

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)

REPORT AND ORDER

Adopted: June 26, 2009

Released: June 29, 2009

By the Commission: Acting Chairman Copps and Commissioners Adelstein and McDowell issuing separate statements.

TABLE OF CONTENTS

	para.
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. DISCUSSION.....	9
A. Content of Forbearance Petitions.....	11
1. Petitions Must be Complete as Filed.....	11
2. Definition of Complete as Filed.....	16
3. Burden of Proof.....	20
B. Transparent Procedures, Actively Managed.....	24
1. Transparency.....	25
2. Active Management of Proceedings.....	27
C. Withdrawal of Forbearance Petitions.....	35
D. Other Matters.....	39
IV. PROCEDURAL MATTERS.....	41
A. Final Regulatory Flexibility Analysis.....	41
B. Paperwork Reduction Act.....	42
C. Congressional Review Act.....	43
V. ORDERING CLAUSES.....	44
APPENDIX A – List of Commenters	
APPENDIX B – Final Rules	
APPENDIX C – Final Regulatory Flexibility Analysis	

I. INTRODUCTION

1. Today we adopt procedural rules governing petitions for forbearance filed pursuant to section 10 of the Communications Act of 1934, as amended, (the Act).¹ In particular, we adopt rules requiring

¹ 47 U.S.C. § 160(c) (“Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers.”).

that forbearance petitions be “complete as filed.”² This is consistent with the principle that whenever a petitioner files a petition for forbearance, the petitioner bears the burden of proof with respect to establishing that the statutory criteria for granting forbearance are met.³ We also adopt procedures to ensure that forbearance petitions are addressed in a timely, equitable, and predictable manner.⁴ Further, a forbearance petition may no longer be withdrawn or significantly narrowed by the petitioner after the tenth business day after the due date for reply comments without Commission authorization.⁵ Through these actions, we implement procedures for handling forbearance petitions in a manner that is front-loaded, actively managed, transparent, and fair.

II. BACKGROUND

2. Pursuant to section 10 of the Act, the Commission shall forbear from applying to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, any statutory provision or regulation if it determines that: (1) enforcement of the provision or 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 provision or regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁶ In determining whether forbearance is consistent with the public interest, the Commission also must consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”⁷

3. In addition, section 332(c)(1)(A) of the Act authorizes the Commission to forbear from applying the provisions of Title II to commercial mobile radio service (CMRS) providers, except for sections 201, 202, and 208, if certain criteria are satisfied.⁸ In particular, the Commission may forbear from applying provisions of Title II if it determines that: (1) enforcement of the requirement is unnecessary to ensure that rates are just, reasonable, and non-discriminatory; (2) the requirement is not needed to protect consumers; and (3) forbearance is consistent with the public interest.⁹ The Commission

² See *infra* Section III.A.

³ See *infra* Section III.A.3.

⁴ See *infra* Section III.B.

⁵ See *infra* Section III.C.

⁶ 47 U.S.C. § 160(a).

⁷ 47 U.S.C. § 160(b).

⁸ 47 U.S.C. § 332(c)(1)(A). While section 332(c) does not expressly use the term “forbearance,” the Commission has regularly characterized the regulatory relief in this manner. See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5915-16, para. 39 (2007) (“Section 332(c)(1)(A) requires that providers of commercial mobile service be treated as common carriers under Title II of the Act but also authorizes the Commission to forbear from applying most Title II provisions if it makes certain findings.”). CMRS providers have filed for forbearance under section 10 of the Act. See, e.g., *Cellular Telecommunications Industry Association’s Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations; Telephone Number Portability*, WT Docket No. 98-229, CC Docket No. 95-116, Memorandum Opinion and Order, 14 FCC Rcd 3092 (1999); *Verizon Wireless’s Petition for Partial Forbearance From the Commercial Mobile Radio Services Number Portability Obligation; Telephone Number Portability*, WT Docket No. 01-184, CC Docket No. 95-116, Memorandum Opinion and Order, 17 FCC Rcd 14972 (2002).

⁹ 47 U.S.C. § 332(c)(1)(A).

also must consider whether any proposed forbearance from the requirements of Title II “will enhance competition among [CMRS] providers.”¹⁰

4. Prior to enactment of sections 10 and 332, the Commission, in its *Competitive Carrier* proceeding,¹¹ had forbore from statutory tariffing requirements and adopted a permissive detariffing policy for nondominant carriers.¹² In adopting its detariffing policy for nondominant carriers, the Commission relied on its section 203(b) authority to modify its tariff filing requirements.¹³ The Commission reasoned that nondominant carriers lacked market power and, therefore, would be unable to charge unjust and unreasonable rates or discriminate unreasonably in violation of sections 201(b) and 202(a) of the Act.¹⁴ Accordingly, the Commission found that traditional tariff regulation of nondominant carriers was unnecessary to ensure lawful rates and, further, could be counterproductive as it could raise carrier costs (and rates), delay new services, and encourage collusive pricing.¹⁵ The Supreme Court rejected the Commission’s use of section 203(b) to forbear from applying tariffing requirements to nondominant carriers. Specifically, the Court held that the Commission’s decision to forbear from applying statutory tariff filing requirements exceeded the Commission’s authority to “modify any requirement” under section 203 of the 1934 Act.¹⁶ The Court further held that, although revising the statutory requirements providing for rate regulation for all long-distance, common carrier

¹⁰ 47 U.S.C. § 332(c)(1)(C). Although section 10 and 332 do have similar provisions, the rules we adopt today govern forbearance requests filed pursuant to section 10 of the Act and do not apply to forbearance requests filed under section 332 of the Act.

¹¹ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff’d*, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceeding).

¹² See *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992); see also 47 U.S.C. § 203(a) (“Every common carrier, except connecting carriers, shall . . . file with the Commission . . . schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communications . . .”).

¹³ See 47 U.S.C. § 203(b)(2) (“The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.”); see also *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd at 8077, para. 28 (stating “we believe that Section 203 can be read to permit the FCC to adopt forbearance rules when the public interest so requires”).

¹⁴ *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd at 8073, para. 5; *Competitive Carrier Notice*, 77 FCC 2d at 334-48; 47 U.S.C. §§ 201(b), 202(a).

¹⁵ *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd at 8073, para. 5; *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59.

¹⁶ *MCI v. AT&T*, 512 U.S. at 225, 228.

communications to one of rate regulation only where competition does not exist may be a good idea, it was not what Congress had established in the 1934 Act.¹⁷

5. In response to the Supreme Court's decision, Congress enacted section 10.¹⁸ Congress, however, went beyond the area of tariffing that was the subject of *MCI v. AT&T*. Specifically, Congress enacted section 10 to give the Commission the authority to forbear from enforcing statutes and regulations that are no longer "current and necessary in light of changes in the industry."¹⁹ Congress found that to "improve the [1996 Act's] deregulatory nature," it had to give carriers the ability to compel the Commission to exercise its authority "to forbear from regulating."²⁰ Under the statute, the Commission has the authority to forbear from applying regulation on its own motion, as well as in response to a petition for forbearance.²¹

6. The Commission has never adopted detailed procedures to implement section 10. Indeed, there is only a single rule implementing section 10, a rule that requires a forbearance request to be filed as a separate pleading and to be identified as a petition for forbearance in the caption of the pleading.²² Rather than adopting procedures to specifically address forbearance petitions, the Commission has

¹⁷ *Id.* at 231-22. The Court noted that there was considerable debate over the wisdom of the filed rate doctrine and continued regulation of the telecommunications industry, but such estimations cannot alter the meaning of the 1934 Act. *Id.* at 234.

¹⁸ See e.g., S. REP. NO. 103-367, at 117 (1994) (stating that provisions of the new statute would reverse the Supreme Court's ruling in *MCI v. AT&T* and permit the Commission to grant exemptions to the statutory tariffing requirements).

¹⁹ 141 Cong. Rec. S7893 (June 7, 1995) (remarks of Sen. Pressler).

²⁰ 141 Cong. Rec. S8069-70 (June 9, 1995) (remarks of Sen. Pressler). We note that under section 10(d), the Commission may not forbear from sections 251(c) and 271 of the Act until those requirements are fully implemented. See 47 U.S.C. §160(c); see also *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19440, para. 54 n.135 (2005), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007), (holding that "[i]n the present context, we conclude that section 251(c) is fully implemented once the Commission has completed its work of promulgating rules implementing section 251(c) and those rules have taken effect"); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21503, para. 16 (2004), *aff'd EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (holding with respect to section 271 "[o]nce the checklist requirements have been met and the [Bell Operating Company (BOC)] is granted authority to provide interLATA services under section 271(d), there is nothing further the Commission or the BOC needs to do in order to implement the checklist.").

²¹ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, para. 90 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) (forbearing, on the Commission's own motion, from applying tariffing requirements to providers of wireline broadband Internet access service that offer the underlying transmission component of broadband Internet access service as a telecommunications service).

²² 47 C.F.R. § 1.53. This rule addressed the problem of parties combining forbearance requests with other requests for Commission action making it difficult for Commission staff and interested parties to identify section 10(c) forbearance requests. See *Separate Pleadings for Petitions for Forbearance*, Final Rule Action, 15 FCC Rcd 1140 (2000). The ability to easily identify requests for forbearance is important to avoid accidental automatic grants. See *id.* at 1142, para. 3 ("Given the statutory deadline for Commission action on section 10(c) forbearance petitions, we are concerned that the Commission and interested parties may not have sufficient opportunity to consider these requests in a timely manner if they are not clearly identifiable as section 10(c) forbearance petitions.").

heretofore considered each petition on a case-by-case basis. In the first several years after enactment of the statutory forbearance provisions, parties requested relatively specific forbearance relief.²³ More recently, however, forbearance requests have become increasingly complex, and the requested relief has become increasingly broad.²⁴ Petitioners seeking forbearance relief, meanwhile, have become less specific in identifying the statutory provisions and rules from which forbearance is being sought as well as identifying the relevant services and geographic areas.²⁵

7. Moreover, certain forbearance petitions have gone into effect by operation of law, without a Commission order, under the section 10 “deemed grant” provision.²⁶ In the most notable example,

²³ See generally *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (granting requests to establish permissive detariffing for non-ILEC providers of interstate exchange access services); *Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627 (CCB 1998) (forbearing from application of section 272 to the BOCs’ E911 and reverse directory services, subject to certain conditions); cf. *Federal-State Board on Universal Service, Startec Global Communications Corporation Request for Forbearance or Exemption from the Universal Service Contribution Requirement*, CC Docket No. 96-45, Memorandum Opinion and Order, 14 FCC Rcd 8030 (1999) (denying Startec’s request that the Commission forbear from enforcing the universal service contribution requirement).

²⁴ See, e.g., *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Petition for Forbearance, WC Docket No. 04-0440 (filed Dec. 20, 2004) (*Verizon Title II and Computer Inquiry Forbearance Petition*) (requesting relief from Title II of the Act and the *Computer Inquiry* rules to its broadband services); see also *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (requesting “me too” relief from Title II of the Act and the *Computer Inquiry* rules to their broadband services), review pending, Nos. 07-1426, 07-1427, 07-1429, 07-1430, 07-1431, and 07-1432 (D.C. Cir. filed Oct. 22, 2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry Rules and Certain Title II Common-Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (same), pet. for review pending, No. 07-1442 (D.C. Cir. filed Nov. 5, 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007), pets. for recon. pending; *Petition of Qwest for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (same).

²⁵ See, e.g., *Verizon Title II and Computer Inquiry Forbearance Petition* at 1 (seeking relief from Title II and the *Computer Inquiry* Rules “to any broadband services offered by Verizon”).

²⁶ Section 10(c) provides that a forbearance petition “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission.” See 47 U.S.C. § 160(c). Since 1996, four petitions for forbearance have been granted by operation of law. See *Ameritech Request for Forbearance from the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149, 13 FCC Rcd 95 (1998); *SWBT Request for Forbearance from the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law*, Public Notice, CC Docket No. 96-149, 13 (continued....)

