

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)

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby submits these reply comments in response to the initial comments filed 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

The *NPRM* sought comments regarding the Petition for Rulemaking filed by Covad Communications Group and 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 In response to the *NPRM*, numerous parties have filed comments demonstrating that the forbearance rules proposed in the Covad, *et al.* Petition as well as a variety of other proposed new rules contained in the initial comments in this proceeding would improperly limit the effectiveness of petitions for forbearance submitted pursuant to Section 10 of 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). Comments filed Mar. 7, 2008.

² See Covad, *et al.*, Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings, WC Docket No. 07-267, filed Sept. 19, 2007.

Communications Act of 1934 as amended (the “Act”).³ These comments demonstrate that the rights bestowed on carriers in Section 10 are statutory in nature and can only be curtailed by an act of Congress. These comments also demonstrate that the proponents of new rules overstate the impact of the statutory petition-initiated forbearance process and, thus, predicate the claim that something must be done to “restore order” to the forbearance process on assumptions and factual conclusions that are simply erroneous. For the reasons stated below, in Qwest’s initial comments and in the comments of numerous other parties opposing new rules in this context, the Commission should not adopt the rules proposed by Petitioners or any other new procedural rules in connection with Section 10 forbearance.

II. QWEST’S REPLY COMMENTS

A. The Initial Comments Confirm That Proponents Of Forbearance Procedural Rules Overstate The Impact Of The Petition-Initiated Forbearance Process On The Overall Regulatory Structure.

The initial comments further confirm that, as Qwest demonstrated in its initial filing, Petitioners and other proponents of forbearance procedural rules overstate the impact of forbearance petitions on the overall regulatory structure. In reality, the Commission’s forbearance process is not “out of control” and therefore any purported justification for the so-called procedural rules advocated by Petitioners and others is specious.

The record shows that, contrary to these contentions, with few exceptions that were readily dealt with by the Commission,⁴ forbearance has been used just as it was intended and

³ As with its initial comments, Qwest’s comments are addressed specifically to Section 10 petitions and, unless otherwise indicated, “forbearance” or “forbearance petition” refers to Section 10 forbearance proceedings.

⁴ See *In the Matter of Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007), *pet. for review pending*, *Core Communications, Inc. v. FCC*, D.C. Cir. No. 07-1381.

forbearance activity has not increased materially in recent years. For example, Petitioners, in their comments, assert that “the volume of forbearance petitions has been steadily increasing over the past several years.”⁵ As support for this contention, Petitioners assert that six petitions were filed in 2005 and thirteen were filed in 2007.⁶ Given the massive volume of federal communications regulations governing the conduct of carriers, these numbers are, if anything, surprisingly small. Moreover, a look at the past six years suggests that the volume of forbearance petition filings has been cyclical and that the last three years have not been anomalous.⁷ Notably, the number for 2006 and 2007 is also deceptively large as it separately counts duplicative “me-too” petitions and petitions such as the Verizon and Qwest MSA Petitions where multiple petitions present the same substantive issue to the Commission. In any event, even if such duplicative petitions are counted separately, the numbers of forbearance petition filings for the 2005 to 2007 time period have not been unusually high – and certainly not higher than would have been expected by Congress when it enacted Section 10.

Verizon, in its initial comments, further bolsters this record with respect to the Commission’s forbearance activity. To begin with, Verizon cites additional statistics on forbearance activity which further put to rest any suggestion that the volume of forbearance activity is increasing.⁸ This is true despite the fact that, as Verizon states, this is a time when Congress would have reasonably expected dramatic increases in the number of forbearance petitions as increased competition reduces and eliminates the need for existing regulations.⁹

⁵ Covad, *et al.* Comments at 2.

⁶ *Id.*

⁷ Again, 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).

⁸ Verizon and Verizon Wireless Comments at 19-22 (“Verizon”).

⁹ *Id.* at 20.

