

**FHH Telecom Law**  
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**FCC Grants Forbearance of  
Verizon Broadband Services  
Breadth of Grant is Unclear, Action is Appealed**

*By Paul J. Feldman*  
*feldman@fhhlaw.com*  
*703-812-0403*

Recently, the FCC granted a petition filed by Verizon requesting forbearance from Title II regulation as applied to certain broadband services offered by Verizon. However, due to the procedure used to grant Verizon's petition, significant questions remain as to the services affected. This article attempts to shed some light on the answers to those questions.

Under Section 10 of the Communications Act, if the FCC does not act on a petition for forbearance within 15 months of filing, the petition is deemed to be automatically granted. That is what occurred in this case — there was no substantive order, just a news release and press releases from various Commissioners, discussing their views on the automatic grant. The confusion regarding the recent grant of forbearance to Verizon arises because Verizon's original Petition for Forbearance was pretty vague as to what services it wished to be covered.

So, what services are covered by the grant of forbearance? A bit of historical analysis is probably necessary to answer that question.

Verizon's Petition was filed in December of 2004. At that time, the FCC had already released its Notice of Proposed Rulemaking in the Wireline Broadband proceeding, but had not yet issued its Order in that proceeding. The Verizon Petition spent almost no space describing the services for which it sought forbearance, which it denoted merely as "any broadband services offered by Verizon." In September of 2005, the FCC issued its *Wireline Broadband Order*, which held that wireline Internet access is properly considered to be an information service subject to Title I, and that the underlying broadband transmission services used to provide Internet access may be offered either as private carriage under Title I or common carriage under Title II. The *Order* did not appear to make any distinction between mass market and enterprise services, in terms of what was being de-regulated.

In a February 7, 2006 letter, Verizon attempts to explain the services for which forbearance was sought, and the relationship between that relief and the relief granted by the Commission in the *Wireline Broadband Order*. In the letter, Verizon specifically *excludes* "TDM-based services" from those for which relief is sought. Rather, Verizon states that it was seeking forbearance relief for "two principal categories of service":

*Packet-Switched broadband services, which include Frame Relay, ATM, IP-VPN, and Ethernet services; and*

*“Non-TDM-based optical networking, optical hubbing and optical transmission services”* provided at “OC’n speeds” but specifically *excluding* “services at DS1 and DS3 speeds.” According to Verizon, these are services provided over SONET networks, as well as over Wave Division Multiplex and Dense Wave Division Multiplex networks.

The February 7<sup>th</sup> Letter states that both categories of service are “sold primarily to enterprise customers” (on a “retail basis”) and to “other carriers on a wholesale basis.” In regards to those two categories of customers, the Letter states that it seeks relief “regardless of the nature of the customer to whom the service is offered.”

In subsequent *ex parte* letters, Verizon addressed CLEC filings opposing its request, and in doing so, adds a bit more detail to what it is seeking. Thus in addressing COMPTTEL complaints that Verizon should not receive forbearance on *wholesale special access*, Verizon states on March 2<sup>nd</sup> that its request *excludes* “traditional TDM-based special access services,” and that such services “will continue to be available as wholesale common carrier services.” Thus, competing carriers can continue to purchase TDM-based special access services “to offer their own packetized services, such as ATM and Frame Relay.” In a March 13<sup>th</sup> Letter, Verizon included *DS1 and DS3* wholesale special access services in the category of services for which relief was *not* sought. Thus, in regards to special access services, it appears that only *non-TDM-based* wholesale (and perhaps retail) services are subject to relief.

With regard to the nature of the regulation from which Verizon sought relief, the Petition and the February 7<sup>th</sup> Letter stated that it sought forbearance from Title II regulation, so that it has the flexibility to offer these services on either a common-carriage or private carriage basis. It specifically sought relief from tariff filing, cost support and pricing requirements. It also sought relief from *Computer Inquiry* requirements regarding CEI (comparably efficient interconnection) and ONA (open network architecture). In its February 7<sup>th</sup> Letter, Verizon stated that to the extent the affected services are subject to USF contribution requirements, Verizon was *not* seeking relief from making contributions, pending resolution of the USF rulemaking.

So, in sum, Verizon sought, and appears to have received, relief from Title II tariff filing, cost support and pricing requirements (and ONA and CEI requirements) for the provision of certain specific retail and wholesale broadband services. This relief addresses many more services than the relief granted to all carriers in the *Wireline Broadband Order*, which applied to retail and wholesale DSL/Internet access service, and the underlying broadband transmission services used to provide Internet access/DSL. We believe that the Commission may be drafting an Order on a related matter B the USF consequences of the Verizon forbearance B so that Order may contain more explanation.

It will come as no shock that COMPTTEL has already filed an appeal of the Verizon

forbearance action with the D.C. Circuit. This case has some unusual facts, and thus it will be difficult to predict the outcome. What is unusual is that there is no actual order to challenge, since the forbearance went into effect by default. It will be hard for COMPTTEL to say that the FCC *did* anything that violated the Communications Act B since they did nothing. The best that COMPTTEL can do is to say that the FCC *should have* acted to affirmatively deny the Petition, but since there is no FCC analysis of the statutory forbearance factors, COMPTTEL will have to convince the court to make its own analysis, which it may not be comfortable doing. Even if the Court is willing to make its own analysis, it is hard to say at this time how it would come out. COMPTTEL's strongest arguments might be that it is unclear what the *breadth* of the forbearance is, since the FCC did not specify it, and that the forbearance is *procedurally defective*, since Verizon did not specify what it wanted until late in the process. If the court agreed with either of these two arguments, it would likely remand to the FCC.

We will keep you up to date on this unusual but potentially far-reaching proceeding.