

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (“Qwest”) hereby submits these comments in connection with the *Notice of Proposed Rulemaking* (the “*NPRM*”) issued by the Federal Communications Commission (the “Commission”) on November 30, 2007.¹

I. INTRODUCTION AND SUMMARY

In the *NPRM*, the Commission largely addresses points raised in a Petition for Rulemaking filed by Covad Communications Group and numerous other competitive local exchange carriers (hereafter “Petitioners” or “Covad, *et al.*”) in September of 2007 [hereafter referred to as the “Covad, *et al.* Petition”].² The Covad, *et al.* Petition asks that the Commission adopt a variety of so-called procedural rules to govern the Commission’s consideration of petitions for forbearance submitted pursuant to Section 10 of the Communications Act of 1934 as amended (the “Act”).³ In the *NPRM*, the Commission also asks for comments “in general on the

¹ See *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 22 FCC Rcd 21212 (2007); 73 Fed. Reg. 6888 (Feb. 6, 2008).

² See Covad, *et al.*, Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267, filed Sept. 19, 2007.

³ Although the Covad, *et al.* Petition addresses only Section 10 forbearance petitions, the *NPRM* addresses its requests for comments to both Section 10 forbearance petitions and forbearance petitions filed pursuant to Section 332 of the Act. Qwest’s comments are addressed specifically

need for procedural rules to govern consideration of petitions for forbearance.”⁴ For the reasons stated below, Qwest opposes the rules proposed in the Covad, *et al.* Petition, which in many instances go beyond mere procedural rules and would dramatically alter the very nature of a forbearance proceeding. With respect to the Commission’s broader request for comment, Qwest also does not believe there is a need for any other additional procedural rules in connection with petitions for forbearance.

To begin with, the Covad, *et al.* Petition rests on a fundamentally misguided view of the Act -- specifically, it ignores the intended self-effectuating de-regulatory framework of the Act, generally, and Section 10, specifically. It is essential to remember that forbearance petitions are just one aspect, but an important aspect, of this broader de-regulatory design of the Act. Section 10, of which Section 10(c) forbearance petitions are just a part, affirmatively requires -- *i.e.*, even without the filing of a forbearance petition -- that the Commission forbear on its own initiative whenever it determines that the Section 10 forbearance criteria are met for any law or regulation. Section 11 complements Section 10 by affirmatively calling upon the Commission to review its regulations on a biennial basis and eliminate any that it determines to be unnecessary. Petition-initiated forbearance pursuant to Section 10(c) then provides an important buttress to this de-regulatory framework by allowing carriers to trigger this de-regulatory mandate in specific areas while also assuring that such requests get priority treatment with the Commission.

Petitioners also overestimate the impact of petition-initiated forbearance and, thus, overstate the case that something must be done to “restore order” to the forbearance process. Contrary to the picture created by Petitioners, forbearance petitions have historically addressed

to Section 10 petitions and, unless otherwise indicated, “forbearance” or “forbearance petition” refers to Section 10 forbearance proceedings.

⁴ *NPRM*, 22 FCC Rcd at 21213 ¶ 5.

subject areas that are obvious candidates for the Commission's de-regulation scrutiny -- *e.g.*, legacy regulation of competitive long distance services or competitive next generation broadband services. Nor can it be said that forbearance has become a substitute for, or a detriment to, the Commission's other policy-making. The volume of forbearance filings has actually remained relatively steady over the past approximately six years. During this time, the Commission has conducted the great majority of its policy-making outside of the forbearance context. It is also noteworthy that forbearance petitions have very rarely resulted in a controversial "deemed-granted" result. Instead, forbearance petitions have typically followed a routine process and either been approved or denied in whole or in part by the Commission (or, in some cases, withdrawn) in the end.

In this light, it is clear that the majority of the rules proposed in the Covad, *et al.* Petition are unnecessary and would directly conflict with the intended fundamental characteristics of Section 10 forbearance proceedings. These proposed rules would essentially convert forbearance petitions into adjudications rather than policy-making proceedings. As a result, the rules would prevent the Commission from exercising its forbearance authority as intended -- *i.e.*, with the flexibility necessary to act in the context of rapidly changing technology and competitive facts as well as constantly evolving law. Petitioners also appear to ignore the baseline obligations already applicable to the Commission when it engages in any kind of policy-making and which already address many of the concerns that Petitioners identify. Additionally, at least some of the proposed new rules would conflict directly with statutorily-required elements of Section 10 forbearance and are therefore legally prohibited.