Verizon's comments also effectively demonstrate that the overwhelming majority of forbearance proceedings have been resolved without any controversy and that the Commission has had great success in defending its rulings on forbearance petitions.¹⁰ Indeed, with respect to the last point, as Verizon points out, the few times the Commission has been reversed on appeal, the reversal has been on procedural grounds -- thus, further supporting a conclusion that forbearance procedural rules are not called for at this time.¹¹

Finally, contentions by various commenting parties that forbearance filings have somehow prevented the Commission from acting on issues like intercarrier compensation are clearly a red herring.¹² There is simply no basis for a conclusion that the Commission would have acted in its *Inter-carrier Compensation* proceeding or other proceedings that are still outstanding if it had received fewer forbearance filings. In all events, the decision to give priority to forbearance petitions was made by Congress, not by the Commission.

In short, for all the reasons discussed above, the forbearance process is working as Congress intended and alleged faults with the Commission's process for examining forbearance petitions have been greatly overstated by Petitioners and other parties.

B. The Initial Comments Confirm That The Objective Of Proponents Of Forbearance Procedural Rules Is Elimination Of The Forbearance Tool Altogether And, Short Of That, To Render It Toothless.

The basis for the Petition is the assumption that the statutory forbearance process is not adequate and that the Commission should do something to remedy Congress' mistakes. This assertion is wrong. Qwest and numerous other commenting parties also demonstrated in their

¹⁰ *Id.* at 9-11, 19-22.

¹¹ *Id.*

¹² *See, e.g.,* Access Point, Inc., *et al.* at 8-9; COMPTTEL at 2; AdHoc Telecommunications Users Committee at 1-2; Columbia Capital and M/C Venture Partners at 7; Sprint Nextel Corporation at 4.

initial comments that forbearance (including a Section 10 forbearance petition) is an essential component in the intended de-regulatory framework of the Act.¹³ Contrary to the role portrayed by Petitioners and other proponents of new forbearance rules, forbearance petitions are not an undesired recent development that needs to be corrected, but rather are a tool that has been used as intended and with adequate supporting processes. Section 10 is a Congressionally-mandated deregulatory tool that is meant to allow carriers to respond to increasing competition through timely removal of unnecessary regulations. The initial comments of Petitioners and other proponents further confirm that their real complaint is the forbearance statute itself and that, if they are unable to obtain a repeal of the statute, they seek new rules that will render the forbearance tool toothless and create procedural traps designed to cause the Commission to reject petitions before their merit is considered.

A cursory review of the comments filed by proponents of forbearance procedural rules makes clear that their real complaint is against Congress, and that their ultimate position is that Section 10 forbearance tool should be eliminated altogether. Again, Petitioners state in the Covad, *et al.* Petition that their preferred result would be a repeal of the statute altogether.¹⁴ Similarly, Time Warner, *et al.* expressly state in their comments that the “real problem” is the forbearance statute itself.¹⁵ Other commenting parties are more subtle, but would also try to accomplish, by their proposals, an effective repeal of Section 10. For example, New Jersey

¹³ Verizon at 9; AT&T Inc. at 6 (“AT&T”); Discovery Institute at 2 (quoting from Senator Robert Dole’s statements in the relevant legislative history that the forbearance petition procedure was intended to “force the Federal Communications Commission to eliminate outdated regulations, and do so in a timely manner. Currently, there is no guarantee that the Commission will ever act on requests that it forbear on regulations.”) Congressional Record, S7897 (June 7, 1995).

¹⁴ Covad, *et al.* Petition at 5.

¹⁵ Time Warner Telecom Inc., One Communications Corp., and Cbeyond Inc. (hereafter “Time Warner, *et al.*”) at 4.

