

**Before the  
Federal Communications Commission  
Washington, D.C. 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.	)	

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**JOINT REPLY COMMENTS OF THE  
NEW JERSEY DIVISION OF RATE COUNSEL  
AND THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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**I. INTRODUCTION**

The New Jersey Division of Rate Counsel (“Rate Counsel”) and the National Association of State Utility Consumer Advocates (“NASUCA”) (collectively, “State Advocates”) hereby reply to the initial comments filed in response to the Notice of Proposed Rulemaking (“NPRM”) released November 30, 2007, by the Federal Communications Commission (“FCC” or “Commission”).<sup>1</sup> State Advocates continue to support the Petition filed by Covad Communications Group; NuVox Communications; XO Communications, LLC; Cavalier Telephone Corp.; and McLeod USA Telecommunications Services, Inc. (“CLEC Petitioners”)<sup>2</sup> and urge the Commission to modify and standardize in a timely manner its process for considering forbearance

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<sup>1</sup> *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 (“07-267”), Notice of Proposed Rulemaking, FCC 07-202 (rel. November 30, 2007) (“NPRM”). The NPRM was published in the *Federal Register*, Vol. 73 No. 25, on Wednesday February 6, 2008, at 6888.

<sup>2</sup> 07-267, Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings, filed September 19, 2007 (“CLEC Petition”).

petitions. There is broad agreement about the deficiencies in the existing process for reviewing forbearance petitions and broad support for many of the modifications that the CLEC Petitioners propose.<sup>3</sup> State Advocates agree with the SBA position that “substantive procedures are needed to prevent arbitrary and capricious deregulation with the potential to destabilize markets.”<sup>4</sup>

Among the observations and recommendations expressed in initial comments that merit the Commission’s consideration are the following:

- The current *ad hoc* forbearance system needs reform: The present process, with its lack of governing rules, encourages numerous and ill-supported petitions, which shift inappropriately the burden from petitioners to the Commission and interested parties and, furthermore, distract the Commission from other pressing policy matters. Changes to the system should correspond with the fact that the petitioning party bears the burden of proof that the petition satisfies the statutory criteria.
- Petitions for forbearance often are incomplete or vague: Rules should clearly require petitions to be complete as they are filed,

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<sup>3</sup> See, e.g., Earthlink Inc. and New Edge Networks (“Earthlink”), at 5; Missouri Public Service Commission (“Missouri PSC”), at 1; National Cable and Telecommunications Association (“NCTA”) at 3; Access Point, Alpheus, ATX, Bridgecom, Broadview, Cavalier, CIMCO, CP Telecom, DSLnet, Globalcom, Lightyear, Matrix, MegaPath, PAETEC, Consolidated, RCN, RNK, segTEL, Talk America, TDS Metrocom, & TelePacific (“Access Point, et al.”) at i; City of Philadelphia, at 10; Columbia Capital and M/C Venture Partners (“Telecom Investors”), at 3; Six Member States of the Mid-Atlantic Conference of Regulatory Utility Commissioners (“MACRUC States”), at 3; Regulatory Studies Program of the Mercatus Center at George Mason University (“Mercatus Center”), at 3-4; National Association of Telecommunications Officers and Administrators (“NATOA”), at 2; Pennsylvania Public Utility Commission (“Pennsylvania PUC”), at 5; Texas PUC, at 5; Time Warner Telecom, Inc., et al. at 3; Office of Advocacy of the U.S. Small Business Administration (“SBA”), at 2.

<sup>4</sup> SBA, at 5.

and should set forth specifically and unambiguously the particular rules and regulations from which forbearance is sought.

- The Commission should establish reasonable timeframes for its procedures for reviewing and seeking comment on petitions for forbearance.
- The Commission should curtail the submission of late-filed information and *ex partes*: When petitioners submit new and significant information subsequent to their original filings, the Commission is denied sufficient time to assess the merits of petitions, and interested parties lack sufficient time to assess the evidence.
- The Commission should issue an order on all forbearance petitions so that the relief granted is unambiguous.
- The “deem granted” process is contrary to the public interest.
- Incumbent local exchange carriers’ (“ILECs”) assertions that changes to the forbearance process would discourage broadband investment are unpersuasive.
- Contrary to the comments of AT&T, Qwest, and Verizon, and despite the semblance of competition created by the evolving array of intermodal services, the fact is that local, switched, and special access markets are not yet competitive.

As numerous initial comments comprehensively and persuasively demonstrate, the undefined process that now exists for the review of petitions for forbearance is

inefficient and intolerable. Repetitive, ambiguous, overlapping, and incompletely supported petitions squander limited FCC resources and flout the requirements set forth in the Administrative Procedures Act (“APA”). Partly as a result of that flawed process, other pressing matters, such as intercarrier compensation and special access remain on the back burner, awaiting resolution for many years.<sup>5</sup> Initial comments also identify specific, practical modifications to the process (and/or support the modifications proposed by CLEC Petitioners), which, if adopted, would result in a more reasoned, transparent and reasonable process for federal and state regulators as well as those representing industry members and consumers. State Advocates reiterate their support for the CLEC Petition, and urge the Commission to take the requisite steps in a timely manner to improve its process for reviewing forbearance petitions. As aptly stated by Access Point, et al.: “Absent procedural rules, petitioning parties are able to dictate the agency’s agenda in pursuit of parochial interests hindering an orderly approach to decision-making based on reasonable priorities and criteria.”<sup>6</sup>

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<sup>5</sup> See, e.g., *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001); *id.*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005); *id.*, Order, 21 FCC Rcd 14764 (WCB 2007); *id.*, Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism, Public Notice, 22 FCC Rcd 5098 (2007); see also *id.*, Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic, 17 FCC Rcd 19046 (2002). See also *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); *id.*, Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, Public Notice, 22 FCC Rcd 13352 (2007).

<sup>6</sup> Access Point, et al., at i.

## II. REVIEW OF INITIAL COMMENTS

### A. **It is essential that the Commission not abdicate its responsibility to properly review forbearance petitions in accordance with the Telecommunications Act of 1996.**

Initial comments do not disturb State Advocates' position that ILECs continue to dominate relevant markets. State Advocates reiterate their initial comments:

Federal and state regulators are responsible, *inter alia*, for protecting ratepayers from anticompetitive behavior by incumbent local exchange carriers ("ILECs"). ILECs continue to dominate the local markets that they have traditionally served, are rapidly regaining control of the long-distance market, successfully serving the market for triple-play packages, and, with cable companies, also dominate the emerging broadband market. ILECs continue to exert control over bottleneck local facilities. Regulatory accountability continues to be necessary to protect consumers and competitors from incumbent local carriers' anticompetitive behavior.<sup>7</sup>

State Advocates concede that where market forces are sufficient, a certain amount of deregulation may be warranted. However, as Comcast Corporation ("Comcast") suggests, "It is equally important, however, that the Commission not use that [forbearance] authority to relax statutory and regulatory safeguards prematurely."<sup>8</sup>

Contrary to the views of AT&T Inc. ("AT&T"), the standards established by Congress by which the Commission must evaluate forbearance petitions are high. Section 10's three-part test is conjunctive, *i.e.*, all of the criteria must be met. As the Commission has explained:

The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied. Thus, the Commission "could properly deny a petition for forbearance if

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<sup>7</sup> State Advocates, at 7, citing 07-204/07-273 Rate Counsel/NASUCA Comments and Opposition, at 16-22.

<sup>8</sup> Comcast, at 1.

it finds that any one of the three prongs is unsatisfied.”<sup>9</sup>

Further, the Commission must also follow the requirement of Section 10(b) that in making a determination of whether forbearance is in the public interest, the Commission “shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>10</sup>

Qwest Communications International Inc. (“Qwest”) asserts that “[c]ontrary to the Petitioners’ view of such petitions as an evil that must be harnessed or eliminated, forbearance petitions are an essential component in the Act’s de-regulatory framework.”<sup>11</sup> AT&T asserts that the “public interest harms” that the proposed rules would cause are real and that the problems they would solve are “entirely illusory.”<sup>12</sup>

Further, AT&T recycles the ILECs’ favorite threat that “blunting the effectiveness of the forbearance tool” would reduce intermodal competition and broadband investment.<sup>13</sup> To the contrary, the adoption of procedural rules governing the forbearance process will, as suggested by Columbia Capital and M/C Venture Partners (“Telecom Investors”) “minimize regulatory uncertainty in the market for investment in telecommunications.”<sup>14</sup>

Telecom Investors explain further:

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<sup>9</sup> *In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, *Memorandum Opinion and Order*, FCC 07-212 (rel. December 5, 2007) (“*Verizon Six MSA Order*”), at para. 20, quoting *Cellular Telecommunications & Internet Assoc. v. Federal Communications Commission*, 330 F.3d 502, 509 (D.C. Cir. 2003). See also *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, *Memorandum Opinion and Order*, 22 FCC Rcd 14118, 14125, para. 12 (2007).

<sup>10</sup> 47 U.S.C. §160(b).