Qwest does not object, in principle, to certain of Petitioners' proposed guidelines for protective orders.⁵ However, Qwest does not believe that these issues need be addressed through new procedural rules.

Finally, the Commission should, in no event, adopt rules that have retroactive effect -- *i.e.*, that have application to forbearance petitions already on file.

For all the reasons stated above, the Commission should not adopt the procedural rules proposed in the Covad, *et al.* Petition or any other new procedural rules in connection with Section 160(c) forbearance.

II. QWEST'S COMMENTS

A. The Covad, *et al.* Petition Rests On A Fundamentally Misguided View Of The Act.

The Covad, *et al.* Petition rests on a fundamentally misguided view of the Act -- specifically, it ignores the intended self-effectuating deregulatory design of the Act, generally, and of Section 10, specifically. Contrary to Petitioners' view of such petitions as an evil that must be harnessed or eliminated, forbearance petitions are an essential component in the Act's de-regulatory framework.

This de-regulatory design of the Act must be kept in mind when evaluating the proposals set forth in the Covad, *et al.* Petition. The legislative history of the 1996 Act indicates that the express underlying goal was to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to

⁵ As discussed below, Qwest opposes certain of the principles proposed by Petitioners regarding protective orders.

competition.”⁶ The 1996 Act’s purpose is described in the Act itself as “reduc[ing] regulation in order to . . . encourage the rapid deployment of new telecommunication technologies.”⁷ Section 10 (entitled “Competition in provision of telecommunications service”) and Section 11 (entitled “Regulatory reform”) further this de-regulatory design by affirmatively charging the Commission with eliminating unnecessary regulation on an ongoing basis.⁸ Section 10 requires the Commission to “forbear from applying any regulation or any provision” of the Act whenever it determines that the three criteria set forth in Section 10 are met.⁹ Section 11, in turn, requires that the Commission review all of its regulations every two years and “determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”¹⁰ Section 11 charges the Commission with repealing or modifying any regulation it determines “to be no longer necessary in the public interest.”¹¹

The forbearance petition procedure set forth in Section 10 is an integral component to this de-regulatory framework. Section 10(c) clearly anticipates that, due to workload, lack of

⁶ Joint Explanatory Statement of the Committee of Conference, attachment to Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement). *See also* House Rep. No. 204 (together with additional and dissenting views, to accompany H.R. 1555), 104th Cong., 1st Sess. 89 (1995) (“Given that the purpose of this legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a useful tool in ending unnecessary regulation.”). *See also* remarks of former Senator Larry Pressler (R-S.D.) on S. 652 (“. . . the legislation permits the FCC to forbear from regulating carriers when forbearance is in the public interest. This will allow the FCC to reduce the regulatory burdens on a carrier when competition develops. . .”). 141 Cong. Rec. S7881, S7887 (June 7, 1995).

⁷ Telecommunications Act of 1996, pmb., 110 Stat. at 56.

⁸ *See* 47 U.S.C. §§ 160 and 161.

⁹ 47 U.S.C. § 160(a).

¹⁰ 47 U.S.C. § 161(a)(2).

¹¹ 47 U.S.C. § 161(b).

awareness, or a variety of other potential causes, the Commission might not always aggressively fulfill its charge under Sections 10 and 11 to proactively eliminate unnecessary regulation. Thus, Section 10(c) grants carriers the ability to trigger the Commission's obligations in particular areas. By providing that such requests will be "deemed granted" if not denied within the designated statutory period, Congress clearly intended a procedure that would assure such requests received priority treatment.

Petitioners, by their proposed "procedural rules," would defeat this essential purpose of Section 10. Indeed, Petitioners make clear that their preferred result would be a repeal of the statute altogether.¹² Barring that, Petitioners propose rules that would convert what is intended to be a nimble tool of pro-active de-regulation into an inflexible and slow-moving proceeding resembling a formal complaint or other adjudicatory proceeding.