Division of Rate Counsel and the National Association of State Utility Consumer Advocates suggest, as a “procedural” rule, that the Commission simply cease action on any forbearance petitions whatsoever for the time being.¹⁶ Similarly, Access Point, Inc., *et al.* suggests that the Commission should begin forbearing from the forbearance statute.¹⁷

Other proponents of new rules satisfy themselves with proposing numerous additional rules which, as AT&T notes, can only be seen as an attempt to “throw sand into the gears” of the Commission’s forbearance process.¹⁸ For example, Access Point, Inc., *et al.* proposes that the Commission adopt rules that would reject forbearance petitions that might be deemed “duplicative” of past petitions or which present issues that could be resolved in a rulemaking.¹⁹ Access Point, Inc., *et al.* also proposes that, not only should the burden of proof now be shifted (in conflict with the statute itself)²⁰ from the Commission to the parties filing forbearance petitions, but that petitioners should now be subject to a *heightened* clear-and-convincing evidence burden of proof.²¹ The Pennsylvania Public Utility Commission proposes that the Commission adopt rules changing its definition of when a petition is “received” thereby extending the statutory deadline even beyond the required 15 months.²² New Jersey/NASUCA would require a pre-filing notice of 60 days, essentially another method of delaying action on

¹⁶ New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates at 22 (“New Jersey/NASUCA”).

¹⁷ *See, e.g.,* Access Point, Inc., *et al.* at 5-7.

¹⁸ AT&T at 2.

¹⁹ Access Point, Inc., *et al.* at 6-10.

²⁰ *See* Qwest Comments at 14.

²¹ Access Point, Inc., *et al.* at 29-30.

²² Pennsylvania Public Utility Commission at 11-12.

forbearance petitions by effectively extending the statutory deadline.²³ Petitioners, in their comments, propose further rules beyond those included in their initial petition in an attempt to still further increase the obligations of parties who file forbearance petitions (*e.g.*, onerous service of process rules and a requirement that parties include with their filings a “history of each of the rules and/or statutory requirements from which it is seeking forbearance”).²⁴ Mid-Atlantic Conference and MO PUC would preclude any new data or other filings in support of a forbearance petition later than 150 days following the filing of the petition. In other words, Mid-Atlantic Conference would freeze forbearance proceedings for approximately two-thirds of the statutory fifteen month period, even in the face of continual escalation of competition that generates updated evidentiary facts key to the Commission’s deliberations.

But of course the Communications Act cannot be repealed by the Commission. Nor can the Commission adopt rules that would undercut one of its key deregulatory provisions. Section 10 is functioning as Congress wrote it into the statute. Dissatisfaction with the Act is no basis on which to craft rules.

For all the reasons stated above and below and in Qwest’s initial comments, the Commission should recognize each of these proposals for what they are -- attempts to improperly weaken the effectiveness of forbearance petitions -- and reject each proposal.

C. The Initial Comments Demonstrate That Rules Comparable To Those Applicable To Formal Complaints Or Section 271 Applications Are Neither Necessary Nor Lawful In The Forbearance Context.

Numerous commenting parties join Qwest in their initial comments in observing that existing procedural rules for Commission formal complaints and section 271 applications are poor models for forbearance process. To begin with, as other parties observed in their

²³ New Jersey/NASUCA at 28.

²⁴ Covad, *et al.* Comments at 8-10.

comments, proposals such as a complete-as-filed requirement would even go beyond the requirements in those proceedings, where parties are able to amend their filings without “re-starting” the clock.²⁵ Additionally, a fact pleading with affidavit support requirement like that followed in formal complaint proceedings is unusual even for civil litigation. It is particularly ill-suited for forbearance proceedings that often require an analysis of up-to-date competitive data and may be resolved as much as fifteen months after filing.

Similarly, 271 applications, the proceedings most frequently cited by proponents of forbearance rules as a process model, clearly are not analogous to a forbearance proceeding. Forbearance proceedings address issues running the full gamut of the Commission’s jurisdiction. Additionally, the relevant data is often not in the possession or control of the filing party and the Commission is subject to a fifteen-month deadline. Section 271 applications, on the other hand, require filing parties to satisfy specific statutorily-required findings and parties usually rely on data in their own control. Moreover, the Commission is subject to a 90-day deadline.

