

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Petition to Establish Procedural Requirements  
to Govern Proceedings for Forbearance Under  
Section 10 of the Communications Act of  
1934, as Amended

WC Docket No. 07-267

**REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS**

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**INTRODUCTION AND SUMMARY**

Consistent with Congress's intent in enacting the Telecommunications Act of 1996,<sup>2</sup> forbearance has proven to be a valuable tool that has enabled parties to identify, and the Commission to cease enforcing, regulatory obligations that no longer are in the public interest and that, in fact, affirmatively harm competition and consumers.<sup>3</sup> But in the face of rapid technological changes that continue to revolutionize the manner in which companies provide communications services to all types of customers, the Commission must take steps to improve its procedures for addressing forbearance petitions so that forbearance can keep pace with marketplace changes.

First, consistent with Congress's intent that Section 10 would spur the Commission "to eliminate outdated regulations . . . in a timely manner,"<sup>4</sup> the Commission should reset parties' expectations about proceedings on forbearance petitions by announcing that it will rule on such

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<sup>1</sup> In addition to Verizon Wireless, the Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. §§ 151 *et seq.*).

<sup>3</sup> See Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 104-230, at 113 (1996) (explaining that the 1996 Act adopts a "pro-competitive, de-regulatory national policy framework") ("Conf. Rep.").

<sup>4</sup> 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole).

petitions within six months, rather than taking the full fifteen months — the maximum allowed under Section 10(c) — as it currently does even on relatively uncontroversial petitions. Second, to enable the Commission to act within that period on a complete record, containing the best available data, the Commission should use its authority to collect probative and relevant data from third parties, and it should ensure that third parties provide such data promptly and in a complete and accurate manner. Third, because a number of parties have recently filed petitions for rulemaking or declaratory ruling disguised as forbearance petitions, the Commission should deny such petitions promptly, rather than forcing the industry and its staff to expend resources on addressing them.

Although there are steps the Commission should take that would improve significantly its handling of forbearance petitions, those are not what many of the commenters here seek. Instead, they seek to prevent the Commission from granting — or even reaching the merits of — forbearance petitions. Indeed, their comments make clear that their real complaint is with recent Commission decisions granting forbearance petitions. But this docket is about the “adoption of procedural rules to govern the Commission’s consideration of petitions,” not about revisiting past rulings on forbearance petitions or changing the Commission’s *substantive* standard for forbearance.<sup>5</sup> Moreover, the Commission already rejected the commenters’ substantive arguments in granting those petitions, and the courts have uniformly upheld the Commission’s rulings. These commenters offer no basis for the Commission to reverse course now, and many of their proposed rules run headlong into the text of Section 10 and judicial decisions construing that section.

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<sup>5</sup> Notice of Proposed Rulemaking, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 22 FCC Rcd 21212, ¶ 1 (2007); see Verizon Comments at 37-38.

Nor should the Commission adopt these commenters' various rule proposals, which have the clear purpose of erecting multiple procedural roadblocks and traps designed to delay, or prevent, the Commission from considering petitions on the merits and on a complete record. Although these commenters plainly seek to preserve legacy regulations that confer benefits on a narrow class of companies, Section 10 makes clear that Congress intended for forbearance to be focused on benefits to "consumers" and "competition," not to individual competitors. 47 U.S.C. § 160(a)(2), (b). In this regard, Section 10 embodies the basic antitrust principle that government regulation of the marketplace is "for the protection of *competition*, not *competitors*."<sup>6</sup> Forcing petitioners to run a gauntlet of procedural traps is directly contrary to that intent. Moreover, all of the commenters' alleged concerns would be eliminated if the Commission were to collect the data it needs from third parties and to rule more quickly on forbearance petitions, so the Commission has a complete record, and data submitted with the petition do not grow stale.

## DISCUSSION

### I. THE COMMISSION'S FORBEARANCE PROCEDURES MUST KEEP PACE WITH RAPIDLY CHANGING TECHNOLOGY AND MARKET CONDITIONS

Forbearance is a "critical" part of Congress's overall effort to ensure that legacy regulations, designed for a "one-wire," wireline world, do not stand in the way of the development of competition and the deployment of new and innovative services.<sup>7</sup> The Commission's exercise of its forbearance authority, moreover, has greatly benefited consumers and the economy, by directly furthering broadband deployment and enabling increased competition. *See* Verizon Comments at 10-11. But the Commission must take steps to improve

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<sup>6</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted).

