

Telecommunications Alert: FCC Order Reforms Telecommunications Regulation Forbearance Process

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The Federal Communications Commission issued an order yesterday adopting new procedures to allow it to handle petitions for telecommunications regulation forbearance “in a manner that is front-loaded, actively managed, transparent, and fair.”¹ The order, responding to a September 2007 petition from several competitive telecommunications companies, addresses many concerns raised about the use of the forbearance process in recent years. Recently, the forbearance petition process has been used primarily by large incumbent local exchange companies (ILECs), like Verizon and AT&T, to escape unbundling and other regulations imposed on them by the 1996 Telecommunications Act.

The Forbearance Process—Background

Section 10 of the Communications Act requires the FCC to forbear from applying a statutory provision or regulation to a telecommunications carrier or service, if the FCC determines that enforcement of the provision is not necessary to protect consumers or to ensure the telecommunications carrier is acting reasonably and not unjustly discriminating. The FCC is also required to determine that forbearance is in the public interest and will “promote competitive market conditions.”²

The statute provides that if the FCC fails to act on a petition for forbearance within one year, the petition is “deemed granted.”³ This occurred most famously in 2006, when the FCC deadlocked on a 2-2 vote, and Verizon’s sweeping petition asking the FCC to forbear from applying Title II telecommunications rules to its broadband services was “deemed granted” without FCC action. Prior to the new order, the FCC had not adopted procedural rules for consideration of forbearance petitions, save for a single rule requiring that such petitions be submitted separately from other carrier requests.

Forbearance Petitions Now Must be Complete at Filing

Forbearance petitions must now be complete at the time of filing. Previously, the FCC had allowed petitioners to supplement petitions with new information at any time in the consideration process. Critics charged that the FCC had sometimes accepted new data and information too late in the process for other parties to properly respond or for the FCC to adequately consider.

Under the new rules, to be considered “complete as filed,” a forbearance petition must:

- Identify clearly the scope of the requested relief, stating with specificity: 1) each statute, rule, or provision from which forbearance is sought; 2) each carrier for which forbearance is sought; 3) each service for which forbearance is sought; 4) the geographic area for which forbearance is sought; and 5) any other factor relevant to determining the scope of relief sought.
- Include the facts, information, data, and arguments necessary to make a *prima facie* case for forbearance. The petition 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.” If the petitioner intends to rely on data or information from third parties, the petition must identify that data or information and explain its relationship to the petition.
- Identify any other proceeding pending before the FCC in which the petitioner has taken a position regarding relief that is comparable to the relief sought in the forbearance petition.
- Follow certain procedural rules, including filing the petition and all supporting data in computer searchable form.

Petitioner Bears Burden of Proof

The FCC’s order clarifies that with respect to petitions for forbearance, the petitioner bears the burden of proof, and is required to provide “convincing analysis and evidence to support its petition.” The burden of proof encompasses both the burden of production—the requirement to state a complete *prima facie* case in the petition—and the burden of persuasion—the requirement that “the petitioner’s evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition.” The FCC rejected arguments that it must demonstrate the ongoing benefits of a regulation.

Late Unilateral Withdrawal of a Petition No Longer Allowed

Responding to concerns that current practice by some forbearance petitioners amounted to a situation of “Heads, I win; Tails, I withdraw,” a new rule prohibits a petitioner from unilaterally withdrawing or significantly narrowing a forbearance petition more than 10 days after reply comments are due. Describing the current practice as wasteful and “unfair to commenters that invest so much in the regulatory process,” the FCC’s new rules will allow petitions to be withdrawn or substantially narrowed at later stages in the proceeding only with FCC permission.

Transparency and Management of the Petition Review Process

The FCC order announces new procedures for handling of forbearance petitions, aimed at promoting a transparent and actively managed process. A list of pending forbearance petitions,

with a timeline to identify the stages of review, will be posted on the FCC website. The order identified the following distinct stages to be applied in FCC processing of forbearance petitions:

- **Filing and Initial Review:** An initial review will determine whether the petition is “complete, coherent, and sufficiently specific to serve as a basis for comment.” Petitions that fail to meet basic requirements will be summarily dismissed, allowing the petitioner an opportunity to cure defects and refile. Failure by the FCC to summarily dismiss a petition at this stage does not necessarily mean it is “complete as filed.”
- **Public Notice:** The FCC will give public notice of the petition and post it on the FCC web page. Pleading cycles will generally allow 30 days for comments and 15 days for replies, with longer cycles for complex petitions. Protective orders for submitted data and proprietary information will be issued as needed. Opposing parties may file motions for summary denial, alleging defects in the completeness and clarity of the petition. Motions for summary denial may be considered at any time up to the statutory time limit for FCC action on the forbearance petition.
- **Intermediate Period:** During an intermediate period—roughly months 3 through 10—the FCC will consider whether to grant or deny less complex forbearance petitions, most of which the FCC expects to be able to resolve within six months of filing. For more complex petitions, the FCC will use the intermediate period to further develop the record, review comments, and analyze data.
- **Circulation and Quiet Period:** The circulation and quiet period—months 11 and 12 for most petitions, or months 14 and 15 if the FCC has exercised its 90-day extension of the review period—will be used for internal consultations and circulation of a draft order. The new order adopts an internal deadline requiring Commissioners to vote on any forbearance order at least seven days before the statutory deadline. The order also sets a new “quiet period” (in which contacts with commissioners and FCC staff about the petition are prohibited) during the final two weeks before the statutory deadline.

Effective Date

The new rules announced in the order become effective 30 days after publication of the order in the *Federal Register*.

Application to Pending Forbearance Petitions

Rejecting arguments that it would not be fair to apply the new rules to currently pending forbearance petitions, the FCC determined that all of the rules, except the “complete-as-filed” rule, should apply equally to pending petitions for forbearance. In contrast to the “complete-as-filed” requirement, the FCC said, the other new rules “do not apply to a petitioner’s past actions and thus are not directly retroactive.”

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Please contact your Mintz Levin telecommunications attorney, or any of the attorneys listed in this Alert for additional information as we continue to follow these issues.

Endnotes

¹ *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, Report and Order, FCC 09-56, ¶ 1 (rel. June 29, 2009) (*Order*).

² 47 U.S.C. § 160. The FCC is also authorized under section 332 of the Act to forbear from applying many Title II telecommunications provisions to commercial mobile radio service (CMRS) providers if similar conditions are met. 47 U.S.C. § 332(c)(1)(A).

³ 47 U.S.C. § 160(c). The FCC can act to extend the one-year period by 90 days if it decides it needs the extra time to consider a petition.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Howard J. Symons

Chair, Communications Practice

(202) 434-7305

HJSymons@mintz.com

Michael H. Pryor

(202) 434-7365

MHPryor@mintz.com

Frank W. Lloyd

(202) 434-7309

FWLloyd@mintz.com

Ernest C. Cooper

(202) 434-7314

ERCooper@mintz.com