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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
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FEATUREGROUP IP )  
 )  
Petition for Forbearance Pursuant to ) WC Docket No.  
47 U.S.C. §160(c) from Enforcement )  
of 47 U.S.C. § 251(g), Rule 51.701(b)(1), )  
and Rule 69.5(b) )

**PETITION FOR FORBEARANCE**

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## EXECUTIVE SUMMARY

In this Petition for Forbearance, Feature Group IP asks that the Commission take immediate, but minimal, action, to ensure that consumers and users of Voice-Embedded Internet-based communications services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of Voice-Embedded Internet communications applications are given the assurance that they may deploy and offer such services without the threat that they will be mired in the archaic access charge quagmire that currently plagues legacy telecommunications.

The incumbent LECs, at&t in particular, are attempting to extend the access charge regime to Voice Embedded Internet-based communications services and applications. Incumbent LECs are exercising their continuing market power and stranglehold over access to their existing base of consumers, to block intercommunication between the Internet and the PSTN except on terms, conditions and prices they dictate, typically the highest intrastate access charge rate.

As things currently stand, would-be providers of Voice-Embedded Internet-based communications, services and applications are chilled from providing next-generation Internet services with a voice component to potential users because of the recurring attempted misapplication of access charges (and in particular *intrastate* access charges) to Voice-Embedded

Internet-based communications, services and applications. Grant of this Forbearance Petition would serve to springboard advanced communications, promote universal service and network effects for Internet communications, online social communities and Group Forming Networks,<sup>1</sup> and create innovative new service opportunities and greater efficiencies for users of telecommunications services, Internet voice applications, and other Internet-based communications tools and social networks.

Forbearance is in the public interest because, by forbearing, the Commission will bring to an end the current legal uncertainty created by the anti-consumer, anti-competitive, anti-innovation misapplication of access charges, the legally insupportable self help actions of ILECs and the misguided claims that ILECs have made with respect to whether interstate and intrastate access charges apply to Feature Group IP serviced IP-PSTN and incidental PSTN-PSTN traffic. Denial of forbearance serves no positive purpose except to stall innovation and communications advances.

Forbearance is now required because without such forbearance, specific competitive harm will be imposed upon all new technology entrants who develop and use telecommunications to provide Information Services.

It will not further the public interest to allow the ILECs to abuse their market dominance and – through self-help behavior rather than regulatory permission – to make IP-PSTN traffic and the incidental traffic described herein subject to access charges. Any fair and impartial reading of the

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<sup>1</sup> See *infra*, p. 14, for discussion of Group Forming Networks.

Telecom Act and implementing rules makes clear that this traffic is *not* to be subjected to access charges. at&t and the other ILECs within their respective serving territories, still maintain *de facto* control over the narrowband access market. There is no reason why users of the narrowband PSTN should be denied the benefits of participating in Internet based communications simply because they do not have a broadband connection. They must not be relegated to the sidelines of the Internet communications revolution, especially when Internet-based communications providers are ready and able to allow them entrée, but for the imposition of excessive and unjustified access tolls.

The rules from which Feature Group IP seeks forbearance are not necessary to ensure that the exchange of traffic between LECs and telecommunications carriers serving Internet-based voice providers is just and reasonable. Indeed, grant of Forbearance would merely allow Feature Group IP to proceed within a fair reading of the law without allowing ILECs to misinterpret and game the access charge regime to their sole financial advantage at the expense of consumers and the growth of Internet-based communications.

Because of their continuing excessive control over the broad base of consumers, ILECs, without regulatory check, still have the power to extract excessive tolls from us and, by extension, our customers unless and until a regulatory authority officially tells them that they cannot use their power to

extract unlawful and unjustifiable, and non-cost based access revenue from enablers of Internet-based communications.

If the Commission grants this Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission's implementing rules, and state-approved, and in some cases arbitrated, interconnection agreements or, if the two LECs agree, under the *ISP Remand* regime. The statute, rules and agreements will ensure that rates and practices are just and reasonable. Grant of this Forbearance would have, albeit minimally, the added benefit of encouraging ILECs to work more vigilantly to resolve the complex intercarrier compensation regime, because forbearance would preclude the ILECs from continuing to misinterpret the rules to extract unfair compensation from enablers of Internet communications. The Commission can and must take this step now to end these wrongful, anti-competitive, anti-consumer and anti-innovation actions by the industry's dominant players with an ostensible stranglehold on access by and between too many captive consumers and would-be application innovators.

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**PETITION FOR FORBEARANCE**

**I. Introduction**

Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC, (collectively “Feature Group IP”), through its attorneys, petitions the Commission for forbearance, as detailed below, in an effort to ensure and foster the timely deployment and growth of Internet-based communications, technologies, networks, services and applications.

Chairman Martin recently stated:

Competitive forces spur innovation and push prices down. When a regulatory issue comes before me, my first instinct is to pick the action that will help facilitate and promote competition, innovation, and consumer choice.<sup>2</sup>

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<sup>2</sup> Remarks of FCC Chairman Kevin J. Martin National Cable & Telecommunications Association Las Vegas, NV, May 7, 2007 (noting that cable and VoIP entry into the voice market dominated by an incumbent has not been easy, and citing recent FCC efforts to create market-opening policies promoting interconnection and access rights that were affecting cable and VoIP providers’ ability to offer competing voice service. *See, e.g., Time Warner Cable Declaratory Ruling*).

In line with Chairman Martin's instinct, we ask herein that the Commission ensure that consumers and users of Voice-Embedded Internet-based communications<sup>3</sup> services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of Voice-Embedded Internet communications applications are given the assurance that they may deploy and offer such services without the threat that they will continue be hobbled by the prospect of becoming mired in the archaic access charge quagmire that currently plagues legacy telecommunications. The incumbent LECs (and, in particular at&t) are attempting to extend the access charge regime to Voice Embedded Internet-based communications services and applications in litigation, in interconnection negotiations, in state arbitrations and before this Commission. Incumbent LECs are exercising their continuing market power and stranglehold over access to their existing base of consumers, to block intercommunication between the Internet and the PSTN except on terms,

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<sup>3</sup> Voice-embedded *IP* communications is generally referred to as "Voice-over-Internet Protocol" or "VoIP." Voice-embedded *Internet* communications is a particular subset of such communications that do not merely use the Internet Protocol to transmit voice signals undifferentiated from PSTN traffic, but actually uses Internet Protocol to provide voice applications as part of a larger Internet communications experience. Feature Group IP uses "Voice-embedded Internet communications," because that term more accurately describes voice as just one of many applications that can be transmitted in IP format, including applications that integrate voice with data, video, or other things. We think it is important for policymakers to recognize a qualitative difference between services that merely use IP technology to provide PSTN-equivalent offerings and services that embed IP-based voice applications as part of a larger, next-generation Internet communications experience. There is significant overlap in the use of the terms "Internet-based" communications and "IP-based" communications. Acknowledging the often subtle distinctions between the terms "Internet communications" and "IP-based communications," we attempt, in this Petition, to use the term that best relates to the particular context in which the service or application is being considered.

conditions and prices they dictate. Specifically, they insist that Internet-based services and applications must pay access charges any time any portion of the PSTN is involved.

As things currently stand, would-be providers of Voice-Embedded Internet-based communications, services and applications are chilled from providing such applications to potential users because of the recurring attempted misapplication of access charges to Voice-Embedded Internet-based communications, services and applications. Without grant of this Petition, the growth of online social communities, Group Forming Networks, and the positive network effects<sup>4</sup> of Internet-based communications will be dramatically stalled in the United States, and American consumers, particularly those consumers without broadband connections, will not be able to avail themselves of the full promise of Internet communications.

