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## **Feds Forge Forbearance Reform Formulation**

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On November 30, the FCC issued a Notice of Proposed Rulemaking (*NPRM*) seeking comments on reforming the Title II forbearance procedures. Because of the numerous petitions for forbearance which are pending, the Commission is moving expeditiously to complete this rulemaking process. The comment period ends on December 30.

Forbearance means that the FCC can decline to apply what would otherwise be a governing rule. This regulatory flexibility was added as a part of the Telecommunications Act of 1996. It can be applied when the Commission determines – usually upon the request of a regulated entity – that the regulation is not needed to protect consumers or ensure just and reasonable rates and practices by carriers, or when it would otherwise promote the public interest. As it is now, if the Commission does not act on a petition for forbearance within a year (plus a potential, one-time, 90-day extension), it is deemed granted. This unique provision of the statute – that a forbearance petition is deemed granted if not acted on within this time frame – has been a godsend to long-suffering regulatees who usually must sit and wait, often for years, for the FCC to act on a particular request. The statute in this case forces the Commission to do something.

This provision of the law has drawn criticism from some legislators and led to calls to change the law.

Interestingly, the U.S. Court of Appeals for the D.C. Circuit recently upheld the Commission's "grant" of a forbearance petition when the grant was actually a *failure* to act. This somewhat unlikely set of circumstances arose as a petition for forbearance filed by Verizon was approaching the one-year deadline and the President hadn't appointed a fifth Commissioner. The four Commissioners were evenly split on whether to grant the petition. The result was a 2-2 deadlock. The issue before the court was whether this constituted Commission action or not on the petition, and the court held that it did not. Therefore the petition was deemed granted.

The Commission is specifically seeking comments on:

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- Whether new rules should govern the format and content of forbearance petitions;
- Whether new notice and comment rules, such as default comment periods and time limits on *ex parte* filings, should be adopted; and
- Whether other rules would facilitate the participation of state commissions, as well as other parties, in forbearance proceedings.