<sup>7</sup> *AT&T Inc. v. FCC*, 452 F.3d 830, 832, 836 (D.C. Cir. 2006).

its handling of forbearance petitions so that forbearance can keep pace with the intermodal competition — from cable companies, fixed and mobile wireless providers, over-the-top Voice-over-Internet-Protocol providers, and others — that continues to revolutionize the communications services these companies provide to customers of all shapes and sizes. *See* Verizon Comments at 5-9.

*First*, forbearance proceedings routinely take the full fifteen months available under the statute — even for relatively uncontroversial petitions — which is far too long given the pace of change in the industry and is inconsistent with Congress’s intent that the Commission grant forbearance whenever it determines that the statutory criteria are satisfied. *See* 47 U.S.C. § 160(a). The Commission, therefore, should use this proceeding to reset parties’ expectations about the timing of the forbearance process. The Commission should announce that it will rule on the merits of forbearance petitions well before the statutory deadline — indeed, within six months of when a petition is filed — and that it will extend the statutory deadline only in extraordinary cases. *See* Verizon Comments at 13-14.

If the Commission were to decide forbearance petitions within six months of filing, it would eliminate many of the commenters’ supposed concerns about the process. A shorter timeframe would decrease the chance that data submitted in the petition grow stale before the Commission rules, so parties would have less need to submit *ex parte* filings to update the data in the record, eliminating supposed concerns about late-filed data.<sup>8</sup> There would also be little chance of the Commission failing to vote — or to release a written order justifying that vote —

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<sup>8</sup> *See, e.g.*, City of Philadelphia Comments at 2; Time Warner Comments at 9-10; Access Point *et al.* Comments at 19-20; Covad Comments at 4.

within the statutory period, eliminating concerns about petitions being deemed granted by operation of law.<sup>9</sup>

*Second*, the Commission must adopt procedures that recognize that — although petitioners have every incentive to support their petitions with the best data available to them — petitioners will not always have access to all relevant data. Instead, such data — about the extent of third-party networks and third-party success in winning customers — often are in the hands of others. Those third parties, moreover, may have an incentive not to provide such data to the Commission in the hope that refusing to do so will lead the Commission to deny the forbearance petition, thereby preserving their regulatory advantages.

The Commission, therefore, should take steps to collect relevant data from third parties, should do so soon after a petition is filed, and should ensure that those third parties provide the data the Commission seeks. *See* Verizon Comments at 14-17; ACS of Anchorage Comments at 4. No commenter disputes the Commission’s authority to collect information from third parties.<sup>10</sup> Various provisions of the Communications Act, including §§ 154(i),<sup>11</sup> 403,<sup>12</sup> and

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<sup>9</sup> *See, e.g.*, Access Point *et al.* Comments at 45; Time Warner Comments at 14.

<sup>10</sup> *See, e.g.*, Time Warner Comments at 24 (noting that the FCC has asked parties to provide data relevant to forbearance petitions); ACS of Anchorage Comments at 4 (urging the Commission to “adopt a mechanism for requiring competitive providers to submit market data”).

<sup>11</sup> 47 U.S.C. § 154(i) (authorizing the Commission to perform “any and all acts . . . as may be necessary in the execution of its functions”); *id.* § 154(j) (authorizing the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice”).

<sup>12</sup> *Id.* § 403 (“The Commission shall have full authority and power at any time to institute an inquiry . . . relating to the enforcement of any of the provisions of” the Act).

409,<sup>13</sup> all authorize the Commission to collect information necessary to carrying out its duties under the Act, which include ruling on forbearance petitions.<sup>14</sup>

In order to create a full record, the Commission should encourage petitioners to identify, in their petitions, third parties likely to have probative information. The Commission should then promptly collect such data from those third parties. The Commission has ample authority to compel a recalcitrant third party to provide the data, including through the use of citations.<sup>15</sup> In all events, were a third party to fail to submit data in its possession, the Commission should make clear that it will draw “an inference that the evidence is unfavorable to” the third party and, in fact, supports the forbearance petition.<sup>16</sup>

*Third*, the Commission should also conduct an initial screening of forbearance petitions to ensure that petitioners are actually seeking forbearance from existing regulations that apply to them, and not the establishment of new regulations on others. *See* Verizon Comments at 17-18. The Commission has properly rejected as “procedurally defective” alleged forbearance petitions that, in fact, seek to create new regulatory obligations.<sup>17</sup> The Commission should quickly deny

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<sup>13</sup> *Id.* § 409(e) (“[T]he Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.”)