B. Petitioners Overstate The Impact Of Forbearance Petitions.

Petitioners also overstate the impact of forbearance petitions. Forbearance petitions have not usurped the Commission's other policy-making.

Since the passage of the 1996 Act, the Commission has exercised its Section 10 forbearance authority on numerous occasions, at times on the Commission's own initiative and at times in response to carrier petitions. The Commission first used forbearance when, in 1996, it ruled, on its own initiative, that non-dominant interexchange carriers were no longer required to file tariffs for interstate, domestic, interexchange services.¹³ Later, in the Commission's ongoing review of the need for Section 251 unbundled network element ("UNE") obligations, the

¹² Covad, *et al.* Petition at 5.

¹³ See *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730 (1996), *on recon.*, 12 FCC Rcd 15014 (1997), *on further recon.*, 14 FCC Rcd 6004 (1999).

Commission specifically directed carriers to address these issues through forbearance petitions on a market-by-market basis rather than in a rulemaking or other process.¹⁴ Ironically, it is these types of forbearance requests (*i.e.*, related to Section 251 UNE and related obligations) that have drawn the greatest criticism by parties such as Petitioners.¹⁵ Other notable areas of forbearance activity include petitions relating to dominant carrier regulation after Section 272 sunset in the competitive long distance marketplace,¹⁶ Title II regulation of next generation broadband services,¹⁷ and legacy BOC accounting and reporting obligations.¹⁸

¹⁴ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2556-57 ¶ 39 (2005) (“*Triennial Review Remand Order*”), *aff’d sub nom. Covad Communs Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“We also note that incumbent LECs remain free to seek forbearance from the application of our unbundling rules in specific geographic markets where they believe the aims of Section 251(c)(3) have been “fully implemented” and the other requirements for forbearance have been met. One incumbent LEC, Qwest, has already sought such relief in one geographic market, and we encourage other incumbent LECs to file similar petitions where appropriate.”).

¹⁵ *See, e.g.*, Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, filed Apr. 27, 2007 (“Qwest Denver, Minneapolis-St. Paul, Phoenix and Seattle Forbearance Petitions”); 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, filed June 21, 2004 (“Qwest Omaha Forbearance Petition”); Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, filed Sept. 6, 2006 (“Verizon Six MSA Petitions”).

¹⁶ *See* Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules as they Apply after Section 272 Sunset Pursuant to 47 U.S.C. § 160, WC Docket No. 05-333, filed Nov. 22, 2005 (“Qwest Section 272 Forbearance Petition”); Petition of the Verizon Local and Long Distance Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Certain Dominant Carrier Regulations for In-Region Interexchange Services, WC Docket No. 06-57, filed Feb. 28, 2006 (“Verizon Section 272 Forbearance Petition”); Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, WC Docket No. 06-120, filed June 2, 2006 (“AT&T Section 272 Forbearance Petition”). Notably, the AT&T Section 272 Forbearance Petition was addressed in both the *Section 272 Sunset Order* and also in a separate ruling. *See In the Matters of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate*

Affiliate Requirements of Section 64.1903 of the Commission's Rules, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) (“*Section 272 Sunset Order*”); *see also, In the Matter of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, Memorandum Opinion and Order, 22 FCC Rcd 16556 (2007). The Verizon Section 272 Forbearance Petition had been withdrawn earlier (in May of 2007), however the Commission applied the same framework to Verizon (as well as AT&T) to be “consistent with the Commission’s decision in the *Qwest Section 272 Sunset Forbearance Order*.” *Section 272 Sunset Order*, 22 FCC Rcd at 16442 ¶ 2.

