

MEMORANDUM

**Date** : February 22, 2008

**To** : The Commission  
(Meeting of February 28, 2008)

**From** : Helen Mickiewicz  
Assistant General Counsel

**Subject:** Filing of Comments in Response to FCC's Rulemaking  
Regarding FCC Consideration of Forbearance Petitions;  
WC Docket No. 07-267

**RECOMMENDATION:** The CPUC should file comments in response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM), adopted November 30, 2007. The NPRM responds to a petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (Petitioners or Covad, *et al.*), in which the companies asked the FCC to establish rules for addressing petitions seeking forbearance from federal laws and regulations. Specifically, the FCC seeks comment on the petition's proposal that the FCC consider adopting procedural rules to govern its consideration of petitions for forbearance pursuant to §10 of the Communications Act of 1934, as amended (Act).<sup>1</sup> Comments are due March 7, 2008.

**BACKGROUND:** On September 19, 2007, Covad *et al* filed their Petition urging the FCC to adopt the following rules to govern its consideration of forbearance petitions:<sup>2</sup>

- A rule confirming that Administrative Procedure Act (APA) notice-and-comment rules apply to petitions for forbearance;
- A rule specifying that the forbearance petitioner has the burden of proof;
- Rules governing the format and content of forbearance petitions, including, without limitation, a complete-as-filed requirement and a requirement that the petitioner demonstrate that it has satisfied each and every component of the § 10 test;

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<sup>1</sup> 47 U.S.C. § 160.

<sup>2</sup> Covad, *et al.* Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under § 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267 (filed Sept. 19, 2007) (Petition).

- Rules governing protective orders and *ex parte* filings;
- Rules encouraging state commission input; and
- Rules establishing timetables for filing.

Staff recommends that the CPUC file comments in support of certain of the procedures recommended by Petitioners to govern FCC consideration of §10 forbearance petitions.<sup>3</sup> The Staff’s specific recommendations are articulated below.

## **BACKGROUND**

Pursuant to §10 of the Act, any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the FCC requesting that the FCC forbear from enforcing any statutory or regulatory requirement under the Act with respect to that carrier or those carriers, or any service offered by that carrier or carriers. The FCC is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier’s charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>4</sup> In determining whether forbearance is consistent with the public interest, the FCC also must consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”<sup>5</sup> Pursuant to statute, if the FCC does not act on a §10 forbearance petition within one year, the petition is “deemed granted”.<sup>6</sup>

Section 10 is intended to facilitate the elimination of outdated and unnecessary regulations without legislative intervention. It delegates broad authority to the FCC to waive statutory provisions, but neither the language of the statute nor its legislative history provide guidance or procedural steps for review of the forbearance petitions. Increasingly incumbent carriers are filing forbearance petitions that require complicated analysis of market conditions, in essence setting the FCC agenda and forcing it to act in the limited time frame of the statute or permit the petition to become law through non-action. As noted by Petitioners “...Section 10 has become a magnet for controversy.”<sup>7</sup> “[T]he ‘deemed granted’ aspect of the forbearance provision enables a mere delay in Commission action to result in the elimination of key statutory or regulatory provisions.

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<sup>3</sup> The FCC also seeks comment in this NPRM with respect to petitions for forbearance pursuant to section 332 of the Act governing wireless carriers. CPUC does not recommend commenting on procedural requirements for § 332 petitions.

<sup>4</sup> Id. at § 160 (a).

<sup>5</sup> Id. at § 160 (b).

<sup>6</sup> Id. at § 160 (c).

<sup>7</sup> Petition, p. 2.

Such consequences are well outside of the regulatory mainstream fostering outcomes that are not based on sound decision-making.”<sup>8</sup>

Numerous forbearance petitions are filed at the FCC each year, many of which involve fundamental provisions of the Act and the FCC’s common carrier rules.<sup>9</sup> Petitioners argue that an established process will ensure the integrity of the decision-making process and urge that the FCC adopt procedural requirements to help ensure critical issues raised in these petitions are considered in a fair and thorough manner.

