

## *Verizon's Petition For Forbearance Deemed Granted*

By operation of law, the Commission has allowed Verizon's petition for forbearance<sup>1</sup> to take effect. Verizon's petition sought forbearance from applying certain pricing and tariffing obligations on numerous broadband services offered to Verizon's large volume enterprise customers and other carriers. Under Section 10 of the Communications Act, the Commission had until midnight on March 19, 2006 to deny Verizon's petition for failure to meet the requirements of forbearance, or to modify the petition. The Commission, however, let Verizon's petition take effect under the "deemed granted" clause of the statute, without issuing an order.

The Commission's "action" has caused considerable uncertainty and raises a number of novel issues.

### **What was Granted?**

From both a practical and legal perspective the scope of the forbearance that was granted is unclear. Verizon initially petitioned the Commission to forbear from applying traditional common-carriage requirements for all broadband services to the extent that any of those requirements might ultimately be construed to apply. Verizon subsequently identified ten broadband services for which it sought forbearance from Title II common-carriage regulation regardless of the nature of the customer to whom the service is offered. In a press release, the

Commission contends that only Verizon's amended petition was granted by operation of law. However, the separate statements by the Commissioners disagreed widely on what was granted, with Chairman Martin taking a narrow view while Commissioner Copps suggested a much broader effect of the failure to act. In order to give the grant of the petition meaning, the Commission (or perhaps more likely, the courts) will be called upon to clarify the extent to which common carriage regulations are to be imposed, and on which broadband services.

### **Is This the Last Word on the Petition?**

The effect of the Commission's action also is unclear. The statutory language provides that forbearance petitions may be granted by operation of law if the Commission "does not deny" the petition within the statutory deadline, but Section 10 also seems to require that the Commission explain its grant or denial in writing. If it fails to do so, then the Commission is in violation of Section 10. Moreover, Section 10 does not address whether the FCC has any authority to act after a petition is "deemed granted." The FCC opined in an appeal in another case, which is pending, that it retains authority to deny or grant the petition in whole or in part and to explain its decision in writing after the deadline has passed. Under this theory, the passage of time

without Commission action on a forbearance petition merely operates to effectuate a grant of the petition subject to the normal rules regarding reconsideration and judicial review. But what if the Commission never explains its decision in writing? The passage of time without affirmative action by the Commission presumably would not relieve the Commission of its obligation under the Administrative Procedure Act to engage in reasoned decision-making when adopting rules that affect other parties to the forbearance petition. Failure to explain the reasoning for its decision would most assuredly make the “deemed” grant of Verizon’s petition arbitrary and capricious.

### Is the "Order" Appealable?

Commissioner Copps argued in his statement that there is no Order which can be appealed by an aggrieved party. Others believe that the Commission's decision to allow the petition to take effect under the “deemed granted” clause would be deemed to be an act by the Commission that is appealable. We believe that the separate statements issued by the Commissioners could be construed as the Commission’s written explanation, which would effectively operate as an “order” that can be appealed. In any event, we believe that it may be possible to file an appeal or to ask the court to remand the matter (perhaps through a writ of mandamus) to the Commission to issue its explanatory statement. On the sub-

stance, we believe that the petition still must satisfy each prong of the forbearance standard enumerated in Section 10 of the Act. If the petition lacks any one of the requirements, the grant could be reversed or remanded. Moreover, given that the Commission has not explained its reasoning, we do not believe it would be appropriate for a reviewing court to grant deference to the Commission’s decision to allow the petition to be deemed granted.

Further, we would expect that any party appealing the “Order” will seek a stay of its effectiveness. It is very hard to predict the likelihood that a party would be successful in obtaining a stay of the petition’s effect pending the outcome on appeal, however.

### Next Steps.

During the interim period, the forbearance is effective. Carriers and large enterprise customers should watch for a Verizon tariff filing to withdraw some or all of the services effected. Such a filing may present a vehicle to challenge the meaning of the automatic grant of the petition. In addition, parties that wish to appeal the grant should begin analyzing these issues in depth.

### Endnotes

- <sup>1</sup> On December 20, 2004, Verizon filed a petition asking the Commission to forbear from applying Title II and the *Computer Inquiry* requirements to any broadband services offered by Verizon.

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