<sup>14</sup> *See* Notice of Apparent Liability for Forfeiture and Order, *1st Source Information Specialists, Apparent Liability for Forfeiture*, 21 FCC Rcd 8193, ¶¶ 8-9 (2006) (“*1st Source Forfeiture Order*”) (delineating the Commission’s subpoena power).

<sup>15</sup> *See* 47 U.S.C. § 503(b)(5); *see, e.g.*, Letter from Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, to Ronald R. DeLia, Security Outsourcing Solutions, Inc., 22 FCC Rcd 7714, 7714 (2007) (issuing a citation for “refusal to comply with the Commission’s order requiring the production of documents and information”).

<sup>16</sup> *International Union v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

<sup>17</sup> *See* Memorandum Opinion and Order, *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, 21 FCC Rcd 11125, ¶¶ 7-9 (2006); *see also* Memorandum Opinion and Order, *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118, ¶¶ 11-12 (2007) (noting arguments that the petition is “procedurally

or dismiss petitions that actually seek a rulemaking or a declaratory ruling, in order to conserve Commission and industry resources and to direct these resources toward potentially meritorious petitions.

## **II. IN ADOPTING PROCEDURAL RULES, THE COMMISSION IS CONSTRAINED BY THE STATUTE**

A number of commenters are using this proceeding to air yet again their disagreement with past Commission rulings granting forbearance petitions and court rulings upholding those decisions. The Commission correctly rejected their claims in its orders, and the commenters' claims fared no better with the courts. Those claims do no better this time around. Indeed, these commenters' dissatisfaction with the Commission's past rulings led them to propose numerous rules that are flatly contrary to the text of Section 10 and judicial precedent. The Commission should reject all of these unlawful proposals.

### **A. The Commission Cannot Refuse To Consider *Bona Fide* Forbearance Petitions**

Commenters offer a variety of ways for the Commission to reject out-of-hand petitions that actually seek forbearance from the enforcement of existing regulations and that make out a *prima facie* case in support of forbearance. None is lawful.

For example, the lead proposal from one group of commenters is that the Commission forbear from the provision of Section 10(c) that allows carriers to submit forbearance petitions.<sup>18</sup> The Commission has no such authority. Section 10 permits the Commission to forbear from "applying any regulation or provision of this Act to a telecommunications carrier or a telecommunications service." 47 U.S.C. § 160(a). But carriers' right to submit petitions, which

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defective" for seeking new regulation, but declining to reach that issue because the Commission "den[ied] Core's forbearance petition on other grounds").

<sup>18</sup> See Access Point *et al.* Comments at 10.

the Commission must address within a specified period of time, is not a rule that the Commission “appl[ies] . . . to a telecommunications carrier.” *Id.* Nor is it a provision that the Commission “enforce[s]” at all. *Id.* § 160(a)(1)-(2). Instead, it is a right Congress granted directly to carriers. The Commission cannot shut its doors to such petitions, as some commenters propose.

Nor can the Commission refuse to consider a petition for forbearance simply because a rulemaking proceeding or judicial review on the subject matter is pending.<sup>19</sup> As an initial matter, Section 10 mandates that the Commission “*shall* forbear” whenever certain criteria are met, and provides no exception for the pendency of another proceeding raising similar issues. 47 U.S.C. § 160(a) (emphasis added).<sup>20</sup> In any event, the courts have already rejected the same claim, reversing the Commission for adopting a similar approach. In *AT&T Corp. v. FCC*, the court made clear that “§ 10 remains a viable and independent avenue of appeal,” notwithstanding the “availability of . . . an alternative route” to regulatory relief.<sup>21</sup> In language equally applicable to this proposal, the court confirmed that the existence of another proceeding “does not diminish the Commission’s responsibility to fully consider petitions under § 10.”<sup>22</sup>

Equally unlawful are proposals that would allow the Commission to prohibit carriers from filing so-called repetitious petitions for three years absent special permission from the Commission.<sup>23</sup> Even aside from the fact that three years is a competitive lifetime given the rapid pace of change in today’s marketplace, nothing in Section 10 permits the Commission to refuse to consider whether the forbearance criteria are satisfied *today*, simply because the Commission

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<sup>19</sup> See, e.g., Access Point *et al.* Comments at 8; NASUCA Comments at 26-27.