As will be further explained below, the Commission can break this logjam. It can hold that Voice Embedded Internet-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality are enhanced services and, therefore, that the so-called “ESP Exemption” from access charges still applies and this exemption is carried forward into the intercarrier compensation regime under either § 251(b)(5) or the *ISP Remand Order* (e.g., § 201). If the Commission reaffirms these

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<sup>4</sup> A “network effect” is a characteristic that causes a good or service to have a value to a potential customer which depends on the number of other customers who own the good or are users of the service. Definition from Wikipedia [http://en.wikipedia.org/wiki/Network\\_effect](http://en.wikipedia.org/wiki/Network_effect).

principles, it can deny this Petition, without harming or stifling emerging Internet networks and applications. On the other hand, if the Commission holds that Voice Embedded Internet-based communications, services and applications that do involve a net change in form, a change in content and/or an offer of non-adjunct to basic enhanced functionality are not exempt from access charges, or the ESP Exemption is not carried forward into intercarrier compensation pursuant to § 251(b)(5) or § 201, then the Commission must forebear from application of certain express and implied provisions of Section 251(g) of the Communications Act of 1934, as amended (“Act” or “Communications Act”), Rule 51.701(b)(1), and, where applicable, Rule 69.5(b).

Almost four years ago, Level 3 began its request for forbearance from the application of access charges to IP-based communications services with the following:

As [former] Chairman Michael Powell has stated, IP-based voice communication is ‘a lifestyle-changing, new, fantastic technology’ and ‘the most vibrant innovation to come into the American economy, the global economy in decades – in centuries even.’<sup>5</sup> As Commissioner Michael Copps stated at the FCC’s December 1, 2003, Voice-over-Internet Protocol (“VoIP”) forum, ‘[i]t’s incumbent on [the Commission] to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeonholes without adequate justification. It’s no slam dunk that the old rules even apply.’<sup>6</sup> Bearing these principles in mind with respect to IP communications, the

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<sup>5</sup> *Kudlow & Kramer: Interview with Chairman Michael K. Powell* (CNBC Television, Nov. 19, 2003).

<sup>6</sup> Opening Remarks of Michael J. Copps, FCC Voice Over Internet Protocol Forum (Dec. 1, 2003), *available at* [http://hramfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241765Al.udf](http://hramfoss.fcc.gov/edocs_public/attachmatch/DOC-241765Al.udf) (last visited Dec. 19, 2003).

Commission must distinguish those rules that, in a competitively-neutral and technologically-appropriate manner ....<sup>7</sup>

Level 3, however, withdrew its request on the eve of a required ruling, and, as a result, this Commission, the communications and computer industries and users all missed the opportunity for resolution of the issue as presented by Level 3.

Feature Group IP is now putting forth what we regard as a more forward-looking, technology-advancing Petition for Forbearance. Within this Petition and appended documentation, we provide the technological, economic and policy reasons why forbearance is not only justified, but is now required due to anti-competitive actions – principally by at&t, but mimicked by other incumbents. The incumbent monopolists who wished to prevent forbearance for their own financial interests (*i.e.*, extending the access charge regime to IP-PSTN communications to extract as much monopoly rent in the form of unjustified access payments from Internet-based communications) have carried the day in the wake of withdrawal of the *Level 3 Forbearance Petition* and have been, in the absence of a clear statement, been, *de facto*, allowed to continue and expand their attack on, and stifling of, new technology, services and applications. The Commission must put an end to incumbent LEC efforts to stifle innovation and competition and to extract new monopoly rents from emerging voice-embedded Internet applications.

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<sup>7</sup> Petition, *In the Matter of Level 3 Communications L.L.C. Petition For Forbearance Under 47 U.S.C. 8 160(c) From Enforcement of 47 U.S.C. 8 251(g), Rule 51.701(b)(1), And Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) (*Level 3 Forbearance Petition*).

Without action, not only will current users of broadband Internet-based communications services not be able to experience the full network effects of Group Forming Networks and Internet communications, but those consumers without broadband Internet access will also not be able to experience the positive network effects of Group Forming Networks and other benefits of Voice-embedded Internet communications.

To this end, Feature Group IP now comes before the Commission with a new Petition, under duress from the actions of at&t and the inactions of the administrative and legal bodies whose duties are to implement the Act and enforce its provisions in order to promote competition and deployment of advanced telecommunications capabilities. Grant of this Forbearance Petition is one way to allow the Internet and advanced telecommunications capabilities to evolve on a timely basis without being mired in the current, uncertain morass of the intercarrier compensation regime.

The Supreme Court recently observed that the Bell Companies have demonstrated hostility to the intent of the 1996 Telecom Act because the Act “did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates.” Intent on “keeping [their] regional dominance,” they “thwart CLECs’ attempt to compete” and “keep them out” through “flagrant resistance to the network sharing requirements of the 1996 Act.”<sup>8</sup>

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<sup>8</sup> *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955, 1972-73 167 L. Ed. 2d 929, 948 (2007).

As in *Trinko*,<sup>9</sup> the Supreme Court ruled not to allow Federal courts to apply antitrust laws to the telecommunications competition issues, at least where a complex regulatory regime can be better overseen by the expert regulatory agencies. The Supreme Court essentially trusted regulators to “get it right” by interpreting both the letter and spirit of the Telecom Act to promote competition and advance new technology, services and applications. This you must now do. Feature Group IP requests forbearance so that at&t may no longer *arbitrage* the *network effect* of all inter-model communications for its own ill-gotten gains at the expense of consumers, entrepreneurs, innovators and the U.S. economy. Just as calls to the Internet were not allowed to be “gamed” by CLECs for ill-gotten profits,<sup>10</sup> calls from the Internet should not be “gamed” by the controllers of terminating bottleneck facilities and customers for profits they have not earned, based on intercarrier compensation relationships that should not logically apply to next-generation Internet-based communications.

While discussions on the merits of new technology in communications, like the *Level 3 Forbearance Petition*, generally focus on the importance of the enabled services and applications, they generally give substantially less

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<sup>9</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

<sup>10</sup> Which is the effective result from the Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, WC Docket 01-92, FCC 01-131, 16 FCC Rcd 9151, (Apr. 2001) (hereinafter “*ISP Remand Order*”), *rev’d on other grounds and remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”) and the express intent of our arbitrated language and bargained for language in our existing ICA with at&t.

emphasis to the importance of the positive externalities brought about by the network effects themselves. The potential impact of the positive externalities of network effects, however, has not been lost on at&t. In an effort to exert and extend its control over consumers and Internet application providers, particularly those with an embedded voice communications capability, at&t is currently waging war on both unique applications and the positive network effects associated with interconnecting new technologies with old. In its affirmative attack on Feature Group IP's service, at&t has finally revealed its anti-competition, anti-innovation and anti-consumer position that pure Internet-based voice applications are subject to access charges where they incidentally terminate to the PSTN. In support of its erroneous position, at&t is currently exploiting the fact that many VoIP providers (*e.g.*, Vonage and cable modem-based VoIP providers) have chosen, for ease of interoperability, to emulate PSTN number representation.<sup>11</sup> Such a position cannot be cost-justified, and serves only to stifle the development, deployment, growth and uptake of next-generation Internet-based communications networks and applications.