<sup>11</sup> Qwest, at 4 (see generally at 4-6).

<sup>12</sup> AT&T, at 2.

<sup>13</sup> *Id.*, at 2-3.

<sup>14</sup> Telecom Investors, at 1.

Sound procedural rules to govern the Commission's consideration of petitions for forbearance will provide regulatory certainty to the marketplace, thus promoting investment, which leads to innovation, competition, and the provision of new services to the American public. In contrast, continued uncertainty and unpredictability in the forbearance process will increase investment risk, distort investment decisions, lead to inefficiency, and thus be contrary to the objects of the Communications Act.<sup>15</sup>

State Advocates concur with Telecom Investors that increasing the stability and predictability of the forbearance process will encourage investment.

Also, even if the Commission, contrary to State Advocates' recommendation,<sup>16</sup> considers the duopoly that consists of the incumbent telecommunications carrier and the incumbent cable company to constitute sufficient competition, regulatory oversight is nonetheless essential because cable companies depend on ILECs for interconnection.<sup>17</sup>

As stated by Comcast, "ILECs are currently the only carriers that operate geographically ubiquitous local networks that can provide efficient transit service."<sup>18</sup>

SBA states that the impact of forbearance is of concern to many rural ILECs with regard to deregulation of broadband services and the requisite access to the Internet backbone.<sup>19</sup> SBA further suggests that "[b]ecause the language of Section 10 directs the Commission to consider how a forbearance grant will impact competition in the market, the potential economic burden imposed on rural ILECs and other small providers by such grants warrants close review."<sup>20</sup>

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<sup>15</sup> Id.

<sup>16</sup> See, e.g., State Advocates, at 16-17.

<sup>17</sup> See Comcast, at 3.

<sup>18</sup> Id., at 5.

<sup>19</sup> SBA, at 4.

<sup>20</sup> Id., at 5 (notes omitted).

In its initial comments, Verizon describes a purportedly competitive market<sup>21</sup> and refers to the “old, ‘one-wire’ world.”<sup>22</sup> State Advocates concur that today’s world is a “multi-wire” world, and concurs with the statement of Thomas Tauke, Verizon’s executive vice president-public affairs, policy, and communications, that “consumers today believe they would like to have access both to wireless and wireline services.”<sup>23</sup> Despite intermodal alternatives and the popularity of wireless service, however, the vast majority of consumers continue to rely on ILECs’ retail wireline service, and purchase wireless to supplement rather than to replace their traditional link to the public switched network – that is, most consumers want *both* a wireline *and* a wireless connection.<sup>24</sup> Furthermore, the general assertions of competition in the ILECs’ initial comments<sup>25</sup> do not alter the fact that ILECs continue to dominate switched and special access services.

State Advocates concur with Verizon that “Congress intended for the 1996 Act to unleash competitive forces,”<sup>26</sup> but strongly disagrees that the much-anticipated competition has come to fruition. According to Verizon, “Congress specifically singled out ‘regulatory forbearance’ as one of the means that the Commission should ‘utiliz[e]’ in order to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”<sup>27</sup> However, neither Verizon’s

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<sup>21</sup> Verizon, at 5-9.

<sup>22</sup> Id., at 7.

<sup>23</sup> *TR Daily*, February 11, 2008.

<sup>24</sup> State Advocates recognize that an estimated 14 percent of consumers have “cut the cord” (or have not opted to subscribe to wireline service to begin with). However, speculations about future consumer demand patterns should be afforded little weight. See, e.g., Verizon, at 7 (referring to the percentage of wireless-only consumers as “expected to continue increasing”).

<sup>25</sup> See, e.g., AT&T, at 2; Verizon, at 5-9.

<sup>26</sup> Verizon, at 9.

<sup>27</sup> Id., at 9, citing 47 U.S.C. § 706.

comments nor other initial comments have demonstrated how the regulations and obligations from which ILECs seek forbearance are thwarting the deployment of advanced telecommunications, nor do they specify the investments that they are *not* undertaking because of the existence of such purportedly onerous regulations. Moreover, *improving* the forbearance petition process does not mean *eliminating* any procedural constraints. The beneficial consequences of Section 10 are entirely compatible with, and would benefit from, a more reasoned process.

Further, the 1996 Act envisions a state role in promoting the deployment of advanced services, but the current forbearance process, according to the ILECs, precludes state commissions from involvement in broadband promotion, which would be fundamentally inconsistent with congressional intent. The ILECs' interpretation of the 1996 Act would constitute a rewriting of the statute, which in turn, raises constitutional concerns.

State Advocates concur with Access Point, et al. that the Commission should adopt procedural rules that require forbearance petitions “to include ‘actual data’ that supports the forbearance relief sought”<sup>28</sup> and that the facts should be “those in existence at the time the petition is filed and not by predictions or speculations of what the future has in store.”<sup>29</sup> Petitioners should be required to provide detailed evidence (as discussed in more detail below) about purported competition, rather than be allowed to rely on generalizations about potential competitive threats to their markets.

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<sup>28</sup> Access Point, et al., at 22.

<sup>29</sup> Id., at 23.

**B. The Commission should bring clarity and predictability to the process by adopting basic rules to govern its review of forbearance petitions.**

Initial comments support an improved process for the FCC’s review of forbearance petitions. The California PUC, for example, states that the “sheer number of petitions and the complexity of many, however, require some established procedures to ensure a thorough and effective review as possible within the limited timeframe set by Congress.”<sup>30</sup> Access Point, et al. point out that the Commission has established procedural rules to govern proceedings subject to statutory deadlines, such as Section 208 complaints, Section 271 applications, and rulemaking proceedings, but that, despite concerns expressed by congressional offices and some of the FCC Commissioners, the process to date for reviewing forbearance proceedings, by contrast, has been “entirely *ad hoc*.”<sup>31</sup>

Contrary to AT&T’s assertion that the CLEC proposed rules would “pointlessly eliminate” the ability of the Commission to be flexible and adapt its procedures and, instead, result in “rigid, one-size-fits-all procedures” for the review of forbearance petitions, most commenters support Commission adoption of at least a modicum of order to the process.<sup>32</sup> AdHoc Telecommunications Users Committee (“AdHoc”) supports the “thrust” of the petition but is concerned that “it would not go far enough in allowing the Commission to regain control of its agenda.”<sup>33</sup> The National Association of Regulatory Utility Commissioners (“NARUC”) notes that the CLEC Petitioners “raised a number of

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<sup>30</sup> California PUC, at 4.

<sup>31</sup> Access Point, et al., at 2-3.

<sup>32</sup> AT&T, at 12.

<sup>33</sup> AdHoc, at 1.

valid concerns about the process.”<sup>34</sup> Even the Mercatus Center, which asserts that the Commission should take a “more active role in advancing forbearance,”<sup>35</sup> suggests that notice and comment rules would be “eminently sensible.”<sup>36</sup>

AT&T’s suggestion that rules governing forbearance petitions would make the Commission’s job harder “by eliminating its flexibility” is unfounded.<sup>37</sup> As noted by the CLEC Petitioners<sup>38</sup> and by NARUC,<sup>39</sup> the Commission retains authority to waive its rules for good cause. AT&T’s position is not persuasive – instead, as numerous other initial comments demonstrate, reining in the multitude of poorly crafted petitions with a reasonable and clear process that establishes well-delineated requirements for petitioners would lessen the burden on the Commission and provide for a more reasoned and transparent review process.

State Advocates disagree with Verizon’s assertion that the Commission’s “procedures for handling forbearance petitions do not require a radical overhaul.”<sup>40</sup> Verizon points to the “Commission’s substantive successes in defending its rulings on forbearance petitions” (when reviewed by courts of appeal) as evidence that the “existing forbearance process is not dysfunctional” and further states that only a few petitions for

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<sup>34</sup> NARUC, at 4.

<sup>35</sup> Mercatus Center, at 3.

<sup>36</sup> Id., at 4. However, Mercatus Center argues that forbearance proceedings are not subject to APA, but the Commission could use APA rules as a model. Id. Forbearance proceedings are indeed covered by the APA. See State Advocates at 9-10, 28 and discussion in these reply comments below.

<sup>37</sup> AT&T, at 12.

<sup>38</sup> CLEC Petition, at 17.

<sup>39</sup> NARUC, at 6, stating: “As with all of its rules, the FCC, however, would retain authority, on its own motion, to waive [the complete as filed] requirement for good cause. See, 47 C.F.R. §1.3.”

<sup>40</sup> Verizon, at 19; see also id., at 19-27, and Verizon’s Exhibit A, which lists the Commission’s written orders on forbearance.

forbearance have been “deemed granted” by operation of law.<sup>41</sup> Contrary to Verizon’s assertion, the Commission’s success in defending its forbearance rulings is not incompatible with a conclusion that the forbearance procedures merit modification. The Commission’s success has been *despite* the lack of a reasonable procedural process. Verizon further defends the filing of updated information as necessary because the proceedings take fifteen months.<sup>42</sup> State Advocates recommend that the *Commission* should decide if and when it requires petitioners and non-petitioners to update information.