¹⁷ *See* Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services, WC Docket No. 06-125, filed June 13, 2006, withdrawn Sept. 11, 2007, refiled Sept. 12, 2007 (“Qwest Title II Forbearance Petition”); Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry*, Rules with Respect to Their Broadband Services, WC Docket No. 04-440, filed Dec. 20, 2004 (“Verizon Title II Forbearance Petition”); Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109, filed May 22, 2006 (“ACS Title II Forbearance Petition”); Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125, filed July 13, 2006; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125, filed July 20, 2006 (collectively “AT&T/BellSouth Title II Forbearance Petitions”); Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of *Computer Inquiry* and Certain Title II Common-Carriage Requirements, WC Docket No. 06-147, filed July 26, 2006; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 06-147, filed Aug. 4, 2006 (collectively the “Embarq/Citizens Title II Forbearance Petitions”).

¹⁸ *See* Petition of Qwest Corporation for Forbearance from Enforcement of the Commission’s ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160, WC Docket No. 07-204, filed Sept. 13, 2007 (“Qwest ARMIS Forbearance Petition”); Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission’s ARMIS Reporting Requirements, WC Docket No. 07-139, filed June 8, 2007 (“AT&T ARMIS Forbearance Petition”); Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of ARMIS Reporting Requirements, WC Docket No. 07-204, filed Oct. 19, 2007; Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission’s Recordkeeping and Reporting Requirements, WC Docket No. 07-273, filed Nov. 26, 2007.

Even this brief overview confirms that forbearance has generally been used exactly as it was intended to be used. Regardless of what one thinks of the merits of the relevant petitions, these subject areas have been obvious candidates for Commission de-regulatory scrutiny.

Nor can it be said that forbearance has been used as a substitute for the Commission's other policy-making during this time. The sheer volume and significance of Commission activity outside of the forbearance context makes that fact self-evident. For example, the Commission has clearly performed the great majority of its significant policy-making during the last six years in non-forbearance proceedings.¹⁹ Meanwhile, contrary to the picture portrayed by

¹⁹ See, by way of example only, the *Triennial Review Remand Order* in note 14, *supra*, and the Commission's earlier *Triennial Review Order*, see *In the Matter of 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 (2003) ("*Triennial Review Order*"), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020 (2003); *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *aff'd sub nom. Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), *aff'd sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 207 (2007); *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006), Second Report and Order, 22 FCC Rcd 19633 (2007), pet for recon. pending; *In the Matter of United Power Line Council's Petition for*

Petitioners, the volume of forbearance activity did not increase materially during that time period.²⁰

Forbearance petitions have also rarely resulted in the controversial “deemed granted” result that occurred in connection with Verizon’s recent broadband forbearance petition.²¹

Instead, these petitions have more typically followed a routine process and either been approved or denied in whole or in part (or, in some cases, withdrawn) in the end.²²

Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 FCC Rcd 13281 (2006); the *Section 272 Sunset Order*, cited in note 16, *supra*; and *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

²⁰ By Qwest’s rough count, the number of petitions filed each year from 2002 to the present were as follows: 7 (2002); 18 (2003); 12 (2004); 9 (2005); 19 (2006); 13 (2007). These numbers, in fact, tend to overstate forbearance activity, particularly for the more recent years, given that many of the petitions included in this count were duplicative “me-too” petitions or, for the years 2006 and 2007, were the Verizon Six MSA Petitions and the Qwest Denver, Minneapolis-St. Paul, Phoenix and Seattle Forbearance Petitions where multiple petitions filed by Verizon and Qwest, respectively, addressed the same substantive issues for different geographic areas. See note 15, *supra*.

²¹ 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.

²² For example, in note 15, *supra*, the Qwest Omaha Forbearance Petition was granted in part and denied in part, see, *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007), whereas the Verizon Six MSA Petitions were recently denied, see *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 06-172, rel. Dec. 5, 2007 (“*Verizon Six MSA Petitions Order*”), *pet. for rev.* filed Jan. 14, 2008 (D.C. Cir. No. 08-1012). Also, the Qwest Section 272 Forbearance Petition cited in note 16, *supra*, was granted in part and denied in part, see, *In the Matter of Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207 (2007), while the Verizon Section 272 Forbearance Petition was withdrawn while the AT&T Section 272 Forbearance Petition was disposed of in a separate order, see 22 FCC Rcd 16556. The ACS Title II Forbearance Petition regarding broadband services, cited in note 17, *supra*, was granted subject to certain conditions and otherwise denied.