In its effort to impose the out-moded access charge regime on services not contemplated before the Telecom Act, at&t is mounting an attack on the positive externalities of the network effect of evolving Internet-based

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<sup>11</sup> In essence, at&t is saying that the number representation in the Signaling System 7 CPN parameter is determinative for the wholesale billing relationship as between CLECs and ILECs. This means that Vonage does not owe the money directly, but that Vonage's CLEC vendor does.

communities and networks. Ultimately, at&t's design is to make all communication with the PSTN require a unique 10 digit phone number issued by the North American Numbering Plan Administrator ("NANPA"), or such communications will summarily be deemed fraudulent or, at least, subject to the highest available intercarrier compensation charge. In the Internet voice world this is the equivalent of the Postal Service requesting that all e-mail servers must be "hosted" by the local post office where users must pay to log on and check e-mail. In essence, at&t wants to prevent new technology use unless it can directly profit from it or not cannibalize its existing revenue streams. The result would be that at&t obtains ill-gotten revenue at the expense of consumers, the American and global economy and the evolution of the Internet and Internet-based communications and networks.

In a modern understanding of networks, the underlying physical network is differentiated from the logical network primarily by multiplicity: for every network of  $N$  users, there are an exponential number of possible logical networks. The collection of these networks encapsulates the total number of possible sub-groupings of users at the application level. Recent developments in technology manifested through applications such as Facebook and MySpace have provided new modes of interaction and direct user control of network appearances that are allowing users to actualize

previously inaccessible sub-groupings at an accelerating rate.<sup>12</sup> The term “Group Forming” is used to describe this phenomenon, and such networks are referred to as Group Forming Networks (“GFN”).<sup>13</sup> The theory of Group Forming Networks provides an elegant and powerful description of all possible modes of communication within and between networks. This allows for the balanced treatment of understanding legacy point-to-point POTS communications vis-à-vis novel point-to-point Internet-based communications such as Skype.

This treatment allows us to understand more fully the technological chilling effect and consequent loss of economic and social value that would result if at&t is allowed to continue to advance its policies, and to compel GFNs, or those enabling GFNs, to pay “toll” to interact with the PSTN. Incidental access to consumers on the narrowband PSTN should not be deemed so special or sacrosanct that the toll-seeking gatekeeper of such access should be allowed to disrupt the efficient and natural evolution, growth and positive network effects of GFNs. From a regulatory point of view, failure to keep controllers of PSTN bottlenecks in check would allow such gatekeepers to arbitrage and co-opt the underlying technology and positive network effects at the expense of advancing next-generation

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<sup>12</sup> How many Americans under 25 have a White Page Directory listing? Now ask how many identify themselves through Facebook, or MySpace or both? Does each social network appearance need to be identical? No. Compare the usefulness and control that person has over identity applications like MySpace when compared to a 10-digit geographically tied down telephone number.

<sup>13</sup> For more on Group Forming Networks, see David Reed’s links at <http://www.reed.com/dprframeweb/dprframe.asp?section=gfn>.

communications capabilities enabled by the Internet and IP-based technology. This would not be the first time that at&t has advanced that strategy to kill competition and technical innovation until it could control it and arrogate to itself all the value and profit deriving from innovation and technological advancement. In essence, doing nothing allows at&t to abuse its position of controlling the PSTN to control the adoption and use of new technology, stifling innovation and invention.<sup>14</sup>

Fortunately, the FCC has already addressed this exact issue, at a time when at&t (then AT&T) was still a regulated monopoly. The FCC created and implemented the Enhanced Service Provider Exemption which exempted new technology companies from being under the control of the monopolist by allowing those companies *not* to pay access charges. at&t's current strategy is, in essence, to pretend that the ESP exemption was not intended to apply to Voice Embedded IP-based communications, services and applications related traffic.<sup>15</sup> The FCC must make it clear, as it recently did in the *Time Warner Order*,<sup>16</sup> and as Chairman Martin and the other Commissioners have

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<sup>14</sup> Consider Bell control and deployment, or reluctance to deploy DSL technology, mobile technology, VoIP technology, unless and until it became clear that Bell would not cannibalize existing revenue streams and would be allowed to control the genie without threat of competition.

<sup>15</sup> As further described in this Petition, Feature Group IP has diligently worked within the confines of the current law and the ESP exemption from its inception in 2000, when its founders got at&t (then SBC) to agree to "No compensation due for all traffic to or from ESPs." For more than five years now, we have been attempting to arbitrate and modernize the signaling, routing and rating of all new technology traffic, and have yet to have an actual hearing to resolve these issues on a going forward basis. Further, no such hearing to establish clear new rules on signaling, routing and rating is in sight.

<sup>16</sup> *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the*

repeatedly opined, that the FCC supports competition from alternative business models, especially when those business models are crafted with “good public policy” in mind. A public policy that supports technological innovation and invention and protects and enhances the positive network effects and benefits to society brought about by Group Forming Networks is such a policy.

Feature Group IP now files this Petition requesting that the Commission forbear from enforcing its governing statute and rules to the extent that such statute and rules could, arguably, be interpreted to permit LECs to impose interstate or intrastate access charges on Voice Embedded IP-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality when there is an end-point on the Public Switched Telephone Network (“PSTN”).<sup>17</sup> Specifically, Feature Group IP seeks forbearance for Voice Embedded IP-based communications, services and applications related traffic that (1) originates in IP format and terminates to the legacy “Time Division Multiplexed” (“TDM”) circuit-switched telephone network; (2) originates on the legacy TDM circuit-

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*Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order (Adopted March 1, 2007) (*Time Warner Cable Order*).

<sup>17</sup> For purposes of this Petition, the “PSTN” is the same as the definition of “Public Switched Network” as defined at 47 C.F.R. § 20.3: “Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.”

switched telephone network and is addressed to an IP-based end point; or (3) originates on the legacy TDM circuit-switched network and terminates on the legacy TDM circuit-switched network but (a) is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform, there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user. Communications between an IP-based end point and a legacy TDM circuit-switched end point – regardless of which end-point initiated the session – will hereinafter be referred to as “IP-PSTN traffic.” “Incidental” traffic occurs where all of the relevant end-points are on the legacy TDM circuit-switched network but an IP-based platform is involved and there is a change in content and/or non adjunct-to-basic enhanced functionalities are offered.

This particular Forbearance request is also limited to those communications that traverse Feature Group IP’s Internet Gateway Intermediation Point of Presence (“IGI-POP”) services. Accordingly, the requested forbearance would initially extend only to Feature Group IP. Logically, however, any LEC that tariffs its services as a common carrier on a LATA by LATA basis and commits to operate in a non-discriminatory manner that furthers the pro-technology policies spelled out by Feature Group IP in this Forbearance Petition could also apply for its own forbearance.<sup>18</sup>

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<sup>18</sup> Feature Group IP’s Internet Gateway Intermediation Point of Presence (“IGI-POP”) Tariff is attached to this Petition as Appendix A and may also be accessed at [http://www.featuregroupip.net/wp-content/uploads/2nd\\_Revision\\_to\\_UTEX\\_Tariff\\_FCC\\_No.1.pdf](http://www.featuregroupip.net/wp-content/uploads/2nd_Revision_to_UTEX_Tariff_FCC_No.1.pdf). The corresponding

While Feature Group IP does not, at present, agree to any geographic exemptions, or any exemption based on the type of ILEC (*e.g.*, small or large, rural or urban) still reigning over captive PSTN customers, Feature Group IP would voluntarily exclude from this Forbearance request any incumbent LEC from any rural area, upon a finding by the Commission that the subsidies and inherent non-cost based arbitrage of the current inter-carrier regime that the rural LEC claims are in fact necessary and that this need for implicit support outweighs the positive network effects and other benefits that would result from allowing rural Americans to participate in Group Forming Networks and other Internet-based communications communities. We suggest that, if this Commission wishes to “restrict” competition and preserve the implicit subsidies to LECs, it can do so by selectively excluding Forbearance relief in those markets served by an ILEC that is exempt from Section 251(c) pursuant to Section 251(f)(1); or by excluding forbearance relief in those circumstances where a user of a voice-embedded Internet communications service is calling customers of a “local” ILEC with fewer than 5,000 access lines.