The Commission should treat forbearance petitions as contested cases under the APA, which make them adjudications. In many of the forbearance cases, there are fundamental facts in dispute, including whether the incumbent possesses the ability to exercise market power, which would warrant more than notice and comment. The FCC’s rules should identify the additional procedures that parties will be afforded the parties if the process is more than a notice and comment adjudication.

**C. There is little opposition to Commission affirmation that forbearance petitions are subject to a notice and comment period.**

Others join State Advocates in supporting the CLEC Petitioners’ recommendation that the FCC at least require Section 10 forbearance petitions to be subject to the APA notice and comment rulemaking procedures, and that such a requirement be adopted formally by the FCC.<sup>43</sup> (This would apply, as noted above, where the proceeding was not

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<sup>41</sup> Id., at 21.

<sup>42</sup> Id., at 25.

<sup>43</sup> See, e.g., NATOA, at 5; Telecom Investors, at 3; California PUC, at 5, citing CLEC Petition, at 11-12; Access Point, et al., at 15-16 (footnote omitted) (recommending that the Commission conclude that the APA’s notice and comment rules that apply to rulemakings also apply to all Section 10 forbearance proceedings).

an adjudication.) As stated in numerous comments and reply comments submitted by NASUCA, NASUCA members, and Rate Counsel, the potential impact on consumers, consumer advocates, and state regulators of Commission grants of forbearance is enormous. Contrary to the comments of some that the Commission need not formalize the comment period given that it has always allowed for comments,<sup>44</sup> Sprint Nextel correctly observes that the comment cycle has “varied significantly” in each of the forbearance proceedings.<sup>45</sup> State Advocates address this issue further in the section below regarding proposals about the time line for forbearance petitions.

**D. Petitioners bear the burden of proof to demonstrate that they have met all the standards for forbearance and to delineate specifically the rules from which they seek forbearance.**

AT&T cites a statement by Chairman Martin that Section 10 puts “the burden of justifying a denial of a forbearance petition on the Commission.”<sup>46</sup> AT&T opines that:

while the statute provides that carriers ‘may’ file petitions ‘requesting that the Commission exercise the authority granted it,’ the Commission’s statutory obligations are independent of any such filings and therefore do not change merely because a private party has brought certain circumstances to its attention in a petition. This burden does not suddenly shift to a private carrier just because it files a petition.<sup>47</sup>

AT&T’s assertion that because some Commissioners have, in the past, interpreted Section 10 to place the burden of proof (to justify a denial, for instance) on the Commission, a requirement placed on petitioners to establish that the criteria have been

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<sup>44</sup> AT&T, at 17-18

<sup>45</sup> Sprint Nextel, at 5.

<sup>46</sup> AT&T, at 3, citing Separate Statement of Commissioner Kevin J. Martin, Approving in Part and Dissenting in Part, Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, 17 FCC Rcd. 14972, 14998 (2002) (“Martin Statement”).

<sup>47</sup> AT&T, at 7-8 (cites omitted).

met would, therefore, be unlawful, is faulty.<sup>48</sup> For example, many of the Commissioners' statements to which AT&T directs the Commission's attention are dissenting statements, for one, which would suggest that other Commissioners may have had very different interpretations of Section 10.

Other than certain Commissioners' opinions, however, AT&T cites no authority for its argument that the burden is on the Commission *not* to grant a petition. SBA, by contrast, suggests that "[i]n legal and regulatory actions, the petitioner is responsible for bearing the burden of proof, and if the Commission must depart from this established procedure, they should explain the reasoning for such a change."<sup>49</sup> State Advocates also concur with Earthlink that:

Unlike other types of FCC proceedings, in forbearance petitions the petitioner rather than the Commission picks the target regulatory provisions, the time, and the relief sought. With this power must come the legal burden that a petitioner's pleadings are specific and their evidence is compelling.<sup>50</sup>

Further, the preponderance of evidence standard applies to adjudications.<sup>51</sup>

Indeed, if, as AT&T asserts, the Commission bears the burden of proof, then it would seem the Petitioner would not need to lift a finger in support of its petition other than to simply request forbearance from a particular rule. (Of course, the Commission then presumably could simply reason that it found no evidence that the criteria were met.) AT&T apparently is suggesting that the Commission must provide data on its own demonstrating that the criteria are not met, but the plain language of Section 10 states that

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<sup>48</sup> *Id.*, at 8; see also *id.*, at footnote 23 and 24.

<sup>49</sup> SBA, at 8 (note omitted). See also Pierce, *Administrative Law and Process* (4<sup>th</sup> Ed. 2004), § 10.7.

<sup>50</sup> Earthlink, at 7; see also Sprint Nextel, at 6 and Comptel, at 7, stating that the petitioner has the burden of proof.

<sup>51</sup> See *Steadman v. SEC*, 450 U.S. 91 (1981).

“the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or a telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, *if the Commission determines that*” the three criteria are met.

While regulatory inaction may indeed result in a “deemed granted” petition, contrary to AT&T’s argument the default outcome is not necessarily forbearance *unless the Commission proves otherwise*. AT&T recognizes as much when it states: “To be sure, any petitioner that fails to provide evidence, support, and analysis to explain why forbearance is necessary weakens its chances that the Commission will determine that the statutory requirements for forbearance have been met.”<sup>52</sup> AT&T’s argument about the burden of proof is not persuasive.

Verizon opposes any proposal to adopt a burden of proof standard, and asserts that the Commission, not the petitioner, “has the authority and ability to compile that complete record.”<sup>53</sup> Verizon further reasons that a petitioner cannot bear the burden of providing evidence that it does not possess, and that a petitioner should not be penalized if third parties do not provide the requisite information.<sup>54</sup> According to Verizon, unlike in civil litigation, where a judge is deciding a private dispute between private parties, in a forbearance proceeding, “the Commission has a statutory duty to grant forbearance whenever it finds the § 10(a) forbearance criteria, which address the public interest, are satisfied.”<sup>55</sup> Verizon overlooks the fact that forbearance cases are contested under the

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<sup>52</sup> AT&T, at 9.

<sup>53</sup> Verizon, at 39-40.

<sup>54</sup> *Id.*, at 40.

<sup>55</sup> *Id.*

APA, as noted above, and as adjudications, the petitioners bear the burden of proof, as State Advocates discuss more fully above. Further, the Commission must base its decisions on a record, and that record must come from somewhere.

If the Commission now accepts that petitioners do not bear the burden of proof, then, as asserted by the MACRUC States,

a Petitioner could simply make general and vague claims about harm to competition that, without documentation, the interested public might be unable to address without adequate data and information from the Petitioner. By keeping the burden of proof on the Petitioner or proponent of forbearance, the Petitioner or proponent will have the appropriate incentive to provide the data and information needed to determine if forbearance is appropriate.<sup>56</sup>

The Mercatus Center contends that the burden of proof does not rest on the petitioner and that the Commission must “explain itself if it chooses not to forbear.”<sup>57</sup> The difference in view, in part, seems to be in semantics, because the end result is the same: The Mercatus Center also states that “[t]his does not mean that a party can file a petition that contains no new evidence suggesting why the Commission must forbear and expect the Commission to take action” and that “[t]he Commission can safely reject such a petition because it brings nothing new to the attention of the Commission.”<sup>58</sup>

State Advocates also agree that:

Interested parties should not be required to guess at the specific statutes, rules and orders subject to a forbearance request, as happens when parties vaguely request relief with undefined terms such as “economic regulation” or “broadband regulation.” Moreover, as the recent experience with Verizon shows, when a

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<sup>56</sup> MACRUC States, at 6.

<sup>57</sup> Mercatus Center, at 7.

<sup>58</sup> Id.

vaguely worded petition is “deemed granted,” no one actually knows the full scope of forbearance.<sup>59</sup>

The Commission should establish unambiguously that petitioners bear the burden of demonstrating the specific relief sought, rather than leaving it up to the Commission and interested parties to guess about the scope of the specific forbearance petition.

**E. The Commission should adopt “complete-as-filed” rules and rules governing Commission treatment of late-filed data.**

There is broad support among commenters for the adoption of a “complete-as-filed” rule.<sup>60</sup> MACRUC States contend that “an applicant seeking forbearance should be expected to file enough information, data, and supporting documentation to establish a *Prima Facie* case on the first filing date.”<sup>61</sup> State Advocates also concur with Access Point, et al. that the Commission should evaluate and judge forbearance petitions “as they were presented by the petitioners at the time of filing, not on the basis of extensive supplemental information submitted by the petitioners long after being docketed,”<sup>62</sup> and also that the “petitioner should not be given unlimited flexibility and discretion to file additional support later.”<sup>63</sup>

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<sup>59</sup> Earthlink, at 2 (referring to 06-172); see, also, State Advocates, at 10, citing 06-172 State Advocate Comments, at 16-17.