<sup>20</sup> See also *AT&T Inc.*, 452 F.3d at 835.

<sup>21</sup> *AT&T Corp. v. FCC*, 236 F.3d 729, 731, 738 (D.C. Cir. 2001).

<sup>22</sup> *Id.* at 738.

<sup>23</sup> See Access Point *et al.* Comments at 9.

found that they were not satisfied based on older (or incomplete) evidence. Nor is there any history of carriers filing carbon copy petitions, hoping to elicit a different result. Some commenters take issue with Verizon's recent forbearance petition specific to Rhode Island as a "repeat" of an earlier petition the Commission denied.<sup>24</sup> But even these commenters acknowledge that Verizon's new petition contains "updated information."<sup>25</sup> And the Commission, in denying Verizon's earlier petition, made clear that the Commission was open to granting "future relief" on a "showing of a more competitive environment."<sup>26</sup> Although Verizon is challenging the Commission's order denying the earlier petition, there can be no serious dispute that Verizon's new petition shows an even more competitive environment, demonstrating that forbearance is warranted.

**B. The Commission Cannot Tinker With the Statutory Deadline**

The "very purpose" of Congress's enactment of Section 10(c) was to "force the Commission to act within the statutory deadline" on a forbearance petition, regardless of whether "it finds the statutory deadline inconvenient."<sup>27</sup> Nonetheless, some commenters propose that the Commission invent ways to extend the statutory deadline. None is lawful.

*First*, Congress provided explicit guidance on when the statutory clock starts running: the Commission has one year "after the Commission *receives*" a forbearance petition, to deny the petition for the reasons set forth in the statute, or it "shall be deemed granted." 47 U.S.C. § 160(c) (emphasis added). Although the Commission could perhaps by regulation specify a

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<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> Memorandum Opinion and Order, *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*, 22 FCC Rcd 21293, ¶ 36 (2007).

<sup>27</sup> *AT&T Inc.*, 452 F.3d at 835-36.

Commission office to receive the petition or determine that a petition is received only when the petition reaches that office,<sup>28</sup> it could not “interpret” the word “receives” to mean publishing notice in the Federal Register or the Commission’s Daily Digest, as some propose, as that interpretation is flatly inconsistent with the ordinary meaning of the term.<sup>29</sup> Nor could the Commission interpose, consistent with the plain language of the statute, a “pre-filing” requirement that petitioners provide 60 days’ advance notice before actually filing the petition.<sup>30</sup> There is no statutory basis for such a proposal, which likewise would confer on the Commission discretion over when the statutory clock starts running, even though Congress gave the Commission no such discretion.

*Second*, a number of commenters propose that the Commission should “restart the clock” if the petitioner submits additional data after filing its petition, thereby denying the initial petition.<sup>31</sup> Congress, however, spoke not only to how the statutory period starts, but also to how it ends: a petition “shall be deemed granted if the Commission does not deny [it] *for failure to meet the requirements for forbearance*” under Section 10(a). 47 U.S.C. § 160(c) (emphasis added). A party’s submission of additional evidence in order to respond to commenters’ opposition to the petition or to update data that have grown stale during the course of a year- or fifteen-month-long proceeding does not provide a basis for denying a petition under the statutory standard. Indeed, when the Commission attempted to restart the clock in exactly the way these commenters suggest, the courts reversed its decision. After Verizon filed an *ex parte* clarifying a pending petition in light of Commission decisions in other dockets that granted some of the relief

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<sup>28</sup> Cf. 47 C.F.R. § 1.13(a)(1) (defining the term “receives” in 28 U.S.C. § 2112(a)(1)).

<sup>29</sup> See PA PUC Comments at 12.

<sup>30</sup> See NASUCA Comments at 28.

<sup>31</sup> See, e.g., Access Point *et al.* Comments at 26-27; California PUC Comments at 5-6; Columbia Capital Comments at 6; Missouri PSC Comments at 4; NARUC Comments at 5.