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explanations which were filed at the FCC are available at <http://www.featuregroupip.net/regulatory-issues/>. As explained in the tariff filing, this tariff was filed as a competitive response to the at&t “TIPToP” tariff. While both tariffs require “Situs” (a logical presence in the LATA so that all traffic to and from the Tariff Customer is never “interLATA” from the perspective of the offering LEC”) that is where the similarities stop. Feature Group IP does not require utilization of Legacy SS-7 signaling and purchasing of Legacy signaling, TIPToP does; Feature Group IP does not require presentation by the customer of its own 10 digit phone numbers, TIPToP functionally does; IGI-POP requires its customers to both a) not be a carrier and b) to affirmatively claim the ESP exemption so to be able to buy a flat rated product; TIPToP is silent on the ESP exemption, but discriminates against non IP-VIS traffic by charging a high-per minute rate.

Grant of this petition is required by Section 10(a) of the Communications Act of 1934, as amended (“Act”). In accordance with Section 10(a)(3), forbearance is in the public interest because, by forbearing, the Commission will bring to an end the current legal uncertainty created by the anti-consumer, anti-competitive, anti-innovation misapplication of access charges to IP-PSTN interconnection, the “litigious self help actions of at&t” and the misguided claims at&t has made with respect to whether interstate and intrastate access charges apply to Feature Group IP serviced IP-PSTN and incidental PSTN-PSTN traffic. Denial of forbearance serves no positive purpose except to stall innovation and communications advances while allowing at&t to line its pockets at the expense of consumers. Forbearance would simply verify that the Enhanced Service Provider Exemption<sup>19</sup> should

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<sup>19</sup> The following is how Feature Group IP defines the application of the ESP Exemption in our FCC filed Tariff and how we have implemented our services:

**Enhanced Service**

“Enhanced service” means voice mail, Internet service (including Voice Over Internet service), tele-messaging services, information services and other services a Feature Group IP customer states is an enhanced service under Section 153(20) of the Act and/or 47 CFR §64.702.

**Enhanced Service Provider or ESP**

ESPs include but are not limited to voice mail companies, Internet Service Providers, Information Service Providers and tele-messaging companies. For purposes of this agreement, all ESPs, whether affiliated or not, are to be treated as End Users if the ESP avails itself of the ESP exemption upon order of service from Feature Group IP.

**ESP Exemption**

The “ESP Exemption” is an affirmative exercise of federal regulatory authority over interstate service whereby, despite heavy use of interstate service, the FCC allows ESPs to purchase flat rated local service to terminate and originate traffic over Local Exchange Carrier and CMRS networks without creating any liability for the payment of traditional Exchange Access charges. When an ESP takes advantage of the ESP exemption, it is exempt from being charged Interstate or Intrastate Interexchange services on a usage sensitive basis. An ESP, at its election, may choose to not avail itself of the ESP exemption and

and must logically apply to Feature Group IP's customers. In the wake of at&t efforts to extract toll from us and other providers of voice-embedded Internet communications so that we might bring the benefits of Internet communications, such as allowing them to realize the network effects of GFNs, we believe there is no other way for us to effectively implement the legal affirmative election of this exemption made by our customers. at&t has successfully launched an anti-competitive campaign to subvert the ability of new technology to be adopted in a competitive way unless and until such new technology strictly adheres to old protectionist monopoly rules and unless the provider of new technology agrees to pay the monopolist controller of old technology for "access" to communicate.<sup>20</sup> Thus, forbearance is now required because without such forbearance, specific competitive harm will be imposed

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instead subscribe to interstate Access tariffs such as the new SBC TIPToP tariff. Feature Group IP shall only sell IGI-POP services to entities which claim the ESP Exemption.

<sup>20</sup> In discovery produced in Texas, at&t admits to launching "Access over Local" revenue retention campaigns aimed against the CLECs they know are handling VoIP applications. For example, at&t modified their billing systems and platforms to pretend everything is really an ordinary long distance call which can be billed to an interconnecting CLEC while behind the scenes they focus on creating rules that target Internet-based VoIP Applications. The attack is simple but deadly. Internet-based VoIP users do not usually have what at&t considers to be a "Valid" CPN (*e.g.*, a 10-digit geographic telephone number active in the LERG). at&t contends the CLEC is subject to intrastate access charges since the call is not demonstrably "local." This campaign also classifies as "toll" applications like Vonage or any IP-based service that does signal an ordinary phone number as if the calling and called numbers are associated with rate centers that are not "local" to each other, and, thus, Vonage signals it willingly wants to purchase "exchange access" from the LECs. This Campaign is targeted only against new entrant CLECs. ILECs do not apply this treatment to other ILECs. at&t refuses to acknowledge note 92 in the *AT&T Declaratory Ruling*, which admonished ILECs not to assess access charges against interconnecting CLECs but, instead to charge the IXC. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (2004). at&t refuses to acknowledge the Commission's finding in the *Vonage Order* that numbers no longer matter when it comes to IP-based services. *See In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (2004) {"Vonage Order"}.

upon all new technology entrants who develop and use telecommunications to provide Information Services.

Feature Group IP requests forbearance for these forward-looking policy reasons; but also needs forbearance for survival.<sup>21</sup> at&t has revealed through discovery in a state complaint case<sup>22</sup> and through information disclosed in an indefinitely-abated arbitration case that its business practices no longer recognize that Information Services, Enhanced Services and Internet services are to be exempt from per minute, non-cost based charges.

at&t also provided answers to Feature Group IP's requests for admissions in a pending Federal court proceeding related to historical abuses and violations of our existing Interconnection Agreement with at&t.

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<sup>21</sup> See active Dockets 26381 and 33323 at the Texas PUC. Amazingly, for five and a half years, Feature Group IP has been unable to arbitrate a new agreement to deal with wholesale interconnection provisions when service to an ESP is involved. at&t's self-help attempts to eliminate the ESP exemption at the Texas PUC and to ignore the bargained for language in the existing contract is only now being heard in the context of a post-interconnection agreement dispute resolution on an agreement that is ten years old. Feature Group IP's current compensation section states that "no compensation is due for all traffic to or from an ESP." Notwithstanding the express language, the Texas PUC has certified at&t's attempt to collect access fees from Feature Group IP for traffic from Skype and Vonage must be resolved by December 6, 2007 or the Texas PUC may force Feature Group IP to post the equivalent of a bond equal to at&t's fraudulently billed access charges just to keep Feature Group IP's ESP traffic flowing.

<sup>22</sup> See, *infra*, Appendix C, *Pre-Filed Direct Testimony of Soren Telfer in Texas PUC Docket No. 33323*, which describes the current at&t billing system and SS-7 content delivery billing practice. What is particularly disturbing about this content delivery policy is it was cooked up in secret during and after the same periods Feature Group IP was asking at&t to establish a mutual policy about what to represent when traffic comes from an Internet user who may not also have a 10 digit phone number. Not knowing the top secret billing policies by at&t, and not having at&t negotiate in good faith with Feature Group IP led us to our own policy creation which (1) encourages any 10 digit number that can be reversible, if one exists, and (2) if no 10 digit number exists, encourages a unique representation of some information to allow potential identification of the calling party by the called party. It turned out that our policy added fuel for the anti-competitive billing system created by at&t. For each call that had a non-routable identifier in its content of CPN or an 8yy identifier in its content of CPN, at&t increased its charges by seven fold to Feature Group IP.

