a process that leaves much to be desired.”).

provision also creates the potential for a grant of a petition without any agency consideration of the petition and without a written decision, as occurred in connection with Verizon's broadband forbearance petition.²

The legislative history of Section 10 provides little guidance as to what role Congress intended forbearance to play in setting telecommunications policy. For the most part, the House and Senate Reports merely reiterate the statutory language.¹⁰ However, Congress anticipated that "forbearance authority will be a useful tool in ending unnecessary regulation."¹¹ Most likely, Section 10 was intended as an adjunct to policymaking that is normally achieved through rule-making, as a way to eliminate outmoded regulation, and to grant relief from statutory provisions to particular carriers based on unique circumstances. It is not likely that Congress intended forbearance to take center stage as the way to set telecommunications policy, as a substitute for rulemaking, or to eliminate important legislation shortly after enactment. Nor is it likely that Congress intended that the Commission would fail to exercise its authority to adopt procedural rules that could protect the integrity of its deliberations and proceedings, including forbearance, and its ability to carry out its statutory responsibilities.

² See *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (announcing that Verizon's petition for forbearance from certain Title II and *Computer Inquiry* requirements for enterprise broadband services was granted by operation of law).

¹⁰ Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rep. No. 104-23 at 50 (1995); Report from the Committee on Commerce on H.R. 1555, J. Rep. 104-204, at 89 (1995); Conference Report on S. 652, S. Rep. 104-458, at 184-185 (1996).

¹¹ See Committee on Commerce Report, HR 1555, Section 103 (104th Congress, July 24, 1995).

Verizon's recently submitted petition seeking forbearance from unbundling obligations in Rhode Island is a prime example of problems created by the lack of procedural rules. Having lost its earlier proposal for forbearance for most of Rhode Island, Verizon now wants the Commission to grant the same relief requested for essentially the same geographic area using a new way of evaluating competition – on a rate center basis.¹² Verizon apparently intends to invoke the statutory deadline and “deemed granted” provisions to compel the Commission to consider new ways of evaluating competition, over and over, until it gets its way. Procedural rules prohibiting repetitive petitions could limit this waste of Commission resources. The Commission receives dozens of forbearance petitions each year, and an enormous amount of resources is expended by the Commission and interested parties in addressing them. There is no guarantee that the Commission may not receive considerably more and be burdened even more. In order to prevent poor outcomes, and inefficient use of resources, the Commission should promptly adopt procedural rules governing forbearance under Section 10.

As described in these comments, the Commission may use the forbearance tool provided in Section 10 to forbear from aspects of Section 10 itself as a means to: (a) limit repetitious forbearance petitions that are filed; or (b) those that cover ground in pending rulemakings. The Commission may also adopt a number of rules providing a structure for consideration of forbearance petitions. These measures will permit the Commission to provide an orderly administration of the Act while continuing forbearance as a useful adjunct to policymaking.

¹² Verizon Rhode Island Petition at n.7, 8-9.

II. THE COMMISSION SHOULD CREATE AN IMPROVED FORBEARANCE PROCESS THROUGH FORBEARANCE FROM ASPECTS OF SECTION 10

A. The Commission May Forbear from Section 10 Itself

Section 10 provides that:

... the Commission shall forbear from applying *any regulation or provision of this Act* to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets ... [emphasis added]

if the enumerated statutory standards for forbearance are met.

Because Section 10 provides that the Commission may forbear from any provision of the Act, forbearance from Section 10 is permitted on the face of the statute. Further, the legislative history of Section 10, while less illuminating than it could be as to what Congress intended, presents no bar to forbearance from Section 10 itself. Section 10 limits the ability of the Commission to forbear from Sections 251(c) and 271, but not from any provision of Section 10. Therefore, there are presumptively no limits on the ability of the Commission to forbear from Section 10 itself other than the general standards for forbearance enumerated in Section 10.

Under Section 10, the Commission may forbear from application of any regulation or provision of the Act “to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets.”¹³ Forbearance from the statutory provision that a “telecommunications carrier ... may submit a petition” is clearly forbearance from application of a provision of the Act “to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic mar-

¹³ 47 U.S.C. § 160(a).

kets.”¹⁴ Therefore, forbearance from accepting repetitious petitions or petitions that duplicate rulemakings would be a form of forbearance from regulations or provisions of the Act applicable to carriers.

Accordingly, the Commission would not transgress Section 10 by forbearing from section 10 itself. Commenters do not address here whether the Commission may or should establish a general forbearance from provisions of Section 10, such as the ability to file forbearance petitions in defined cases, the statutory deadline or the “deemed granted” provisions. Commenters reserve the right separately to file petitions seeking general forbearance from those provisions. Rather, as described in the following sections, Commenters propose only that the Commission establish procedural rules setting a framework within which it could forbear from accepting particular forbearance petitions on a case-by-case basis.

B. Forbearance from Accepting Petitions that Duplicate Rulemakings

To protect its ability to control its docket and allocate its internal resources, the Commission should adopt a rule that requires each forbearance petition to state whether the relief requested duplicates, in whole or in part, relief and issues already under consideration in pending rulemaking proceedings. If the relief requested in the forbearance petition duplicates pending rulemakings, the Commission should require that the petition additionally explain why the Commission should not, with respect to the petition in question, forbear from the provision of Section 10(c) that “[a]ny telecommunication carrier ... may submit a petition ...” and, if it does forbear, dismiss the petition.

¹⁴ 47 U.S.C. § 160(c).

Whether the Commission should forbear from accepting a petition because of the same or similar issues pending in a rulemaking will likely depend on the facts of a particular case. It is not likely to be difficult, however, to justify forbearance from Section 10(c) when the petition directly raises issues already being addressed in pending rulemaking proceedings. If the relief is pending in another proceeding, it is almost by definition not necessary to consider a separate forbearance petition to assure that rates are reasonable or to protect consumers, because relief may be granted in the rulemaking. Nor is it likely, as a general matter, to serve the public interest to consider duplicative requests for relief. It is also likely that, in most cases, consideration of the requested relief in a rulemaking as opposed to forbearance would not adversely impact competition.

Forbearance from the ability to file petitions that duplicate rulemakings in whole or in part would go a long way towards permitting the agency to engage in an orderly consideration of important issues by restoring rulemaking as the primary vehicle for policymaking, by preventing private parties from dictating the Commission's agenda, and by freeing up agency resources to work on important industry-wide policy making. The numerous forbearance petitions that have been filed over the last few years may account for why the Commission has not devoted resources to completing a number of important rulemakings, such as intercarrier compensation,¹⁵

¹⁵ See, e.g., *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Order, 21 FCC Rcd 14764 (WCB 2007); *Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism*, CC Docket No. 01-92, Public Notice, 22 FCC Rcd 5098 (2007); see also *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket 01-92, Public Notice, 17 FCC Rcd 19046 (2002).

special access,¹⁶ and regulation of ILEC broadband services,¹⁷ among others. If this proposed rule had been in place previously, the Commission could have determined that it was more efficient to proceed by rulemaking and dismissed all of the BOCs' broadband petitions that asked for exactly the same relief that was already under consideration in the pending *Dom/Non-Dom Broadband* proceeding.¹⁸ At the same time, forbearance could go forward where the petition requests consideration of an issue that the Commission has not raised, or will raise, in a more general proceeding.

C. Forbearance from Accepting Repetitious Petitions

The Commission should also require that forbearance petitions state whether the requested relief duplicates to any extent relief that has already been requested in any forbearance petition that was denied within the last 36 months and, if so, explain why the Commission should not, with respect to the petition in question, forbear from the provision of Section 10(c) that "[a]ny telecommunication carrier ... may submit a petition" If the Commission forbears from applying this provision in these circumstances, it may then dismiss the petition.

¹⁶ See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593, Public Notice, 22 FCC Rcd 13352 (2007).

¹⁷ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("*Incumbent LEC Broadband NPRM*") (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services).

¹⁸ See *Incumbent LEC Broadband NPRM*.