Verizon filed a petition requesting that the Commission forbear from applying Title II of the Act and the *Computer Inquiry* rules to its broadband services. This was also an example of a broad and complex forbearance request. By their recorded vote, two Commissioners voted to adopt, and two Commissioners voted against, a draft Report and Order granting Verizon's petition in part.²⁷ Accordingly, the draft Report and Order was never adopted, and the Commission issued a News Release announcing that the petition had been granted by operation of law.²⁸ The D.C. Circuit denied petitions for review that attempted to challenge the deemed grant.²⁹ The outcome of the proceeding caused concern among some commenters and led to the introduction of legislation to amend the statute.³⁰

8. On September 19, 2007, Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. petitioned the Commission to adopt procedural rules to govern the Commission's consideration of petitions for forbearance.³¹ On November 30, 2007, the Commission sought comment on measures proposed in that petition in the *Forbearance Procedures NPRM*.³² Among other questions, the *Forbearance Procedures NPRM* sought comment on whether all petitions for forbearance should be complete as filed;³³ whether a petitioner for forbearance should have to demonstrate separately how it has satisfied each component of the forbearance standard;³⁴ and whether the Commission must issue a written

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FCC Rcd 11151 (1998); *Forbearance from Separate Affiliate Requirements of Section 272 in Connection with 1+ Calls from Payphones Granted by Operation of Law to Verizon on October 22, 2003 Pursuant to Section 10(c)*, WC Docket No. 02-200, News Release (Oct. 23, 2003); *Verizon Title II and Computer Inquiry Forbearance Petition*.

²⁷ *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect Their Broadband Services is Granted by Operation of Law*, WC Docket No. 04-440, FCC News Release (rel. Mar. 20, 2006).

²⁸ *Id.*

²⁹ *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (holding that "Congress, not the Commission, [had] 'granted' Verizon's forbearance petition" and therefore that there was no agency action to review).

³⁰ *See, e.g.*, Protecting Consumers Through Proper Forbearance Procedures Act, H.R. 400, 111th Cong. (2009) (proposing to delete the deemed grant language in Section 10(c) and replace it with the requirement that the Commission grant or deny a forbearance petition within the one year, plus 90-day extension, timeframe). *See also* Covad, *et al.* 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 at 6 (filed Sept. 19, 2007) (claiming that the Commission needs to "apply order" to the forbearance process) (Covad Petition); *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, Memorandum Opinion and Order, Joint Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, 20 FCC Rcd 9361, 9373 (2005) ("Although we have reservations about the potential for confusion created by this language, we support the decision because it is superior to Commission inaction. Failure to issue a decision would have resulted in an automatic grant of this petition, a result that we find untenable in light of the record before us."). *See also* *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, WC Docket No. 07-267, 22 FCC Rcd 21212, 21215, para. 13 (2007) (*Forbearance Procedures NPRM*).

³¹ Covad Petition.

³² *Forbearance Procedures NPRM*, 22 FCC Rcd at 21212, para. 1.

³³ *Forbearance Procedures NPRM*, 22 FCC Rcd at 21213-14, para. 6.

³⁴ *Forbearance Procedures NPRM*, 22 FCC Rcd at 21214, para 7

order on all forbearance proceedings.³⁵ The Commission also encouraged broader comment. The *Forbearance Procedures NPRM* also asked whether the forbearance process is being used as Congress intended, how individual forbearance proceedings relate to industry-wide proceedings, and what burdens, including administrative and financial costs, forbearance proceedings place on stakeholders in the industry.³⁶

III. DISCUSSION

9. The Commission has gained significant experience considering petitions for forbearance in the more than 13 years since the forbearance provisions were enacted. Indeed, since 1996, the Commission has addressed more than 120 petitions filed under section 10 of the Act. Thus, we base our findings and the procedures we adopt on the Commission's experience with forbearance petitions, as well as on the record in response to the *Forbearance Procedures NPRM*.³⁷

10. The procedures we adopt require petitions to be complete as filed. This requirement is consistent with the petitioner's general burden of proof that we clarify below. We also adopt rules to ensure a transparent and actively-managed review process. Finally, we discuss the issue of the use of confidential data and the effect of this order on pending petitions.

A. Content of Forbearance Petitions

1. Petitions Must be Complete as Filed

11. In the *Forbearance Procedures NPRM*, the Commission sought comment on whether forbearance petitions should be required to be "complete as filed."³⁸ We conclude that section 10 petitions for forbearance must be complete as filed as we describe below. We acknowledge that the Commission has not previously required forbearance petitions to be complete at the time of filing,³⁹ but we now find it necessary, for the reasons set forth below, to adopt such a requirement. Henceforth, we require forbearance petitions to state explicitly the scope of the relief requested; to address each prong of the statute as it applies to the rules or provisions from which the petitioner seeks relief; to identify any other proceedings pending before the Commission where the petitioner speaks to the relevant issues (or declare not to have spoken to the issue, if that is the case); and to comply with simple format requirements intended to facilitate our and the public's review of the petition.⁴⁰

12. We require forbearance petitions to be complete as filed as defined below for three reasons: to make the process fairer for commenters, more manageable for the Commission, and more predictable for petitioners.⁴¹ First, complete petitions permit interested parties to file complete and thorough

³⁵ *Forbearance Procedures NPRM*, 22 FCC Rcd at 21215, para 11.

³⁶ *Forbearance Procedures NPRM*, 22 FCC Rcd at 21215-16, para 14.

³⁷ *Forbearance Procedures NPRM*, 22 FCC Rcd 21212 (2007). See Appendix C for a list of commenters.

³⁸ See *Forbearance Procedures NPRM*, 22 FCC Rcd at 21213-14, para. 6 (seeking comment on whether forbearance petitions should be required to be complete as filed).

³⁹ See Verizon Comments at 30-31; 34 (stating that the Commission has previously looked to evidence beyond that submitted, and that Commission orders have relied on analysis of section 10(a)(1) to serve for sections 10(a)(2) and (3)). Inasmuch as the Commission has not previously required petitioners to address the statutory criteria with particularity, we now amend that policy for reasons stated in this Order.

⁴⁰ See Appendix B.

⁴¹ The majority of commenters agree that the Commission should establish a rule requiring that any forbearance petition filed under section 10 of the Act should be complete when filed. See, e.g., Access Point Comments at 16; California PUC at 5-6; City of Philadelphia Comments at 8; COMPTTEL Comments at 7; Covad Comments at 6; (continued....)

comments on a fully-articulated proposal.⁴² By contrast, less than complete petitions present interested parties with a moving target, which frustrates their efforts to respond fully and early in the process.⁴³ Keeping up with a petitioner's unfolding arguments and evidence also unreasonably burdens the resources of stakeholders.⁴⁴ This burden is especially onerous for smaller companies, which may be affected severely by grants of forbearance to large companies.⁴⁵ Second, complete petitions permit the Commission to act swiftly and efficiently on petitions that clearly meet the petitioner's burden of proof, or clearly fail to meet it.⁴⁶ By contrast, incomplete or disorganized petitions that cannot be properly evaluated are at odds with Congress's intent that the Commission address petitions for forbearance with dispatch.⁴⁷ Petitions that are complete as filed also help the Commission to address more complex issues within the time allowed. Third, clear filing requirements create objective standards, which help petitioners file successful petitions that might otherwise fail for lack of clarity or sufficient support.⁴⁸ The Commission has imposed a similar requirement in a separate context for similar reasons.⁴⁹

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DeltaCom Comments at 5; EarthLink Comments at 14; Missouri PSC Comments at 4; NCTA Comments at 4; NARUC Comments at 2; NJ Rate Counsel/NASUCA Comments at 11; SBA Comments at 7; Sprint Nextel Comments at 7; Telecom Investors Comments at 5; TEXALTEL Comments at 7.

⁴² See, e.g., Missouri PSC Comments at 4 (stating that a complete as filed requirement "will ensure that all parties have a fair opportunity to respond to the petitioner's request and evidence"); NJ Rate Counsel/NASUCA Comments at 11 (stating that when forbearance petitioners add additional information after the filing of an initial petition, "it is difficult for others to engage in a full review and analysis and submit timely comments that provide analysis and/or rebuttal of any additional information and data"); SBA Comments at 7 (forcing carriers to present the requisite data at the outset will better enable all interested parties to present their views in an accurate manner before the Commission); Sprint Nextel Comments at 7 (stating that a complete as filed requirement is needed to ensure that forbearance proceedings are conducted in a fair manner that provides interested parties with a meaningful opportunity to express their views).

⁴³ See, e.g., Telecom Investors Comments at 6 (stating that "[a] moving target also prejudices the ability of affected parties to provide meaningful comment.>").

⁴⁴ See, e.g., EarthLink Comments at 14 (stating that a "complete-as-filed" rule would allow commenters to focus limited time and resources on the real issues); SBA Comments at 7.

⁴⁵ SBA Comments at 4-7 (arguing in favor of greater procedural safeguards in general and a complete-as-filed rule in particular).

⁴⁶ As discussed in Section III.A.3, a petitioner for forbearance bears the burden of proof with respect to the three prongs of section 10 upon which it is requesting the Commission to make findings.

⁴⁷ 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Senator Robert Dole that the purpose of forbearance is the "eliminat[ion] [of] outdated regulations . . . in a timely manner"); see AT&T Comments at 19 (maintaining that petitions should be granted or denied as soon as possible).

⁴⁸ See, e.g., AT&T Comments at 2 (supporting elimination of regulations that are dated, costly, and counterproductive); Verizon Comments at 9-12 (describing benefits of section 10 in promoting competition and advanced services as Congress intended); see also SBA Comments at 7 (stating that the Commission should establish a framework which would bring clarity to the forbearance process, and provide small carriers with a better understanding of what they must show in order to support or oppose a forbearance grant).

⁴⁹ Commenters compare and contrast the complete-as-filed requirement we apply to forbearance petitions with the Commission's requirement that section 271 petitions must be complete as filed. See, e.g., Verizon Comments at 29-31; AT&T Comments at 14-15. The Commission requires filings to be complete in numerous contexts in addition to section 271 petitions. See, e.g., *Bell Atlantic-Delaware, Inc., et al. v. Global Naps, Inc.*, Memorandum Opinion and Order, File No. E-99-22, 15 FCC Rcd 12946, 12959, para. 24 (1999) (rejecting incomplete tariff and alluding to (continued....))

13. We reject the argument that, because the time limit for considering forbearance petitions is not as short as the time limit specified in section 271, we should not require forbearance petitions to be complete as filed.⁵⁰ Unlike rulemakings, section 10 limits time for the Commission to make specific determinations, and forbearance petitioners that continue to present their case after filing has triggered the statutory time limit unreasonably burden the resources of stakeholders and the Commission.⁵¹ We also reject the argument that requiring petitions to be complete as filed would be counterproductive because the requirement may lead to procedural disputes among parties.⁵² Disputes concerning the completeness of a petition may assist the Commission in the decision-making process by clarifying the scope of relief sought in the petition.⁵³ We disagree that completeness entails needless repetition.⁵⁴

14. We acknowledge that we have not previously required petitioners to specify in the petition how the requested relief meets each of the three forbearance criteria, and that a requirement to do so will burden applicants to the extent that they must develop their supporting arguments in advance of filing.⁵⁵ We do not, however, consider this an unreasonable expectation, and we find that the benefit to both commenters and the Commission of clarity and precision outweighs the burden on the petitioner of explaining how forbearance from each regulation or statutory provision meets each prong. We reassure petitioners that this requirement is not formalistic or otherwise rigid and inflexible, but is designed to facilitate the Commission's efficient evaluation of whether the forbearance test has been met.⁵⁶ To the contrary, petitioners are encouraged to concentrate on the substance of their arguments, and to refrain from rote repetition.

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long-standing principle that tariffs must be complete when filed); *see also* 47 C.F.R. § 1.1404 (pole attachment complaint requirements); 47 C.F.R. § 1.721 (format and content of formal complaints).