Collectively, at&t – for the first time – specifically characterizes each and every sort of Voice Embedded IP-based communications, services and applications, from Skype, to Vonage to Xbox users, as all being subject to “Exchange Access” charges. While the specifics over how Feature Group IP has been historically damaged by the at&t breaches of our contract will, perhaps, be determined by the Texas PUC and courts, there can be no doubt now that this forbearance is now essential to prevent further market damage to the industry and to Feature Group IP.

Feature Group IP wants to expand its footprint. We have state authorizations throughout the country. We, however, are bogged down in Texas. at&t’s refusal to deal, and its insistence that it can force Feature Group IP to pay access when access does not apply either to our ESP customers, or – even if the traffic is not exempt – to Feature Group IP since we would be a joint provider rather than an access customer, has prevented us from implementing the business plan.

It will not further the public interest to allow at&t and the rest of the ILEC cartel<sup>23</sup> to abuse their market dominance and – through self-help behavior rather than regulatory permission – to make IP-PSTN traffic and the incidental traffic described herein subject to access charges. Any fair and impartial reading of the Telecom Act and implementing rules makes clear that this traffic is *not* to be subjected to access charges. at&t and the other

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<sup>23</sup> <http://dictionary.reference.com/browse/cartel>.

ILECs within their respective serving territories, still maintain *de facto* control over the PSTN access market. Feature Group IP, and its founders, have built a unique business model on symmetrically treating all Internet traffic the same regardless of direction or application. That business model does not rely on intercarrier compensation; all of our revenue comes from our customers, not from other carriers.<sup>24</sup> We have consistently sought to negotiate “no compensation” terms for all forms and types of traffic, in each direction, with every one of our directly or indirectly interconnected carrier providers.

We have also used technology to solve problems (like “Phantom Traffic”) and do not blame the emerging technology for exposing the reality that the old way of doing things – extracting excessive tolls from providers seeking to gain access to captive consumers of local telephone service – is less useful. We support, but the legacy carriers attempt to crush, spreading the benefits of positive network effects not only to providers but also to users. This is the model that has propelled the viral growth of the Internet. Facebook offers more user-control and options than the whitepages, but both identify users. Skype, too, offers more variability than international operator service companies, but both allow for international real-time voice communication. And, Universal Global Title (invented by Feature Group IP)

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<sup>24</sup> This is precisely what the Commission said it wanted to happen. *ISP Remand Order* ¶¶ 67, 83. See also *Inter-carrier Compensation NPRM* ¶ 56.

representation is better than assuming all new technology is a phantom IXC perpetrator of fraud.<sup>25</sup>

Moreover, consistent with Section 10(a)(1), the rules from which Feature Group IP seeks forbearance are neither necessary to ensure that the exchange of traffic between LECs and telecommunications carriers serving Internet-based voice providers is just and reasonable. Indeed, grant of Forbearance would merely allow Feature Group IP to proceed within a fair reading of the law without allowing at&t to misinterpret and game the access charge regime to its sole financial advantage at the expense of us, consumers and the growth of Internet-based communications. Grant of forbearance would simply confirm what is already solid law, but which at&t and other ILECs simply refuse to accept.<sup>26</sup> Because of their continuing excessive control over the broad base of consumers, they have the power to extract excessive tolls from us and, by extension, our customers unless and until a

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<sup>25</sup> The regulated companies of at&t have refused to discuss directly the signaling issues related to interconnecting new technology with old technology. The only statements and positions we have been able to divine have been from the *Missoula Plan* proceeding. *In the Matter of the Missoula Intercarrier Compensation Reform Plan*, Docket 01-92, DA 06-1510 (“*Missoula Plan*”). Feature Group IP’s filings in response to the *Missoula Plan* may be accessed at <http://www.featuregroupip.net/regulatory-issues/>. We are convinced that our filings demonstrate how the industry can solve the so called “Phantom Traffic” problem. See [http://www.featuregroupip.net/wp-content/uploads/missoula\\_comments.pdf](http://www.featuregroupip.net/wp-content/uploads/missoula_comments.pdf); [http://www.featuregroupip.net/wp-content/uploads/Missoula\\_Phantom\\_Interim\\_Process\\_and\\_Call\\_Detail\\_Proposal\\_Comments.pdf](http://www.featuregroupip.net/wp-content/uploads/Missoula_Phantom_Interim_Process_and_Call_Detail_Proposal_Comments.pdf). To date, at&t has refused to engage Feature Group IP on our proposals. It prefers to insist that all traffic should be billed as ordinary access. We do not want to sell ordinary access, pay ordinary access, or force our customers to pay it either.

<sup>26</sup> *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055; 2006 U.S. Dist. LEXIS 65536 \*49-\*81 (E.D. Mo, 2006); *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005).

regulatory authority officially tells them that they cannot use their power to extract unlawful and unjustifiable, and non-cost based access revenue from enablers of Internet-based communications.

If the Commission grants this Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission's implementing rules, and state-approved, and in some cases arbitrated, interconnection agreements or, if the two LECs agree, under the *ISP Remand* regime. This understanding should already be the governing principle, but to the extent it is not, then that is the rule that would govern upon a grant of forbearance to the extent and to where forbearance is deemed appropriate. The statute, rules and agreements will ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory. To the extent there is some difference between the traffic subject to this Forbearance Petition and circuit-switched traffic, that difference is transitional only, as the Commission can (and ultimately will) fully address any such difference as it adopts a unified intercarrier compensation regime. Grant of this Forbearance would have, albeit minimally, the added benefit of encouraging ILECs to work more vigilantly to resolve the complex intercarrier compensation regime, because forbearance would preclude the ILECs from continuing to misinterpret the rules to extract unfair compensation from enablers of Internet communications.

Allowing at&t to apply non-cost based access charges to IP-PSTN calls

and the non-carriers who thrive on the Internet exactly because there is no top down control of “how things must be done” is bad policy and perpetuates an economically inefficient and unfair regime, both for providers and for consumers. Allowing at&t to bill CLECs for such traffic simply because an IP-to-PSTN call or incidental traffic does not fit into the archaic, illogical, and arguably fraudulent billing platform of at&t is anti-competitive.

Accordingly, all the prerequisites for forbearance enumerated in Section 10(a) are satisfied, and the Commission is therefore required to forbear from the application of interstate and intrastate access charges to IP-PSTN, and incidental PSTN-PSTN, Voice Embedded Internet-based communications, services and applications. The Commission can and must take this step now to end these wrongful, anti-competitive, anti-consumer and anti-innovation actions by the industry’s dominant players with an ostensible stranglehold on access by and between too many captive consumers and would-be application innovators.