It would not be difficult to forbear in this regard with respect to repetitious petitions. In other areas, the Commission has rules barring repetitious applications.¹⁹ If it has recently denied an essentially similar petition on the merits, the Commission may find that the new petition should be denied under the forbearance standards for the same reasons.²⁰ The Commission may also find that it would not serve the public interest because it would harm the Commission's ability to discharge its responsibilities under the Act to consider repeated requests for the same relief, even if the petitioner provides new theories supporting it or modest variations from other petitions. Verizon's recently filed petition for forbearance from unbundling and other obligations in Rhode Island is an example of a repetitious application. This petition requests relief from the identical regulatory obligations in essentially the same geographic area as did Verizon's previous application for the Providence MSA.²¹ Although Verizon now wants the Commission to consider a different basis for evaluating competition – on a rate center, as opposed to MSA or wire center, basis – the new petition essentially recasts its earlier petition with updated information. If Verizon had wanted a different basis for evaluation of its request, it should have presented it in its initial applications.

¹⁹ See 47 C.F.R. §§ 1.937(a), 25.153, 73.3519.

²⁰ Presumably, the Commission usually would not find it necessary to forbear from accepting a petition if the petitioner's previous effort was denied based on procedural defects rather than on substantive grounds, unless the new petition suffers from the same defects. By adopting this case-by-case approach, the Commission can guard against repetitious filings without preventing a petitioner from having at least one opportunity to obtain a ruling on the merits of a properly-filed petition.

²¹ Compare Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006), with Verizon Rhode Island Petition.

Fortunately, the Commission is not helpless to defend against repetitious forbearance petitions. The Commission may forbear from Section 10 itself in such instances, as described above. In addition, it may exercise its authority to establish general rules to efficiently conduct business and carry out its statutory mission that prohibit repetitious forbearance applications.

III. THE COMMISSION HAS AUTHORITY TO ADOPT PROCEDURAL RULES THAT APPLY TO PENDING AND FUTURE FORBEARANCE PETITIONS

The Act expressly grants the Commission broad discretion to conduct its “proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”²² Courts frequently have recognized the Commission’s wide authority in establishing procedures. Thus, in *FCC v. Schreiber*, the Supreme Court noted that the Commission “should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties.”²³ In *Florida Cellular Mobile Communications Corp. v. FCC*, the Court of Appeals for the D.C. Circuit stated, in the context of a licensing dispute, that there “can be no doubt of the FCC’s authority to impose strict procedural rules.”²⁴ In other

²² 47 U.S.C. § 154(i).

²³ 381 U.S. 279, 290 (1965) (quoting *FCC v. Potsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).

²⁴ 28 F.3d 191, 198 (D.C. Cir. 1994) (quoting *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994)). See also, e.g., *Massachusetts v. U.S. Nuclear Regulatory Comm’n*, 924 F.2d 311, 333 (D.C. Cir. 1990) (NRC has “wide discretion to structure its licensing hearings in the interests of speed and efficiency”); *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n*, 920 F.2d 50, 53 (D.C. Cir. 1990) (“absent constitutional constraints or extremely compelling circumstances courts are never free to impose on [administrative agencies] a procedural requirement not provided for by Congress”) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978); internal quotation omitted).

contexts, in accordance with its Section 4(i) authority, the Commission has adopted and has adhered to specific procedural rules.²⁵

The Commission plainly has authority to establish procedural rules that apply to forbearance petitions.²⁶ Doing so is necessary to manage the agency's "decision making process in an

²⁵ See, e.g., 47 C.F.R. §§ 1.399-1.430 (rulemakings); 1.711-1.736 (complaints); see also, generally, *Formal Complaints Rulemaking Order*.

²⁶ This is the case even though procedural rules may limit the filing of petitions and supporting material. See, e.g., *Amendment of Part 94 of the Rules Regarding Point-to-Multipoint Use of the 2.5, 10.6 and 18 GHz Bands by Private Operational Fixed Microwave Licensees*, Notice of Proposed Rulemaking, 3 FCC Rcd 3532, ¶ 41 (1988) (recognizing that a revision of procedural rules will, *inter alia*, "reduce the strain on Commission resources [and] reduce the burden on applicants and licensees."); *Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, 98 FCC 2d 1249, ¶ 26 (1984) (noting that "[m]ost services have cut-off rules or 'window' filing periods to...allow for a more efficient processing procedure." The Commission further recognized that "traditional cut-off dates" for allowing filings "has been the principal means to limiting filings" and that "the 'window' or 'dates certain' cut-off approach has recently been employed on an increasing basis.") (citations omitted). Although the Act provides that parties may file various kinds of applications and petitions, see, e.g., 47 U.S.C. §§ 157(b) (petition or application for new technology or service must be ruled on within one year), 160(c) (petition for forbearance must be ruled on within 15 months), that the Commission must rule on some of them within certain statutory deadlines, and even in the case of forbearance petitions that they are "deemed granted" if the Commission does not act within a certain time, the Commission is not helpless to protect the integrity of its deliberations. In this proceeding, for example, the Commission should adopt rules that limit the filing of evidence at the last minute or the filing of repetitious applications and provide for dismissal of any such filings or petitions. These procedural rules will not negate the statutory deadline or "deemed granted" provision. Those provisions will be fully applicable to petitions that comport with the Commission's reasonable procedural rules that are not dismissed. Reasonable procedural rules will embody an appropriate balancing of the Commission's ability to protect the integrity of its deliberative processes that enable it to discharge its statutory responsibilities, while also giving effect to the statutory deadline for forbearance petitions and the "deemed granted" provision. See, e.g., *Falcon Cablevision Warrensburg, Missouri*, Order, 10 FCC Rcd 10409, ¶ 8 (1995) ("While we recognize that cable rate regulation is relatively new to all concerned parties, we must enforce both our substantive and procedural rules to maintain the integrity of the rate review process and to ensure consistency in decision-making."); *Amendment of Section 73.202(b)*, Memorandum Opinion and Order, 3 FCC Rcd 2336, ¶ 10 (1988) ("The Commission's procedural rules are designed to provide adequate time and opportunity for interested parties to fully participate in the decision making process and to avoid prejudice to

efficient manner.”²⁷ In this respect, the Commission can be “guided by court decisions affirming that enforcement of [its] procedural rules promotes orderliness and finality in the administrative process and thereby contributes towards the public interest, convenience, and necessity.”²⁸

The Commission may apply these procedural rules not only to future, but also to pending forbearance petitions. It is well settled that the Commission may apply modified rules to applications that are pending at the time of a rule modification and that a petitioner does not have a vested right in the Commission’s continued application of processing policies in effect at the time of the filing.²⁹ Even if a procedural change may result in an applicant’s expectations being frustrated, the application of changed eligibility criteria to pending applicants does not constitute retroactive rulemaking.³⁰

competing parties by providing predictable, uniformly applicable rules. They also permit the Commission to conduct its business within a reasonable period of time so as to avoid undue delay in the provision of service to the public.”).

²⁷ See, e.g., *Amendment of the Commission’s Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands*; Memorandum Opinion and Order, 15 FCC Rcd 10579, ¶ 3 (2000).

²⁸ *Id.* citing *WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 337 (D.C. Cir. 1977); *Civic Telecasting Corporation v. FCC*, 523 F.2d 1185, 1188 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 949 (1976); *Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615, 622 (D.C. Cir. 1967); *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964).

²⁹ *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997); *Applications of Crabtree Aircraft Company INC. for Renewal of Aeronautical Advisory Station KGW6, Guthrie, OK, Spirit Wing Aviation Services LTD., for New Aeronautical Advisory Station at Guthrie, OK*, FCC File Nos. 0001278243, 0001300645, Order, 19 FCC Rcd 23187, n.10 (2004)

³⁰ *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (“[A] new rule or law is not retroactive merely because it ... upsets expectations based on prior law,” quotation omitted); *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (“[I]t is often the case that a business will undertake a certain course of conduct based on the current law and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking ...”).

Nor would the establishment of forbearance procedures meet the test commonly used to determine whether a rule has retroactive effect, because it does not “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”³¹ Any forbearance procedural rules the Commission establishes clearly do not increase a forbearance petitioner’s liability for past conduct or impose new duties with respect to existing regulatory obligations that apply to it.³²

IV. THE COMMISSION SHOULD ADOPT PROCEDURAL RULES THAT ENSURE INTERESTED PARTIES HAVE ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO COMMENT

A. APA Notice and Comment Requirements Apply to Forbearance Petitions

The APA governs, among other things, the manner in which administrative agencies, including the Commission, propose and establish regulations and defines a rulemaking as an “agency process for formulating, amending or repealing a rule.”³³ Section 553(b) of the APA

³¹ *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

³² *Cf. Hispanic Info. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) (“The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.”). *See also Community Television, Inc.*, 216 F.3d 1133, 1143 (D.C. Cir. 2000) (“... the mere filing of upgrade applications did not vest petitioners with a legally cognizable expectation interest. *See Chadmore Comm., Inc.*, 113 F.3d at 240-41. Thus, the FCC was free to alter its criteria for considering those applications.”).

