

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

*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**

**FCC 07-202**

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**COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

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On February 6, 2008, the Federal Communications Commission (FCC or Commission), in response to a petition filed by several competitive local exchange carriers, published in the Federal Register a Notice of Proposed Rulemaking (NPRM)<sup>1</sup> in the above-captioned proceeding. The NPRM invites comments on a proposal to establish additional procedural rules to assure a full and proper vetting of the issues in petitions seeking forbearance filed pursuant to Section 10 of the *Communications Act of 1934*, as amended.

Subsequently, on February 20, 2008, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution specifically addressing several issues raised in the NPRM.

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<sup>1</sup> “Notice of Proposed Rulemaking”, *In the Matter of a Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as amended*, 73 Federal Register 6888 (February 6, 2008).

Specifically, the NARUC resolution urges the FCC to:

- [1] “[A]ct on an expedited basis to adopt improvements to the procedural rules governing forbearance petitions” . . .preferably, “before additional forbearance petitions are filed;”
- [2] “[A]dopt a strict “complete-as-filed” requirement for forbearance Petitions similar to Section 271 requirements;”
- [3] [A]dopt policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential and highly confidential information so they can have sufficient data to file detailed and timely comments with the FCC;” and
- [4] [A]dopt formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States.

A copy of this resolution is attached as an appendix to these comments. In support of these positions, NARUC states as follows:

#### **NARUC’S INTEREST**

NARUC is a nonprofit organization founded in 1889. Congress and the courts have consistently recognized NARUC as a proper entity to represent the generic interests of the State utility commissions. In the Communications Act,<sup>2</sup> Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.<sup>3</sup> There is no question that this proceeding raises serious issue of considerable importance to NARUC’s member commissions.

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<sup>2</sup> *Communications Act of 1934, as amended by the Telecommunications Act of 1996*, 47 U.S.C. §151 et seq., Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

<sup>3</sup> See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon); *Cf.* 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.)

The petitioners that requested this rulemaking note that State commissions have unique insight into the local market conditions that are central to any forbearance petition and have specifically suggested rules to facilitate the State's role in FCC forbearance proceedings.

### DISCUSSION

This NPRM seeks comment on a September 19, 2007 petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (Petitioners) asking the FCC to consider adopting procedural rules to govern the agency's consideration of petitions for forbearance pursuant to the *Communications Act of 1934*, as amended (Act). The rulemaking identifies several possible areas of improvement in the procedures the agency uses for such petitions, including:

- a) the absence of a "complete-as-filed" requirement;
- b) the lack of discipline and guidelines on the filing of ex-parte comments by the Petitioner, often resulting in substantial evidence filed late in the process, and the concurrent diminution of due process rights for other interested persons and constituencies;
- c) the lack of access by each qualified interested person, subject to appropriate protective orders, to confidential and highly confidential information; and
- d) the lack of access by State commissions, subject to appropriate protective orders, to such confidential and highly confidential information so that they have sufficient data in order to file detailed and timely comments with the FCC.

NARUC passed a resolution addressing this rulemaking at its recent winter meetings in Washington, D.C. As noted, supra, the resolution specifically addresses a number of issues raised in the NPRM.

***The FCC should act on an expedited basis to adopt improvements to the procedural rules governing forbearance petitions, preferably, before additional petitions are filed.***

NARUC is concerned about the rapid increase in forbearance petitions by incumbent carriers which, because of, *inter alia*, the statutory time constraints on the time for FCC action, has created a significant burden on State commissions and interested parties. It is not always possible for States to thoroughly review the petitions and provide detailed input to the FCC before the looming deadline for FCC action keeps the agency from fully evaluating those State additions to the record. Even the FCC, in establishing an expedited comment cycle for the NPRM, “acknowledge[s] that the pendency of numerous forbearance petitions creates an urgency to consider adoption of procedural rules.” NARUC agrees with the FCC. The petitioners raised a number of valid concerns about the process. To create greater certainty and stability within the telecommunications industry, NARUC urges the Commission to act promptly on this NPRM before additional forbearance petitions are filed and to adopt formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States.