<sup>60</sup> See, e.g., NATOA, at 5; Comptel, at 7-8; AdHoc, at 2; MACRUC States, at 3; Pennsylvania PUC, at 6; Mercatus Center, at 5-6; SBA, at 7; NCTA, at 4; Missouri PSC, at 4; Telecom Investors, at 5; Earthlink, at 13; Sprint Nextel, at 7; California PUC, at 5-6 (recommending that petitioning party be prohibited from materially supplementing its petition without restarting the statutory clock, and referring to the FCC’s precedent in Bell operating companies’ § 271 proceedings); Access Point, et al., at 17 (stating that “[w]hen a petitioner submits little support with its forbearance petition, the notice and comment cycle is rendered virtually meaningless because the petitioner’s real case and detailed support is not yet available for comment” and therefore “[i]nterested parties are denied a full and fair opportunity to present their views on the real case and detailed support to the Commission during the formal comment cycle.”)

<sup>61</sup> MACRUC States, at 3; see also, Pennsylvania PUC, at 6.

<sup>62</sup> Access Point, et al., at 18.

<sup>63</sup> *Id.*, at 19.

State Advocates and many other commenters express support for the CLEC Petitioners' proposal that the Commission should require a petitioner to "submit all of the evidence upon which it would have the Commission rely in evaluating whether the statutory requirements of Section 10 have been met"<sup>64</sup> in its initial forbearance petition. Such a rule is hardly onerous and is simply common sense. AdHoc asserts that dismissal for incomplete petitions is appropriate and that "[a]ny other approach would reward petitioners for filing incomplete petitions."<sup>65</sup> NARUC observes that "under the current rules [or lack thereof], 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."<sup>66</sup> The Commission should adopt an explicit pre-filing notice requirement, which would simplify the process considerably.

Verizon opposes recommendations to expand filing requirements that would "impose evidentiary burdens on petitioners to proffer evidence largely in the hands of those opposing relief."<sup>67</sup> Verizon also distinguishes the 90 day deadline that applies to § 271 applications from the much longer time frame for forbearance petition deliberations.<sup>68</sup> Verizon also opposes the CLEC Petitioners' proposed requirement that petitions specifically address how each of the three components of the § 10 test are met, contending that dismissing a petition for procedural reasons is inconsistent with § 10(c), "which requires the Commission to reach the substantive questions of whether the petition makes out a *prima facie* case and, if so, whether the record as a whole that the

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<sup>64</sup> CLEC Petition, at 13.

<sup>65</sup> AdHoc, at 3.

<sup>66</sup> NARUC, at 5.

<sup>67</sup> Verizon, at 30.

<sup>68</sup> Id., at 31-32.

Commission compiles demonstrates that the forbearance criteria are satisfied.”<sup>69</sup> Verizon further contends that the proposal is inconsistent with prior Commission forbearance analyses in which the Commission “has repeatedly recognized that the three criteria in § 10 are interrelated.”<sup>70</sup> State Advocates urge the Commission to establish minimum filing requirements that balance the need to discourage incomplete petitions (which needlessly squander Commission resources) with the possible need to seek additional information from non-petitioners (e.g., regarding competitors’ entry into relevant markets). At the very least, petitioners should be required to identify the information that they do not have so that the Commission can seek it out.

The Mercatus Center characterizes the proposed complete-as-filed rule as “sensible.”<sup>71</sup> Yet the Center suggests that the Commission “should not tie its hands, and it should allow for the extraordinary situation in which a material amendment is warranted or when the scope of what constitutes a ‘material amendment’ is in controversy.”<sup>72</sup> A complete-as-filed rule would not prohibit the Commission adapting to such extraordinary situations.

The Pennsylvania PUC states that “parties and the petitioner often file exhaustive supplemental data, information, or commitment submissions much later in the forbearance docket” with resultant prejudice to parties.<sup>73</sup> For example, the Pennsylvania PUC cites Docket No. 04-440 in which Verizon was ultimately granted forbearance through Commission inaction, but because of “multiple ex parte filings with exhaustive

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<sup>69</sup> Id., at 33-34.

<sup>70</sup> Verizon, at 34.

<sup>71</sup> Mercatus Center, at 6.

<sup>72</sup> Id.

<sup>73</sup> Pennsylvania PUC, at 8.

information up until a few weeks before the statutory deadline” there remains uncertainties about what forbearance the petitioner actually received.<sup>74</sup> As noted by the Pennsylvania PUC “[t]his arose because the Petitioner’s forbearance pleadings varied over time and the forbearance became operational as a matter of law.”<sup>75</sup>

State Advocates concur with MACRUC States that the completeness of a petition should be judged also on whether the petition addresses each of the forbearance criteria.<sup>76</sup> State Advocates reiterate their initial comments: “Many state consumer advocate offices, and certainly other interested parties, simply do not have the resources to re-visit the merits of petitions based on late-filed information.”<sup>77</sup> Many commenters similarly suggest that the petitioner should not be allowed to “materially supplement” a petition unless the statutory clock begins anew.<sup>78</sup> Such a requirement is essentially a corollary to the “complete-as-filed” rule. The only way to enforce the “complete-as-filed” requirement is to reset the clock and/or treat substantial new information as a new petition.<sup>79</sup> MACRUC States support a “reset” of the clock for the filing of new information.<sup>80</sup> State Advocates concur with the Pennsylvania PUC’s proposal that the FCC adopt a rule that substantial filings after a certain date of the review timeline (90 days after notice in Daily Digest and Federal Register) are treated as “an effective

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<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> MACRUC States, at 8.

<sup>77</sup> State Advocates, at 12.

<sup>78</sup> CLEC Petition, at 13. State Advocates support rules that provide the Commission with discretion as to limited circumstances under which a petitioner could correct a petition without restarting the statutory clock. As noted by CLEC Petitioners, Section 1.3 of the Commission’s rules allows it to waive rules for good cause. Id., at 17. See, also, Missouri PSC, at 4.

<sup>79</sup> MACRUC States, at 5-6.

<sup>80</sup> MACRUC States, at 3-4; see also, Pennsylvania PUC, at 9-10.

‘refiling’ of the original Petition.” The results would be either rejection or withdrawal of the original petition, and the new filing would then be viewed as a new petition subject to a new statutory clock.<sup>81</sup> Numerous commenters concur that the statutory clock should restart with the addition of substantive information by the petitioner.<sup>82</sup>

The California PUC, however, recommends that in certain instances the FCC not re-start the clock, specifically when the petitioning party *rescinds* parts of its request for relief.<sup>83</sup> State Advocates concur with the California PUC in its example that if a party seeks forbearance from Title II regulation in five wire centers and then amends its petition to eliminate one of the wire centers, the clock need not be restarted.<sup>84</sup> Other situations would be more problematic. A party restricting its request should request a waiver.

Initial comments resoundingly respond affirmatively to the Commission’s question whether there are “additional burdens placed on stakeholders due to the fact that there is a statutory deadline on the completion of forbearance petitions.”<sup>85</sup> The CLEC Petitioners’ proposal to adopt rules governing content and “complete-as-filed” requirements can minimize those burdens. State Advocates reiterate their support for the CLEC Petitioners’ proposal for “complete-as-filed” requirements, including a specification by the Commission as to information that would be necessary for a *prima facie* showing that forbearance should be granted.

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<sup>81</sup> Pennsylvania PUC, at 13.

<sup>82</sup> See, e.g., NARUC, at 5, Pennsylvania PUC, at 13; MACRUC States, at 3-4; Access Point, et al., at 26-27; AdHoc, at 2-3; California PUC, at 5-6; Telecom Investors, at 6; Comptel, at 8-9; Earthlink at 14; Mercatus Center, at 5-6; Missouri PSC, at 4; NCTA, at 4; Pennsylvania PUC, at 4; Sprint Nextel, at 7.

<sup>83</sup> California PUC, at 6.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., NARUC, at 4; AdHoc, at 2; MACRUC States, at 9-10, responding to *NPRM*, at para. 13.

**F. The Commission should adopt specific requirements related to the types of data that should accompany specific types of forbearance petitions and standards for review of such data.**

Others follow the same line as State Advocates' recommendation that carriers seeking forbearance from section 251 and/or 271 of the Act provide additional supporting data.<sup>86</sup> The California PUC recommends that petitioners be required "to include all supporting data at the wire center level and relevant declarations in support of that wire center data."<sup>87</sup> State Advocates continue to urge the Commission to utilize the analytical framework established by the Commission in its *Triennial Review* proceeding to assess competitive entry and the merits of petitions for forbearance from unbundling obligation and to adopt the self-provisioning triggers it used in the *Triennial Review* proceedings when assessing local competition in forbearance proceedings.<sup>88</sup>

The Mercatus Center reasons that if the petitioner does not provide sufficiently granular information to the Commission in a "complete-as-filed" petition in order to demonstrate that the criteria are met, "the Commission can safely reject the petition. There is no need to set a higher bar for any particular type of forbearance petition . . ."<sup>89</sup> However, the Mercatus Center's rationale misses the point that reviewing incomplete petitions inefficiently consumes precious Commission time and effort. The reason for setting a higher bar is to prevent the filing of half-baked petitions, which then divert limited Commission resources from other matters. As State Advocates stated in initial comments, "[u]ltimately, it is not the responsibility of the Commission, but rather is the

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<sup>86</sup> See, e.g., California PUC, at 9; Access Point, et al., at 30; SBA, at 8-9.