³³ 5 U.S.C. § 551(5). It also defines a “rule” as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing

5 U.S.C. § 551(4) (emphasis supplied).

generally requires notice and an opportunity to comment before promulgation of a final agency rule.³⁴ While the Commission generally treats forbearance petitions consistent with the APA's notice and comment procedures and applies its "permit-but-disclose" *ex parte* rules in the proceedings addressing these petitions,³⁵ the Commission has not made clear that the full APA protections and extensive case law are afforded to interested parties in forbearance proceedings. As CLEC Petitioners recommended,³⁶ the Commission should conclude that the APA's notice and comment rules that apply to rulemakings apply to all Section 10 forbearance proceedings. A decision that grants forbearance relief falls with the definition of a "rule" under the APA, which is "an agency statement of general or particular applicability and future effect designed to implement ... law or policy."³⁷ Thus, a forbearance proceeding is a rulemaking in which 5

³⁴ Specifically, the APA requires that a rulemaking notice include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Further, after the required rulemaking notice has been provided, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). There is an extensive body of case law implementing these requirements, among others, under the APA.

³⁵ See, e.g., *Pleading Cycle Established for Comments on Verizon New England's Petition for Forbearance in Rhode Island*, WC Docket No. 08-24, Public Notice, DA 08-469 (WCB rel. Feb 27, 2008); *Pleading Cycle Established for Comments on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Public Notice, DA 06-1869 (WCB rel. Sept. 14, 2006); *Pleading Cycle Established for Petition of the Embarq Local Operating Companies for Forbearance from Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(B) of the Communications Act and Commission Orders on the ESP Exemption*, WC Docket No. 08-08, Public Notice, DA 08-94 (WCB rel. Jan. 14, 2008).

³⁶ CLEC Petition for Forbearance Procedural Rules at 11-12.

³⁷ 5 U.S.C. § 551(4).

U.S.C. § 553 applies³⁸ and the Commission's failure to comport with APA requirements would be subject to judicial review.

B. Forbearance Petitions Should be Complete-as-Filed and Should Clearly Set Forth the Regulatory Relief Sought

1. Supporting Information Should be Submitted with the Petition

As recommended by the CLEC Petitioners,³⁹ the Commission should adopt a “complete-as-filed” rule for all Section 10 forbearance petitions that requires a petitioner to submit all the evidence it wants the Commission to consider in determining whether the statutory requirements of Section 10 have been met. This would help ensure that: (1) interested parties have a fair opportunity to comment on the petitions and supporting evidence; and (2) the Commission has ample time to evaluate the record, including both the petitioner's case and other parties' comments, before the expiration of the statutory deadline. As CLEC Petitioners explained,⁴⁰ the Commission has recognized the necessity and benefit of adopting a complete-as-filed (or similar) rule in the context of its review of Section 271 applications and formal complaints filed with the

³⁸ A forbearance proceeding is more akin to a 5 U.S.C. § 553 rulemaking than a 5 U.S.C. § 554 adjudication because (1) adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973); *Ford Motor Co. v. FTC.*, 673 F.2d 1008, 1010 (9th Cir.1981), *cert. denied* 459 U.S. 999 (1982); (2) adjudications involve concrete disputes and they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (the “central distinction” between rulemaking and adjudication is that rules have legal consequences “*only* for the future”) (Scalia, J., concurring) (emphasis added); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). Unlike adjudications, forbearance proceedings are not proceedings designed to resolve disputes among specific individuals in specific cases.

³⁹ CLEC Petition for Forbearance Procedural Rules at 13.

⁴⁰ *Id.* at 14.

Commission pursuant to Sections 208 and 271(d)(6). For the several reasons discussed below, the same reasons support a complete-as-filed requirement for Section 10 forbearance petitions.

A complete-as-filed rule is desirable because BOCs are filing forbearance petitions that are fishing expeditions for data that might justify forbearance and only file support at the end of the comment cycle or just before the statutory deadline. As CLEC Petitioners noted, Verizon in the Six MSA Proceeding filed detailed market-specific data for the first time in its reply comments.⁴¹ Verizon also filed significant amounts of data during the last few days before the statutory deadline that it should have provided with its original petition.⁴² Even after all that, much of the information on which the Commission relied was not provided by Verizon at all, but obtained from third parties through data requests initiated by the Wireline Competition Bureau.

When a petitioner submits little support with its forbearance petition, the notice and comment cycle is rendered virtually meaningless because the petitioner's real case and detailed support is not yet available for comment. Interested parties are denied a full and fair opportunity to present their views on the real case and detailed support to the Commission during the formal comment cycle. The APA requires notice and comment,⁴³ and the federal courts have interpreted

⁴¹ *Id.* at 15.

⁴² See Letter from Even T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 30, 2007); see also Letter from Andrew D. Lipman *et al.*, counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Dec. 3, 2007) at 3 (noting that “Verizon engages in procedural abuse by attaching to [its November 30] letter an eleventh hour data dump and analysis of cable coverage” and explaining that “[p]arties have not had a chance to analyze it closely and test its accuracy and reliability”).

⁴³ 5 U.S.C. § 553(c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments...”).

that requirement to mean a formal comment filing, with adequate time for review and analysis.⁴⁴ As a matter of pure notice, many interested parties would likely be unaware of the existence of a petitioner's extensive data production at or after the close of the comment cycle. Because these extensive submissions are not put out for public notice and comment, the Commission should not presume that adequate notice to interested parties has been afforded.

Case law prohibits such a presumption and expressly forbids agencies from relying on any information for which interested parties are not given adequate time, access and opportunity to comment – especially when the comment cycle has closed.⁴⁵ Forbearance petitions should therefore be evaluated and judged by the Commission as they were presented by the petitioners at the time of filing, not on the basis of extensive supplemental information submitted by the petitioners long after being docketed.

Application of a complete-as-filed rule is also justified because Section 10 gives a party a right to initiate a proceeding, with the potential of a “deemed grant” if the Commission fails to act by the statutory deadline. This aspect of the Act by itself warrants placing the burden on the petitioner to file its complete case with its petition. If the petitioner is unable to make its case in

⁴⁴ See *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (“Notice of a proposed rule must include sufficient detail on its content and basis in law to allow for meaningful and informed comment.”); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (“[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comments, the data the agency used to develop the proposed rule.”).

⁴⁵ 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*, 58 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.”).

its petition, the petition should be denied summarily. The petitioner should not be given unlimited flexibility and discretion to file additional support later.

For these reasons, the Commission should impose a complete-as-filed rule and prohibit a forbearance petitioner from supplementing, updating, or otherwise materially modifying its forbearance petition and supporting documentation later in the proceeding.

2. Requested Relief Should be Clearly Stated

A complete-as-filed rule should also require that a forbearance petition clearly set forth the regulatory relief sought. In particular, it should require that the petitioner set forth specifically and precisely each of the following:

- The particular statutory provisions, regulations, and/or Commission orders from which forbearance is sought;
- The telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, for which forbearance is sought; and
- The geographic market or markets in which forbearance is sought;

These requirements are necessary because many forbearance petitions lack this specificity. Instead, the petitions assert broad, ambiguous pleas for regulatory relief; only later in the proceeding does the petitioner circumscribe and clarify its forbearance request. For instance, in the Verizon broadband forbearance proceeding, the petition was ambiguously broad and Verizon waited until six weeks before the 15-month statutory period deadline to provide specifics of the services and regulations for which it sought forbearance.⁴⁶ In the *Verizon Six MSA* Proceeding, Verizon was not specific about certain forbearance relief it sought until it provided some clarifi-

⁴⁶ See Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket 04-440 (Feb. 7, 2006).

cation to the Wireline Bureau in a June 2007 *ex parte*, which was well after the comment cycle.⁴⁷ Even then, Verizon never clarified with particularity the services and regulations associated with Computer III, ONA and CEI requirements from which it sought forbearance relief.