C. The Majority Of The Rules Proposed In The Covad, *et al.* Petition Are Unnecessary And Conflict With The Essential Statutory Characteristics Of Forbearance.

In this light, it is clear that the majority of the rules proposed in the Covad, *et al.* Petition are unnecessary and would directly conflict with explicit statutory requirements or otherwise undermine the fundamental characteristics of Section 10 forbearance. These proposed rules would essentially convert forbearance to an adjudicatory rather than a policy-making activity.

To begin with, Petitioners ignore the fact that the baseline obligations already applicable to the Commission when it engages in any kind of policy-making already address the concerns that Petitioners identify. Whenever it engages in policy-making, the Commission must negotiate issues like the need for up-to-date data and the input of third-parties, midstream developments in the law through other proceedings, pending appeals, last-minute *ex parte* filings, etc. The Commission has not found it necessary to adopt additional procedural rules to address these concerns in non-forbearance policy-making proceedings. It is therefore self-evident that the Commission's existing rules are also adequate when the Commission makes policy in forbearance proceedings.

Many of the proposed new rules also conflict directly with the statutory requirements of Section 10 forbearance and are therefore legally prohibited. For example, Petitioners effectively

Similarly, AT&T/BellSouth was granted substantial forbearance relief in *In the Matters of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) cited in note 17, *supra*, and the Embarq/Citizens Title II Forbearance Petitions cited in note 17, *supra*, were also granted with the same "substantial forbearance relief," see *In the Matter of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007).

propose the elimination of deemed granted forbearance when they suggest that the Commission require a written order in deemed granted situations.²³ The United States Court of Appeals for the D.C. Circuit has ruled that a deemed-granted forbearance is an Act of Congress thereby rendering a Commission order superfluous in that context.²⁴ Similarly, Petitioners propose that the Commission have the ability to unilaterally leave forbearance proceedings open past the deemed-granted deadline and/or conduct post-deadline activities to undo deemed granted forbearance relief in some circumstances.²⁵ These proposals are legally prohibited as they would effectively defeat the express deemed granted requirement set forth in Section 10.

Other proposed rules would also clearly undermine the fundamental characteristics of forbearance. For example, Petitioners propose a rule by which the Commission would be restricted from exercising its forbearance authority except through a rulemaking notice with a standard comment period.²⁶ Again, given that the Commission always has an ongoing burden to justify regulation and may even exercise its forbearance authority *sua sponte*, such a rule would unnecessarily restrict the Commission in this important area. As an example of why a standard comment period is necessary, Petitioners cite to the Commission's decision in the Fall of 2007 to notice Qwest's re-filed broadband forbearance petition with a seven-day comment period.²⁷ That

²³ Covad, *et al.* Petition at 32. As previously stated in filings with the Commission, Qwest believes that the Commission is already subject to a requirement that it issue a written order in context of decision granting or denying forbearance petitions in whole or in part. *See* Qwest's Opposition to Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440, filed Aug. 13, 2007 at 3 ("Section 160(c) requires a written order in the instance of Commission decision to 'grant or deny in whole or in part.'"). Therefore, no new procedural rule is required on that issue.

²⁴ *See Sprint Nextel v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), *pet. for reh'g denied* (Jan. 30, 2008, No. 06-1111).

²⁵ Covad, *et al.* Petition at 32-33.

²⁶ *Id.* at 11.

²⁷ *Id.* at 8, n.22.

proceeding is, in fact, a perfect example of why a standard comment period is not appropriate. In that instance, Qwest re-filed a petition that was identical to a prior Qwest petition that had been on file with the Commission for fifteen months, had been fully vetted during that time period and was identical in substance to petitions by ACS, AT&T, Embarq and Citizens that the Commission had either already acted on or which faced near-term deemed-granted deadlines. In those circumstances, a standard notice and comment period, which, for Petitioners would be a minimum of four months, is completely unnecessary and would only prevent the Commission from eliminating unnecessary regulation promptly as expressly required by the Act.