⁵⁰ *See, e.g.*, Verizon Comments at 31; AT&T Comments at 14-15 (both contrasting the 90 day limit for consideration of 271 application with the one year limit for consideration of forbearance petitions). *Compare* 47 U.S.C. § 271(d)(3) *with* § 160(c). *See* Verizon Comments at 29 (arguing that the complete-as-filed rule for section 10 is more stringent than the complete-as-filed rule in section 271 proceedings because, in section 271 proceedings, the burden of production shifted to opponents once petitioner made a *prima facie* case; *citing Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, CC Docket No.97-137, 12 FCC Rcd 20543, 20572, para. 51 (1997)). In each case, a complete petition that makes a *prima facie* case puts a burden of production on opponents.

⁵¹ *See, e.g.*, Sprint Nextel Comments at 7 (complete-as-filed petition necessary for interested parties to express views); COMPTTEL Comments at 4-5 (grants based on evidence not in petition unfair to commenters; assistance to petitioners in developing their case unfair to opponents); COMPTTEL Comments at 7-9 (no fair opportunity to scrutinize last-minute filings); Time Warner Comments at 21, 23 (petitions seeking relief from "common carrier regulation" insufficiently precise); California PUC Comments at 5-6 (favoring notice of the relief sought and full opportunity to evaluate evidence). By contrast, in a rulemaking proceeding the Commission will consider all relevant comments and material of record before taking final action. *See* 47 C.F.R. § 1.425.

⁵² Verizon Comments at 32 (filing requirements likely to provoke distracting procedural disputes).

⁵³ *See* 47 C.F.R. § 1.727(b) (dispositive motions regarding formal complaints).

⁵⁴ *See* AT&T Comments at 16-17 (arguing against needless repetition when reasons for forbearance overlap); Verizon Comments at 34 (arguing that requiring petitioners to address all three prongs is not consistent with precedent recognizing that the criteria are interrelated).

⁵⁵ *See* Verizon Comments at 34.

⁵⁶ *See* Verizon Comments at 33-34 (contending that requiring petitioners to argue all three prongs is rigid, inflexible, and inconsistent with the forbearance process).

15. Commenters express concern that a complete-as-filed rule may discourage or frustrate forbearance petitions,⁵⁷ or unduly limit petitioners from responding to counterarguments,⁵⁸ or prevent petitioners from adding third party data,⁵⁹ or from supplementing the petition with additional data,⁶⁰ or preclude the Commission from considering evidence submitted by parties other than the petitioner,⁶¹ but these concerns are misplaced. The requirement does not prevent a petitioner from seeking additional data from third parties.⁶² At the time of filing, we merely require forbearance petitioners to identify the nature of the third-party information they need, the parties they believe possess it, and how the information relates to the petition.⁶³ The requirement does not limit a petitioner's ability to respond to arguments and data in oppositions and comments with counter-arguments and responsive data.⁶⁴ A petitioner may submit substantively new material, including new information, data, studies, or arguments, at the request of the Commission, as well as in response to oppositions.⁶⁵ The Commission may be expected to require updated data from a petitioner prior to reaching some determinations, and the filing requirement in no way prevents the Commission from seeking information or clarification from any source, or basing its

⁵⁷ See, e.g., AT&T Comments at 13-16 (expressing concern that the filing requirements may “hamstring” the process, or may serve as a “guise” for restarting the clock); Verizon Comments at 31-32; Qwest Comments at 14.

⁵⁸ See, e.g., Embarq Comments at 2-3 (stating that a complete-as filed requirement is unfair and inconsistent with the Administrative Procedures Act (APA) if it denies opportunity to respond to evidence).

⁵⁹ See, e.g., Qwest Comments at 14 (stating that sufficiently-granular third-party data are often critical to competitive analysis but unavailable to petitioners prior to filing.)

⁶⁰ See, e.g., Verizon Comments at 31-32 (arguing that the Commission has appropriately relied on all the evidence in the record when considering petitions for forbearance.)

⁶¹ See Letter from Robert W. Quinn, Jr., Senior Vice President - Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-267 (filed June 12, 2009) (AT&T June 12, 2009 *Ex Parte* Letter).

⁶² See AT&T Comments at 15-16 (noting that the formal complaint rules “contemplate that additional discovery will be conducted and that additional evidence will be submitted after the complaint is filed”). We contemplate that petitioners will seek third-party data in forbearance proceedings, and that a petitioner's knowledge of the data may be quite limited at the time of filing.

⁶³ We clarify that the standard for identifying data, facts, and information held by third parties is the level of specificity available to a petitioner who exercises due diligence. In addition, a petitioner must make a reasonable effort to relate the data to be sought to specific prongs of the forbearance test.

⁶⁴ We disagree with AT&T that the rule will “prohibit petitioners (but not others) from providing the Commission with relevant, updated market information bearing on the original request for forbearance.” AT&T Comments at 13. Petitioners may update data, and may likewise respond to commenters' submissions of data, as a matter of course. Petitioners may also submit new data that the Commission determines are relevant and do not materially alter the petition. See Letter from Nneka Ezenwa, Executive Director of Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC (filed June 4, 2009) (Verizon June 4, 2009 *Ex Parte* Letter) (stating that the Commission should recognize that a petitioner may always introduce evidence necessary to respond to the arguments of other parties or the data submitted by third parties).

⁶⁵ We reject arguments that filing any new data that supports the petition should necessarily restart the clock. See, e.g., Access Point Comments at 26-27; Telecom Investors Comments at 6. The Commission will determine whether the new information materially alters the petition, and petitioners may obtain Commission leave to lessen the scope of their petition. See California PUC Comments at 5-6 (arguing that amendments that reduce the scope of a petition should not restart the clock); *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1232-35 (D.C. Cir. 2004) (holding that the Commission must explain why new material should require refiling, and that petitioners may narrow the scope of relief sought).

forbearance decision on all timely-filed evidence.⁶⁶ Having addressed these concerns, we state below the criteria for determining whether a forbearance petition is complete.

2. Definition of Complete as Filed

16. *Scope.* A petitioner for forbearance must identify clearly in the petition the scope of the requested relief. In particular, the petition must state the following with specificity: (1) each statutory provision, rule, or requirement from which forbearance is sought; (2) each carrier, or group of carriers, for which forbearance is sought; (3) each service for which forbearance is sought; (4) the geographic location, zone, or area in which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief. The Commission's ability to make the determinations within the statutory time frame required is significantly compromised when a petition does not clearly state the relief sought.

17. *The Prima Facie Case.* A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance. Specifically, the *prima facie* case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought.⁶⁷ A petition for forbearance must take into account relevant Commission precedent. If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify the data or information, and the parties that possess it, and explain the relationship of the information to the *prima facie* case.⁶⁸ When the petition is filed at the Commission, the petitioner must provide a copy of it to each party identified as possessing relevant data or information, and the relevant Bureau will respond to requests for third-party discovery on a case-by-case basis.⁶⁹ Other than third-party information, a petition may not rely on data or information that is not made available, without charge, to the Commission staff and interested parties that agree to comply with any protective orders the Commission issues in the course of the proceeding. We find broad support for requiring petitioners to state a *prima facie* case.⁷⁰

18. *Relevant Proceedings.* A petition for forbearance must identify any proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the petition must state that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought, if that is the case.⁷¹

⁶⁶ See, e.g., Memorandum Opinion and Order, *Application by Qwest Communications International Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, 18 FCC Rcd 13323, 13369-70, paras. 88-93 (2003) (waiving the complete-as-filed rule for a section 271 application).

⁶⁷ See, e.g., NCTA Comments at 4 (stating that the burden should be on the petitioner to identify each and every statutory or regulatory provision from which it is seeking relief and to provide all information within its control that demonstrates the statutory criteria are satisfied). Although we discourage needless redundancy, we do require express cross reference; the Commission will not assume relationships that a petition does not state.

⁶⁸ See Verizon Reply at 6 (stating that petition should identify third party data). The burden is on the petitioner, and not on the Commission, to identify the data and its relevance.

⁶⁹ See *infra* Section III.D. (discussing proprietary data).

⁷⁰ See, e.g., AT&T Comments at 16 (stating that AT&T has no objection to the . . . proposal that the Commission adopt rules that require a petitioner to explain in its petition why the requested relief satisfies each of the three forbearance factors); Covad Comments at 8; Time Warner Comments at 22-23; Access Point Reply at 8-9.

⁷¹ To understand fully the issues posed by forbearance petitions, and to make determinations within the statutory timeframe, the Commission must be aware of any related issues that the Commission is attempting to resolve in (continued....)

19. *Format and Filing Requirements.* Petitions for forbearance must comply with the Commission’s general filing requirements in 47 C.F.R. § 1.49.⁷² In addition, all petitions for forbearance must be emailed to forbearance@fcc.gov at the time of filing. All filings including all data related to a forbearance petition must be provided in a searchable format. The steps a filer must take to ensure its submission is searchable will vary by context. At a minimum, a party that submits large spreadsheets of data should submit electronic copies of those data formatted so as to allow Commission staff and other interested parties a meaningful opportunity to analyze those data. A forbearance petition must include (1) a plain, concise, written summary statement of the relief sought; (2) a full statement of the petitioner’s *prima facie* case for relief; and (3) appendices that list (a) the scope of relief sought, (b) all relevant data, including market analysis, and (c) any supporting statements or affidavits.

3. Burden of Proof

20. In the *Forbearance Procedures NPRM*, the Commission sought comment on which party bears the burden of proof in a forbearance proceeding.⁷³ We conclude that the petitioner bears the burden of proof – that is, of providing convincing analysis and evidence to support its petition for forbearance.⁷⁴ This has historically been the case in American jurisprudence.⁷⁵ The burden of proof is on the proponent in both formal rulemaking and formal adjudication, but we consider arguments whether a forbearance proceeding more closely resembles rulemaking or adjudication to be largely beside the point.⁷⁶ Whatever passing similarity to other procedures petitions for forbearance may have, the essential nature of a petition for forbearance is that it is a petition for relief from regulation. The petitioner asks the Commission to

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pending proceedings. Similarly, in light of the timeframe, disclosure of related filings is fair to opponents and commenters.

⁷² Our adoption of filing requirements used for rulemakings in no way implies that we consider a forbearance petitions to be, or fundamentally to resemble, rulemakings. For purposes of forbearance petitions, we adopt procedures that have proven to be equitable and serviceable in other contexts without resolving issues parties raise concerning which other proceedings forbearance proceedings most closely resemble. *See, e.g.*, Access Point Reply at 7-8 (arguing that the APA’s procedural requirements for rulemakings apply to forbearance proceedings). *But see* AT&T Comments at 18 (contending that forbearance proceedings are adjudications and therefore not covered by the APA rulemaking rules); Telecom Investors Reply at 3 (arguing that classification of forbearance proceedings is not significant).

⁷³ *Forbearance Procedures NPRM*, 22 FCC Rcd at 21212, para. 6; Covad Petition at 12-13.

⁷⁴ Most commenters agree that the petitioner bears the burden of proof. *See, e.g.*, COMPTTEL Comments at 5; Covad Comments at 6; EarthLink Comments at 2, 7; NCTA Comments at 4; SBA Comments at 8; Access Point Reply at 12-14; Comcast Reply at 1-4; COMPTTEL Reply at 1-4. *But see* AT&T June 12, 2009 *Ex Parte* Letter (arguing that any rule recognizing that a forbearance petitioner bears the burden of proof would be unlawful).

⁷⁵ Although the “touchstone inquiry” is the “plain text of the statute,” where the statute is silent, the “ordinary default rule” applies: “that plaintiffs bear the risk of failing to prove their claims.” *Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (holding that the burden of proof in an administrative hearing was properly placed upon the party seeking relief) (*Schaffer*); *see Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-76 (1994) (describing the history of the “burden of proof” in American jurisprudence) (*Greenwich Collieries*); WILLIAM C. BURTON, BURTON’S LEGAL THESAURUS 484 (4th ed. 2007) (articulating the historic Latin maxim that the burden of proof lies on the complainant).