## **II. BACKGROUND**

Feature Group IP is a telecommunications carrier providing interstate telecommunications pursuant to Section 214 of the Communications Act of 1934 and authorized to provide intrastate telecommunications services

pursuant to state certificates of public convenience and necessity.<sup>27</sup> As discussed herein, Feature Group IP petitions the Commission to forbear from the enforcement of certain express and implied provisions of Section 251(g) of the Communications Act of 1934, as amended (“Act” or “Communications Act”), Rule 51.701(b)(1), and, where applicable, Rule 69.5(b).<sup>28</sup>

Feature Group IP contends that these provisions do not, at present, result in the imposition of interstate or intrastate switched access charges on IP-PSTN or incidental traffic, as defined herein. The ILECs – and in particular at&t – disagree. If these provisions can be read to result in application of access charges, the Commission must forbear from enforcing them for the reasons set out in this Request. Feature Group IP makes these requests pursuant to Section 10(c) of the Communications Act and Section 1.53 of the Commission’s rules.<sup>29</sup>

The Commission should grant this Petition while it completes its work to develop a comprehensive, uniform intercarrier compensation regime. This will allow Voice Embedded communications, services and applications to develop with the cleanest slate possible, regardless of whether such communications occur wholly on an IP network or between an IP network

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<sup>27</sup> Feature Group IP has state licenses in many states but does not provide any intrastate services. The only active operations are in the state of Texas and expansion is on hold because of the difficulties described herein. UTEX Communications Corporation is active and does do business. Even though the Texas entity has a state certificate in the name of UTEX Communications Corporation it does not provide any intrastate service; all of its services and all of its traffic are related to a purely and solely interstate tariffed offering designed to facilitate the intercommunication of the Internet and the PSTN.

<sup>28</sup> 47 U.S.C. § 251(g); 47 C.F.R. § 51.701(b); 47 C.F.R. § 69.5(b).

<sup>29</sup> 47 U.S.C. § 160(c); 47 C.F.R. § 1.53.

and the PSTN. Forbearance with respect to these statutory and regulatory provisions meets each element of the three-pronged test for forbearance in Section 10(a) of the Communications Act. Forbearance will: (1) result in the needed business and legal certainty that Feature Group IP has diligently sought for nearly six years on these issues, (2) increase investment, (3) promote product and technology innovation, and (4) increase deployment of advanced services. Upon grant of this Petition, Voice-embedded IP-PSTN traffic would be exchanged between a LEC and a telecommunications carrier serving a Voice-embedded Internet service provider pursuant to Section 251(b)(5) of the Act and Subpart H of Part 51 of the Commission's rules, and Feature Group IP will be able to offer its flat rated intermediation services throughout the whole country.

Voice-embedded IP-PSTN communications represent the evolution away from traditional circuit-switched technologies, and provide more than a functional equivalent to circuit-switched voice telephony. They are a more flexible and powerful way to connect and manage voice communications and are also a necessary component of any IP-IP voice application that needs to receive or send communications to users on the PSTN. Voice-embedded IP, both IP-IP and IP-PSTN, allows a provider, *inter alia*:

- to uniquely identify users and user groups without the need for “phone numbers” thus extending the positive economic effect of Group Forming Networks to the users of the legacy PSTN;
- to integrate voice transmission with much more powerful data processing capabilities that then facilitate the offering of additional

enhanced functionalities;

- to integrate voice, data and video applications;
- to detect a user's "presence" on a network;
- to route communications according to sophisticated user-specified preferences, including variations by time of day, calling party number, and any other parameter that can be defined through a computerized database; and
- to protect the privacy and safety of individuals by means of customized call screening and routing.
- to support "one-to-many" communications sessions, including the ability to "ring" several simultaneous edge devices using only one called party address, or to intelligently route call session requests to the appropriate edge device depending on user-supplied instructions.
- to support "many-to-one" communications sessions.
- to support "any-to-any" communications sessions (e.g., bridging various platforms and edge devices, including traditional telephones, such as a traditional land-line telephone engaging in a call session with a user of an instant messaging application like Skype or GoogleTalk.
- to support communications sessions that mix voice, video, text, or other data communication applications, voice call session interruption and an invocation of different network resources, such as retrieving real-time or stored information from the Internet (such as stock quotes, or driving directions). The user can initiate such a response by sending a SIP INFO request from a soft client, IP phone, or a key combination from a mobile or POTS phone (which is interpreted and translated into a SIP INFO request).
- to support talking email or text voice mail, using speech-to-text conversion or text-to-speech conversion.<sup>30</sup>

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<sup>30</sup> The potential list of enhanced functions is limitless. The ILECs want to pretend it is not true, but each of these enhanced functions can be offered to users on the PSTN unfortunate enough to still be tied to a traditional phone. The incumbents just do not have a vision on how to innovate or rapidly develop and deploy novel offerings that are driven by user – rather than network provider – control and choice. They therefore believe it does not exist. And they strive to kill any chance of it ever existing, unless and until they are the ones to

Moreover, because IP-based softswitch technology allows for decentralized direction and innovation, IP-originated and/or terminated voice services have seen and are likely to continue to see faster innovation than circuit-switched networks. Voice-embedded Internet communications will be an engine of innovation and growth, properly placing circuit-switched communications platforms logically underneath the superior Internet applications that provide a more useful communications experience for their users.

IP-PSTN communications undergo a “net protocol” conversion, and thus can be classified as “Information Services” under existing FCC precedent. Protocol change aside, the more important aspect from a policy perspective is the capabilities that IP makes possible in terms of a change in content and the attendant enhanced functions that can follow. A favorable ruling on this petition would settle the question of whether access charges should apply to the circuit-switched portion of IP-PSTN and incidental communications when that traffic is exchanged between a LEC (such as an ILEC) and another telecommunications carrier (such as a CLEC) before or after the traffic reaches the information service provider (“ISP”). Moreover, even if this Commission, a state commission, or a court were to conclude that some Voice-embedded IP communications constitute “telecommunications services,”

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decide to when, where and on what terms. You can bet it will involve billing by the minute and at an exorbitant price far above incremental cost.

granting this petition would further reaffirm that such traffic is to be exchanged on a co-carrier basis pursuant to Section 251(b)(5) and make clear that legacy switched access charges do not apply.

Such a reaffirmation has become timely and critical to Feature Group IP because at&t is asserting that access charges apply to such traffic even if the communication originates from a voice-embedded Internet communications application – even, for example, from an Xbox or PlayStation.<sup>31</sup> Further, at&t has initiated multiple active lawsuits against Feature Group IP and others to collect such charges retroactively and to collect revenues from multiple parties for the same, single communication. Grant of this Petition will reduce the ability for at&t to game the alleged ambiguity in the intercarrier compensation regime to impose crushing litigation costs on new

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<sup>31</sup> at&t has contended in deposition that XBox users should not be allowed to “call” the PSTN because they do not have phone numbers (CPN). While we suppose at&t might have some right to refuse to directly connect XBox users’ traffic, we strongly object to at&t claiming that a CLEC also cannot be allowed to do so. In its direct testimony against Feature Group IP in Texas, at&t asserts that our incentives will be naturally to “cheat” and solely for that reason we should be required to pay access and prohibited from providing our service. at&t, in other words, wants to ban competitors from serving new technology customers on the ground that the competitors will be tempted to instead misroute traditional legacy telephone toll over “local” trunks. ILECs cannot be allowed to regulate their competitors in this fashion to the point that the competitors’ business plan is effectively banned. If the FCC feels that our products designed to serve new technology are too susceptible to “cheating” to be left solely to “market forces” then the Commission can regulate us directly by requiring changes to our current Tariff. If the FCC decides to go this route, we suggest that the FCC also order ILECs to change their tariffs to require IXCs who purchase originating Feature Group D access to not claim an ESP exemption, or use an ESP on the terminating side. At the end of the day at&t is trying to turn the XBox into an IXC – or wall it off from the PSTN. The only thing in common between the two is the letter “X.” The FCC has never desired to apply the 70 year old access charge regime onto new competitive technologies, and it certainly has never said new technology cannot and should not be used. XBox and nearly each new technology device capable of voice communications simply do not need phone numbers, and the fact that they don’t have them should not result in a ban or automatic imposition of access charges on companies like Feature Group IP who are creating ways to interconnect with new technologies and intermediate them with the legacy PSTN so as to extend intercommunication and provide enhanced functions to PSTN users.