Numerous other rules proposed by Petitioners are similarly objectionable as they would essentially convert forbearance petitions to adjudications. For example, Petitioners propose rules requiring that forbearance petitions include all supporting evidence in their initial petitions with affidavit support for each supporting fact and that forbearance petitions be complete as filed (*i.e.*, that petitioning parties must include every conceivable fact and argument supporting the requested relief in their initial petition).²⁸ Again, as Petitioners themselves concede,²⁹ the Commission's forbearance authority is a policy-making as opposed to an adjudicatory authority. Commission formal complaint procedure, from which these proposed rules are drawn, is thus a poor model. In fact, the Commission's formal complaint rules, themselves, already impose a far more stringent set of pleading requirements than is typically even required in civil litigation. For example, the Commission's rules require fact pleading as opposed to the notice pleading typically required in state and federal civil litigation. Whatever may be the justification for such extreme pleading requirements in the context of Commission formal complaint proceedings, there is no basis for extending such requirements to a Commission policy-making function. Nor

²⁸ *Id.* at 13-18.

²⁹ *Id.* at 8.

is a forbearance petition remotely similar to a Section 271 application, where the statute explicitly states detailed guidelines for the determination of precisely-defined factual findings.³⁰ In the context of a forbearance petition, a petitioner should only be required to articulate a good faith, non-frivolous argument that the forbearance criteria are met for a given regulation.

There is also a fundamental practical problem with fact pleading, affidavit support and complete-as-filed requirements in the forbearance context. Third-party data is often critical to a competitive analysis and therefore to any Commission review of a forbearance petition. However, parties filing forbearance petitions have a limited ability to obtain third-party data -- much of which is typically confidential and proprietary -- prior to filing a petition. For example, in a Section 251 forbearance petition, a filing party often does not have access to the data that is central to a granular geographic quantification of the scope of telecommunications competition. Thus, it is a practical impossibility for petitioning parties to include, in their initial petition, every conceivable fact with affidavit support as well as every conceivable argument supporting their requested relief. It is therefore the ultimate irony and completely self-serving that Petitioners have requested the Commission require the forbearance petitions to be complete as filed.

Similarly, Petitioners' proposal that the party filing a forbearance petition have the ultimate burden of proof seeks to turn the intent of Section 10 on its head. At the point that a party filing a forbearance petition has stated a non-frivolous basis for forbearance, there is effectively a presumption in favor of de-regulation and the burden shifts to the Commission to justify the continuation of the regulation at issue. This is the genius of the 1996 Act's de-regulatory framework. A former Commission chairman described the Commission's statutory obligation to forbear under Section 10 as follows:

³⁰ See 47 U.S.C. § 271.

I believe that under the congressional forbearance scheme, the Commission has an obligation to validate or justify continued regulation in light of competitive conditions and cannot discharge that burden by shifting complete responsibility to petitioners. It is becoming a pattern at this Commission to set its own malleable standards of proof in forbearance cases and then sit back and summarily dismiss petitions for lack of proof. I believe Section 10 requires more. It requires the Commission to come down from on high and itself accept responsibility for demonstrating with some rigor why continued regulation is justified. It requires us to get our hands dirty.³¹

The Commission has a standing responsibility to eliminate any law or regulation for which the Section 10 criteria are met. A forbearance petition simply triggers a Commission obligation to exercise that responsibility in a specific context and sets an outside date for the Commission to act.

Other miscellaneous procedural rules proposed by Petitioners are equally inappropriate in the forbearance context. These include Petitioners' proposals that the Commission specify standard timelines for a Commission initial review of petitions and for the filing of motions to dismiss, that the Commission be required to obtain the input of states in connection with each petition on a standard time table and before any further action is taken on a forbearance request, and that the Commission set special rules governing the filing and service of *ex partes* in forbearance proceedings. Again, the Commission already has the ability in forbearance proceedings, as it does in other policy-making proceedings, to avert any of the purported concerns given by Petitioners for these rules. Petitioners imply a dark conspiracy by parties who file forbearance petitions, suggesting that those parties seek to delay action on their petitions. The reality is that filing parties would always prefer more immediate action on their petitions and are subject, like all interested parties, to the priorities of the Commission when it comes to how their petitions are processed. The Commission already has the authority to initiate early requests

³¹ See Dissenting Statement of Commissioner Michael K. Powell, rel. Jan. 29, 1999 at 4 (footnote omitted) to the December 31, 1998 Memorandum Opinion and Order, 14 FCC Rcd 391 (1998).

for data or other input from states or other third parties. The Commission is also able to address concerns about late *ex partes*. The Commission must deal with these issues in all of its policy-making activities and is in the best position to determine how it should conduct such activities in the context of a given forbearance petition.³² The process will not be helped by make-work procedural requirements that only make the Commission's job more difficult.