Verizon sought through forbearance, the Commission treated Verizon’s *ex parte* as a “new forbearance petition,” restarted the clock on that petition, and issued an order denying Verizon’s initial petition.<sup>32</sup> The court found that the Commission’s decision was “arbitrary and capricious” because Verizon’s submission of the clarification did not constitute a “failure to meet the requirements for forbearance” under Section 10(c) allowing the Commission to deny the initial petition, and in effect restarting the clock on Verizon’s forbearance request.<sup>33</sup>

**C. The Commission Cannot Alter the Statutory Criteria for Forbearance**

Reflecting disagreement with the Commission’s recent decisions granting forbearance petitions, some commenters propose rules that would require petitioners to submit certain specific kinds of evidence or that would require the Commission to make certain kinds of findings — namely, different evidence and different findings than those the Commission found sufficient to grant forbearance in decisions the courts have upheld. Even aside from the fact that this docket is designed to establish *procedural* rules, not substantive ones, these commenters provide no basis for the Commission to reverse course. Indeed, doing so in the manner they suggest would conflict directly with Congress’s purpose in adopting Section 10 as part of a “pro-competitive, de-regulatory national policy framework,”<sup>34</sup> as well as with judicial precedent construing that section.

*First*, some commenters suggest that the Commission require petitioners to propose “specific product and geographic markets to be analyzed,” to provide data on “market share” and the “concentration of the market,” as well as “market structure,” and “elasticity of supply and

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<sup>32</sup> *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1232 (D.C. Cir. 2004).

<sup>33</sup> *Id.* at 1235.

<sup>34</sup> Conf. Rep. at 113.

demand,” as well as a “substantial analysis of the wholesale market.”<sup>35</sup> The Commission previously has declined to require a rigid mode of analysis in ruling on forbearance petitions, and judicial precedent confirms that Section 10 “imposes no particular mode of market analysis or level of geographic rigor.”<sup>36</sup> The court explained that the forbearance statute “is silent about how to determine when [forbearance] is appropriate” and, therefore, the Commission “reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances.”<sup>37</sup> Indeed, such inflexible rules would restrict the Commission’s ability to reach the merits of forbearance petitions and to make decisions in the public interest. Instead, parties must be permitted to present their case for forbearance using the arguments and evidence they believe are most persuasive, and the Commission must remain free to apply an appropriate analysis to the petition and the rules at issue.

*Second*, for similar reasons, the Commission should reject proposals that would dictate that carriers seeking forbearance from portions of §§ 251 or 271 include data in their petitions at the wire-center level.<sup>38</sup> Although the Commission has considered wire-center level data in some past forbearance proceedings,<sup>39</sup> there is no reason for the Commission to constrain itself to consider such data in every § 251 or § 271 forbearance proceeding. Indeed, market realities

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<sup>35</sup> Time Warner Comments at 25.

<sup>36</sup> *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006).

<sup>37</sup> *Id.*

<sup>38</sup> *See, e.g.*, NASUCA Comments at 14-15; US SBA Comments at 8-9.

<sup>39</sup> *See, e.g.*, Memorandum Opinion and Order, *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*, 22 FCC Rcd 1958, ¶ 16 (2007).

might dictate the use of less granular data, particularly when petitioners are seeking forbearance with respect to a broader geographic area.<sup>40</sup>

*Third*, equally unlawful are proposals that would require the petitioner to demonstrate empirically that “market[s] will actually become more competitive as a result of forbearance,” and that would preclude the Commission from exercising its expertise to make predictive judgments about the competitive effect of granting forbearance.<sup>41</sup> As an initial matter, these commenters’ view that only empirical evidence that competition will increase can suffice in making the public interest determination — and that the Commission’s predictive judgments “are clearly insufficient”<sup>42</sup> — ignores the Commission’s expert role and flies in the face of judicial precedent. The D.C. Circuit has repeatedly stressed, in reviewing Commission decisions on forbearance petitions, that it “is not for th[e] court to second-guess” the Commission’s conclusions about how the marketplace is likely to develop.<sup>43</sup> The D.C. Circuit also noted that such “predictive judgments” regarding whether forbearance is warranted “are entitled to *particularly deferential* review.”<sup>44</sup> Indeed, the D.C. Circuit found “no reason to disturb the Commission’s predictive judgment”<sup>45</sup> in granting forbearance to Qwest in portions of the Omaha MSA, rejecting the same arguments these commenters press again here.