⁷⁶ *See, e.g.*, AT&T Comments 18 (arguing that a forbearance proceeding is an adjudication); Qwest Comments at 13-14 (arguing that a forbearance proceeding is a rulemaking). The main issue is the adequacy of the record regardless of the nature of the proceeding. *See* 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); *id.* at § 553-54 (basic procedural requirements for adjudications and rulemakings).

forbear from enforcing against it one or more rules or statutory provisions, which the Commission will do if it determines that the petition meets the statutory criteria.⁷⁷ When the Commission receives petitions for relief including, for example, a carrier's petition to offer in-region long distance service under section 271 of the Act,⁷⁸ or a state's petition to retain authority over cellular rates,⁷⁹ or when the Commission explains how it will evaluate petitions under the Communications Assistance for Law Enforcement Act (CALEA),⁸⁰ the Commission always requires the petitioner to produce sufficient evidence and analysis to warrant granting the relief sought. Likewise, the Commission requires petitioners to produce sufficient evidence and analysis to warrant the grant of a forbearance petition.⁸¹ We now state explicitly that the burden of proof is on forbearance petitioners at the outset and throughout the proceeding.

⁷⁷ See 47 U.S.C. §160(c).

⁷⁸ See, e.g., *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of in-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, 13 FCC Rcd 20599, 20637-38, para. 56 (1998) (“Although there is often more than one type of evidence that an applicant can use to meet its burden of proof, we hope that this order will assist future applicants by identifying particular types of evidence we find persuasive in assessing whether the BOC has complied with the checklist.”); *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, 17 FCC Rcd 25828, 25840, para. 22 (2002) (“As the Commission's previous decisions make clear, a BOC may submit as part of its *prima facie* case a valid pricing determination Once the BOC makes a *prima facie* case of compliance, the objecting party must proffer evidence that persuasively rebuts the BOC's *prima facie* showing. The burden then shifts to the BOC to demonstrate the validity of its evidence.”).

⁷⁹ See, e.g., *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, PR Docket No. 94-105, Memorandum Opinion and Order, 11 FCC Rcd 796, 800, para. 7 (1995) (“[The] CPUC did not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, [and] . . . failed to advance any persuasive analysis regarding the critical issue of investment by cellular licensees.”).

⁸⁰ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360, 5384-85 (2006) (explaining “persuasive evidence” required for the Commission to make CALEA statutory determinations).

⁸¹ See, e.g., *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11750, 11754-58, paras. 28, 36, 39 (2008) (*Qwest 4 MSA Order*) (noting that Qwest had failed to meet its burden of persuasion regarding sufficiency of market share); *Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21309-10, 21313-17, paras. 28, 30, 37, 40 (2007) (*Verizon 6 MSA Forbearance Order*) (noting that Verizon's arguments and data failed to meet its burden of persuasion), *appeal docketed*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008); *Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2637, para. 16 (CCB 1998) (“To forbear, we must determine that each of the three forbearance criteria set forth in section 10 are met. Application of those criteria is not a simple task, and a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met.”); see also, e.g., *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19879-80, para. 55 (1998) (“MariTEL's request cannot be granted because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest.”).

21. We further clarify that the “burden of proof” for the purpose of forbearance proceedings encompasses both the burden of production⁸² and the burden of persuasion.⁸³ The burden of production in this context requires that the petitioner state a complete *prima facie* case in the petition, the precise requirements of which we discuss in the “complete as filed” section.⁸⁴ The burden of persuasion requires that, in addition to stating a *prima facie* case, the petitioner’s evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance.⁸⁵ If the petitioner does not support the case for forbearance with sufficient evidence and persuasive arguments, the Commission cannot make an informed and reasoned determination that the statutory criteria are met.⁸⁶ In determining whether a petitioner has met its burden of proof, the totality of the record will be taken into consideration. For example, the Commission will consider evidence filed in the record by third parties that is favorable to the petitioner’s position as part of the petitioner’s showing.

22. We disagree with parties who maintain that the Commission has “an ongoing burden to justify regulation” and we find no burden of proof placed on the Commission “clearly” written into the statute, as some commenters allege.⁸⁷ The statute does state plainly that the Commission must attend promptly to petitions for forbearance, and specifically that “[a]ny such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.”⁸⁸ Section 10(c) also requires the Commission to forbear from applying a regulation or statutory provision if it determines that the statutory criteria are met, that is to say, if the regulation or provision is no longer necessary to protect other carriers, consumers, and the public

⁸² The burden of production is typically understood as “which party bears the obligation to come forward with the evidence at different points in the proceeding.” *Schaffer*, 546 U.S. at 56. It also means the burden of making the initial case. *See, e.g.*, Verizon/Verizon Wireless Comments at 39 (agreeing that “forbearance petitioners are required to make out, in their petition, a *prima facie* case that the statutory criteria for forbearance are met”).

⁸³ *See Schaffer*, 546 U.S. at 56 (burden of persuasion is defined as “which party loses if the evidence is closely balanced”); *Greenwich Collieries*, 512 U.S. 267, 278-80 (finding that the burden of persuasion properly rests on the petitioner unless the statute states otherwise); *see also* 5 U.S.C. § 556(d) (Rulemakings and adjudications “on the record after opportunity for a hearing” require the burden of proof to be put on the “proponent of a rule or order”).

⁸⁴ *See supra* Section III.A.

⁸⁵ *See supra* note 75 (citing *Schaffer*, *Greenwich Collieries*, and 5 U.S.C. § 556(d)).

⁸⁶ Forbearance may only be granted if the Commission determines that: “(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.” 47 U.S.C. § 160(a).

⁸⁷ *See, e.g.*, Qwest Comments at 12-14 (arguing that the Commission has a perpetual burden to justify continued regulation); ALEC Reply at 3 (arguing that section 10’s “plain terms” place the burden of proof on the Commission); Discovery Institute Comments at 4 (arguing that the statutory language “clear[ly]” puts the burden on the Commission); Verizon Comments at 39-40. *But see* SBA Comment at 7-8 (stating that the statutory language fails to indicate whether the petitioner must carry the burden of proof; therefore, the Commission should clarify that the petitioner maintains the burden of presenting the requisite data “as this party is the one requesting regulatory change”); Comcast Reply at 3 (arguing that the burden of proof is not on the Commission as a result of the “deemed grant” provision); COMPTTEL Reply at 1-4 (arguing that placing the burden on the petitioner is consistent with the Act).

⁸⁸ *See* 47 U.S.C. § 160(c).

interest.⁸⁹ But it is for the petitioner to convince the Commission to make those determinations in the petitioner's favor.

23. Verizon contends that the petitioner's inability to compel the production of evidence vital to forbearance proceedings makes it unfair to apply a burden of proof to the petitioner.⁹⁰ We disagree. As we define the burden of production, a petitioner need only explain the relevance of evidence it believes is held by third parties in order to make a *prima facie* case for forbearance. AT&T argues that section 10 requires the Commission to forbear from applying rules or provisions of the Act if the statutory criteria are met regardless of whether any party files a petition, and for that reason the Commission may not impose a burden of proof upon a petitioner.⁹¹ We disagree. We do not "impose" any new burden on petitioners, but rather simply recognize that a proponent of regulatory relief is seeking to convince the Commission to make the "determinations" required under section 10 before such relief can be granted, and thus the petitioner bears the twin burdens of production and persuasion—the "burden of proof"—as we demonstrate above. Others argue that, because some Commissioners have opined in separate statements that the burden is on the Commission, the burden is in fact on the Commission.⁹² We reject the argument because separate statements do not constitute institutional Commission action.⁹³

B. Transparent Procedures, Actively Managed.

24. As stated above, the rules we adopt today promote a clearly defined, front-loaded, transparent, and actively-managed process. Having laid out the complete-as-filed requirement above, and clarified a petitioner's burden, we turn now to transparency and active management of the forbearance proceeding.

1. Transparency

25. After the rules we adopt in this Order take effect, the Commission will post on its web site a timeline intended to identify the stages of review of forbearance petitions. The web page will also contain docket numbers, contact information, and a link to the Commission's Electronic Comment Filing System. Posting this information will promote a better understanding of how the Commission gives full and timely attention to the issues presented in a forbearance petition, and will establish a framework that describes how review of a forbearance petition should normally progress.

⁸⁹ See 47 U.S.C. § 160(a) and (c).

⁹⁰ Verizon Comments at 39-40.

⁹¹ See, e.g., AT&T June 12, 2009 *Ex Parte* Letter (arguing that any rule recognizing that a forbearance petitioner bears the burden of proof would be unlawful).

⁹² See, e.g., Qwest Comments at 15 (citing statement of Chairman Powell); AT&T Comments at 3 (citing statement of Chairman Martin); see also Separate Statement of Commissioner Harold Furchtgott-Roth, *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; Petitions for Forbearance*, CC Docket No. 96-61, 1999 WL 556977 (rel. Aug. 2, 1999) ("I believe that the Section 10 forbearance scheme requires the Commission to justify continued regulation in light of the competitive conditions in the marketplace."); Dissenting Statement of Commissioner Michael K. Powell, *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance*, CC Docket No. 96-61, 1999 WL 38420 (rel. Jan. 29, 1999) ("[U]nder the Congressional forbearance scheme, the Commission has an obligation to validate or justify continued regulation in light of competitive conditions.").

⁹³ *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007) (holding that Commissioners' individual statements are not institutional Commission actions). See *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975).

26. A general timeline necessarily oversimplifies the process, and the circumstances of individual cases will differ. Internal deadlines create no enforceable rights for private parties, and such targets should be understood rather as goals for internal Commission action. The timeline should therefore be viewed as a flexible tool, and the order and timing may vary. Generally, the later stages and times are intended to indicate procedural goals for the most complex petitions. The statutory obligation to determine each of section 10's three prongs takes precedence over the informal timeline, and the Commission's failure to adhere to a benchmark is not indicative of how it will resolve the issues raised in a proceeding.

2. Active Management of Proceedings

27. *Filing and Initial Review.* Filing a petition starts the clock on the statutory time limit.⁹⁴ As we discuss above, a forbearance petition must be complete as filed, and must be emailed to forbearance@fcc.gov at the time of filing. In addition, to ensure immediate attention, we recommend that petitioners contact the relevant Bureau prior to filing.⁹⁵ The Bureau will review the petition upon receipt. A petition that on its face is incomplete or defective will be summarily denied.⁹⁶ As a practical matter, the initial review upon filing should determine whether the petition appears to be complete, coherent, and sufficiently specific to serve as a basis for comment. The legal standard for summary denial is whether the petition, viewed in the light most favorable to the petitioner, fails to meet the requirements for forbearance specified in the statute.⁹⁷

28. Summary denial on receipt gives petitioners an early opportunity to cure and refile, and respects interested parties' resources.⁹⁸ Failure by the Bureau to summarily deny a petition upon receipt does not establish or even imply that the petition is "complete as filed." It merely establishes that the petitioner has observed the filing procedures we adopt today and that no fatal insufficiency is evident upon cursory review. Threshold questions about a petition's completeness may be sufficiently complex to require comment and consideration.

29. *Public Notice.* If a petition appears to be complete and coherent on its face, the Bureau will give public notice and post the petition on the forbearance page of the Commission's website.⁹⁹ The

⁹⁴ We reject as contrary to the statute the Pennsylvania PUC's suggestion that we may delay starting the clock until we publish notice of the petition in the Federal Register or the Daily Digest. Pennsylvania PUC Comments at 12. See 47 U.S.C. § 160(c) (specifying that receipt of the petition by the Commission begins the time limit).

⁹⁵ We do not judge whether or not we may require prior notification under section 10. See AT&T Reply at 10 (arguing that a notification requirement is not consistent with the time limit in section 10). We reject NJ Rate Counsel/NASUCA's suggestion that we require 60 days prior notice. NJ Rate Counsel/NASUCA Comments at 28. Petitioners advance their own interest in the timeliest possible review of the petition by notifying the relevant Bureau before filing.