3. Forbearance Petitions Should State the Original Basis for the Rules at Issue and Potential Impact if the Commission Forbears

As part of a complete-as-filed rule, the Commission should require that forbearance petitioners fully describe the policy and purpose of the rules from which regulatory relief is sought. Currently, forbearance petitioners give little, if any, information about the original basis for the regulations or orders and the potential impact that forbearance would have on the industry. Consequently, interested persons may not fully understand the forbearance relief sought and the significance of it based on the forbearance petition itself.

For instance, when Verizon sought forbearance relief from Computer III requirements, it provided no basis whatsoever for the forbearance relief sought, nor did it explain what offering or service it wished to be relieved of these requirements, or why continued application of these requirements is no longer necessary to achieve the public interest goals that justified the FCC's

⁴⁷ See Letter from Joseph Jackson, Associate Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172, at 7 (June 13, 2007) ("Doc. No. 06-172, Verizon June 13, 2007 *Ex Parte*"). For instance, based on Verizon's September 6, 2006 forbearance petitions that initiated this forbearance proceeding, it was not clear if Verizon was requesting relief from both dominant carrier regulations that apply to both interstate switched and special access services. See, e.g., Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) at n.3 ("Verizon Boston-MSA Petition"). It was not until Verizon filed its June 13, 2007 *ex parte* that Verizon clarified it was only seeking forbearance relief from dominant carrier regulations that apply to switched access services. See Doc. No. 06-172, Verizon June 13, 2007 *Ex Parte* at 7.

original imposition of the obligation.⁴⁸ The only place Verizon referenced relief from Computer III requirements was in footnote 3 of its petition. Verizon followed the same practice in the recent petition it filed seeking forbearance from similar obligations, among others, in Rhode Island.⁴⁹

The APA supports the establishment of such a requirement. As discussed above, the APA requires that interested parties be given adequate notice of the forbearance relief sought so that they can determine if they wish to comment on the relief requested. Forbearance petitioners should not be able to hide the significance of their request in a passing footnote and claim that adequate APA notice has been afforded. Stated differently, if a forbearance petition does not provide adequate notice pertaining to the obligation upon which forbearance relief is sought and why the rationale for original imposition of the obligation is now unjustified, the forbearance petition fails to satisfy the notice requirement under the APA. For these reasons, forbearance petitions should state the original basis for the rules at issue and the potential impact if the Commission forbears.

4. A Forbearance Petition Must Fully Demonstrate that It Satisfies All Statutory Criteria

a. The Petitioner Should Have the Burden of Demonstrating with Specificity and Empirical Data that the Requested Relief Satisfies Section 10

Established law requires that the proponent of an order has the burden of proof⁵⁰ and must demonstrate a *prima facie* case for its request. In the context of a forbearance petition, the

⁴⁸ See, e.g., Verizon Boston-MSA Petition at n.3.

⁴⁹ Verizon Rhode Island Petition at n.4.

⁵⁰ See, e.g., *Mark Eden v. Lee*, 433 F.2d 1077, 1082 (9th Cir. 1970).

petitioner is seeking an order granting its forbearance request and therefore has the burden of demonstrating that each element of the forbearance standard is satisfied. This detailed demonstration should be made in the forbearance petition.

Currently, the Commission accepts forbearance petitions in which the petitioner fails to demonstrate with specificity and empirical data that the forbearance relief requested satisfies each of the Section 10 criteria. Instead, these petitions routinely make general assertions that the criteria are satisfied.⁵¹ As CLEC Petitioners explained,⁵² without a detailed showing, interested parties are forced to speculate why the petitioner believes forbearance is justified and provide countervailing arguments and substantive support which amount to nothing more than speculations. Ill-supported forbearance petitions improperly shift the burden to the Commission and commenting parties to demonstrate that the petition should be denied on substantive grounds.

b. Petitioner Should Satisfy its Burden of Proof with Actual Data and Not Predictive Judgments

The Commission should also establish procedural rules requiring forbearance petitions to include “actual data” that supports the forbearance relief sought. The forbearance petition should not be based on a petitioner’s mere assertions as to what it will do in the future. For instance, if a petitioner seeks forbearance from an obligation to provision a certain service or perform a specific function that it is required to offer under the Act or pursuant to Commission regulation or Order on grounds that competition will force it to offer competitive rates and terms, the petitioner should be required to submit with its forbearance petition the baseline competitive offering it expects to make available if the forbearance relief for which it seeks is granted. This

⁵¹ See, e.g., Verizon Six MSA Forbearance Petitions.

⁵² CLEC Petition for Forbearance Procedural Rules at 19.

will at least provide interested parties with an opportunity to comment on whether the petitioner's justification for its forbearance request is credible. In this connection, the Commission should not make predictive judgments that forbearance is warranted, and the burden should be on the petitioner to provide hard evidence that supports granting the forbearance relief requested.⁵³

Similarly, procedural rules should require that forbearance petitions be supported by facts in existence at the time the petition is filed and not by predictions or speculations of what the future has in store. Section 10 requires the Commission to forbear only if it finds that enforcement of a law or regulation “*is not necessary*” to ensure reasonable terms of service or to protect consumers; it is not sufficient to allege that enforcement “*may not be necessary*” or may become unnecessary in the future. For instance, if a petitioner is unable to show that a forbearance is warranted at the time of filing but bases its petition on the premise that the competitive market will evolve to justify granting the petition in the future, the Commission should immediately deny the forbearance petition. The Petitioner may then choose to refile with updated data, subject to any rules restricting repetitious petitions.⁵⁴ Nothing in Section 10 suggests that it is permissi-

⁵³ As discussed in note 70 *infra*, the Commission did not require that Qwest make this demonstration in the *Omaha Forbearance Order* and should have.

⁵⁴ As discussed in Section II.C above, the Commission is not obligated under Section 10 to endlessly consider repeated applications that rely on some new data. The Commission may impose reasonable timeframes for refiling petitions seeking earlier requested relief, even if based on new data, in order to protect the integrity of its decision-making and to permit it to accomplish its overall statutory mandates on an efficient basis. *See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, Third Order on Reconsideration, 13 FCC Rcd 4856, Appendix C (1998) (allowing dismissed applicants the option to refile applications for same service within 60 days.). In denying Verizon's Six MSA forbearance petitions, the Commission recognizes that a forbearance request can be re-filed when and if changed market circumstances warrant a forbearance grant. Chairman Martin even emphasized in his statement supporting the Commission's Verizon Six MSA Order that “[a]s competition in these markets continues to develop, I am happy to reevaluate these markets based

ble for forbearance petitions to be based on speculations. Rather, Section 10 contemplates the petitioner will provide actual data showing that the regulatory requirements for which it seeks forbearance relief are no longer warranted.

5. All Arguments Supporting the Forbearance Relief Sought Should be Set Forth in the Forbearance Petition Itself and Not in Collateral Documents

The Commission should also require that all legal arguments be included in the body of forbearance petitions.⁵⁵ The Commission should expressly prohibit parties from burying legal arguments in declarations, attachments, or other collateral documents and should put forbearance petitioners on notice that any legal arguments that are not included in the petition itself may be struck.

The Commission has applied this type of requirement in other proceedings. In the context of the § 271 application process, the Commission imposed a similar requirement because applicants were including substantive arguments in affidavits or other supporting materials only, and not in their legal briefs. Consequently, the Commission found it “burdensome and time consuming to determine the position of parties.”⁵⁶ The Commission therefore required applicants to make “all substantive legal and policy arguments in a legal brief.”⁵⁷ It warned that it “retains the authority to strike, or to decline to consider, substantive arguments that appear only in affidavits

on updated facts.” *Verizon Six MSA Forbearance Order*, Separate Statement of Chairman Kevin J. Martin at 33. The Commission should, however, clarify its policy to avoid consideration of unduly repetitious forbearance petitions.

⁵⁵ See also CLEC Petition for Forbearance Procedural Rules at 17-18.

⁵⁶ *Updated 271 Filing Requirements*, at 4.