## **RECOMMENDATIONS ON SPECIFIC PROPOSED RULES**

Notice and Opportunity to Comment: Petitioners urge the FCC to subject forbearance petitions to notice and comment rulemaking procedures. The Administrative Procedure Act (APA) governs the manner in which the FCC proposes and establishes regulations, but it does not address how the FCC should handle § 10 petitions. Under APA rules, agencies are required to provide adequate notice of a proposed rule and a reasonable opportunity to comment. The same rules should apply to § 10 petitions, but currently, they do not. Staff recommends that the Commission support this recommendation.

“Complete-as-Filed “Standard: Petitioners urge the FCC to require all § 10 forbearance petitions to be complete-as-filed. This proposed rule would require a petitioning party to submit all evidence in support of its forbearance petition in the party’s initial filing, and disallow any material supplement to a petition without restarting the statutory clock. Given the FCC’s limited timeframe for considering forbearance petitions, it is essential that petitioners include all relevant information and arguments in the initial petition. Staff recommends supporting this recommendation.

Meeting the §10 Standard: Petitioners recommend that the FCC require the petitioning party to separately demonstrate that it satisfies each component of the §10 standard. As Petitioners note, forbearance petitions often fail to address each element of the §10 standard. Instead petitioning parties just generally assert that the forbearance criteria are satisfied with respect to all regulations or statutory provisions from which relief is sought<sup>10</sup>, limiting the ability of interested parties to adequately respond to the petition. Staff recommends supporting this recommendation.

Scope and Interpretation of Protective Orders: Petitioners urge the FCC to require the submitting party to make available Confidential and Highly Confidential documents in searchable electronic format. Currently, the FCC only requires submitting parties to

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<sup>8</sup> Id. at p. 4.

<sup>9</sup> Key members of Congress have sought to amend § 10 to eliminate the one year deadline. Other legislative efforts have addressed the “deemed denied” provision of § 10. To date, Congress has not modified the statute.

<sup>10</sup> Petition at p. 19.

make available Highly Confidential information in electronic format and only in response to a particular request. Staff recommends supporting this recommendation.

State Use of Protected Documents: Petitioners argue that states should be permitted to use documents designated as Confidential and Highly Confidential in related state proceedings. Petitioners assert that any data a petitioner submits in support of a forbearance petition, especially a petition requesting forbearance from §§ 251 and/or 271 of the Act, may be highly relevant to a related state inquiry or docket. Staff recommends supporting this recommendation.

Procedure for State Commission Input: Petitioners suggest the FCC to establish a procedure encouraging state input to be completed *prior* to the general comment cycle on a petition so that interested parties (and the petitioning party) may respond to the state analysis. Early state input also would provide the FCC with ample opportunity to seek more information from the petitioning party if the state input raises new issues. Petitioners urge the FCC to allow 90 days from the date a forbearance petition is filed for a state to complete its review and report to the FCC. Staff recommends opposing a separate track for state input; states should comment on the same schedule as other parties. In the alternative, if the FCC adopts a separate state track, the CPUC should recommend a state review period longer than 90 days.

Standard Comment Cycle: Petitioners propose that the FCC adopt a standard comment cycle for all § 10 forbearance petitions. Petitioners recommend that the comment cycle start when the FCC has completed its initial review of the petition (and the petitioning party has cured any non-material procedural defects), after the applicable states have been given the opportunity to provide their input. Staff recommends a more flexible approach, allowing the FCC to set comment deadlines appropriate to the scope of the petition.

Ex Parte Submissions: Petitioners recommend that the FCC develop policies governing *ex parte* submissions in §10 forbearance proceedings. Staff recommends supporting time limits on substantive *ex partes*, so as to prevent a party from gaming the process by engaging in a substantive *ex parte* contact late in the FCC's review process, thus foreclosing the opportunity for other parties to respond.

Treatment of § 251 and § 271 Forbearance Petitions: Petitioners recommend that in proceedings seeking forbearance from §§ 251 and/or 271, the FCC should require petitions to include all supporting data at the wire center level and relevant declarations in support of that wire center data. Staff recommends supporting these recommendations.

**Assigned staff:** Legal Division – Helen Mickiewicz (HMM, 3-1319); Communications Division – Roxanne Scott (RS2, 3-5263).