⁹⁶ See Verizon Reply at 6-7 (arguing that the Commission should quickly deny defective petitions in order to conserve Commission and industry resources). Summary denial is without prejudice to refile.

⁹⁷ Cf. 47 C.F.R. § 1.728 (providing for dismissal of defective formal complaints).

⁹⁸ See Access Point Comments at 9-11 (arguing that the Commission should deny duplicative or repetitious petitions). It is entirely appropriate for a petitioner to amend and refile a defective petition, or one that has been found unsupported or unpersuasive. For that matter, the Commission may *sua sponte* incorporate a forbearance petition record in a notice of proposed rulemaking. We perceive no limitation on such actions in the letter or intent of section 10.

⁹⁹ Although we model our notice rules for petitions for forbearance on our notice rules for rulemakings at 47 C.F.R. § 1.413, this in no way implies that we consider forbearance petition proceedings to be, or fundamentally to resemble, rulemakings.

notice will announce the pleading cycle, which will typically allow 30 days for comments and 15 days for replies, with longer cycles for the more complex petitions.¹⁰⁰ The Bureau may issue a protective order, as needed.¹⁰¹ Motions for summary denial may be filed not later than the due date for comments, to which the petitioner may file an opposition not later than the due date for replies. In the interest of completing the record in one cycle, and consistent with our formal complaint rules, replies to oppositions to motions for summary denial will not be permitted.¹⁰² We disagree with comments to the effect that public notice and comment cycles for forbearance petitions are not required and may not always be appropriate.¹⁰³ We find public comment necessary to identify issues and to help the Commission understand the policy ramifications of a petition from varying points of view. Although we describe here the typical comment cycle for forbearance petitions, we retain the flexibility to ensure that the time for comment on any individual forbearance petition is both adequate and not needlessly long.

30. *Motions for Summary Denial.* Commenters may use motions for summary denial to focus their attention on completeness and clarity, and should avoid conflating these threshold issues with their substantive arguments. A contention, for example, that a petition does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met might form the basis of a motion for summary denial. Because we expect the arguments and scope of the relief sought to vary widely from petition to petition, the adequate granularity of data may likewise vary, and for that reason we would judge on a case-by-case basis whether or not a petition for forbearance requires supporting data at, for example, the wire center level.¹⁰⁴ Failure by the Bureau to deny a petition summarily does not establish that the petition is “complete as filed.” Although the Bureau may grant a motion for summary denial, it may instead use the record generated by the motion to better understand threshold issues early in the process. All parties are best served when these issues regarding specificity

¹⁰⁰ Most commenters favor the use of notice and comment procedures in forbearance proceedings. *See, e.g.*, SBA Comments at 5-6 (stating that the forbearance process should be subject to notice and comment procedures because receiving input from industry is critical to well-reasoned decisions consistent with the APA and the RFA); *see also* COMPTTEL Comments at 6; NJ Rate Counsel/NASUCA Comments at 9; Sprint Nextel Comments at 5-6; Telecom Investors Comments at 3-4.

¹⁰¹ *See* 47 C.F.R. §§ 0.457-0.459. *See also* NARUC Comments at 2, 10; NJ Rate Counsel/NASUCA Comments at 19; Time Warner Comments at 27. We discuss comments received regarding proprietary information *infra* in Section III.D.

¹⁰² We agree with Verizon that it is counterproductive to delay consideration of the issues by prolonging the comment cycle. *See* Verizon Comments at 28. The fact that our formal-complaint rule, 47 C.F.R. § 1.727(f), also does not permit replies to oppositions to motions in no way implies that we consider forbearance petition proceedings to be, or fundamentally to resemble, adjudicatory proceedings.

¹⁰³ *See* AT&T Comments at 17-18 (arguing that, because forbearance petitions are adjudicatory, APA rulemaking provisions should not apply); Qwest Comments at 12-13 (maintaining that a standard comment period is not appropriate when a petition is refiled).

¹⁰⁴ *See Forbearance Procedures NPRM*, 22 FCC Rcd at 21215, para. 10. Several parties disagree whether a petitioner requesting forbearance from regulations under sections 251 or 271 must submit all supporting data for its petition at the wire center level. *See, e.g.*, California PUC Comments at 9 (requesting that parties seeking forbearance from sections 251 and/or 271 file all supporting data at the wire center level and relevant declarations in support of that wire center data); NJ Rate Counsel/NASUCA Comments at 14. *But see* AT&T Comments at 21 (stating that the Commission should not mandate wire center level data in all forbearance proceedings); Frontier Comments at 4 (arguing that provision of supporting data at the wire center level would not be relevant to the issues); Qwest Comments at 16 (stating it is not at all clear that wire center data should or will be required in all instances).

and sufficiency are identified quickly and brought to the forefront.¹⁰⁵ The Commission may address a motion for denial at any time, up to and including the statutory time limit for Commission action.

31. *Intermediate Period.* An intermediate period consisting roughly of months 3 through 10 follows the closing of the comment cycle. During this period, the Bureau will consider whether to grant or deny routine or less complex forbearance petitions that clearly meet, or clearly fail to meet, the statutory forbearance criteria. We anticipate that the Commission will be able to resolve such petitions within six months of their filing.¹⁰⁶ For more complex petitions, the Bureau may actively develop the record where appropriate during this intermediate period, and will review comments, analyze data, and discuss the merits of the petition with the Commissioners and their staff.

32. *Circulation and Quiet Period.* The final period will generally consist roughly of months 11 and 12 in normal cases, or months 14 and 15 if the Commission requires an extension of time.¹⁰⁷ During this period, several important steps will occur. These steps include: additional consultations among the Commissioners' offices and between the Commissioners' offices and the Bureau staff; circulation of a draft order; establishment of a quiet period;¹⁰⁸ and voting of the order. In this Order, we adopt an internal deadline of seven days prior to the statutory deadline for voting any forbearance order, whether on circulation or at an agenda meeting. An early vote gives a majority that votes *against* the circulated draft an opportunity to draft a replacement order prior to the statutory deadline. An early vote also will generally ensure that the Commission will be able to make the necessary determinations and release an order before the statutory deadline.

33. We clarify that the timing of each step described below is calculated against the statutory deadline, and not against the deadline for the vote, which we determine, as set forth above, should occur seven days prior to the statutory deadline. The Bureau will circulate a draft order addressing a complex forbearance petition no later than 28 days prior to the statutory deadline, which is to say, 21 days prior to the voting deadline, unless all Commissioners agree to a shorter period.¹⁰⁹ We establish a two-week quiet period before the statutory deadline (one week before the voting deadline) for forbearance petitions, which is analogous to the one-week quiet period before an agenda meeting.¹¹⁰ A public notice, posted on

¹⁰⁵ See *Forbearance Procedures NPRM*, 22 FCC Rcd at 21214-15, para. 9. Many commenters agree that there is a need for timetables for motions to deny or dismiss. See, e.g., Access Point Comments at 41-42; EarthLink Comments at 7, 14-16; Arizona Corporation Commission Reply at 12-13. But see AT&T Comments at 20 (contending that the rule would invite a time-consuming, endless stream of motions).

¹⁰⁶ See Verizon June 4, 2009 *Ex Parte* Letter (recommending that the Commission set a 180-day target for complex forbearance petitions).

¹⁰⁷ 47 U.S.C. § 160(c) ("The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a).").

¹⁰⁸ See 47 C.F.R. § 1.1203.

¹⁰⁹ The Bureau circulates a draft order by permission of the Chairman.

¹¹⁰ The quiet period procedures will parallel those applied, under section 1.1203 of the Commission's rules, to Sunshine Agenda matters. See 47 C.F.R. § 1.1203. The forbearance quiet period will last for two weeks, and will apply regardless of whether the Commissioners plan to vote the order on circulation or at an agenda meeting. AT&T does not object to a rule that would preclude parties from making *ex parte* submissions within 14 days of a statutory deadline, except in response to specific Commission or staff requests. AT&T Comments at 20. Competitive LECs support much earlier deadlines for the filing of substantive *ex partes*. See, e.g., Access Point Comments at 44-45; Sprint Nextel Comments at 8; Covad Comments at 6; California PUC Comments at 8-9; Pennsylvania PUC Comments at 7; AdHoc Comments at 2.

the website, will announce the beginning of the quiet period, which may occur earlier in the proceeding in cases where the Commission does not require the full statutory period to render a decision.

34. This quiet period will enable the Commissioners and their staff to consider a proposed order, and will shield them from lobbying by either the petitioner or the opponents of the petition. Some commenters argue that any limit to *ex parte* presentations would be contrary to congressional intent, or effectively prevent the Commission from considering the best and most recent information relevant to the petition.¹¹¹ We disagree that a quiet period contravenes the intent of the statute.¹¹² If anything, a period of undistracted consideration furthers the goal of timely decisionmaking. Restricting contact with outside parties during the final week before voting does not deprive parties of more than adequate opportunity to present their case to the Commission, both in the paper record and in meetings. In many cases, such a proceeding continues for a year or more, and the procedural requirements we put in place today help to ensure that the record is filled out early in the proceeding. The benefits we describe above – allowing the Commissioners and their staff to carefully consider fully developed issues in a proceeding that is not changing by the hour – more than outweigh any inconvenience to the petitioner and other stakeholders.¹¹³ Absent unusual circumstances, this quiet period will end with the release of a Commission order addressing the forbearance petition, or if approved by the Commission, withdrawal of the petition by the petitioner.

C. Withdrawal of Forbearance Petitions

35. To prevent waste, and to ensure that arguments against forbearance are not structurally disfavored, we conclude that the Commission, rather than solely the petitioner, should decide whether or not a forbearance proceeding concludes with any action other than the issuance of a decision by the Commission. In the *Forbearance Procedures NPRM*, the Commission sought comment on whether forbearance petitions may unreasonably burden stakeholders, make ineffective use of Commission resources, drive the Commission's decision-making process, or otherwise operate in a way other than that intended by Congress.¹¹⁴ Numerous commenters voice these concerns, including Time Warner, which argues that limits should be placed on the withdrawal of forbearance petitions.¹¹⁵ Henceforth, for the reasons set forth below, a petitioner may not withdraw a forbearance petition, nor may a petitioner narrow a petition so significantly as to amount to a withdrawal of a large portion of the forbearance relief originally requested by the petitioner after the date that its reply comments are due plus 10 business days, unless the Commission authorizes the withdrawal. A petitioner is free to withdraw or narrow a petition prior to such date.

36. The current practice of “Heads, I win; Tails, I withdraw” has a number of pernicious side effects. Full-fledged participation in the notice and comment process generated by forbearance petitions puts an enormous burden on stakeholders' resources.¹¹⁶ Mounting repeated defenses against multiple forbearance petitions, possibly all raising similar issues in different markets, wastes competitors'

¹¹¹ See, e.g., Verizon Comments at 25.

¹¹² See Frontier Comments at 3.

¹¹³ See, e.g., Frontier Comments at 3; Verizon Comments at 25.

¹¹⁴ See *Forbearance Procedures NPRM*, 22 FCC Rcd at 21215, para. 6; Time Warner Comments (arguing that limits should be placed on the withdrawal of forbearance petitions).

¹¹⁵ See Time Warner Comments (arguing that limits should be placed on the withdrawal of forbearance petitions).