⁵⁷ *Id.*

or other supporting documentation.”⁵⁸ It further noted that 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.”⁵⁹

These conclusions are equally applicable to Section 10 forbearance petitions. Similar to 271 applications, Section 10 petitions frequently are voluminous, and given the abbreviated timeframes available to respond to a petition, it is essential that the petitioner incorporate all relevant information – including all relevant legal arguments – in the petition itself.⁶⁰

C. Replies to Oppositions to Forbearance Petitions May Only Rebut Arguments Made By Commenters, and Any Reply that Raises New Issues or Showings Should be Stricken

Consistent with the establishment of a complete-as-filed rule and as CLEC Petitioners proposed,⁶¹ the Commission should also impose a rule that prohibits a forbearance petitioner from raising new, substantive arguments in its reply comments. Establishment of this rule is appropriate for the same reasons the Commission imposed it in the § 271 application process. In doing so, the Commission emphasized that reply comments “may not raise new arguments or include new data that are not directly responsive to arguments other participants have raised, nor may the replies merely repeat arguments made by that party in the application or initial com-

⁵⁸ *Id.*

⁵⁹ *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁶⁰ As CLEC Petitioners proposed, to ensure that the forbearance petitioner has taken all reasonable efforts to verify the accuracy of all relevant documentation in support of its petition, it should be required to submit an affidavit by an officer or director of the company affirming that all statements contained in the petition and all supporting materials are true and correct. *See* CLEC Petition for Forbearance Procedural Rules at 18.

⁶¹ *Id.* at 16.

ments.”⁶² It clarified that new factual evidence may only be submitted on reply “if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters.”⁶³

Application of this rule is consistent with Section 1.45(c) of the Commission’s general rules of practice and procedure, which limits reply comments to matters “raised in the opposition.”⁶⁴ The Commission has rejected pleadings filed during the reply period that raise new arguments that should have been filed during the comment period.⁶⁵ As the Commission has stated, it does not have the time or the resources to evaluate “a record that is constantly evolving.”⁶⁶ Nor would the acceptance of new arguments be fair to interested parties, who are effectively denied their right of replying to all issues raised in a forbearance petition. Allowing this tactic would tacitly encourage “gaming” of the forbearance process, since forbearance petitioners will have been rewarded for holding back evidence until the final round of comments.⁶⁷

Even if the Petitioner secures new supportive information after comments have been filed, the appropriate procedure is for the petitioner to be required to withdraw the pending forbearance petition, and refile a new request. The 12 month forbearance clock should be re-

⁶² See *Updated 271 Filing Requirements*, at 7-8.

⁶³ *Updated 271 Filing Requirements*, at 3 (“In order to meet its burden of proof, the applicant may submit new evidence after filing solely to rebut arguments made or facts submitted by other commenters.”).

⁶⁴ 47 C.F.R. § 1.45(c).

⁶⁵ See, e.g., *Amendment of Section 73.622(b)*, Report and Order, 17 FCC Rcd 23492, n.2 (2002) (“Although entitled ‘Reply Comments,’ Caloosa’s comments are untimely and will be dismissed because they raise new matters that should have been filed during the initial comment period.”).

⁶⁶ *Updated 271 Filing Requirements*, at 4.

⁶⁷ See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶ 52 (1997).

started in that instance to ensure that the other parties have a full and fair opportunity to respond to the new information after adequate notice.

V. THE COMMISSION SHOULD ADOPT ADDITIONAL REQUIREMENTS FOR ILEC PETITIONS SEEKING FORBEARANCE FROM 251 OBLIGATIONS

A. ILECs Must Demonstrate that Rates for Equivalent Non-251 Services, and Other Terms and Conditions, are Just and Reasonable

The Commission should require that ILECs seeking forbearance from § 251 obligations⁶⁸ demonstrate that the rates for equivalent non-251 wholesale services, whether they be 271 network elements or something comparable, are just and reasonable, to the extent they rely on such wholesale offerings as justifying forbearance.⁶⁹ Sections 10(a) and 10(b) support the establishment of a requirement that ILECs demonstrate in their forbearance petitions that they currently offer reasonable rates, terms, and conditions for last-mile access in the absence of UNE obligations. In particular, Section 10(a) permits forbearance if the regulation at issue “is no longer necessary” to ensure the telecommunications carrier’s charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory. Under Section 10(b), the Commission must consider whether forbearance will “promote competitive

⁶⁸ The same procedural requirements proposed in this entire Section V should also apply to any BOC petition seeking forbearance from § 271(c)(2)(B) checklist obligations, such as making loops, transport, and switching available on an unbundled basis despite any obligations that may or may not apply under Section 251(c)(3).

⁶⁹ As explained in Section IV.B.4.b *supra*, the Commission should not make predictive judgments that the ILEC’s rates for analog, DS0-, DS1-, and DS3-circuits will remain just and reasonable, absent a compelling demonstration by the ILEC, and grant forbearance. In the *Omaha Forbearance Order*, the Commission relied on its predictive judgment and did not require Qwest to make this showing when it granted Qwest’s request for relief from its § 251(c)(3) obligations in certain wire centers in the Omaha MSA. This prediction has been proven incorrect, as demonstrated in McLeodUSA’s Petition for Modification of the Omaha Forbearance Order. See Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223 (filed July 23, 2007) (“McLeodUSA Petition for Modification”).

market conditions” and “enhance competition among providers of telecommunications services.” Consistent with Section 10, the burden should be on the forbearance petitioner to demonstrate in its petition that the rates, terms and conditions for its § 251(c)(3) alternatives are just and reasonable and will promote competitive market conditions.

Qwest’s failure to offer just and reasonable alternatives subsequent to the *Omaha Forbearance Order*, and Verizon’s refusal to make such a demonstration in the six MSA forbearance proceeding,⁷⁰ reinforce the need for an affirmative requirement of such a showing in forbearance petitions. As the McLeodUSA Petition for Modification of the Omaha Forbearance Order amply demonstrated, there is simply no basis for any prediction by the Commission that market incentives will compel an RBOC to offer commercially just and reasonable pricing in absence of 251 obligations.⁷¹ Rather than making predictions as to whether the ILEC has an incentive to offer just and reasonable alternatives to § 251 services, the Commission should specifically determine that the available wholesale offerings actually are just and reasonable before granting an ILEC’s § 251 forbearance request.

⁷⁰ In this proceeding, Verizon flatly refused to disclose to the Commission what “commercial” terms it would offer for unbundled copper loop facilities if it had been relieved of its Section 251 UNE obligations. *See* Letter from Andy D. Lipman *et al.*, Counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Oct. 3, 2007) at 2; Letter from Andy D. Lipman *et al.*, Counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed July 10, 2007) at 6. Verizon urged the Commission to make the same mistake it made in the *Omaha Forbearance Order*—to make a predictive judgment that an BOC will lease facilities to its own competitors at reasonable rates, for the benefit of a marginal increase in facilities utilization. *See* Letter from Dee May, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Sep. 12, 2007). In its recent filing, Verizon-RI has again failed to disclose to the Commission what “commercial” terms it would offer as § 251(c)(3) alternatives. *See*, Verizon Rhode Island Petition (not disclosing rates, terms and conditions for its § 251(c)(3) UNE alternatives in Rhode Island).

⁷¹ *See* McLeodUSA Petition for Modification at 4.

B. ILECs Should Provide “Clear and Convincing Evidence” that § 251 Forbearance Relief is Warranted

The Commission should require that the “clear and convincing” burden of proof applies to ILEC forbearance petitions that seek relief from § 251 obligations and that ILECs must make this showing in these forbearance petitions. The Commission has applied the clear and convincing standard in other contexts under § 251 and should do so here.

Specifically, in the *Local Competition Order*,⁷² the Commission applied the clear and convincing burden of proof standard associated with the three prong test under Section 251(h)(2) of the Act that sets forth a process by which the Commission may decide to treat LECs as incumbent LECs.⁷³ It concluded that it “will not impose incumbent LEC obligations on non-incumbent LECs absent a *clear and convincing* showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest,

⁷² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 1248 (1996) (“*Local Competition Order*”) (subsequent history omitted).

⁷³ 47 U.S.C. § 251(h)(2) states:

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

convenience, and necessity and the purposes of section 251.”⁷⁴ For the inverse to occur, *i.e.*, for the ILEC to be relieved of its § 251 obligations, the Commission should apply the same standard of proof and require the ILEC to provide clear and convincing evidence that forbearance from its § 251 obligations is warranted.