<sup>87</sup> California PUC, at 9, citing CLEC Petition, at 31. See also Access Point, et al., at 30, recommending that the Commission require petitioners to identify the specific geographic markets from which forbearance relief is sought.

<sup>88</sup> State Advocates, at 14-18.

<sup>89</sup> Mercatus Center, at 7.

responsibility of forbearance petitioners, to demonstrate that the standards of Section 10 are met.”<sup>90</sup>

Comcast raises an interesting concern regarding ILEC submission of wire center data. Comcast wants the ILECs to provide “evidence of the presence of alternative providers in the same format that those providers use to measure their presence in a geographic area.”<sup>91</sup> Essentially, Comcast submits that the Commission has required competitive providers to do all the work in converting their data into data that will be comparable to what the ILEC submitted. Thus, the competitors, instead of the petitioner, bear the costs and burdens.<sup>92</sup> Comcast uses rate centers differ from wire centers. Comcast “agrees that granular data are needed” but states that the burden of, and responsibility for, any data conversions should lie with the petitioners.<sup>93</sup> NCTA has the same concern as Comcast’s, stating, “[T]he process for considering such petitions often has proven to be unnecessarily burdensome for cable operators because they often are required to comply with requests from Commission staff for information on the state of competition in particular geographic areas. Often these requests come relatively late in the process.”<sup>94</sup>

Access Point, et al. assert that Verizon’s recently submitted petition for forbearance in Rhode Island<sup>95</sup> “is a prime example of problems created by the lack of procedural rules,” and explains further that “[h]aving lost its earlier proposal for

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<sup>90</sup> State Advocates, at 17.

<sup>91</sup> Comcast, at 5.

<sup>92</sup> Id., at 5-6.

<sup>93</sup> Id., at 6.

<sup>94</sup> NCTA, at 2.

<sup>95</sup> Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24 (filed February 14, 2008).

forbearance for most of Rhode Island, Verizon now wants the Commission to grant the same relief requested for essentially the same geographic area using a new way of evaluating competition – on a rate center basis.”<sup>96</sup> State Advocates concur with Access Point, et al. that procedural rules could prevent repetitive petitions that waste Commission resources.<sup>97</sup>

**G. State Advocates urge the Commission to adopt rules that establish a timeline for review of forbearance petitions.**

The NPRM seeks comment on the adoption of “specific timetables for the Commission’s review of forbearance petitions.”<sup>98</sup> State Advocates recommended in initial comments that the Commission consider adopting the timeline put forth by the CLEC Petitioners, which includes a time period for the Commission to identify any deficiencies in the filing and for the Petitioner to “cure minor defects.” Many commenters express specific concerns, modifications, and proposals regarding specific timelines for Commission review and party input.

MACRUC States propose that the statutory timeline for Commission review should be triggered when the FCC “receives” a filing and then defines “receipt” of a filing as the date upon which the FCC issues a public notice in the daily digest or even in the Federal Register. The MACRUC-proposed timeline includes FCC determination of completeness within 60 days of the filing of the petition (state commissions would be served at same time as the FCC), and then notice would be posted in the Daily Digest

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<sup>96</sup> Access Point, et al., at 5.

<sup>97</sup> Id.; see also id., at 7, recommending that the Commission adopt a rule that requires each forbearance petition to indicate whether the requested relief either partially or entirely replicates the relief and the issues that the Commission is considering in pending rulemaking proceedings. See also id., at 11, stating that “[f]ortunately, the Commission is not helpless to defend itself against repetitious forbearance petitions” because the “Commission may forbear from Section 10 itself in such instances.”

<sup>98</sup> NPRM, at para. 9.

with establishment of comment and reply comment period. At that time (publication and notice) the petition would be considered in “receipt,” and the one-year clock would begin.<sup>99</sup> NARUC’s comments seem to support such an approach. NARUC notes that in formal complaint proceedings the statutory deadline clock does not start until the complaint “has met all applicable procedural requirements.”<sup>100</sup>

AdHoc expresses concern regarding the timeline proposed in the CLEC Petition. In particular, AdHoc is concerned about the requirement that the Commission review petitions for completeness and deficiencies within 21 days of petition filing and suggests, instead, that interested parties should file motions to dismiss.<sup>101</sup> Although parties should not be precluded from filing motions to dismiss, the primary responsibility should remain with the Commission for governing its proceedings.

Verizon asserts that the Commission should indicate its intention to rule on forbearance petitions within six months of filing and should rarely extend the statutory deadline.<sup>102</sup> State Advocates disagree. The Commission, rather than industry, should determine if and when to process forbearance petitions at the faster pace that Verizon seeks, based on the scope and merits of a petitioner’s specific request, and the Commission should not create a general expectation that it will rule on petitions within six months. Although any given petition may seem of particular significance to the petitioner, the Commission can assess its workload and other competing priorities, and

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<sup>99</sup> MACRUC States, at 9-10 and 13-14.

<sup>100</sup> NARUC, at 5.

<sup>101</sup> AdHoc, at 2.

<sup>102</sup> Verizon, at 12; see *id.*, at 13-15, discussing the changing communications marketplace “where 12 or 15 months is a competitive lifetime”.

based on that assessment, determine the proper time frame within the statutory guidelines. A specific petitioner would be free to seek a waiver.

Numerous comments set forth specific varying suggestions for time lines, which these reply comments do not attempt to summarize. By way of example, Access Point, et al. recommend that the Commission:

- Issue a protective order promptly after a forbearance petition is filed;<sup>103</sup>
- Review a petition within 21 days of its filing and then allow a petitioner to correct minor, non-material “defects” within the subsequent 14 days (and deny the petition if such corrections are not made);<sup>104</sup>
- Give interested parties 45 days from the public notice to file motions to dismiss, and then give the petitioner no more than 10 days to oppose the motion, and then give the party filing the motion another five days to reply to the opposition, and issue a decision within 15 days of the filings addressing the motion to dismiss;<sup>105</sup>

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<sup>103</sup> Access Point, et al., at 41.

<sup>104</sup> Id.

<sup>105</sup> Id., at 41-42.

- Establish a deadline for staff to issue its first set of data requests so that responses are submitted at least 21 days before the date for filing initial comments;<sup>106</sup>
- Provide interested parties 45 days after the Commission has conducted its initial review and after the petitioner has corrected non-substantive errors to submit initial comments, and 30 days thereafter to file reply comments (consistent with the CLEC Petition recommendation);<sup>107</sup> and
- Prohibit material *ex parte* filings.<sup>108</sup>

State Advocates recommend that the Commission consider carefully the various suggestions regarding time lines and then, based on its review of these suggestions and the Commission’s experience with numerous forbearance proceedings, issue rules that set forth a reasonable time frame. Further, as noted above, the Commission should adopt a requirement for filing a notice of intent to file a forbearance petition at least 60 days in advance of the petition filing, which would specify the rules or statute from which forbearance is sought.<sup>109</sup>

An issue of particular importance to commenters (as previously stated above) is the issue of late filings, including *ex partes*, which contain substantial information.

AdHoc proposes an *ex parte* final deadline 60 days after reply comments.<sup>110</sup> Sprint

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<sup>106</sup> Id., at 43 (noting that “the D.C. Circuit has held that an ‘agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary,’” cite omitted).

<sup>107</sup> Id., at 44.

<sup>108</sup> Id., at 44-45.

<sup>109</sup> This would allow the exchange of information before the petition is filed.

<sup>110</sup> AdHoc, at 3.

Nextel supports the quiet period proposed in the CLEC Petition (i.e. 30 days prior to statutory deadline).<sup>111</sup> Certainly, State Advocates believe that a specific deadline for *ex partes* and a corresponding “quiet period” would lead to more time for analysis of the petition by the Commission. AdHoc enumerates the benefits derived from having a hard cut-off date for *ex partes*. An *ex parte* deadline would:

- Incent parties to file all information earlier;
- Preserve Commission resources;
- Provide for “fuller communication within the Commission” (i.e. they have more time to discuss the issues within the Commission);  
and
- Provide a “quiet period”<sup>112</sup>

Even AT&T (which, for the most part, expresses the opinion that forbearance process needs no fixing) states. “[T]he only feature of the Commission’s current procedures that could use some fine-tuning is the tendency for parties to file last-minute *ex partes*, and AT&T does not oppose a new rule prohibiting such filings within a reasonable period, such as within the last fourteen days before the statutory deadline” as long as all parties are subject to the deadline and the Commission and Staff can seek additional information from all parties during that time.<sup>113</sup> Earthlink Inc. and New Edge Networks state that “it is becoming standard practice for forbearance petitioners to withhold key data until late in the forbearance process.”<sup>114</sup>

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<sup>111</sup> Sprint Nextel, at 8.

<sup>112</sup> AdHoc, at 3-4.

<sup>113</sup> AT&T, at 11-12; see, also, Id., at 20.