¹¹⁶ See Letter from Thomas Jones, Counsel for One Communications Corp. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-49 (May 13, 2009) (One Communications May 13, 2009 *Ex Parte* Letter) (stating that competitors incur enormous costs opposing forbearance petitions).

resources if those proceedings do not result in greater regulatory clarity.¹¹⁷ Permitting petitioners to withdraw their petitions without Commission approval is not only wasteful but also unfair to commenters that invest so much in the regulatory process.¹¹⁸ Thus, whether the Commission decides the issues raised in a forbearance petition should not be left solely to the petitioner's discretion.¹¹⁹

37. The Commission also must allocate substantial resources to address forbearance petitions, resources that it otherwise could devote to other pressing matters. If no order results, the resources will have been expended without significant public benefit.¹²⁰ For example, Verizon recently withdrew two petitions seeking forbearance from various regulatory and statutory requirements in Rhode Island and Cox's service territory in the Virginia Beach MSA.¹²¹ When the Commission devotes significant time to summarizing a record, analyzing data, weighing arguments, and otherwise conducting a complex forbearance proceeding, the decision to cast the effort aside should not be left to a private party. The Commission has a significant stake in the matter if it is to maintain control over its own agenda and apportion its resources in a way that serves the public interest. For similar reasons, Federal Rule of Civil Procedure 41 requires a complainant to get court permission before withdrawing a complaint if the withdrawal comes after the filing of an answer or motion for summary judgment.¹²²

38. Permitting parties to withdraw petitions in the late stages of a proceeding that are otherwise headed for denial could also distort the Commission's jurisprudence.¹²³ Over time, Commission precedent could tilt toward orders that contain analysis and reasoning in support of forbearance petitioners, and away from orders that make a case against them. If petitioners are allowed to select the orders that the Commission adopts, they could inadvertently or deliberately push precedent in a direction favorable to themselves, and thus exert undue influence on regulatory policy.

¹¹⁷ Moreover, although many of the recent forbearance petitions that have been filed sought benefits that would accrue primarily to some of the industries' largest participants, as the SBA argues, the burdens of the forbearance process may be most pronounced for the communications industry's smaller entities. *See* SBA Comments at 4-7.

¹¹⁸ *Cf. ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc., Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket No. 08-220, Order, DA 09-854 (WCB rel. Apr. 17, 2009) (stating that "[f]orbearance petitions require tremendous Commission resources to resolve" and encouraging parties not to file forbearance petitions seeking relief that will be superseded shortly).

¹¹⁹ *See AT&T Corp. v. FCC*, 220 F.3d 607, 630-31 (D.C. Cir. 2000) (upholding the Commission's reference to administrability concerns in interpreting a provision of the Act, and citing the Commission's discretion with regard to "judgment[s] about the most efficient way to proceed in . . . complex administrative matter[s]").

¹²⁰ One Communications May 13, 2009 *Ex Parte* Letter at 1.

¹²¹ *See* Letter of Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24, 08-49 (filed May 12, 2009); Letter from Michael J. Copps, Acting Chairman, FCC, to Henry A. Waxman, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (June 5, 2009) (reporting that the Commission spent 2,096 hours (at a personnel cost of \$149,772) and received over 1850 pages of comment on petitions that Verizon withdrew on May 12, 2009), *available at* http://74.125.95.132/search?q=cache:4O8HL2yU8mAJ:energycommerce.house.gov/Press_111/20090609/copps.pdf+Copps+verizon+withdrawal&cd=2&hl=en&ct=clnk&gl=us (last visited June 16, 2009).

¹²² *See* Fed. R. Civ. P. 41; *see, e.g., In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 231, 220 (8th Cir. 1977) (explaining that the purpose of Fed. R. Civ. P. 41 "is to is to fix the point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right").

¹²³ One Communications May 13, 2009 *Ex Parte* Letter at 1-2.

D. Other Matters

39. *Proprietary Data.* Nothing in the record convinces us to amend the Commission's existing rules regarding the submission and disclosure of confidential information at this time.¹²⁴ We will continue to address on a case-by-case basis issues regarding access to proprietary data that our rules do not address. This approach permits us to balance the need for information against the risk of disclosure in individual circumstances. In particular, we decline on the basis of this record to reexamine our rules defining proprietary information.¹²⁵ Similarly, because a broad range of materials may require confidential treatment, we do not adopt at this time a new rule regarding format requirements on third party submissions.¹²⁶ We likewise reject calls to permit photocopying, or otherwise expand the limitations on use of proprietary data beyond those outlined in individual protective orders.¹²⁷ Finally, we continue to balance need versus risk when deciding when it is permissible to share confidential information with other governmental bodies and agencies, and therefore do not adopt a blanket rule that would govern requests for data by state commissions.¹²⁸

40. *Application to Pending Petitions.* The new complete-as-filed rules we adopt today take effect after this Order has been published in the Federal Register and subject to approval by the Office of Management and Budget.¹²⁹ The Commission sought comment in the *Forbearance Procedures NPRM* regarding the effect, if any, of new procedures on pending petitions.¹³⁰ Some commenters argue that it would be neither appropriate nor fair to apply the new procedures to forbearance petitions that have already been filed.¹³¹ We agree, but only with regard to the complete-as-filed rules that define what a

¹²⁴ See 47 C.F.R. § 0.459 (rules governing requests that materials or information submitted to the Commission be withheld from public inspection); 47 C.F.R. § 0.457 (records not routinely available for public inspection). See, e.g., NJ Rate Counsel/NASUCA Comments at 19-20 (requesting that parties be allowed to use proprietary documents from one forbearance proceeding in another forbearance proceeding); Time Warner Comments at 27 (requesting that the Commission permit authorized persons to use proprietary information in related proceedings).

¹²⁵ See, e.g., Access Comments at 31-37 (maintaining that current standards for redaction are unduly restrictive and abnormally cautious).

¹²⁶ See, e.g., *Petitions of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, First Protective Order, WC Docket No. 07-97, 22 FCC Rcd 10129, para. 2 (WCB 2007) (stating that "the term 'document' means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, pursuant to subpoena, by agreement, or otherwise"); Time Warner Comments at 27; NARUC Comments at 6; NJ Rate Counsel/NASUCA Comments at 19 (all arguing in favor of requiring searchable formats).

¹²⁷ See, e.g., Access Point Comments at 35 (arguing that market share data should not be considered proprietary); Time Warner Comments at 27 (favoring, for example, use of proprietary data by authorized person in related proceedings and removal of prohibition of photocopying proprietary data).

¹²⁸ See, e.g., NARUC Comments at 6 (arguing that data should be shared with state commissions in view of their staffing and budget constraints).

¹²⁹ See *infra* Section IV.B. (Paperwork Reduction Act requirements).

¹³⁰ See *Forbearance Procedures NPRM*, 22 FCC Rcd at 21215, para. 12.

¹³¹ See, e.g., AT&T Comments at 27 (stating the Commission does not have legal authority to adopt new forbearance rules on a retroactive basis); ITTA Comments at 5 (claiming it would be inequitable to apply procedural rules retroactively); Qwest Comments at 18 (fundamentally unfair to apply new procedures to existing forbearance petitions); *Landgraf v. USI Film Products et al.*, 511 U.S. 244, 280 (1994) (*Landgraf*) (defining an impermissible retroactive rule as one that "would impair rights a party possessed when he acted, . . . or impose new duties with respect to transactions already completed").

petitioner must include in a forbearance petition.¹³² Other new requirements will apply to pending petitions, including rules that require a petitioner to seek permission from the relevant Bureau before filing new arguments or data (except in response to new arguments or data filed by commenters, to which the petitioner may respond by right); rules that limit when forbearance petitions may be withdrawn or narrowed as of right; rules that limit *ex parte* contacts in the final weeks before a decision is due; and any other rule that “would [not] impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”¹³³ In contrast to the new filing requirements, these rules do not apply to a petitioner’s past actions and thus are not directly retroactive.¹³⁴ Thus, they will take effect 30 days after publication of this Order in the Federal Register.¹³⁵

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

41. Pursuant to the Regulatory Flexibility Act (RFA),¹³⁶ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) for the Order concerning the possible significant economic impact on small entities by the policies and actions considered in the Report and Order. The text of the Supplemental FRFA is included in Appendix A.

B. Paperwork Reduction Act

42. *Paperwork Reduction Act.* The Report and Order contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. The OMB, the general public, and other Federal agencies are invited to comment on the new and modified information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2005, Public Law No. 107-198, *see* 44 U.S.C. § 3506(c)(4) (SBPRA), we have considered how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” We find that the new and

¹³² *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (holding that legislative rules adopted pursuant to the APA’s notice and comment procedures may only be applied prospectively, unless there is statutory authority to apply them retroactively).

¹³³ *See supra Landgraf*, 511 U.S. at 280.

¹³⁴ *See Landgraf*, 511 U.S. at 269-70 (holding statute does not operate retrospectively if it merely upsets expectations based in prior law); *Chadmoore Comm. Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (mere filing of upgrade applications did not vest petitioners with a legally cognizable expectation interest); *NCTA v. FCC*, 2009 WL 1444094 (D.C. Cir. May 26, 2009) (finding that an agency order that upsets expectations based on prior law is not retroactive); *see, e.g.*, Access Point Comments at 12-14; Access Point Reply at 12-14 (arguing that procedural changes would neither impose new duties nor affect vested interests). Nor do we believe that these changes would have any significant secondarily retroactive effect. *See NCTA, supra*, at * 11. Even assuming that they would, however, we think the considerable benefits of applying these rules to pending petitions (including improved decision-making and increased fairness to all interested parties) outweigh any minimal expectation interests petitioners might have had in having their petitions adjudicated without these new requirements. *See id.* (noting that case law requires agencies to “balance the harmful ‘secondary retroactivity’ of upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests”).

¹³⁵ *See* 5 U.S.C. § 553(d) (“The required [Federal Register] publication or service of a substantive rule shall be made not less than 30 days before its effective date.”)

¹³⁶ *See* 5 U.S.C. § 603. The RFA, *see* U.S.C. §601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (Small Business Act).

modified requirements must apply fully to small entities (as well as to others) to protect consumers and further other goals, as described in the Report and Order. Pursuant to the SBPRA, we will seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

C. Congressional Review Act

43. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 5(c), 10, 201, 225, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c), 160, 201, and 303(r), that the Report and Order in WC Docket No. 07-267 IS ADOPTED, and that Part 1 of the Commission’s Rules, 47 C.F.R. Part 1, IS AMENDED as set forth in Appendix B.

45. IT IS FURTHER ORDERED that the rules and the requirements of this Report and Order SHALL BECOME EFFECTIVE 30 days after publication of Notice of this Report and Order in the Federal Register, except that new or modified reporting and recordkeeping requirements imposed by this action SHALL BECOME EFFECTIVE upon approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act of 1995.

46. IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

Comments in WC Docket No. 07-267

Comments	Abbreviation
Access Point, Inc. <i>et al.</i>	Access Point
ACS of Anchorage	ACS
AdHoc Telecommunications Users Committee	AdHoc
AT&T Inc.	AT&T
California Public Utilities Commission	California PUC
City of Philadelphia	City of Philadelphia
Columbia Capital and M/C Venture Partners	Telecom Investors
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Covad Communications Group, NuVox, and XO Communications, LLC	Covad
DeltaCom Inc.	DeltaCom
Earthlink Inc. and New Edge Networks	EarthLink
Frontier Communications	Frontier Communications
Hance Haney, Director & Senior Fellow, Technology & Democracy Project, Discovery Institute	Discovery Institute
Independent Telephone & Telecommunications Alliance	ITTA
Members of the Mid-Atlantic Conference of Regulatory Utility Commissioners	MACRUC
Mercatus Center, George Mason University	GMU
National Association of Regulatory Utility Commissioners	NARUC
National Association of Telecommunications Officers and Advisors	NATOA
National Cable & Telecommunications Association	NCTA
New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates	NJ Rate Counsel/NASUCA
Office Advocacy, U.S. Small Business Administration	SBA
Pennsylvania Public Utility Commission	Pennsylvania PUC
Public Service Commission of the State of Missouri	Missouri PSC
Public Utilities Commission of Texas	Texas PUC
Qwest Corporation	Qwest
Sprint Nextel Corporation	Sprint
TEXALTEL	TEXALTEL
Time Warner Telecom Inc, One Communications Corp., and Cbeyond Inc.	Time Warner
Verizon and Verizon Wireless	Verizon

Reply Comments Filed in WC Docket No. 07-267

<u>Reply Comments</u>	<u>Abbreviation</u>
Access Point, Inc. <i>et al.</i>	Access Point
Arizona Corporation Commission	Arizona Corporation Commission
AT&T Inc.	AT&T
City of Philadelphia	City of Philadelphia
Columbia Capital and M/C Venture Partners	Telecom Investors
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Covad Communications Group, NuVox, and XO Communications, LLC	Covad
Embarq	Embarq
Frontier Communications	Frontier Communications
Michigan Public Service Commission	Michigan PSC
New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates	NJ Rate Counsel/NASUCA
Qwest Corporation	Qwest
Seth Cooper, Director, Telecommunications & Information Technology Task Force, American Legislative Exchange Council	ALEC
Verizon and Verizon Wireless	Verizon

APPENDIX B

Final Rules

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 PRACTICE AND PROCEDURE

1. The authority of part 1 is amended to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(j), 160, 201, 225, and 303(r).