***The FCC should adopt a strict “complete-as-filed” requirement for Forbearance Petitions similar to Section 271 requirements.***

NARUC agrees with petitioners that requiring parties to file “complete” petitions can only facilitate Commission review and help ensure all interested parties have a fair opportunity to present their views. As noted in the NRPM, the Commission has already recognized in its Section 271 and complaint procedures - the necessity and benefit of adopting a “complete-as-filed” rule. Under Section 271, a Bell Operating Company seeking authority to provide in-region interLATA service was required to submit with its application "all of the factual evidence upon

which (it) would have the Commission rely in making its findings.”<sup>4</sup> There, the FCC explained that the rule provided all interested parties with a "fair opportunity" to comment on the subject petition.<sup>5</sup>

The FCC also requires formal complaints to contain all information upon which the agency could base its decision. The Enforcement Bureau routinely rejects formal complaints that do not meet up-front filing requirements and requires complainants to re-file such complaints with the defects corrected. Significantly, in formal complaint proceedings subject to specific statutory deadlines (i.e., complaints brought under Section 271(d)(6)), the clock does not begin to run until a complaint has met all applicable procedural requirements.

Unfortunately, sometimes information critical to a claim for forbearance may not be submitted until after the comment cycle has ended. Under the current rules, a petitioning party could submit no real evidence with its initial petition and undermine the FCC’s procedures by manipulating the 12-month statutory clock. This compromises the FCC’s ability to properly review the filing. It also makes it difficult for States and others to give the agency critical information crucial to its determinations. The need and merits of a “complete-as-filed” requirement are obvious. It protects the integrity of the FCC process and allows all parties to focus *ab initio* on essential elements of the petitioner’s request. The FCC should prohibit a petitioner from supplementing, updating, or otherwise materially modifying its forbearance petition and supporting documentation in any way *without re-starting the 12-month statutory clock*.

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<sup>4</sup> Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice, 16 FCC Rcd 6923, 6925 (2001) ("March 23 Public Notice").

<sup>5</sup> See, e.g., Application by Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region InterLATA Services in Virginia, Memorandum Opinion and Order, 17 FCC Rcd 21880, 21925, ¶ 78 (2002) ("Verizon Virginia Section 271 Order").

As petitioners note in their pleadings: “This is the same standard the Commission adopted in addressing Section 271 applications and for good reason: permitting a petitioner to amend or supplement its petition repeatedly in situations where it knew (or should have known) the essential elements of its “proof” only would encourage it to submit an incomplete application. As with all of its rules, the FCC, however, would retain authority, on its own motion, to waive this requirement for good cause. See, 47 C.F.R. § 1.3.

***The FCC should adopt policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential information.***

Given the relatively short statutory time frame, it is critical that the procedures for gaining access to confidential information allow timely access to “qualified persons, including State commissions.” NARUC’s resolution does not specify what procedures will best assure this result, but it clearly indicates some additional changes to the FCC’s rules are warranted. The petitioners make several common sense proposals that clearly facilitate review.

For example, it can only facilitate careful review of documents, if authorized individuals who have signed a protective order are allowed to obtain and review all documents at their own location – instead of only at the office of the party who owns the confidential data during set business hours. This is particularly true for parties, like State commissions, who have limited staff resources and even more limited travel budgets.

The petitioners also make the common sense suggestion that all documents, including those classified as confidential, be made available in *electronically searchable formats*. The reason for this is obvious. If the information is readily available in an electronically searchable format, there is no reason to allow parties to convert it to one that is not for submission to the FCC or for access to others that have a legitimate interest in the proceeding. The only reason for

an entity to take such action would be to reduce careful scrutiny of the submitted information by both the FCC and others.

### CONCLUSION

NARUC's resolution is clear. The FCC should move quickly to adopt formal procedures to govern the conduct of forbearance proceedings and include procedures to ensure full participation by affected States. As part of those changes, the FCC should adopt a "complete-as-filed" rule, assure ease of access to evidentiary submissions, and establish a procedure that encourages State input. In almost all cases, NARUC's member commissions are uniquely situated to provide valuable information concerning the markets in their States, and the FCC should adopt a rule that specifically builds State input into the timeline for consideration of a specific forbearance petition. The petitioners have suggested States be afforded 90 days from the date the forbearance petition is filed in which to complete their review and present their views to the Commission.

**Respectfully Submitted,**

*National Association of Regulatory  
Utility Commissioners*

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Submitted: March 7, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Associations' Comments was served this 7th day of March 2008, by electronic filing and e-mail to the persons listed below.