C. Forbearance Petitions Seeking 251(c)(3) Relief Should Provide Geographic Detail and Support Consistent with Commission Precedent

The Commission should require that any ILEC seeking forbearance from § 251(c)(3) obligations identify specific geographic markets consistent with Commission precedent and requirements and provide supporting data in their forbearance petitions. Forbearance petitions that do not make this showing when seeking forbearance relief from § 251(c)(3) obligations should be automatically denied on procedural grounds.⁷⁵

D. The Commission Should Seek Input from, and Work Closely with, States In Reviewing Section 251 Forbearance Petitions

State commissions are a resource that the Commission should formally incorporate into its consideration of ILEC requests for forbearance relief from § 251 obligations. State commissions have insight and experience as to what is “just and reasonable” as Section 10(a)(1) contemplates in their respective states and whether the other Section 10 criteria are satisfied. For over ten years, they have played a key role in determining what constitutes just and reasonable rates, terms and conditions under § 251 and have advised the Commission on these issues in § 271 proceedings. In addition, they are familiar with the ILEC’s operations in more detail, the

⁷⁴ *Local Competition Order*, ¶ 1248 (emphasis added).

⁷⁵ *See also* Section VII below discussing denial of forbearance petitions on procedural grounds.

wholesale competitive market rates, terms and conditions available in their respective states, as well as the issues in dispute between the parties. They also have considerable experience in applying the just and reasonable standard (in accordance with respective state laws) in evaluating the rates for non-251(c)(3) services offered by ILECs and many other public utilities.⁷⁶ Moreover, state commissions are familiar with the detailed company- and state-specific data that may be used to support an ILEC's claim that the rates associated with its alternative to § 251(c)(3) offerings are just and reasonable. They are also able to assess if § 251 obligations are not necessary for the protection of consumers in their state and if forbearance is otherwise in the public interest and will promote competition in their respective states as Sections 10(a)(2)-(3) and (b) require. Accordingly, the Commission should establish a process for obtaining input from, and working closely with, state commissions in consideration of an ILEC's § 251 forbearance petition.

VI. RULES GOVERNING ACCESS TO CONFIDENTIAL INFORMATION IN FORBEARANCE PROCEEDINGS WOULD IMPROVE DECISION-MAKING AND PARTICIPATION BY INTERESTED PARTIES

A. The Commission Should Clarify the Types of Information that Will be Redacted from Forbearance Orders

Commenters request that the Commission develop and establish a policy statement in this proceeding that will limit information redacted from forbearance orders to better comport with legal standards governing disclosure of confidential information than has been past practice. In

⁷⁶ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 663 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) (recognizing that the just and reasonable rate standard has “historically been applied under most federal and state statutes”) (subsequent history omitted).

the *Omaha, Anchorage, and Verizon Six MSA Forbearance Orders*, apparently exercising an abundance of caution, the Commission redacted information that is not confidential under applicable standards. Eliminating unduly restrictive approaches to what is redacted from forbearance orders will improve the administration of Section 10 because interested parties, state commissions, and the Commission could more freely consider and implement forbearance decisions without unnecessary restrictions.⁷⁷ This is especially the case when the redacted information does not directly reveal confidential information submitted by parties, but is derived or computed by the Commission staff from confidential information submitted by parties.

The leading case on what constitutes “confidential” business information, when the information submitted is “required” to be furnished, is *National Parks & Conservation Ass’n v Morton*, 498 F.2d 765 (D.C. Cir. 1974). In *National Parks*, the Court of Appeals held that the test for confidentiality is objective, and the term “confidential” should be interpreted to protect the balance between the right to information under FOIA and governmental and private interests, in accordance with the following two-part test:

commercial or financial matter is “confidential” for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substan-

⁷⁷ See, e.g., *Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, Order, 10 FCC Rcd 2359, ¶ 27 (1995) (“Our finding that substantial competitive harm is probable does not automatically lead to withholding of desired information, because the Commission’s Rules and the FOIA provisions they reflect are exemptions from required disclosure; they are not categorical bars to disclosure. Even when information falls within the scope of a FOIA exemption, the government retains discretion to order release based on public interest grounds.”) citing *Chrysler v. Brown*, 441 U.S. 281, 290-94 (1979).

tial harm to the competitive positive position of the person from whom the information was obtained.⁷⁸

A less stringent test applies to information that was submitted voluntarily to a government agency. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*). However, a submission is not “voluntary” if it is compelled by the agency or required by agency rules, such as when a forbearance petitioner provides factual documentation to support its petition.⁷⁹ Similarly, information that is not submitted on those companies’ own initiative, but provided in response to an agency request, is deemed “required” information. Courts have found that responses to agency requests for information objectively constitute “required” information. *See In Defense of Animals v. HHS*, No. 99-3024, 2001 U.S. Dist. LEXIS 24975 at *32 (D.D.C. Sept. 28, 2001). Courts will not look at the subjective intent of an agency in making the request, but rather, if the agency has the legal authority to compel the requested information, the submission of information following a request for such information will be deemed required.⁸⁰ The

⁷⁸ *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁷⁹ *See Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (“when the government requires a private party to submit information as a condition of doing business with the government” the submission is deemed “required”); *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997) (“Information is considered ‘required’ if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government”), *aff’d in part, rev’d in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999); *Lykes Bros. S.S. Co. v Peña*, No. 92-2780, slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission was “compelled” both by agency statute and by agency letter sent to submitters); *Lee v. FDIC*, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (rejecting agency’s attempt to characterize submission as “voluntary” when documents were “required to be submitted” in order to obtain government approval to merge two banks).

⁸⁰ *Defense of Animals*, 2001 LEXIS 2497 at *35.

Commission plainly has authority under Section 218 of the Communications Act,⁸¹ among other provisions, to require telecommunications carriers and their affiliates to provide relevant information, so information submitted in response to Commission requests, such as the Bureau requests in the *Omaha, Anchorage, and Verizon Six MSA Forbearance* proceedings,⁸² cannot be considered voluntary.⁸³

However, the Commission's practice to date has been to redact far more information than what would be considered confidential under *National Parks*. In the *Omaha, Anchorage, and Verizon Six MSA Forbearance Orders*, the Commission redacted broad comparisons of companies' market shares and information about cable "coverage" in wire centers. Broad comparisons of companies' market shares arguably do not even constitute "confidential information ... obtained from a person" at all, because they are the result of calculations performed by Commission staff, and do not directly disclose any specific information supplied to the Commission by a

⁸¹ 47 U.S.C. § 218.

⁸² See, e.g., Letter from Dana Schaffer, Chief, Wireline Competition Bureau, to Brian W. Murray, Counsel for Time Warner Telecom, WC Docket No. 06-172 (WCB Oct. 29, 2007) (similar letters were sent to counsel for RCN, COX, Comcast, Charter, Cablevision on the same day); see also Letter from J.G. Harrington, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (June 30, 2005) (stating that Cox was submitting "responses to certain questions from Commission's staff"); Letter from John Nakahata *et al.*, Counsel for General Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (Oct. 24, 2006) (providing updated information pursuant to a "request of the Competition Policy Division of the Wireline Competition Bureau"); Letter from John Nakahata *et al.*, Counsel for General Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 (July 12, 2006) (stating "[p]ursuant to the request from the Competition Policy Division of the Wireline Competition Bureau," GCI was submitting documents that it "submitted previously in WC Docket No. 05-281").

⁸³ Even if the Commission views the Bureau's data requests as informal, they still can be deemed required. See *Lepelletier*, 977 F. Supp. at n.3 ("Information is considered 'required' if any legal authority compels its submission, including informal mandates").

person. Nor is it possible to infer any individual company's confidential data from the very high-level comparisons.

Disclosure of broad comparisons of companies' market shares is not likely to constitute confidential information. Disclosure of this category of information does not fall within either of the two *National Parks* exemption criteria. First, disclosure will not impair the ability of the Commission to obtain reliable information from parties in future cases. Forbearance petitioners will have an incentive to provide reliable and complete information to satisfy their burden of proof. Other parties are unlikely to be deterred from responding to mandatory Commission requests for information simply because of the possibility that the Commission may make public some very general, high-level characterizations of their relative market share in particular regions. Second, disclosure will not cause substantial harm to the competitive position of the person from whom the information was obtained. In most, if not all cases, broad comparisons of market share are simply too general and too derivative to permit any other person to take competitive advantage of the data. In the non-forbearance context, the Commission made this type of information public and even cited to these decisions and referenced the market share percentages in the *Verizon Six MSA Forbearance Order*.⁸⁴

⁸⁴ See *Verizon Six MSA Forbearance Order*, ¶¶ 28-29 (stating in the public version of the order that: (a) "in the *AT&T Domestic Nondominance Order*, AT&T was declared nondominant in its provision of domestic interstate interexchange services when it had an approximate market share of '55.2 and 58.6 percent in terms of revenues and minutes respectively.'"; (b) "in the *AT&T International Nondominance Order*, the Commission classified AT&T as nondominant with respect to international message telephone service (IMTS) where it had an overall average market share of 59 percent, but had an average market share of 74 percent with respect to 76 particular countries."; and (c) "in the *AT&T International Nondominance Order*, the Commission found that 'AT&T owns 43 percent of the U.S. end of submarine cable facilities currently in use'").