2. Section 1.49 is amended by adding paragraph (f)(1)(4) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * *

(f)(1)(iv) Petition for forbearance proceedings.

3. Sections 1.55 through 1.65 are added to read as follows:

§ 1.55 Petitions for forbearance must be complete as filed.

(a) *Description of relief sought.* Petitions for forbearance must identify the requested relief, including:

- (1) Each statutory provision, rule, or requirement from which forbearance is sought.
- (2) Each carrier, or group of carriers, for which forbearance is sought.
- (3) Each service for which forbearance is sought.
- (4) Each geographic location, zone, or area for which forbearance is sought.
- (5) Any other factor, condition, or limitation relevant to determining the scope of the requested relief.

(b) *Prima facie case.* Petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance.

- (1) A petition for forbearance must specify how each of the statutory criteria is met with regard to each statutory provision or rule, or requirement from which forbearance is sought.
- (2) If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify:

- (A) The nature of the data or information.
- (B) The parties believed to have or control the data or information.
- (C) The relationship of the data or information to facts and arguments presented in the petition.

(3) The petitioner shall, at the time of filing, provide a copy of the petition to each third party identified as possessing data or information on which the petitioner intend to rely.

(c) *Identification of related matters.* A petition for forbearance must identify any proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the

petition must declare that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought.

(d) *Filing requirements.* Petitions for forbearance shall comply with the filing requirements in § 1.49.

(1) Petitions for forbearance shall be emailed to forbearance@fcc.gov at the time for filing.

(2) All filings related to a forbearance petition, including all data, shall be provided in a searchable format. To be searchable, a spreadsheet containing a significant amount of data must be capable of being manipulated to allow meaningful analysis.

(e) *Contents.* Petitions for forbearance shall include:

(1) A plain, concise, written summary statement of the relief sought.

(2) A full statement of the petitioner's *prima facie* case for relief.

(3) Appendices that list:

(A) The scope of relief sought as required in § 1.55(a);

(B) All supporting data upon which the petition intends to rely, including a market analysis; and

(C) Any supporting statements or affidavits.

(f) *Supplemental information.* The Commission will consider further facts and arguments entered into the record by a petitioner only:

(1) In response to facts and arguments introduced by commenters or opponents.

(2) By permission of the Commission.

§ 1.57 Public notice of petitions for forbearance.

(a) Filing a petition for forbearance initiates the statutory time limit for consideration of the petition.

(b) The Commission will issue a public notice when it receives a properly filed petition for forbearance.

The notice will include:

(1) A statement of the nature of the petition for forbearance.

(2) The scope of the forbearance sought and a description of the subjects and issues involved.

(3) The docket number assigned to the proceeding.

(4) A statement of the time for filing oppositions or comments and replies thereto.

§ 1.59 Motions for summary denial of petitions for forbearance.

(a) Opponents of a petition for forbearance may submit a motion for summary denial if it can be shown that the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.

(b) A motion for summary denial may not be filed later than the due date for comments and oppositions announced in the public notice.

(c) Oppositions to motions for summary denial may not be filed later than the due date for reply comments announced in the public notice.

(d) No reply may be filed to an opposition to a motion for summary denial.

§ 1.61 Circulation and voting of petitions for forbearance.

(a) If a petition for forbearance includes novel questions of fact, law or policy which cannot be resolved under outstanding precedents and decisions, the Chairman will circulate a draft order no later than 28 days prior to the statutory deadline, unless all Commissioners agree to a shorter period.

(b) The Commission will vote on any circulated order resolving a forbearance petition not later than seven days before the last day that action must be taken to prevent the petition from being deemed granted by operation of law.

§ 1.63 Forbearance petition quiet period prohibition.

The prohibition in § 1.1203(a) on contacts with decisionmakers concerning matters listed in the Sunshine Agenda shall also apply to a petition for forbearance for a period of 14 days prior to the statutory deadline under 47 U.S.C. § 160(c) or as announced by the Commission.

§ 1.65 Withdrawal or narrowing of petitions for forbearance.

(a) A petitioner may withdraw or narrow a petition for forbearance without approval of the Commission by filing a notice of full or partial withdrawal at any time prior to the end of the tenth business day after the due date for reply comments announced in the public notice.

(b) Except as provided in paragraph (a), a petition for forbearance may be withdrawn, or narrowed so significantly as to amount to a withdrawal of a large portion of the forbearance relief originally requested by the petitioner, only with approval of the Commission.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (Notice) to this proceeding.¹ The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The Commission received one comment on the IRFA, from the Real Access Alliance. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.²

B. Need for, and Objectives of, the Report and Order

2. This Report and Order (Order) implements procedural rules governing petitions for forbearance filed pursuant to sections 10 of the Communications Act of 1934, as amended, (the Act).³ Pursuant to section 10, the Commission shall forbear from applying 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.⁴ In determining whether forbearance is consistent with the public interest, the Commission also must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."⁵ The procedural rules adopted in this Order require that forbearance petitions must be "complete as filed."⁶ The Order also clarifies that whenever a petitioner files a petition for forbearance, the petitioner bears the burden of proof with respect to establishing that the statutory criteria for granting forbearance are met.⁷ The Order also adopts procedures to ensure that forbearance petitions are addressed in a manner that is actively managed, transparent, and fair.⁸ Finally, this Order adopts a rule limiting unauthorized withdrawals of forbearance petitions after the reply comment date plus 10 business days.⁹

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No commenter responded directly to the IRFA. One commenter, SBA, specifically addresses the needs of small carriers. The Commission agrees with SBA that a complete-as-filed requirement will

¹ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, WC Docket No. 07-267, 22 FCC Rcd 21212 (2007) (*Forbearance Procedures NPRM*), Appendix A.

² See 5 U.S.C. § 604.

³ 47 U.S.C. § 160(c) ("Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers.").

⁴ 47 U.S.C. § 160(a).

⁵ 47 U.S.C. § 160(b).

⁶ See Order, Section III.A.

⁷ See Order, Section III.A.3.

⁸ See Order, Section III.B.

⁹ See Order, Section III.C.

better enable all interested parties to present their views before the Commission;¹⁰ that establishment of a framework brings clarity to the forbearance process;¹¹ and that, when the statutory language fails to indicate whether the petitioner must carry the burden of proof, the petitioner has the burden of proof because it is the petitioner that is requesting regulatory change.¹²

D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.¹³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁶

5. The rules and guidance adopted by this Report and Order will concern procedures relating to petitions for forbearance filed pursuant to section 10 of the Act.¹⁷ The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of wireline and wireless telecommunications carriers. Therefore, in the Report and Order, we consider the impact of the rules on carriers. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

6. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses according to SBA data.¹⁸

7. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.¹⁹

8. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²⁰ Census Bureau data for 2002 indicate that there were 87,525

¹⁰ See Order at para. 11 n.40

¹¹ See Order at para. 11 n.41.

¹² See Order at para. 21 n.80.

¹³ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

¹⁴ 5 U.S.C. § 601(6).

¹⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register.”

¹⁶ 15 U.S.C. § 632.

¹⁷ 47 U.S.C. § 160

¹⁸ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

¹⁹ Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

²⁰ 5 U.S.C. § 601(5).

local governmental jurisdictions in the United States.²¹ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”²² Thus, we estimate that most governmental jurisdictions are small.

1. Wireline Carriers and Service Providers

9. We have included small incumbent local exchange carriers (LECs) in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees) and “is not dominant in its field of operation.”²³ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.²⁴ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. *Incumbent LECs.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LECs. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁵ According to Commission data,²⁶ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

11. *Competitive LECs, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁷ According to Commission data,²⁸ 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive LEC services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and

²¹ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

²² We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

²³ 15 U.S.C. § 632.

²⁴ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²⁵ 13 C.F.R. § 121.201, NAICS code 517110.

²⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, page 5-5 (Aug. 2008) (*Trends in Telephone Service*). This source uses data that are current as of November 1, 2006.

²⁷ 13 C.F.R. § 121.201, NAICS code 517110.

²⁸ *Trends in Telephone Service* at Table 5.3.

118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

12. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁹ According to Commission data,³⁰ 330 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 309 have 1,500 or fewer employees and 21 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

2. Wireless Telecommunications Service Providers

13. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

14. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”³¹ and “Cellular and Other Wireless Telecommunications.”³² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.³³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.³⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.³⁵ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.³⁶ Thus, under this second category and size standard, the majority of firms can, again, be considered small.

²⁹ 13 C.F.R. § 121.201, NAICS code 517110.

³⁰ *Trends in Telephone Service* at Table 5.3.

³¹ 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in Oct. 2002).

³² 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in Oct. 2002).

³³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

³⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

³⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

³⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

15. *Cellular Licensees*. The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”³⁷ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.³⁸ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.³⁹ Thus, under this category and size standard, the majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.⁴⁰ We have estimated that 260 of these are small under the SBA small business size standard.⁴¹

16. *Paging*. The SBA has developed a small business size standard for the broad economic census category of “Paging.”⁴² Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.⁴³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.⁴⁴ In addition, according to Commission data,⁴⁵ 365 carriers have reported that they are engaged in the provision of “Paging and Messaging Service.” Of this total, we estimate that 360 have 1,500 or fewer employees, and five have more than 1,500 employees. Thus, in this category the majority of firms can be considered small.

17. We also note that, in the *Paging Second Report and Order*, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁴⁶ In this context, a small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁴⁷ The SBA has approved this definition.⁴⁸ An auction of Metropolitan Economic

³⁷ 13 C.F.R. § 121.201, NAICS code 517212.

³⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

³⁹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

⁴⁰ *Trends in Telephone Service* at Table 5.3.

⁴¹ *Id.*

⁴² 13 C.F.R. § 121.201, NAICS code 517211.

⁴³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

⁴⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

⁴⁵ *Trends in Telephone Service*, Table 5.3.

⁴⁶ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

⁴⁷ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.⁴⁹ Fifty-seven companies claiming small business status won 440 licenses.⁵⁰ An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁵¹ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁵² We also note that, currently, there are approximately 74,000 Common Carrier Paging licenses.

18. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A “small business” is an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million or less for each of the three preceding years. The SBA has approved these small business size standards.⁵³ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

19. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.⁵⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁵ According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony.⁵⁶ We have estimated that 221 of these are small under the SBA small business size standard.

20. *Broadband Personal Communications Service*. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁵⁷ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together

(Continued from previous page)

⁴⁸ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (dated Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

⁴⁹ See *929 and 931 MHz Paging Auction Closes*, Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁵⁰ *Id.*

⁵¹ See *Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

⁵² See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 18 FCC Rcd 11154 (WTB 2003).

⁵³ SBA Dec. 2, 1998 Letter.

⁵⁴ 13 C.F.R. § 121.201, NAICS code 517212.

⁵⁵ *Id.*

⁵⁶ *Trends in Telephone Service* at Table 5.3.

⁵⁷ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁵⁸ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.⁵⁹ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁶⁰ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

21. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.⁶¹ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.⁶² To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.⁶³ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁶⁴ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁶⁵ The SBA has approved these small business size standards.⁶⁶ A third auction commenced on

⁵⁸ See *PCS Order*, 11 FCC Rcd 7824.

⁵⁹ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

⁶⁰ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

⁶¹ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

⁶² See *Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

⁶³ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (dated Dec. 2, 1998).