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<sup>40</sup> The Commission should also reject proposals to preclude petitioners’ submission of E911 data based on purported claims that submitting such data violates Section 222(b). *See, e.g.,* Access Point *et al.* Comments at 38. Verizon has previously refuted such claims, and the real purpose of such proposals is to hide relevant facts that the Commission needs to evaluate forbearance petitions. *See* Verizon’s Opp’n to Mot. to Dismiss at 3-8, *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 (FCC filed Oct. 30, 2006). Of course, this evidence is all the more essential until such time as the Commission effectively mandates third parties to produce the probative evidence in their possession.

<sup>41</sup> Time Warner Comments at 25 (emphasis omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *In re Core Communications, Inc.*, 455 F.3d 267, 283 (D.C. Cir. 2006).

<sup>44</sup> *EarthLink*, 462 F.3d at 12 (internal quotation marks omitted).

<sup>45</sup> *Qwest Corp. v. FCC*, 482 F.3d 471, 480 (D.C. Cir. 2007).

In any event, these commenters' proposals conflict with Section 10. Congress, to be sure, required the Commission to evaluate whether forbearance is in the "public interest," and directed the Commission to consider "whether forbearance . . . will promote competitive market conditions" and "enhance competition" as part of that public interest analysis. 47 U.S.C. § 160(a)(3), (b). But Congress also made clear that a finding that forbearance will increase competition "may be the basis for a Commission finding that forbearance is in the public interest." *Id.* § 160(b) (emphasis added). Congress, therefore, gave the Commission discretion to determine how much weight to give to the effect of forbearance on competition in its public interest analysis, and enabled the Commission to find that forbearance is in the public interest and to grant a forbearance petition even absent a finding that forbearance will increase competition.

**D. The Commission Cannot Rule on a Petition After It Has Been Granted by Operation of Law**

Despite the fact that only four petitions — out of more than 100 filed — have been deemed granted by operation of law, commenters propose a number of rules to address such situations. If the Commission ruled on forbearance petitions within six months of filing, these concerns would disappear. In any event, the Commission must reject these proposals, which are contrary to Congress's decision to remove in a timely basis regulations that have outlived their usefulness.<sup>46</sup>

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<sup>46</sup> Indeed, the Commission recently informed the D.C. Circuit that "Congress expected" that the "petition driven process" that § 10 creates would "spur the Commission 'to eliminate outdated regulations, and to do so in a timely manner,'" by "'requir[ing] speedy action on . . . petitions for forbearance.'" Brief for the FCC at 4, *Sprint-Nextel Corp. v. FCC*, Nos. 06-1111, *et al.* (D.C. Cir. July 5, 2007) (quoting 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole) and 142 Cong. Rec. S700 (Feb. 1, 1996) (remarks of Sen. Burns) (omission in original)).

*First*, some commenters urge the Commission to issue a written order even after a petition has been deemed granted by operation of law.<sup>47</sup> But Congress provided that any Commission action on a forbearance petition must occur within the one-year (or, at most, fifteen-month) statutory period, or the petition “shall be deemed granted.” 47 U.S.C. § 160(c). As the court recently made clear in *Sprint Nextel*, in the case of a petition deemed granted by operation of law, “Congress, not the Commission, ‘granted’ [the] forbearance petition.”<sup>48</sup> Therefore, there is no Commission decision to explain. Nor could the Commission use such a belatedly issued order as a basis to deny a petition, in whole or in part, that already was deemed granted by operation of law. That is because, once a petition is “deemed granted,” it is no longer pending before the Commission, and the Commission lacks the authority to adopt an order ruling on the petition.<sup>49</sup>

*Second*, Congress made clear that a petition is deemed granted unless the Commission acts to “deny” it. 47 U.S.C. § 160(c). Some commenters urge the Commission to interpret “deny” in this context to include a deadlocked vote.<sup>50</sup> But the Commission cannot reinterpret “deny” to mean any Commission action that does not result in a grant of the forbearance petition. Congress required the Commission, when presented with a forbearance petition, to determine as a Commission that enforcement of the statutory provisions and regulations at issue is warranted and can be justified under the specific criteria Congress set forth in Section 10(a) and (b), which are comparable to the criteria the Commission applies under § 201(b) when determining whether

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<sup>47</sup> See, e.g., Access Point *et al.* Comments at 45; NASUCA Comments at 23-24.