Statements of “coverage” concerning the number of wire centers in which a cable operator provides certain services or has certain levels of facilities coverage, without identifying which specific wire centers comprise the group, is not confidential information either. This information is essentially useless to any other person for competitive purposes if it does not identify which particular wire centers fall into any specified grouping. For this reason, the wire center information cannot satisfy either prong of the *National Parks* test.

On the other hand, specific numbers of lines or other services provided by particular companies to customers in a wire center, MSA, or other geographic market in most cases is likely to be confidential information that should be redacted from forbearance orders. This is likely to be information actually submitted by parties, rather than derived by the Commission from such submissions. Disclosure of line count information, linked with a specific geographic market or sub-market, may cause competitive harm to the submitting carrier and, therefore, would discourage parties from submitting this information. Accordingly, of the types of information that the Commission has redacted from recent forbearance orders, only specific line count, customers, and services provided in an identified geographic market are likely to be entitled to protection from public disclosure under 5 U.S.C. § 552(b)(4).⁸⁵ It is not possible to predict with certainty what types of information will be submitted in every future forbearance proceeding.

⁸⁵ Even customer line counts are not entitled to confidentiality forever. Commenters are prepared to assume that Qwest and Cox could suffer “substantial harm to [their] competitive positive position[s]” if the precise numbers of customers they provide particular services to in Omaha were made public today. However, the information in the Omaha decision relates to services provided in late 2004 and early 2005. Even now, the competitive value of this information would be diluted by the passage of time, since the figures generated in 2004-05 cannot be accurate today. After a few more years, the balance of interests will tilt in favor of disclosure, since it is difficult to imagine how any company could suffer substantial harm from disclosure of what its revenues or line counts were five or ten years earlier.

The Commission in this proceeding should establish a policy that it will follow an approach that comports with *National Parks*, to be implemented as necessary on a case-by-case basis. The Commission also should review the *Omaha, Anchorage, and Verizon Six MSA Forbearance Orders* and release revised redacted versions of them consistent with this policy.

B. Authorized Persons Should be Able to Use Confidential and Highly Confidential Information in Related Forbearance Proceedings

Commenters support the proposal in the petition filed by CLEC Petitioners that persons who have signed appropriate Protective Orders should be permitted to use confidential and highly confidential information in other Commission forbearance proceedings in which a petitioning party seeks relief from the same rules and/or statutory provisions, and in related state proceedings.⁸⁶ The Commission's practice of limiting use of confidential and highly confidential information to the conduct of the proceeding for which it was submitted or any judicial proceeding arising therefrom is unduly restrictive.⁸⁷ Permitting persons who have signed Protective Orders to use this information in related proceedings will promote efficient decision-making by the Commission, as well as implementation of the Commission's forbearance decisions at the state and federal levels.

C. Confidential Documents Should be Searchable

Commenters also support the proposal in the petition filed by CLEC Petitioners that all confidential and highly confidential information should be available in a searchable electronic

⁸⁶ CLEC Petition for Forbearance Procedural Rules at 22.

⁸⁷ See, e.g., First Protective Order, WC Docket No. 08-24, DA 08-470, released February 27, 2008, ¶ 7.

format.⁸⁸ Without this requirement, carriers could thwart effective evaluation of the petition by the Commission and other interested parties simply by submitting large volumes of information which, absent electronic searchability, are largely inaccessible.⁸⁹ The Commission should also require that the information be provided in a timely fashion.

D. The Commission Should Not Accept Confidential Information Obtained in Violation of Sections 222(b) and (c)

Section 222(c) of the Act provides for confidential treatment of customer proprietary network information (“CPNI”). Carriers may only, use, disclose, or permit access to CPNI in provision of service to the customer.⁹⁰ Carriers may use aggregate CPNI for purposes other than provision of service to the customer only if they provide it to others on reasonable and nondiscriminatory terms and conditions.⁹¹ Under Section 222(b) of the Act, a carrier that receives or obtains proprietary information from another carrier for purposes of providing a telecommunications service may only use the information for the purpose of providing the service. Significantly, the statute restricts how the receiving carrier “use[s]” the information; this is a broader requirement than merely prohibiting disclosure of the proprietary information, and includes use of proprietary information in competitive analyses or computations.

Because of their continuing bottleneck control of local networks, and other special responsibilities such as administration of E911 systems and databases, BOCs have access to and

⁸⁸ CLEC Petition for Forbearance Procedural Rules at 21.

⁸⁹ As with any other Commission rule, a petitioner could request a waiver of the searchability requirement for any particular form of information that cannot practicably be provided in searchable form.

⁹⁰ 47 U.S.C. § 222(c)(1).

⁹¹ 47 U.S.C. § 222(c)(3).

possess vast CPNI, as well as proprietary information of other carriers. In the recent *Verizon Six MSA Forbearance Proceeding*, Verizon clearly violated Section 222 restrictions. Verizon brazenly breached contractual obligations with other carriers not to use E911 data for purposes other than provision of E911 service by submitting information drawn from E911 databases it administers in an effort to show sufficient competition that could justify forbearance.⁹² In addition, it revealed the number of special access and UNE circuits its competitors obtained from Verizon in each of the six MSAs.⁹³

Section 222 embodies important objectives of Congress concerning privacy of information that the Commission has sought vigorously to enforce.⁹⁴ In order to further promote compliance with Section 222, and to help assure that forbearance proceedings are not the vehicles for undermining Section 222, the Commission should establish rules in this proceeding that provide that the Commission will not consider information (1) obtained in violation of Section 222, or (2) if use of the information in the forbearance proceeding would violate Section 222.

⁹² Motion to Dismiss filed by ACN Communications Services, Inc. *et al.*, WC Docket No. 06-172 (Oct. 16, 2006).

⁹³ See Letter from Joseph Jackson, Associate Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (Oct. 10, 2007) at 2 (referencing attachments “Exhibit 3 Number of Locations Served by Selected Competing Carriers” and “Exhibit 10 Supplement: Competing Carrier’s Use of Verizon’s Special Access and UNEs by MSA (Selected Carriers).”).

⁹⁴ See, e.g., *Dialaround Enterprises, Inc.*, File No. EB-06-TC-3543, Notice of Apparent Liability, DA 07-4776 (rel. Nov. 29, 2007); *River City Wireless of Tennessee, LLC*, File No. EB-06-TC-6030, Notice of Apparent Liability, DA 07-3734 (rel. Aug. 24, 2007).

VII. A FORBEARANCE PETITION SHOULD BE SUMMARILY DENIED IF A PETITIONER FAILS TO SUBMIT REQUIRED INFORMATION IN ITS PETITION OR OTHERWISE VIOLATES THE PROCEDURAL RULES

The Commission has at its disposal a wide range of sanctions to address violations or abuses of its procedural rules, including summary grant or dismissal of a complaint (in whole or in part), the drawing of adverse inferences as to material facts, monetary forfeitures, admonishment rulings, and show cause proceedings.⁹⁵ In other contexts, under its Section 4(i) authority, the Commission has adopted procedural rules that require dismissal of filings that do not satisfy certain procedural requirements.⁹⁶ Therefore, denying forbearance petitions that violate any of the procedural requirements the Commission adopts would be lawful and appropriate.

The Commission should provide that a forbearance petitioner's failure to satisfy its procedural rules will result in summary denial of the petition without prejudice. To ensure that the forbearance petitioner does not file back-to-back defective petitions, the Commission should only deny "without prejudice" once in a six-month period. If a second forbearance petition has procedural violations, the second denial should be "with prejudice," so that refilings are submitted no more frequently than twelve months from the date of the second denial.