<sup>114</sup> Earthlink, at 13.

The Pennsylvania PUC cites the recent Verizon Six MSA Forbearance Petition in Docket No. 06-172 regarding *ex partes*.<sup>115</sup> “The press of other obligations and the last minute awareness operate to leave the state commissions with little time to respond.”<sup>116</sup> Telecom Investors support the Commission’s ability to refuse to consider late-filed substantive information and suggests that “a moving target also prejudices the ability of affected parties to provide meaningful comment.”<sup>117</sup>

In summary, there is substantial support for a predictable time line that allows for adequate review of relevant evidence and pleadings, and that improves the efficiency of the Commission’s review of forbearance petitions. In addition, concerns about Commission adoption of a timeline or prohibition on *ex parte* filings that will reduce its ability to review forbearance petitions is without merit. The Commission, on its own motion, can always seek additional information or alter the timeline in a particular proceeding.<sup>118</sup>

**H. The Commission should adopt clearly defined and consistent rules regarding protective orders and access to proprietary information.**

State Advocates and others support the CLEC Petitioners’ proposals to improve parties’ access to proprietary information.<sup>119</sup> AT&T asserts, however, that the “only

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<sup>115</sup> Pennsylvania PUC, at 7; see, also, Earthlink, at 13.

<sup>116</sup> Pennsylvania PUC, at 8.

<sup>117</sup> Telecom Investors, at 6.

<sup>118</sup> See AdHoc, at 4.

<sup>119</sup> See, e.g., NARUC, at 6; Missouri PSC, at 5; Telecom Investors, at 4-5; Earthlink, Inc. and New Edge Networks, at 3; Access Point, et al., at 32-37. But see California PUC, at 7-8, recommending that the FCC require petitioning parties to make confidential and highly confidential documents in electronic format, but disagreeing with CLEC Petitioners’ recommendation to make such information available in a searchable format because such a requirement “may be too burdensome for the petitioner.” It should be clear, in any event, that parties should not be able to take information that is in a searchable format and render it “nonsearchable” before transmitting to the FCC.

justification” offered by the CLEC Petitioners for the proposals regarding proprietary information “is that the current protections are inconvenient.”<sup>120</sup> AT&T inappropriately minimizes the substantial burden that over-designation of copy-prohibited materials and the limitation of electronic, searchable materials places on many participants in forbearance proceedings.<sup>121</sup> NARUC supports CLEC Petitioners’ proposals regarding confidential information, noting that with a short statutory timeframe for review “it is critical that the procedures for gaining access to confidential information allow timely access” to proprietary data and that an electronically searchable format requirement is a “common sense suggestion.”<sup>122</sup> NARUC shares the concerns of State Advocates expressed in initial comments that the over-designation of material as copy-prohibited (and thus only available at petitioners’ offices or offices of legal counsel) makes it difficult for parties to conduct a thorough review.<sup>123</sup> NARUC states: “This is particularly true for parties, like State commissions, who have limited staff resources and even more limited travel budgets.”<sup>124</sup> NASUCA members face similar staffing and budget limitations.

AT&T describes the CLEC Petitioners’ proposal as asking the Commission “to reduce the protections afforded to competitively sensitive information” and argues that the proposed rules would “reduc[e] incentives for *any* party to submit such information in

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<sup>120</sup> AT&T, at 26.

<sup>121</sup> AT&T, at 26.

<sup>122</sup> NARUC, at 6. NARUC suggests that it is difficult to understand why a party would convert material from electronic searchable format to a format that is not searchable and states: “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.” *Id.*, at 6-7. See, also, Missouri PSC, at 5 stating that there is “no perceivable hardship or additional risk associated with the submission of information in a searchable electronic format.”

<sup>123</sup> State Advocates, at 20.

<sup>124</sup> NARUC, at 6.

those proceedings.”<sup>125</sup> AT&T is off-base. The Commission should, instead, consider the observations put forth by Telecom Investors:

In the interest of fairness and transparency, to the extent that the Commission’s reliance upon confidential data to grant or deny a forbearance petition becomes precedential, authorized persons should be allowed to use that confidential or highly confidential data in future proceedings. As the Commission has recognized, “[m]aterials submitted under claims of confidentiality may form the basis for an agency decision, and, hence, may have precedential value.” The Commission’s current treatment of confidential data, although neutral on its face, gives an informational advantage to the repeat-player companies, who have first-hand knowledge of how prior forbearance proceedings have fared. Allowing authorized persons to use confidential and highly confidential data from one Section 10 forbearance proceeding in future Section 10 forbearance proceedings will allow interested parties to properly assess whether confidential data (such as market-specific data) in fact meets the Commission’s forbearance requirements.<sup>126</sup>

State Advocates submit that Earthlink’s proposal that the Commission endeavor to resolve disputes regarding confidential materials early in the forbearance proceeding is sound, and the Commission should consider delegating such authority to the Wireline Competition Bureau as suggested by Earthlink.<sup>127</sup> State Advocates also support Access Point, et al.’s recommendation that the Commission carefully assess whether information that is redacted genuinely needs to be redacted.<sup>128</sup>

Verizon recommends that the Commission’s rules encourage petitioners to identify third parties that are likely to have information that may be relevant and also that the Commission, when it determines that third-party data are relevant to an evaluation of

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<sup>125</sup> AT&T, at 4 (emphasis in original).

<sup>126</sup> Telecom Investors, at 4-5, citing *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, para. 63 (1998).

<sup>127</sup> Earthlink, at 3.

<sup>128</sup> Access Point, et al., at 32-37.

a forbearance petition, “collect such data from third parties in a timely manner.”<sup>129</sup> State Advocates do not oppose the inclusion in petitions of suggested third party information that a petitioner recommends the Commission seek, provided that the rationale for such information is also included. The Commission can then consider the merits of such a recommendation, and seek the data within an appropriate time frame. Certainly as the telecommunications industry evolves, it becomes increasingly important for the Commission to gather and to analyze data from diverse industry members.

Based on their review of initial comments, State Advocates reiterate their support for the CLEC-proposed rules regarding copy prohibition and electronic, searchable format. Interested parties should have access to “user-friendly” information to enable them to conduct a thorough review of the evidence that the petitioners have presented to the Commission. Consumer advocates and regulators typically possess far fewer resources than do petitioners, and, therefore, it is essential that voluminous information be readily accessible to interested parties.

**I. The Commission should encourage state commission input, but not require states to submit comments on an accelerated basis.**

CLEC Petitioners sought a “specific vehicle for state commission input” and the Commission seeks proposals for “steps the Commission could take to facilitate the participation of state commissions, as well as other parties, in forbearance proceedings.”<sup>130</sup> There seems to be overall agreement that states need input, but less agreement about the appropriate timing of that input. Neither the Missouri PSC nor the California PUC, for instance, support a separate timeline for state input as outlined by

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<sup>129</sup> Verizon, at 14; see also *id.*, at 14-17, including statement that the Commission sought data from Cablevision 13 months after Verizon filed its Six MSA petition.

<sup>130</sup> *NPRM*, at para. 9.

CLEC Petitioners, but instead believes state comments could be filed at the same time as other comments.<sup>131</sup> The California PUC opposes the CLEC Petitioners' recommendation that the Commission establish a procedure where state input would be required to be completed before the general comment cycle, because states need "as much time as other parties to draft comments, and to respond to the comments of other parties."<sup>132</sup> The California PUC also observes that other parties would be able to respond to states' comments in the reply comment cycle.<sup>133</sup>

Earthlink correctly observes that states are "the primary implementing bodies for local competition rules."<sup>134</sup> According to the Texas PUC:

Many states have been in the forefront of promoting local telecommunications competition and can be an excellent source of information. This is especially true in the context of forbearance proceedings relating to Sections 251, 252 and 271 of the FTA. The Texas P.U.C. continues to conduct arbitrations and resolve post-interconnection agreement disputes regarding various provisions of Section 251 that are instrumental in promoting and nurturing a competitive telecommunications market. As a result of these proceedings, the Texas P.U.C., and other state regulatory authorities, are familiar with issues that affect telecommunications competition, including issues that could impact interstate competition.<sup>135</sup>

State Advocates agree, and also support SBA's observation that "[i]n addition to analyzing this data at the federal level, ... believes that input from state commissions could add a valuable level of granularity to the data in specific forbearance proceedings.

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<sup>131</sup> Missouri PSC, at 6, California PUC, at 10. See also Verizon, at 32-33, observing that requiring states to file comments before others would disadvantage the states because they would have less time to prepare comments.

<sup>132</sup> California PUC, at 10.

<sup>133</sup> Id., at 10.

<sup>134</sup> Earthlink, at 12. See also, Access Point, et al., at 30, describing state commissions as "a resource that the Commission should formally incorporate into its consideration of ILEC requests for forbearance relief from § 251 obligations," and see id., at 30-31, for further discussion of state role.

<sup>135</sup> Texas PUC, at 2.