Nor should the Commission adopt the new rules proposed by Petitioners for Section 251 and Section 271 forbearance. Petitioners propose that the Commission require that petitioners seeking forbearance from Sections 251 and 271 provide, presumably in their initial petitions, supporting data at the wire center level. Petitioners also propose that the Commission adopt a rule requiring that the Commission specifically invite states to report to the Commission on the potential effects of a given Section 251 or 271 forbearance request in their respective states. Again, the Commission has directed carriers to address Section 251 issues through forbearance petitions on a market-by-market basis. In some rulings dealing with Section 251 obligations, the Commission has looked at wire center level data. However, Qwest does not believe that it is at all clear that wire center data should or will be required in all instances. Qwest believes it is more prudent for the Commission to maintain the flexibility to deal with the merits of each petition on a case-by-case basis.

D. Certain Of Petitioners' Proposed Principles Regarding Protective Orders Are Acceptable, But New Procedural Rules Are Not Needed.

Certain of the principles underlying the Petitioners' proposed rules regarding Commission protective orders are acceptable. Unlike the proposed rules described above, these

³² See *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006). (reviewing Commission finding that an SBC forbearance petition lacked adequate specificity as to the regulations covered, remanded with instructions that the Commission reconcile its finding with the specificity standard it has followed in prior non-forbearance policy-making proceedings.)

are arguably consistent with the legal requirements of Section 10 forbearance and with good policy-making and Qwest does not object to them in principle. Specifically, Qwest does not oppose a guideline that the Commission issue protective orders within twenty-one days of the filing of a forbearance petition. In fact, this is essentially consistent with current Commission practice. Qwest also would not oppose the inclusion in protective orders of a requirement that documents be made available in searchable electronic format. However, there is no need for new rules to effect these guidelines. The Commission is already free to follow such guidelines when it issues protective orders.

Qwest, on the other hand, opposes other principles regarding protective orders that are proposed by Petitioners for inclusion in new procedural rules. Qwest opposes the inclusion of a protective order provision allowing that confidential or highly-confidential materials submitted in one forbearance petition may be used subject to the same restrictions in another Commission forbearance proceeding where the petitioning party seeks relief from the same rules and/or statutory provisions. The Commission has previously indicated that there may be good reason to avoid such provisions.³³ Qwest also opposes any rule that would eliminate from the Commission's standard protective orders a provision that prohibits copying for certain highly-sensitive confidential information. This requirement is appropriate in certain circumstances and the Commission is already able to adequately police conduct so that such a provision does not get abused. Qwest also opposes a principle that would allow that confidential or highly-confidential materials submitted in one forbearance petition may be used in "related" state proceedings. Parties are already free in such state proceedings to obtain the materials needed subject to the applicable rules of procedure.

³³ *Verizon Six MSA Petitions Order*, n.42.

E. The Commission Should, In No Event, Adopt Procedural Rules That Have Retroactive Effect.

In no event should the Commission adopt Petitioners' proposal that any new procedural rules adopted by the Commission be applied retroactively to forbearance petitions already on file at the time such rules are adopted. It would be fundamentally unfair to subject forbearance petitions to new procedural rules that did not exist when the petitions were filed with the Commission. It would also clearly be legally improper if new procedural rules somehow resulted in the effect of extending the statutory deemed-granted date of forbearance petitions already on file.

III. CONCLUSION

For the reasons stated above, Qwest requests that the Commission take the action described herein.

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March 7, 2008

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 07-267; 2) served via e-mail on the Competition Policy Division, Wireline Competition Bureau at cpdcopies@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bepiweb.com.

/s/Richard Grozier

March 7, 2008