<sup>48</sup> *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

<sup>49</sup> See *Tri-State Bancorporation, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 524 F.2d 562, 564, 566-68 (7th Cir. 1975) (vacating agency order purporting to deny an application that had been deemed granted); see also *North Lawndale Econ. Dev. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 27 (7th Cir. 1977) (same).

<sup>50</sup> Time Warner Comments at 27.

to promulgate regulations in the first place. If a majority of the Commission will not — or cannot — make such a finding, forbearance occurs by congressional decision and operation of law. Indeed, the D.C. Circuit recently confirmed that “[t]ies . . . do not result in Commission action,” because the Commission “acts by majority vote,” consistent with the “almost universally accepted common-law rule that only a majority of a collective body is empowered to act for the body.”<sup>51</sup>

### **III. THE COMMISSION SHOULD REJECT PROPOSED RULES DESIGNED TO INTRODUCE PROCEDURAL ROADBLOCKS IN FORBEARANCE PROCEEDINGS**

Although commenters that support the CLEC Petitioners offer a handful of proposed rules that would result in marginal improvements to the forbearance process — such as creating a web page collecting forbearance petitions and Commission protective orders and substantive orders on those petitions<sup>52</sup> — the overwhelming majority of these commenters’ proposed rules seek to erect procedural roadblocks with the intent of making it more difficult for the Commission to grant forbearance from outdated and unnecessary regulations. The Commission should reject such efforts to prevent its prompt and thorough consideration of whether forbearance is warranted. These commenters’ proposals, moreover, largely mirror those of the CLEC Petitioners, which Verizon addressed in its opening comments. *See* Verizon Comments at 27-41.

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<sup>51</sup> *Sprint Nextel*, 508 F.3d at 1132 (internal quotation marks omitted). As the Commission explained to the D.C. Circuit, *In re Radio-Television News Directors Association*, No. 97-1528, 1998 U.S. App. LEXIS 13041 (D.C. Cir. May 22, 1998) (“*RTNDA*”) on which these commenters rely (Time Warner Comments at 27), is not controlling precedent and is not on point. *See* Brief for the FCC at 30, 31, *Sprint-Nextel Corp. v. FCC*, Nos. 06-1111, *et al.* (D.C. Cir. July 5, 2007) (explaining that the D.C. Circuit “issued the *RTNDA* order in response to an extraordinary set of circumstances” and that “*RTNDA* did not . . . otherwise alter the traditional rule that the FCC acts only by majority vote”).

<sup>52</sup> Missouri PSC Comments at 7; Covad Comments at 10.

1. Many commenters propose long pleading cycles with extensive time for filing of motions to dismiss and other procedural wrangling.<sup>53</sup> Such proposals serve no purpose other than to delay Commission action on the merits or to lead the Commission to deny potentially meritorious petitions for purported procedural flaws. *See* Verizon Comments at 28-29. A petitioner already has the obligation to submit, in its petition, a *prima facie* case that forbearance is warranted based on the best evidence readily available to it. Once the petitioner does so, the Commission then should move quickly to compile a complete record by requesting comments and taking steps to collect relevant third-party data, so that it can rule expeditiously on the petition. The Commission should not allow itself to be sidetracked by disputes about whether the petitioner satisfied formalistic pleading rules.

2. Commenters also propose a broad range of rules that would govern the precise form of forbearance petitions, which they argue petitioners must satisfy to withstand a motion to dismiss. Dismissals for such formalistic reasons are inconsistent with Section 10(c), however, which permits the Commission to deny petitions only on the *substantive* grounds that the forbearance criteria are not satisfied. *See* Verizon Comments at 33-34.

Such formalistic rules also ignore the need for flexible pleading rules for forbearance petitions, which will differ based on the regulation at issue and the evidence available to the petitioner.<sup>54</sup> Section 10 “allow[s] the forbearance analysis to vary depending on the circumstances.”<sup>55</sup> The Commission’s rules should provide the petitioner the flexibility to put forward its most compelling *prima facie* case as it sees fit based on the evidence available to it and the particular circumstances of the petition.

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<sup>53</sup> *See, e.g.*, EarthLink Comments at 14-16; Time Warner Comments at 26.

<sup>54</sup> *See* AT&T Comments at 12; Frontier Comments at 3.