VIII. THE COMMISSION SHOULD ADOPT A STANDARD TIMETABLE FOR FORBEARANCE PROCEEDINGS

To establish procedural certainty and efficiency to the forbearance process, the Commission should set forth in rules a standard timetable for: (1) the issuance of protective orders; (2) conducting the initial review of the forbearance petition for procedural defects; (3) Commission

⁹⁵ See, e.g., Sections 4(i), 503(b), and 312(b) of the Act, 47 U.S.C. §§ 154(i), 503(b), 312(b).

⁹⁶ See, e.g., 47 C.F.R. §§ 1.934, 1.1406(b)-(d), 1.1870(d)(2).

evaluation of motions to dismiss; (4) Commission data requests; (5) comment and reply deadlines; and (6) *ex parte* submissions. Implementation of a standard timetable to govern these events will ensure that all forbearance petitions are considered fairly and fully, and will provide a concrete set of equitable ground rules that apply to them.

A. Protective Orders Should be Issued Promptly After the Filing of a Forbearance Petition

Promptly after the filing of a forbearance petition, the Commission should issue a protective order that delineates the treatment of Confidential and Highly Confidential Information that will be submitted to the Commission. Promptly issuing a protective order will facilitate and expedite the review of confidential documents, which is an essential step to the Commission's goal of expeditiously resolving forbearance petitions.

B. Forbearance Petitions Should be Reviewed Within 21 days of Filing, and Petitioner Should be Required to Cure Non-Material Defects within 14 Days

As discussed in Section IV.B. above, Commenters believe that forbearance petitions should be substantively complete when filed. Commenters recognize, however, that some forbearance petitions may contain minor, non-substantive defects when filed. Thus, Commenters agree with the CLEC Petitioners that, rather than rejecting the forbearance petitions outright, the Commission should allow a forbearance petitioner to correct minor, non-material procedural defects in its forbearance petition.⁹⁷ The Commission should review a forbearance petition within 21 days of its filing. If the Commission discovers any non-substantive procedural defects, the petitioning party should be allowed 14 days to correct such errors. If the defects are not cured within 14 days, then the petition should be denied.

⁹⁷ CLEC Petition for Forbearance Procedural Rules at 24.

C. Procedural Timelines for Commission Resolution of Motions to Dismiss or Deny Petitions Should be Prescribed

As the CLEC Petitioners proposed,⁹⁸ the Commission should adopt a procedural framework to govern the filing and review of motions to dismiss in the context of forbearance proceedings. Specifically, the Commenters support procedural rules that give interested parties 45 days from public notice of the forbearance petition to file motions to dismiss the petition, such as because the petition is not complete or is repetitious.⁹⁹ The forbearance petitioner should have no more than 10 days to oppose the motion, and the party filing the motion should have 5 days to reply to the opposition. This is a reasonable timeframe similar to the timeframe for petitions to deny under Section 1.45 of the Commission's rules.¹⁰⁰

Equally important to establishing these timeframes, the Commission should establish a deadline to rule on a motion to dismiss. Administrative efficiency and optimizing resources for everyone involved compel the Commission to address a motion to dismiss within a reasonable time frame. As the CLEC Petitioners proposed, the Commission should issue such decision within 15 days of these filings.

D. The Commission Should Establish a Standard Comment Cycle for Section 10 Forbearance Proceedings, and Commission Data Requests Should be Submitted Before the Start of the Comment Cycle

The Commission should adopt a standard comment cycle to ensure that interested parties have ample time to review and analyze the forbearance petition. The comment cycle should not begin until the Commission has reviewed the forbearance petition for non-substantive defects

⁹⁸ *Id.* at 26.

⁹⁹ *See id.* at 26.

¹⁰⁰ *See* 47 C.F.R. §§ 1.45(b), (c).

and the party seeking forbearance has cured any non-substantive defects. Moreover, any data request the Commission issues to the petitioning party should be issued, and the data submitted, before the comment cycle commences.

In prior Section 10 forbearance proceedings, the Commission has sought data from petitioners or other parties well into the statutory time period. In certain instances, the Commission requested data from other parties approximately a month before the statutory “deemed granted” deadline.¹⁰¹ Commenters suggest that the Commission establish a deadline for the staff to issue its primary set of data requests, preferably, so that responses to the requests are submitted at least 21 days before the date for filing initial comments. Establishing these timeframes would be appropriate since courts have concluded that, under the APA, 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.¹⁰² In fact, 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.”¹⁰³ In addition, the U.S.

¹⁰¹ See, e.g., Letter from Dana Schaffer, Chief, Wireline Competition Bureau, to Brian W. Murray, Counsel for Time Warner Telecom, WC Docket No. 06-172 (WCB Oct. 29, 2007) (similar letters were sent to counsel for RCN, COX, Comcast, Charter, Cablevision on the same day); see also, Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, to Suzanne A. Guyer *et al.*, Senior Vice President - Federal Regulatory Affairs, Verizon, WC Doc. Nos. 04-440, 06-125, 06-147 (WCB Aug. 23, 2007) (this letter was also sent to representatives of AT&T, Qwest, Embarq, and Frontier).

¹⁰² See *supra*, note 44.

¹⁰³ *Solite Corp. v. EPA*, 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).

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.¹⁰⁴

For the above reasons, Commenters therefore support the CLEC Petitioners' proposal that would afford interested parties 45 days after the Commission has conducted its initial review of the petition and the petitioner has corrected any non-substantive errors to file comments, and 30 days thereafter to file reply comments.¹⁰⁵ Furthermore, all data requests the Commission expects to issue based on the forbearance petition should be propounded early in the proceeding, so that responses to them are received at least three weeks in advance of the start of the comment cycle.

E. Procedural Rules Should Address the Scope and Timing of Substantive *Ex Parte* Submissions

As CLEC Petitioners proposed,¹⁰⁶ the Commission should limit any *ex parte* filings made by the petitioner where the petitioner seeks to include new, substantive information. In the context of reviewing Section 271 applications, the Commission concluded that "it generally will not be appropriate for an applicant to make any part of its initial *prima facie* showing for the first time ... in *ex parte* submissions"¹⁰⁷ and "emphasize[d] that, as a general matter, it is highly

¹⁰⁴ 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").

¹⁰⁵ CLEC Petition for Forbearance Procedural Rules at 27.

¹⁰⁶ *Id.* at 28.

¹⁰⁷ See *Updated 271 Filing Requirements*, at 4. The Commission did note limited exceptions to this rule. *Id.* citing Application by Bell Atlantic New York for Authorization Under Section

disruptive to our processes to have a record that is constantly evolving.”¹⁰⁸ The same conclusions apply equally here. As discussed above, the Commission “commits serious procedural error” where it relies on material, post-comment information to support its final order.¹⁰⁹

IX. THE COMMISSION SHOULD ESTABLISH A POLICY OF ISSUING A WRITTEN ORDER EVEN FOR PETITIONS THAT ARE “DEEMED GRANTED”

Section 10(c) requires the Commission to “explain its decision ... to grant or deny a petition in whole or in part ... in writing.”¹¹⁰ Properly interpreted, this would apply to a “deemed granted” petition as well. However, even if that is not the case, it would comport with the policy of Section 10(c) to issue a written decision in all cases. Further, a written order in instances where a petition has been “deemed granted” will reduce industry uncertainty as to the extent of forbearance granted. Unfortunately, Verizon’s petition for forbearance from certain pricing and tariffing obligations on broadband services that was “deemed granted” without any order being concurrently or later released has caused considerable confusion as to the scope of the forbearance granted. This also permits Verizon to define its forbearance in overly broad or anticompeti-

271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3968 (1999); Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order, FCC 01-29 at ¶¶ 22-27 (2001) (restating these principles, but waiving their application in exceptional circumstances).

¹⁰⁸ *Updated 271 Filing Requirements*, at 4.

¹⁰⁹ *Solite Corp.*, 952 F.2d at 485 (citations omitted); *see also Ober*, 84 F.3d at 315; *Idaho Farm Bureau*, 5 F.3d at 1403.

¹¹⁰ 47 U.S.C. § 160(c).

tive ways. Accordingly, the Commission should establish a policy of issuing a written order where a petition has been “deemed granted” as soon thereafter as is reasonably achievable.

X. CONCLUSION

For the foregoing reasons, the Commission should adopt the procedural requirements proposed herein.

Respectfully submitted,

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