

FCC Adopts Procedural Rules to Govern Forbearance Proceedings

June 30, 2009

In an order released yesterday, the Federal Communications Commission (the Commission) adopted procedural rules governing petitions for forbearance filed pursuant to Section 10 of the Communications Act of 1934, as amended (the Act). According to the Commission, the new rules, which had been petitioned for in September 2007 by Covad Communications, NuVox, XO Communications, Cavalier Telephone, and McLeodUSA, are designed to ensure that forbearance petitions are handled "in a manner that is front-loaded, actively managed, transparent, and fair."

The Commission adopted the requirement that forbearance petitions be "complete as filed." Petitions must state explicitly the scope of the relief requested, address each prong of Section 10 as it applies to the rules or provisions from which the petitioner seeks relief, identify any other relevant proceedings before the Commission, and comply with the format requirements specified in the order. The petition must include all the facts, information, data, and arguments on which the petitioner intends to rely to make the prima facie case for forbearance. The Commission noted that these requirements will make the process fairer for commenters, more manageable for the Commission, and more predictable for petitioners. Importantly, the Commission concluded that the petitioner bears the burden of proof at the outset and throughout the proceeding. The burden of proof encompasses both the burden of production and the burden of persuasion.

The Commission also adopted rules for the active management of forbearance proceedings, which include a rule that calls for review of a petition by the relevant Bureau upon receipt to determine whether it is incomplete or defective and thus should be summarily denied. The Commission adopted various internal deadlines. These include: (1) a deadline of seven days prior to the statutory deadline for voting any forbearance order; (2) a deadline of 28 days prior to the statutory deadline for Bureau circulation of a draft order; and (3) a two-week quiet period before the statutory deadline. Finally, the Commission adopted a rule prohibiting a petitioner from withdrawing a forbearance petition or narrowing a petition so significantly as to amount to a withdrawal of a large portion of the relief originally requested after the date that its reply comments are due plus 10 business days, unless the Commission authorizes the withdrawal.

The new rules will take effect 30 days after notice of the order is published in the Federal Register, except that the new reporting and recordkeeping requirements will take effect upon approval by the Office of Management and Budget.

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