<sup>55</sup> *EarthLink*, 462 F.3d at 8.

The Commission also should reject proposals that would require petitioners to state the original basis for the regulations and historical advances since that point.<sup>56</sup> Such proposals serve only to increase the costs of filing a petition and to provide another means for opponents to complain about the form of petitions.

3. The Commission should reject proposals for some kind of expanded “complete-as-filed” rule, which purports to place the burden on a petitioner to include in the petition all information relevant to the Commission’s forbearance decision.<sup>57</sup> *See* Verizon Comments at 29-32.

As an initial matter, these commenters ignore that the complete-as-filed rule the Commission applied in § 271 proceedings expressly permitted applicants to submit additional evidence to rebut opponents’ claims.<sup>58</sup> Because these commenters seek to prevent petitioners from doing the same, their proposals do not even follow from the § 271 example on which they rely.

These commenters also seek to use their expanded complete-as-filed proposal to prevent the Commission from considering third-party data to which a petitioner lacks access and, therefore, cannot include in its petition. These commenters acknowledge that such third-party data are relevant to the Commission’s decision on a forbearance petition<sup>59</sup> — they seek to exclude such data precisely for that reason.

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<sup>56</sup> *See, e.g.,* Access Point *et al.* Comments at 20-21; Covad Comments at 9.

<sup>57</sup> *See, e.g.,* Missouri PSC Comments at 4; NARUC Comments at 4-5; Time Warner Comments at 22-23; US SBA Comments at 7.

<sup>58</sup> *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, ¶ 51 (1997).

<sup>59</sup> *See, e.g.,* Time Warner Comments at 24 (suggesting that the Commission require the petitioner to provide all data “even if some of the information needed to meet the Section 10 standard is in the hands of other parties”); Comptel Comments at 5 (noting “the Wireline Competition Bureau has even requested last minute data

4. Although some commenters suggest that the Commission should provide a separate notice-and-comment period for state regulatory bodies before the period for private parties,<sup>60</sup> there is no evidence that states need a special time period in which to comment. *See* Verizon Comments at 32-33. Tellingly, the comments include ample examples of states commenting on forbearance petitions within the normal commenting period,<sup>61</sup> and the Missouri PSC and the California PUC—two of the state regulatory bodies that would purportedly benefit from a separate commenting period—both criticize this proposal and recommend that state bodies submit their comments as part of the normal comment period.<sup>62</sup>

5. The Commission should reject proposed restrictions on *ex parte* submissions, which would constrain the Commission’s ability to compile a full record in considering a forbearance petition and which are designed to give opponents the last word. *See* Verizon Comments at 39-40. In any event, parties already have every incentive to bring relevant evidence to the Commission’s attention as soon as possible, so that the Commission has ample time to consider it. And, if the Commission were to rule more quickly on forbearance petitions, parties would not need to file *ex partes* to update data that had grown stale during the twelve or fifteen months during which the Commission considered the forbearance petition.

Many commenters point to Verizon’s purportedly “late” submission of wire-center data in support of its petitions for forbearance in six MSAs as an example of the problem with late filings.<sup>63</sup> But as Verizon has explained, that information was neither necessary nor late.<sup>64</sup>

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[from third parties] to assist applicants in making their case”); US SBA Comments at 10 (suggesting that “state commissions could add a valuable level of granularity to the data in specific forbearance proceedings”).

<sup>60</sup> *See, e.g.*, PA PUC Comments at 16; Comptel Comments at 10.

<sup>61</sup> *See, e.g.*, Comptel Comments at 6; NASUCA Comments at 21-22.

<sup>62</sup> *See* Missouri PSC Comments at 6; California PUC Comments at 12.

<sup>63</sup> *See, e.g.*, Access Point *et al.* Comments at 17; Time Warner Comments at 11 and n.23.

Further, Verizon submitted those data to respond to the claims in comments opposing its petition. Such submissions are thus an illustration of the process working as it is intended — the petitioner submits data and arguments; opponents claim to find fault with those data and arguments; and the petitioner responds and rebuts those arguments.

### CONCLUSION

For the foregoing reasons, the Commission should modify its procedures and adopt rules consistent with these comments.

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<sup>64</sup> See Verizon's Opp'n to Second Mot. to Dismiss at 5, 7-8, *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 (FCC filed May 29, 2007); Verizon Comments at 26.