In the end, the record does not demonstrate a need for procedural rules along the lines of those proposed by any of the commenting parties.

D. Efforts To Have Certain Types Of Forbearance Issues Prejudged In This Proceeding Should Be Rejected Out Of Hand.

Many of the new procedural rules proposed by other parties in their initial comments would really have the Commission pre-judge in self-serving ways issues that come up in certain types of forbearance petitions and which issues are better left to decisions on a case-by-case basis. For example, Comcast asks that the Commission, as part of this proceeding, establish certain requirements for petitions that may impact incumbent local exchange carrier (“ILEC”)

²⁵ AT&T at 4, 15-16.

Section 251 obligations or transit service.²⁶ Similarly, Comcast would have the Commission impose unique data format requirements on ILECs when they file forbearance petitions.²⁷ Access Point, Inc., *et al.* ask that the Commission establish policies that would pre-judge what types of information would receive confidentiality treatment.²⁸ Time Warner, Inc. uses this proceeding to try and re-litigate numerous substantive issues unique to a variety of past forbearance petitions.²⁹

The Commission should reject out-of-hand these various requests to have forbearance “merits” issues prejudged in this proceeding and should instead resolve those on a case-by-case basis in the context of each proceeding. A carrier has a statutory right to file for forbearance under Section 10 and to make the statutory showing that entitles it to forbearance. Prejudging how a specific factual situation would be evaluated without giving the proponent a chance to demonstrate statutory compliance would be a terrible process and would violate the statutory right of a carrier to make an appropriate factual demonstration of its right to forbearance.

²⁶ Comcast at 2-5.

²⁷ *Id.* at 5-7.

²⁸ Access Point, Inc., *et al.* at 31-38. As Qwest stated in its initial comments, it is open to certain concepts stated in the Covad, *et al.* Petition around protective orders such as the provision of data in searchable format in some circumstances and consistent with current Commission practice. However, this goal must be weighed along with the interest in avoiding the unnecessary exposure of confidential materials. In the end, these issues should not be dealt with in new rules but rather on a case-by-case basis in the context of a given petition. The Commission has proven that it can handle this issue adequately.

²⁹ Time Warner, Inc., *et al.* at 15-20.

E. The Initial Comments Demonstrate Unequivocally That Any Retroactive Application Of New Forbearance Procedural Rules Would Be Fundamentally Unfair And Unlawful.

Qwest echoes the demonstrations of Verizon and AT&T that any retroactive application of any new forbearance procedural rules would be both fundamentally unfair and unlawful.³⁰

III. CONCLUSION

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

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Timothy M. Boucher
Craig J. Brown
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

It Attorneys

March 24, 2008

³⁰ AT&T at 27-28; Verizon at 40-41.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY 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; 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bepiweb.com; and 4) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/Richard Grozier

March 24, 2008

Edward Shakin
William H. Johnson
Verizon
Suite 500
1515 North Court House Road
Arlington, VA 22201

John T. Scott
Verizon Wireless
Suite 400 West
1300 I Street, N.W.
Washington, DC 20005

Scott H. Angstreich.....Verizon
Kellogg, Huber, Hansen, Todd
Evans & Figel, PLLC
Suite 400
1615 M Street, N.W.
Washington, DC 20036

Mary P. McManus
Comcast Corporation
Suite 500
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006

Brian A. Rankin
Comcast Cable Communications, LLC
50th Floor
One Comcast Center
Philadelphia, PA 19103

A. Richard Metzger, Jr.....Comcast
A. Renee Callahan
Lawler, Metzger, Milkman & Keeney, LLC
Suite 802
2001 K Street N.W.
Washington, DC 20006