By: /s/ James B. Ramsay

The following parties were served:

Via ECFS

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*Resolution on Forbearance Procedures*

**WHEREAS**, Pursuant to Section 10(a) of the Communications Act of 1934 (the Act), as amended, the Federal Communications Commission (FCC) is required to forbear from enforcing any regulation or provision of the Act if it reaches a determination that three broad criteria are satisfied, including consistency with the public interest, protection of consumers, and a finding that the requested forbearance would not result in unreasonable discrimination and unjust and unreasonable rates or terms; *and*

**WHEREAS**, A statutory timeline of 12 months (which the Commission may extend to 15 months), is given for final action by the FCC; *and*

**WHEREAS**, If action on a petition is not taken by the FCC prior to expiration of the statutory period, the forbearance requested by the petitioner is deemed granted and becomes effective; *and*

**WHEREAS**, Such a broad grant of authority to waive application of statutory provisions duly passed by Congress and signed by the President, and regulations approved by order of the FCC, under the above broad criteria and an abbreviated timeline for final action, is quite unusual when considering the normal procedures and regulations governing independent federal agency actions; *and*

**WHEREAS**, Many incumbent telecommunications carriers have recently submitted a plethora of petitions seeking broad relief from important provisions of the Act and FCC regulations, such as the unbundling requirements of Section 251, and the obligation to provide information under the ARMIS system; *and*

**WHEREAS**, Many States have the obligation to enforce various provisions of the Act and FCC regulations that, among other objectives, seek to promote wholesale competition and protect telecommunications users, and to a significant extent, rely on the continued enforcement of provisions of the Act in order to achieve their respective State policy objectives; *and*

**WHEREAS**, The States are uniquely equipped to provide detailed, market-specific data regarding the state of competition that the FCC must consider in conducting its forbearance analysis; *and*

**WHEREAS**, The Notice of Proposed Rulemaking (NPRM) in WC Docket No. 07-267, released by the FCC on November 30, 2007, identifies possible areas of improvement in the procedures by which the Commission examines such petitions for relief under Section 10(a), including:

- a) the absence of a “complete-as-filed” requirement;
- b) the lack of discipline and guidelines on the filing of ex-parte comments by the Petitioner, often resulting in substantial evidence filed late in the process, and the concurrent diminution of due process rights for other interested persons and constituencies;
- c) the lack of access by each qualified interested person, subject to appropriate protective orders, to confidential and highly confidential information; and

- d) the lack of access by State commissions, subject to appropriate protective orders, to such confidential and highly confidential information so that they have sufficient data in order to file detailed and timely comments with the FCC; *and*

**WHEREAS**, Several members of Congress have introduced bills to amend Section 10 of the Act, including bills to eliminate the “deemed granted” section of the statute (H.R. 3914 and S. 2469), while preserving the ability of the Commission to continue to use the Section 10 process when appropriate; *and*

**WHEREAS**, The FCC, in establishing an expedited comment cycle for the NPRM, has stated: “We acknowledge that the pendency of numerous forbearance petitions creates an urgency to consider adoption of procedural rules, and we therefore are seeking comment on a relatively short pleading cycle;” *now, therefore, be it*

**RESOLVED**, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its 2008 Winter Meetings in Washington, D.C., commends the FCC for initiating this rulemaking and urges the Commission to act on an expedited basis to adopt improvements to the procedural rules governing forbearance petitions; *and be it further*

**RESOLVED**, That the FCC adopt a strict “complete-as-filed” requirement for Forbearance Petitions similar to Section 271 requirements and also adopt policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential and highly confidential information so they can have sufficient data to file detailed and timely comments with the FCC; *and be it further*

**RESOLVED**, That NARUC is concerned about the rapid increase in forbearance petitions by incumbent carriers which has created a significant burden on State commissions and interested parties to examine these petitions thoroughly and to provide detailed input to the FCC in a timely manner; *and be it further*

**RESOLVED**, That NARUC expresses its support of bills in Congress to eliminate the “deemed granted” provision in the statute specifically, H.R. 3914 and S. 2469, and urges prompt action; *and be it further*

**RESOLVED**, In order to create greater certainty and stability within the telecommunications industry, NARUC urges the Commission to act promptly on this NPRM before additional forbearance petitions are filed and to adopt formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States; *and be it further*

**RESOLVED**, That NARUC General Counsel be directed to take any appropriate actions to further the intent of this resolution.