October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.⁶⁷ Three of these claimed status as a small or very small entity and won 311 licenses.

22. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.⁶⁸ For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁶⁹ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁷⁰ Thus, under this second category and size standard, the majority of firms can, again, be considered small. Assuming this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard. In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.⁷¹

23. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁷² This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁷³ A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.⁷⁴ Auctions of

⁶⁷ See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

⁶⁸ 13 C.F.R. § 121.201, NAICS code 517212.

⁶⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued Oct. 2000).

⁷⁰ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁷¹ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control.

⁷² *220 MHz Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997).

⁷³ *Id.* at 11068, para. 291.

⁷⁴ See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.⁷⁵ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.⁷⁶ Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.⁷⁷

24. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards “small entity” and “very small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years, or that had revenues of no more than \$3 million in each of the previous calendar years, respectively.⁷⁸ These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

25. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁷⁹ A “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.⁸⁰ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁸¹

⁷⁵ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

⁷⁶ See, e.g., *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (1999).

⁷⁷ *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

⁷⁸ 47 C.F.R. § 90.814(b)(1).

⁷⁹ See *Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299, 65 FR 17594 (2000).

⁸⁰ See generally *220 MHz Service Auction Closes*, Public Notice, Report No. WT 98-36 (rel. Oct. 23, 1998).

⁸¹ *700 MHz Guard Band Auction Closes*, Public Notice, 16 FCC Rcd 4590 (rel. Feb. 22, 2001).

26. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁸² An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁸³ The SBA has approved these small business size standards.⁸⁴ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

27. *Wireless Cable Systems.* Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”),⁸⁵ and the Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”),⁸⁶ to transmit video programming and provide broadband services to residential subscribers.⁸⁷ These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁸⁸ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁸⁹ As described below, the SBA small business size standard for the broad census category of Cable and

⁸² See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 18600, 63 FR 6079 (Feb. 6, 1998).

⁸³ *Id.*

⁸⁴ See Letter from Aida Alvarez, Administrator, SBA, to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 4, 1998).

⁸⁵ MDS, also known as Multichannel Multipoint Distribution Service (“MMDS”), is regulated by Part 21 of the Commission’s rules, see 47 C.F.R. Part 21, subpart K, and has been renamed the Broadband Radio Service (BRS). See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket Nos. 03-66, 03-67, 02-68, and 00-230, MM Docket No. 97-217, RM-10586, RM-9718, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*MDS/ITFS Order*).

⁸⁶ ITFS systems are regulated by Part 74 of the Commission’s rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS). See *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

⁸⁷ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565, para. 131 (2006) (*2006 Cable Competition Report*).

⁸⁸ *Id.*

⁸⁹ See *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) (*Local Multipoint Distribution Service Order*).

Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS, ITFS and LMDS.⁹⁰ Other standards also apply, as described.

28. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,⁹¹ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁹² This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁹³ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.⁹⁴ MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

29. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁹⁵ We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

30. In the 1998 and 1999 LMDS auctions,⁹⁶ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.⁹⁷ Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.⁹⁸ These definitions of "small business" and "very small business" in the context of the

⁹⁰ 13 C.F.R. § 121.201, NAICS code 517510.

⁹¹ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

⁹² 47 C.F.R. § 21.961(b)(1).

⁹³ *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service & in the Instructional Television Fixed Service*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

⁹⁴ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

⁹⁵ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁹⁶ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

⁹⁷ *See Local Multipoint Distribution Service Order*, 12 FCC Rcd at 12545.

⁹⁸ *Id.*

LMDS auctions have been approved by the SBA.⁹⁹ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

31. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.¹⁰⁰ The auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licensees as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁰¹ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁰² The SBA has approved these small business size standards in the context of LMDS auctions.¹⁰³ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

32. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.¹⁰⁴ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.¹⁰⁵ A "very small business" is defined as an entity that, together with its affiliates and persons or entities that holds interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three

⁹⁹ See Letter from A. Alvarez, Administrator, SBA, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC (January 6, 1998).

¹⁰⁰ See *Local Multipoint Distribution Service Order*, 12 FCC Rcd 12545.

¹⁰¹ *Id.*

¹⁰² See *id.*

¹⁰³ See Letter from Aida Alvarez, Administrator, SBA, from Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

¹⁰⁴ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330, 59 FR 24947 (May 13, 1994).

¹⁰⁵ *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497, 64 FR 59656 (Nov. 3, 1999).

years.¹⁰⁶ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

33. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.¹⁰⁷ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.¹⁰⁸ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹⁰⁹ Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent¹¹⁰ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

34. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.¹¹¹ “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.¹¹² The SBA has approved these small business size standards.¹¹³ These size standards will apply to the future auction, if held.

E. Description of Projected Reporting, Record Keeping and other Compliance Requirements

35. The rules adopted in this Order require that petitions for forbearance must be complete as filed as set forth in new section 1.55 “Petitions for forbearance complete as filed.” Section 1.55 requires that petitions for forbearance must identify the requested relief, including each provision, rule, or requirement from which forbearance is sought; each carrier, or group of carriers, for which forbearance is

¹⁰⁶ *Id.*

¹⁰⁷ 13 C.F.R. § 121.201, NAICS code 517212.

¹⁰⁸ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued Oct. 2000).

¹⁰⁹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

¹¹⁰ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

¹¹¹ *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

¹¹² *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

¹¹³ *See* Letter from Gary M. Jackson, Assistant Administrator, SBA, to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (July 28, 2000).

sought; each service for which forbearance is sought; each geographic location, zone, or area for which forbearance is sought; and other factor, condition, or limitation relevant to determining the scope of the requested relief.¹¹⁴ Section 1.55 also requires that petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance and must specify how each of the statutory criteria is met with regard to each provision or rule from which forbearance is sought.¹¹⁵ If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify: the nature of the data or information; the parties believed to have or control the data or information; and the relationship of the data or information to facts and arguments presented in the petition.¹¹⁶ Finally, a petition for forbearance must identify any other petition, rulemaking, or waiver proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition.¹¹⁷ Alternatively, the petition must declare that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought.¹¹⁸

36. In addition, petitions for forbearance must comply with the filing requirements in § 1.49.¹¹⁹ Petitions for forbearance must be emailed to a temporary repository at forbearance@fcc.gov at the time for filing.¹²⁰ All filings related to a forbearance petition, including all data, must be provided in a searchable format.¹²¹ Petitions for forbearance must include: (1) a plain, concise, written summary statement of the relief sought; (2) a full statement of the petitioner's *prima facie* case for relief; (3) appendices that list: (A) the scope of relief sought as required in § 1.53(b); (B) all supporting data upon which the petition intends to rely, including a market analysis, and (C) any supporting statements or affidavits.¹²² To be searchable, a spreadsheet containing a significant amount of data must be capable of being manipulated to allow meaningful analysis.¹²³

F. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

37. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹²⁴

¹¹⁴ See Order at Appendix B (adopting new rule 47 C.F.R. § 1.55 (a)).

¹¹⁵ See *id.* § 1.55(b)(1).

¹¹⁶ See *id.* § 1.55(b)(2).

¹¹⁷ See *id.* § 1.55(c).

¹¹⁸ See *id.* § 1.55(c).

¹¹⁹ See *id.* § 1.55(d).

¹²⁰ See *id.* § 1.55(d)(1).

¹²¹ See *id.* § 1.55(d)(2).

¹²² See *id.* § 1.55(e).

¹²³ See *id.* § 1.55(d)(2).

¹²⁴ 5 U.S.C. §§ 603(c)(1)-(c)(4).

38. Although the Order imposes compliance or reporting requirements, nothing in the record suggests that small carriers are disadvantaged by the new procedural requirements. In fact, small entities are disadvantaged by the lack of procedural rules governing consideration of forbearance petitions, because they have had to expend significant resources to respond to the scattershot arguments that have been made by much larger entities that have sought and often received forbearance in recent years. The SBA filed comments in support of the new information requirement that petitions for forbearance must be complete as filed.¹²⁵

39. **Report to Congress:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹²⁶ A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.¹²⁷

¹²⁵ See *supra* para. 12; SBA Comments at 7 (advocating that petitions for forbearance should be complete as filed).

¹²⁶ See 5 U.S.C. § 801(a)(1)(A).

¹²⁷ See 5 U.S.C. § 604(b).

**STATEMENT OF
ACTING CHAIRMAN MICHAEL J. COPPS**

RE: *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*

I have long bemoaned the ills of a forbearance process gone awry, wherein industry is able to drive the Commission's agenda through a time-consuming and resource-heavy process that ranges far beyond the intent of our authorizing statute. Forbearance is, of course, a part of the Communications Act and substantive changes to it would require Congressional action. Today, however, the Commission does the next best thing, which is to put in place procedures that will hopefully result in forbearance proceedings that are more transparent, fair, and protective of the use of limited Commission resources and also more in spirit with the limited purposes for which it was designed.

Today's Order makes clear that a petitioner must present its case with specificity and clarity from the get-go; that the burden of proof falls squarely and properly on the petitioner; and that a petitioner, without Commission authorization, is no longer able to withdraw its petition at the end of the process if it doesn't look like it is going to get its way. While I don't expect that these rules will end the Commission's consideration of forbearance petitions, I am hopeful that they will inject some rationality into the process and greatly reduce the procedural gamesmanship that we've too often seen in the forbearance proceedings of the past.

These changes are good for numerous reasons not the least of which is that they establish reasonable parameters for the forbearance process, promote sounder policy-making, and hopefully provide significant savings of human and financial resources for the Commission, which has expended far too many dollars and hours dealing with matters that should have been dealt with elsewhere or, occasionally, not at all.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

RE: *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*

I am pleased to support today's action to bring predictability and fairness to our section 10 forbearance reviews. This order will benefit everyone with a stake in these important proceedings, including the consumers who depend on a reasoned, deliberate, and timely determination from the Commission.

Among the many steps today's order takes to improve our forbearance review, I am particularly pleased that future petitioners will have to state clearly what relief they seek, including the rules they seek forbearance from and the services at issue. They must also – at the beginning of the process - supply all relevant evidence that supports their case, and identify any evidence that might be in the hands of other parties. This seems basic, and it is. I am also pleased that petitioners will now need Commission approval if they wish to withdraw petitions more than ten business days after the date for reply comments. Recent experience has shown that an unlimited ability to withdraw petitions squanders Commission and private resources.

Amazingly, the Commission has never adopted detailed procedures to implement section 10. Because of this inaction, we have seen less-than-complete petitions, unpredictable processes, and last minute decisions and non-decisions. That is no way to give effect to Congress' intent. I have repeatedly urged the Commission to adopt procedural rules for forbearance petitions. So I want to thank Chairman Copps for setting us and future Commissions on the right course. All of us – especially consumers who are affected most when we forbear – owe him our thanks.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

RE: *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

I have stated repeatedly that the forbearance petition process is flawed and should be improved. Only Congress can amend Section 10, which is simple and clear in its mandate; but the statute allows the Commission to take steps to improve its implementation. I am pleased that today we take such steps.

Our actions are well-grounded in the statute and in the traditions of American jurisprudence. We clarify, for example, that a petitioning party has the burden of proving its case, but make clear that the totality of the record, including evidence introduced by third parties, must be taken into consideration when determining if that burden has been met.

Furthermore, we place restrictions on a petitioner's ability to withdraw or significantly narrow a petition, but only after a petitioner has had a reasonable opportunity to review the record developed during the pleading cycle.

Additionally, our Order today is balanced. Although we appreciate all of the suggestions offered by interested parties, after a thorough analysis we have chosen not to adopt many of them for a variety of pragmatic and legal reasons, not the least of which is our effort to remain faithful to the deregulatory intent of Section 10.

In short, the purpose of this Order is not to make it harder for petitioners to receive the benefits of deregulation through forbearance. For instance, our Order does not raise or lower the evidentiary bar that any other petitioner has faced in a Section 10 proceeding before this Commission. Instead, today's action will help the Commission to manage its resources, and to ensure the forbearance process is more efficient, predictable, fair, and transparent for all parties concerned. It is a constructive step down the road to greater reform of the Commission and its processes.