Karen Reidy
COMPTTEL
Suite 400
900 17th Street, N.W.
Washington, DC 20006

Anna M. Gomez
Jennifer A. Duane
Sprint Nextel Corporation
Building A, 2nd Floor
2001 Edmund Halley Drive
Reston, VA 20191

Gregg C. Sayre
Kenneth F. Mason
Frontier Communications
180 South Clinton Avenue
Rochester, NY 14646-0700

Andrew D. Lipman.....Columbia
Joshua M. Bobeck
Nguyen T. Vu
Bingham McCutchen LLP
2020 K Street N.W.
Washington, DC 20006

Jack S. Zinman
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Washington, DC 20036

David L. Lawson.....AT&T
Jacqueline G. Cooper
Christopher T. Shenk
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

John T. Nakahata.....EarthLink
R. Paul Margie
Harris, Wiltshire & Grannis LLP
1200 18th Street, N.W.
Washington, DC 20036

Paul Kenefick
EarthLink
Suite 200
1776 K Street, N.W.
Washington, DC 20006

Shelley R. Smith
Michael C. Athay
Robert A. Sutton
Phillip A. Bullard
The City of Philadelphia
17th Floor
1515 Arch Street
Philadelphia, PA 19102

Ronald K. Chen
Stefanie A. Brand
Christopher J. White
New Jersey Division of Rate Counsel
11th Floor
31 Clinton Street
Newark, NJ 07101

David C. Bergmann
National Association of State Utility
Consumer Advocates
Suite 1800
10 West Broad Street
Columbus, OH 43215-3485

Joshua Seidemann
Independent Telephone &
Telecommunications Alliance
Suite 550
975 F Street, N.W.
Washington, DC 20004

Barry T. Smitherman
Julie Parsley
Paul Hudson
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TX 78711-3326

Daniel L. Brenner
Neal M. Goldberg
Steven F. Morris
National Cable &
Telecommunications Association
Suite 100
25 Massachusetts Avenue, N.W.
Washington, DC 20001-1431

Karen Brinkmann.....ACS of Anchorage
Elizabeth R. Park
Latham & Watkins, LLP
Suite 1000
555 Eleventh Street, N.W.
Washington, DC 20004-1304

Leonard A. Steinberg
ACS of Anchorage, Inc.
Anchorage, AK 99503

Thomas M. Sullivan
Cheryl M. Johns
U.S. Small Business Administration
Suite 7800
403 3rd Street, S.W.
Washington, DC 20416

Libby Beaty
Stephen Traylor
National Association of Telecommunications
Officers and Advisors
Suite 495
1800 Diagonal Road
Alexandria, VA 22314

D. Anthony Mastando
DeltaCom, Inc.
7037 Old Madison Pike
Huntsville, AL 35806

Hance Haney
Discovery Institute
Suite 900
1015 15th Street, N.W.
Washington, DC 20005

Thomas Jones.....Time Warner
Nirali Patel
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006

James B. Ramsay
Grace Soderberg
National Association of Regulatory
Utility Commissioners
Suite 200
1101 Vermont Avenue, N.W.
Washington, DC 20005

James S. Blaszak.....AdHoc
Levine, Blaszak, Block & Boothby, LLP
Ninth Floor
2001 L Street, N.W.
Washington, DC 20036

Sheri Hicks
TEXALTEL
Building 8, Suite 250
500 N. Capital of Texas Highway
Austin, TX 78746

Andrew D. Lipman.....Access Point, *et al.*
Russell M. Blau
Patrick J. Donovan
Philip J. Macres
Bingham McCutchen, LLP
2020 K Street, N.W.
Washington, DC 20006

Joseph K. Witmer
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Brad Mutschelknaus.....Covad, *et al.*
Genevieve Morelli
Kelley Drye & Warren LLP
Suite 400
3050 K Street, N.W.
Washington, DC 20007

080324 WC07-267 COS.doc
Last edited 03/24/08