State commissions are closer to the public interests and market conditions in their specific regions, because they are tasked with focusing on a particular geographic area of the U.S. telecommunications industry.”<sup>136</sup>

MACRUC States support a “formal” Commission process for seeking state input of those states directly impacted by the petition, including that the petitioner be required to file their petition with the appropriate states.<sup>137</sup> MACRUC, the Pennsylvania PUC; and the Texas PUC propose that petitioners be obligated to file petitions and any substantial subsequent filings directly with state commissions.<sup>138</sup>

The MACRUC States’ experience has been that even after the states learn of a proceeding, the Petitioners often file exhaustive supplemental data, information, or supporting documentation after expiration of the formal filing period. These substantial supplemental filings should be available for analysis by state commissions in order to facilitate a state commission’s determination of whether to participate in a forbearance proceeding.<sup>139</sup>

It is not clear whether this proposal is intended to address only the geographically-limited MSA forbearance petitions, or more broadly to all petitions. Clearly, individual states’ interest in the former would likely be more focused.

MACRUC States also propose an additional state response that would be due 30 days after the comment and reply period ends.<sup>140</sup> NARUC, on the other hand, in

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<sup>136</sup> SBA, at 10; see also, State Advocates, at 20-21.

<sup>137</sup> MACRUC States, at 12.

<sup>138</sup> Id., at 6; Pennsylvania PUC, at 6; Texas PUC, at 2.

<sup>139</sup> MACRUC States, at 4.

<sup>140</sup> Id., at 14. Also, MACRUC States then propose that petitioner and other interested parties could file a response to the state response 30 days thereafter. MACRUC States propose no more supplemental filings unless the FCC seeks such information or rules that there is good cause shown. MACRUC States, at 15; see also, Pennsylvania PUC, at 16).

supporting a rule that “specifically builds State input in to the timeline” expresses support for the CLEC Petitioners’ proposal for a ninety day window for state input.<sup>141</sup>

The MACRUC States also raise an issue concerning preemption:

Section 160(e) prohibits a state commission from applying or enforcing any provision that the Commission has determined to forbear from applying. The MACRUC States view Section 160(e) as a limitation on the state commission’s exercise of federal law. The MACRUC States do not view Section 160(e) as a limitation on independent state law obligations. Section 160(e) does not address preemption or the FCC’s authority to overturn independent state law. For that reason, the MACRUC States consider forbearance to not limit their independent state law unless and until the FCC expressly preempts state law in a manner consistent with federal preemption. Section 160(e) is not a federal preemption authority separate and apart from any other provision of federal law authorizing the FCC to preempt the states.”<sup>142</sup>

State Advocates agree with the MACRUC States on this point.

**J. Forbearance rules adopted in this proceeding should apply to all pending and future forbearance petitions.**

State Advocates concur with NARUC’s recommendation that the Commission move swiftly to adopt rules for the review of forbearance petitions before carriers file additional petitions.<sup>143</sup> The Missouri Public Service Commission (which refers to itself as “MoPSC”) states:

Since this NPRM is only seeking comment on the need for procedural requirements, the MoPSC understands it will be necessary to promulgate another rulemaking to address the specific procedural requirements to be developed. The MoPSC’s preference is for the Commission to adopt rules on an interim basis from this proceeding pending the outcome of a separate rulemaking proceeding to establish permanent rules. In this instance, the establishment of interim rules is preferable to the

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<sup>141</sup> NARUC, at 7.

<sup>142</sup> MACRUC States, at 16-17; see, also, Pennsylvania PUC, at 18-19.

<sup>143</sup> NARUC, at 4.

current situation of having no rules in place for providing structure to the forbearance process.<sup>144</sup>

As stated in State Advocates' initial comments, "Section 10 of the 1996 Act requires that the Commission deny forbearance petitions on public interest grounds. The Commission should halt all forbearance proceedings until this rulemaking is complete."<sup>145</sup> Verizon asserts, however, that "the Commission cannot lawfully apply rules of the type these CLECs' [sic] propose to *pending* proceedings to deny already-filed petitions" and contends that the APA prohibits retroactive rules.<sup>146</sup> State Advocates, however, concur with Access Point, et al. that the Commission may apply its procedural rules not only to future but also to pending petitions for forbearance.<sup>147</sup> There is no general prohibition on retroactive applicability of procedural rules, because they do not impact parties' substantive rights. This is made clear by the case cited by AT&T, *Landgraf v. USI Film Products et al.*, 511 U.S. 244, 280 (1994).<sup>148</sup>

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<sup>144</sup> Missouri PSC, at 3.

<sup>145</sup> State Advocates, at 22.

<sup>146</sup> Verizon, at 40-41 (emphasis in original), citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J. concurring); and also *National Mining Ass'n v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002). See also Qwest, at 18, opposing any new procedure rules that would be applied retroactively to forbearance petitions that have been filed already with the FCC.

<sup>147</sup> Access Point, et al., at 13, citing *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997); *Applications of Crabtree Aircraft Company INC. for Renewal of Aeronautical Advisory Station KGW6, Guthrie, OK, Spirit Wing Aviation Services LTD., for New Aeronautical Advisory Station at Guthrie, OK*, FCC File Nos. 0001278243, 0001300645, Order, 19 FCC Rcd 23187, n.10 (2004); and citing and quoting *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) ("[A] new rule or law is not retroactive merely because it . . . upsets expectations based on prior law," quotation omitted); *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[I]t is often the case that a business will undertake a certain course of conduct based on the current law and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking . . .").

<sup>148</sup> T&T, at 7.

**K. The Commission should issue an order approving or declining every forbearance petition rather than allowing petitions to be “deemed granted” on the basis of Commission inaction.**

Initial comments demonstrate widespread support for the CLEC Petitioners’ proposal that the Commission adopt a rule requiring that a written order be issued for all forbearance petitions.<sup>149</sup> Mercatus Center suggests that a written order “would do much to provide transparency and, in the case of denial, to explain which Section 10 elements are missing in the case.”<sup>150</sup> State Advocates agree that an order provides transparency, but would point out that in order to deny a forbearance petition, the Commission *must* issue an order. Failure to issue an order results in the “deemed grant” conundrum. As State Advocates pointed out in initial comments, the “public interest is disserved when the Commission does not explain its actions.”<sup>151</sup>

Verizon opposes the CLEC Petitioners’ proposal that the Commission maintain an open docket so that the Commission can issue a written order even after a petition has been deemed granted, and asserts that once a petition has been deemed granted, it is therefore no longer pending before the Commission, which, according to Verizon, means that the Commission lacks the authority to later adopt an order ruling on the petition.<sup>152</sup> State Advocates disagree with Verizon’s assertion that the Commission cannot issue an

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<sup>149</sup> *NPRM*, at para. 11; CLEC Petition, at 32. See, e.g., MACRUC States, at 16; Mercatus Center, at 8; Missouri PSC, at 8; Sprint Nextel, at 9; Access Point, et al., at 45-46.

<sup>150</sup> Mercatus Center, at 8.

<sup>151</sup> State Advocates, at 23.

<sup>152</sup> Verizon, at 23.

order after a petition has been deemed granted. The Commission has also taken a contrary position.<sup>153</sup>

**L. Improving the forbearance petition procedures will liberate Commission resources for other pressing matters.**

The Commission seeks comment on “whether forbearance is an effective means for the Commission to make changes to its regulations” and whether “forbearance is being utilized for the purposed intended by Congress.”<sup>154</sup> The Mercatus Center asserts that “[t]his question is substantially beside the point because ... the Commission was not given the statutory authority to forbear from regulation not in the public interest, but the obligation to do so.”<sup>155</sup> Further, the Mercatus Center argues that “whenever the Commission declines to enforce a regulation as a result of forbearance in the public interest, it is essentially axiomatic that the provision is being used as intended.”<sup>156</sup> However, the Mercatus Center fails to demonstrate how Commission inaction and failure to conduct a full review the forbearance criteria in Section 10 necessarily leads to forbearance from regulation that is not in the public interest. The Mercatus Center’s logic is that “regulation” in and of itself is predetermined to be “not in the public interest” and then the Mercatus Center’s other arguments “logically” follow.<sup>157</sup> Instead, the Commission should heed the comments of SBA: “Deregulation is a laudable goal; however, the decision to proceed must consider how forbearance may significantly

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<sup>153</sup> See, e.g., letter to Mark Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, from Joseph Palmore, Deputy General Counsel, Federal Communications Commission, Re: Sprint Nextel Corp. v. FCC, No. 06-1111, dated October 12, 2007.

<sup>154</sup> *NPRM*, at para. 13.

<sup>155</sup> Mercatus Center, at 2.

<sup>156</sup> *Id.*, at 3.