entrants and maintain the current uncertainty – that the ILECs themselves created through, what we consider, spurious litigation – which will permit these innovative new Internet-based and IP-based applications and services to develop and grow without forcing them into the economic and regulatory constructs of the circuit-switched access charge system. Granting this petition also is appropriate because the Commission is considering adoption of a uniform intercarrier compensation regime to govern the exchange of all communications traffic, including “exchange access” traffic. Forbearance from the imposition of access charges on Voice-embedded Internet communications avoids shifting this traffic from exchange traffic subject to reciprocal compensation (today’s *de facto* legal *status quo*) to exchange traffic subject to access charges, simply to shift this traffic yet again to exchange traffic under a uniform intercarrier compensation system. Grant of this Petition would not affect any other duties that Voice-embedded Internet providers, or carriers serving Voice-embedded Internet providers, may have under applicable state or Federal law, regardless of whether the Commission ultimately concludes that Voice-embedded Internet communications providers are “Information Services” providers or *bona fide* “telecommunications carriers.”

We contend that at&t and its cartel partners are abusing their political and market power to impose new rules they – rather than the market or regulators – have contrived in a last-ditch effort to control the technology of

the future and the evolution of communications networks, services and applications. Such unilateral control by a single industry player or industry segment with excessive market power stifles investment and innovation and prevents competition. Grant of this petition is not just good policy; it is required by the terms of the Act, particularly the mandatory forbearance requirements contained in Section 10.

### III. SPECIFIC FORBEARANCE REQUESTED

Feature Group IP requests that the Commission, with respect to Feature Group IP and any other telecommunications carrier handling Voice-embedded Internet communications that involves one or more “legs” on the PSTN, forbear from enforcement of:

- Section 251(g) of the Act, insofar as it applies to the receipt of compensation for switched “exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,”<sup>32</sup> pursuant to state and federal access charge rules;
- any limitation on the scope of Section 251(b)(5) that is implied from Section 251(g) preserving LEC receipt of intrastate switched access charges.<sup>33</sup>

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<sup>32</sup> 47 U.S.C. § 251(g).

<sup>33</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, WC Docket 01-92, FCC 01-131, 16 FCC Rcd 9151, 9168 (¶ 37 n.66), (Apr. 2001) (hereinafter “*ISP Remand Order*”), *rev’d on other grounds and remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”). Throughout this petition, Feature Group IP will refer collectively to forbearance from the express terms of Section 251(g), as well as forbearance from this implied restriction on the scope of Section 251(b)(5) inferred from Section 251(g), as “forbearance from the enforcement of Section 251(g).” The Commission should reaffirm that Voice-embedded IP communications are inseparably interstate, rather

- the clause of Rule 51.701(b)(1) that excludes from the definition of telecommunications traffic subject to the Subpart H of Part 51 of the Commission’s rules “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paragraphs 34,36,39,42-43);”<sup>34</sup>
- Rule 69.5(b), to the extent applicable;<sup>35</sup>
- Any “numbering representation rule” to the extent applicable
- Any signaling standard that requires or assumes a particular geographic reference point (such as a rate center) which could be used to support a billing platform to treat such traffic as ordinary “telephone toll” traffic.<sup>36</sup>

Feature Group IP requests forbearance with respect to traffic that is carried by a LEC on its side of the point of interconnection with a telecommunications carrier such as Feature Group IP and that:

- originates in IP format and terminates on the legacy TDM circuit-switched network; or
- originates on the legacy TDM circuit-switched network and is addressed to an IP-based end point;
- originates on the legacy TDM circuit-switched network and terminates on the legacy TDM circuit-switched network but (a) is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user; where
- when the point of interconnection between the LEC serving the

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than intrastate. If it does so this request for forbearance with respect to any limitation on the scope of Section 25 1(b)(5) with respect to intrastate access charges will be moot.

<sup>34</sup> 47 C.F.R. § 51.701(b)(1).

<sup>35</sup> 47 C.F.R. § 69.5(b). By requesting forbearance from Rule 69.5(b), where applicable, Feature Group IP does not concede that the rule is otherwise applicable to all of the traffic subject to this petition.

<sup>36</sup> Feature Group IP will endeavor to place on each call a unique Internet calling identifier called a UGT that it has invented and is working with Internet application providers to implement as this petition is filed. Such information is actually more useful than ordinary numbers for all conceivable public policy purposes.

voice-embedded Internet application or service provider and the LEC serving the PSTN user end-point is located in the same LATA as the PSTN end-point;

With the exception of incidental and *de minimis* “phone-to-phone” traffic,<sup>37</sup> calls that do not undergo a net protocol conversion on an end-to-end basis and do not involve a change in content and/or an offer of non-adjunct-to-basic enhanced functionality would not be within the scope of this forbearance request.<sup>38</sup> Feature Group IP also requests that the Commission forbear from the enforcement of these same provisions of Section 251(g), Rule

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<sup>37</sup> This incidental amount could be completely eliminated if the ILECs and IXCs simply changed their business practices to only purchase services from other carriers. Feature Group IP has done its part by excluding LECs and IXCs from the ability to purchase our new technology services. Our experience in the last five years shows some interesting things. First, the amount of incidental traffic is smaller each month as a percentage, and second, the largest complainer (at&t) is also the largest benefactor of such incidental traffic. The great preponderance of the traffic that originates on the PSTN is coming from at&t’s IXC operations. Feature Group IP has publicly offered to assist any carrier in finding the originating source of any carrier that is “mis-routing” non-enhanced traffic as enhanced. To date, not a single carrier or Regulatory Commission actually has followed up with us to fix any “routing” problem.

<sup>38</sup> In other words, a communication that is delivered by a user to an IP network provider in IP form, and is terminated over the circuit switched PSTN, would fall within the scope of the requested forbearance even if the user employs customer premises equipment (such as Vonage’s Multimedia Terminal Adapter) to convert a communication to and from analog form within the customer’s own internal network. Further, a call originated over the PSTN and terminated on the PSTN that does not involve a change in content or an offer of enhanced functionality (e.g., the traffic found subject to access charges in Order, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (Apr. 2004) (“*AT&T Declaratory Ruling*”) would also not fall under this request. Nor would minimally enhanced functionalities the Commission has held are “adjunct-to-basic” in cases such as *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005) (*Calling Card Order and NPRM*), or the services held to be similar to those in issue in the *AT&T Declaratory Ruling* and the *Calling Card Order and NPRM* in *In the Matter of Federal-State Joint Board on Universal Service, Appeal of Administrator’s Decision, Radiant Telecom, Inc.*, Filer ID 822268, CC Docket No. 96-45, DA 07-2922 (Jun. 2007) if the Wireline Competition Bureau’s Order on Appeal is or becomes final. The non adjunct-to-basic enhanced functionalities that are covered by this request would be offered by entities other than the IXC that is the presubscribed or dial around IXC used to reach the enhanced platform on the originating end.

51.701(b)(1), and, where applicable, Rule 69.5(b) with respect to incidental PSTN-PSTN traffic. Many applications could, for example, terminate to a customer as an IP-based application, but then could be “forwarded” to a particular user’s mobile phone. In addition, an Internet user may “socially network” traffic onto and from the public switched network into and out of pure IP-to-IP platforms. There is no feasible way for such traffic to be segregated or distinguished from the customer’s other PSTN-IP traffic, nor is it economically desirable for a Voice-embedded Internet application provider to monitor its customer’s disposition of such traffic.