<sup>157</sup> See also, Independent Telephone & Telecommunications Alliance, at 1, stating that Section 160 demands “prompt Commission response to evolving market-place conditions.”

impact small telecommunications providers. Data from industry indicates that deregulation via forbearance has been arbitrary in recent years.”<sup>158</sup> SBA further states: “The removal of regulation that took years to implement cannot be handled lightly. While reducing the amount of regulation is a laudable goal, the process must be conducted in a constrained environment.”<sup>159</sup>

The Commission has been distracted from its larger agenda and instead focuses resources examining rules in numerous fragmented forbearance proceedings.<sup>160</sup> State Advocates continue to believe that “[t]he Commission, perhaps because of political pressure for deregulation from segments of the industry, has lost sight of the high bar that Section 10 requires of forbearance petitions.”<sup>161</sup> As noted by Telecom Investors, “In the last few years it seems that the Commission’s agenda has merely shifted from one forbearance petition to the next forbearance petition to be decided.”<sup>162</sup> AdHoc asserts that because of the volume of forbearance petitions, “[m]atters of high importance that affect the public generally languish, while Commission resources are diverted to evaluate BOC forbearance petitions,” citing the USF and inter-carrier compensation reforms that have been put on hold for the past few years.<sup>163</sup> However, AdHoc recognizes, as do State Advocates, that Section 10 requires Commission review of forbearance petitions, but

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<sup>158</sup> SBA, at 1. SBA states that the impact of forbearance is of concern to many rural ILECs with regard to deregulation of broadband services and the requisite access to the Internet backbone. *Id.*, at 4.

<sup>159</sup> *Id.*, at footnote 17.

<sup>160</sup> State Advocates, at 25-27.

<sup>161</sup> *Id.*, at 25.

<sup>162</sup> Telecom Investors, at 7. Telecom Investors note that the Commission has yet to “harmonize the relief ‘granted’ Verizon with the relief granted to AT&T and others” for broadband services. *Id.*, at 8. See also, Earthlink, at 8 stating that forbearance proceedings “have become key drivers of the FCC policy process in many of the Commission’s most important areas of authority.”

<sup>163</sup> AdHoc, at 2.

AdHoc urges that Commission to “adopt procedures that are fair and reduce consumption of Commission resources.”<sup>164</sup>

The Commission asks what the burdens are “on stakeholders from forbearance proceedings, including administrative and financial costs.”<sup>165</sup> The ad hoc process of the FCC’s review of forbearance petitions imposes undue burdens and costs, especially on consumer advocates, seeking to protect the interests of consumers. Also, as noted in initial comments, “because individual carriers submit forbearance petitions and thus, in practical terms, only impact consumers and regulators in one operating territory, the petitioners are able to ‘divide and conquer’ the opposition, and to thwart the reasoned development of overarching policy.”<sup>166</sup> NARUC expresses concern about the sheer number of petitions that have been filed, which, coupled with the statutory time period, have “created a significant burden on State commissions and interested parties.”<sup>167</sup> Sprint Nextel observes that “stakeholders, including state commission, consumer agencies, and competitive carriers, incur substantial financial and administrative burdens by having to repeatedly devote limited resources to participating in a constant stream of forbearance proceedings, especially as the ILECs capitalize on the statutory clock to prompt Commission action on a host of critical issues.”<sup>168</sup> Qwest incorrectly contends that the review of forbearance petitions has not prevented the Commission from other policy-making as it evidenced by what Qwest characterizes as “the sheer volume and

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<sup>164</sup> Id.

<sup>165</sup> *NPRM*, at para. 13.

<sup>166</sup> *State Advocates*, at 27.

<sup>167</sup> *NARUC*, at 4.

<sup>168</sup> *Sprint Nextel*, at 4.

significance of Commission activity outside the forbearance context.”<sup>169</sup> State Advocates disagree with Qwest and urge the Commission to improve the efficiency of its forbearance petition process.

**M. Other recommendations for improving the forbearance process**

Initial comments raise various recommendations for improving the forbearance process, not all of which these reply comments necessarily address. For example, Access Point, et al. support the CLEC Petition’s recommendation that the Commission require all legal arguments to be included in the body of the forbearance petitions (rather than being buried in declarations, attachments, or other documents).<sup>170</sup> Access Point, et al. also support the imposition of a Commission rule that would prohibit a petitioner from “raising new, substantive arguments in its reply comments,”<sup>171</sup> because the Commission lacks the time to examine an evolving record and because otherwise a petitioner could “game” the process by withholding relevant information until the reply round.<sup>172</sup> State Advocates concur with Access Point, et al. on these points.

State Advocates also concur with Access Point, et al. that any ILEC seeking forbearance from § 251 obligations should be required to “demonstrate that the rates for equivalent non-251 wholesale services, whether they be 271 network elements or something comparable, are just and reasonable, to the extent they rely on such wholesale

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<sup>169</sup> Qwest, at 9.

<sup>170</sup> Access Point, et al., at 24, referring to CLEC Petition, at 17-18, and citing the Commission’s requirements for § 271 requirements.

<sup>171</sup> Access Point, et al., at 25.

<sup>172</sup> Id., at 26.

offerings as justifying forbearance.”<sup>173</sup> Access Point, et al.’s assertion that Sections 10(a) and 10(b) support the Commission adopting a requirement that “ILECs demonstrate in their forbearance petitions that they currently offer reasonable rates, terms, and conditions for last-mile access in the absence of UNE obligations,”<sup>174</sup> is persuasive because, as Access Point, et al. explain, Section 10(a) permits forbearance if the regulation in question “‘is no longer necessary’ to ensure the telecommunications carrier’s charges, practices, classifications, or regulations are just reasonable, and not unjustly or unreasonably discriminatory.”<sup>175</sup> State Advocates further concur that “[r]ather than making predictions as to whether the ILEC has an incentive to offer just and reasonable alternatives to § 251 services, the Commission should specifically determine that the available wholesale offerings actually are just and reasonable before granting an ILEC’s § 251 forbearance request.”<sup>176</sup>

Verizon asserts that adopting additional pleading requirements for petitions seeking forbearance from § 251(c)(3) and § 271(c)(2)(B) “has no basis in the statute” and that “pleading rules are not the proper place for adopting such substantive requirements.”<sup>177</sup> State Advocates disagree with Verizon’s analysis: The Commission possesses the authority to establish additional pleading requirements where it determines such requirements would be appropriate. As the very first of the Commission’s procedural rules, 47 C.F.R. § 1.1, states, “Procedures to be followed by the Commission

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<sup>173</sup> Id., at 27, and footnote 69 (raising concerns about the Commission’s predictive judgment in its *Omaha Forbearance Order* in which it granted Qwest’s relief from § 251(c)(3) obligations in certain wire centers but according to Access Point, et al., “[t]his prediction has proven incorrect”).

<sup>174</sup> Id., at 27.

<sup>175</sup> Id.

<sup>176</sup> Id., at 28 (see generally discussion of deficiencies in Qwest’s Omaha petition and Verizon’s Six MSA petition).

<sup>177</sup> Verizon, at 35-36.

shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.”

State Advocates, after review of initial comments, reiterate their proposed additional refinements to improve the Commission’s process for reviewing forbearance petitions:

The Commission could require petitioners to submit a pre-filing notice at least 60 days in advance of filing that would indicate that the petitioners intend to file and that also would identify the specific areas in which forbearance is sought. The Commission could then publish a notice, which, in turn, would enable interested parties to contact the petitioner to determine the relevant documents and to request that the documents be produced by the date of filing. Under the Federal rules of discovery, there is an obligation to give the other party all documents upfront.

Furthermore, if the Commission, in its review of any particular petition, is considering any limitation or condition on the petition, State Advocates recommend that the Commission’s forbearance process include notice and comment on those proposed conditions and limitations. This notice and comment period should also include an opportunity for other parties also to propose other conditions and limitations, and the Commission should extend the 270-day period accordingly.

State Advocates also urge the Commission to recognize that forbearance petitions are typically contested cases, and, therefore, under the APA, the substantial evidence test should apply, including the requirement to make findings of fact and conclusions of law. The determination on whether a petition satisfies the three criteria are met should be subject to *de novo* review. Moreover, any substantial change in the relief sought after filing should trigger a refiling requirement.<sup>178</sup>

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<sup>178</sup> State Advocates, at 28-29.

### III. CONCLUSION

On February 20, 2008, NARUC adopted a resolution urging the Commission to:

- Act on an expedited basis to adopt rules and improve the forbearance process
- Adopt a “strict” complete as filed requirements (similar to 271 requirements)
- Adopt policies to ensure that persons subject to protective orders have “timely access” to confidential and highly confidential information
- Adopt formal procedures to govern forbearance proceedings (including rules that ensure full participation of affected States).<sup>179</sup>

State Advocates support the intentions of that NARUC resolution. State Advocates urge the Commission to overhaul the flawed and inefficient *ad hoc* process that now governs the Commission’s review of and deliberations on forbearance petitions. In their initial comments, state regulators, state consumer advocates, CLECs, and user groups identify specific, practical ways to improve the fairness and efficiency of the Commission’s forbearance process, which merit the Commission’s prompt and comprehensive attention. The misuse of forbearance petitions now occurring is harming consumers (by, among other things, distracting the Commission from larger issues and by consuming an inordinate level of resources) and is thwarting competitive entry by other telecommunications providers, thereby denying consumers the benefits of competition.

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<sup>179</sup> NARUC, at 2.

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