For the purposes of this petition, incidental “PSTN-to-PSTN” traffic does not include traffic that originates and terminates in circuit-switched format (*i.e.*, no net protocol conversion) and that is exchanged between the calling party’s LEC and another telecommunications carrier when the interconnected telecommunications carrier is the calling party’s +1 presubscribed interexchange carrier or a carrier sponsored and sold calling card/dial-around carrier provider selected by the calling party.<sup>39</sup>

Feature Group IP is not seeking to have the Commission forbear from enforcing Section 251(g) as it applies to any potential obligation to compensate the LEC for use of LEC special access facilities. This petition extends only to forbearance from the application of switched access charges.

As noted above, while Feature Group IP is willing to accept denial of

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<sup>39</sup> By limiting this petition to IP-PSTN and incidental PSTN-PSTN traffic, this petition takes no position on whether access charges should apply. As noted above, Feature Group IP is not seeking forbearance from application of access charges to the type of traffic held to be non-exempt in the *AT&T Declaratory Ruling* or the *Calling Card Order and NPRM*.

forbearance from enforcing Section 251(g), Rule 51.701(b)(1) and Rule 69.5(b) with respect to traffic exchanged between Feature Group IP and a LEC operating within the geographic service area of an ILEC that currently is exempt from Section 251(c) pursuant to Section 251(f)(1), if the Commission expressly enters certain findings. Feature Group IP recognizes that the inherent subsidy scheme of the current inter-carrier compensation scheme requires a different balancing of policy when it comes to LECs that are exempt from section 251(c) on account of section 251(f). Are allowing the positive competitive effects and network effects of applications like Skype in rural areas more important than the continued policies that support and subsidize wireline locally-focused ordinary phone communications when such service is provided in rural areas by independently owned rural companies? We think so, but we understand that there is an argument that this must be weighed. This is a clear public interest balance. If the Commission expressly finds that the needs of rural telephone companies for access-related subsidies predominates over the benefits that would accrue to rural customers from expanded access to advanced technology, we will accept that result.

There, however, is no question that the two giants, Verizon and at&t, which average more than \$30 billion dollars in trailing 12-month EBITDA each, do not need and have no right to claim or extract financial support from new technology entrants. In addition, this Commission can pursue a case-by-case evaluation with respect to exempting rural areas without substantially

impeding the introduction and development of Voice-embedded Internet communications throughout the rest of the country.<sup>40</sup>

In filing this request for forbearance, Feature Group IP is *not* conceding that it is otherwise appropriate to apply access charges to the traffic covered by this Petition, whether in exempt rural areas or elsewhere. To the contrary, as discussed further below, in order to conclude that ordinary access charges should apply to IP-PSTN and/or incidental PSTN-PSTN traffic, the FCC and the applicable state commissions would have to resolve a myriad of issues including: (1) whether the particular Voice-embedded IP communication is a “Telecommunications Service” or an “Information Service”; (2) if a “Telecommunications Service,” then it must determine whether such service (in many cases it is not a “service” at all but rather an application residing in user’s edge device or somewhere on the Internet) is then necessarily provided by a new type of “carrier”; (3) if all of the software developers who create and roll out Voice-embedded Internet applications and services that can intercommunicate with the PSTN (or the consumers that install and use them) are now deemed carriers, will they be afforded all of the other rights

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<sup>40</sup> Rural telephone companies, as defined in the Act, serve only about 13% of all lines, and not all rural companies remain exempt under Section 251(c). *See* Universal Service Administrative Company, First Quarter 2004 FCC Filing, Appendix HC05, “High Cost Loop Support Projected by State by Study Area” (appendix HC05 identifies 23,236,452 working loops in rural study areas and 158,500,642 working loops in non-rural study areas, for a total of 181,737,094 working loops; dividing the number of working loops in rural study areas by the total number of working loops demonstrates that rural loops represent 12.8% of all lines). Again we have suggested that a balance of policy interests (the interest of rural ILECs in continued subsidies and the interest of rural users in having access to advanced technology) is necessary. But the balancing must be done expressly and specific findings must be entered. That, at least, will shine some of the light on the amount of the subsidy and the Commission’s thinking on how the interests can best be balanced.

and benefits of carrier status, including the right to interconnect under sections 201, 251, 252 and 332 and if so what are the appropriate terms, conditions and prices for interconnection and traffic exchange that should apply and who should be the net winner;<sup>41</sup> (4) if these new providers are “deemed” carriers, what are the appropriate signaling and transport standards and “rights” to be created for this new type of traffic; and (5) whether these questions will be decided under the rubric of the 1996 Telecom Act or in some other way?

In short, this Commission and other regulatory bodies must address the public interest issues and technology issues Feature Group IP has been pursuing in Texas for more than five years and about which has yet to engage in a factual hearing. By eliminating the statutory and regulatory bases for imposing circuit-switched access charges on IP-PSTN and incidental PSTN-PSTN traffic, this Petition seeks to end the lengthy litigation and anti-competitive practices to which we have been subject for the last five years, and the attendant regulatory uncertainty, which is currently being used at state public utility commissions across the country as a tool to stifle competition by CLECs and the ESPs and software and hardware developers

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<sup>41</sup> There is an economically sound argument that the Incumbent LECs should pay a new type of access charge to these new providers because it is their inventions that obviate the need for the Incumbents to invest in new technologies to allow for the interoperation of the old network to “talk to” the new technology users. It is not a given that these new types of putative “Carriers” and their traffic should be classified as IXCs or that they can be held to provide any “service” much less a telecommunications service. But it is clear once you remove your Bell-shaped hat that new technology networks, applications and services, when interconnected to old technology networks, make both networks more valuable.

that need some certainty in order to accelerate wide deployment of this new technology and the services and applications that the new technology enables.<sup>42</sup>

Finally, Feature Group IP is not seeking forbearance from the rules governing intercarrier compensation for ISP-traffic under the *ISP Remand Order* and *Core Forbearance Order*.<sup>43</sup> To the contrary, we seek either confirmation that this regime already applies to Voice-embedded Internet communications or forbearance so that the same treatment will result. Unless otherwise negotiated by the parties, the restrictions established by the *ISP Remand Order* as modified by the *Core Forbearance Order* would remain in place. As a practical matter, however, the relative use of facilities that handle both inbound dial-up ISP traffic and origination/termination of Voice-embedded IP communications will *shift*, as Feature Group IP delivers Voice-embedded IP communications traffic for termination over the same interconnection trunks that carry ILEC-originated, inbound dial-up ISP traffic to Feature Group IP. Moreover, all ILEC-terminated Voice-embedded

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<sup>42</sup> The ILECs' efforts rise to the level of a prohibition on deployment because of the cost of intercommunicating with the PSTN makes deployment uneconomic. The PSTN charges far outweigh the rest of the product costs. Feature Group IP believes that imposing access charges on these services and applications raises significant concerns and requires the application of the considerations set out in section 157:

**SEC. 7. [47 U.S.C. 157] NEW TECHNOLOGIES AND SERVICES.**

(a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

<sup>43</sup> *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, FCC 04-241, 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*").

IP communications traffic would be “originating” traffic for the purposes of applying any “3:1 ratio of terminating to originating traffic” to presumptively delineate ISP-inbound traffic from other traffic.<sup>44</sup> In essence, forbearance will ensure that traffic to the Internet will be treated the same as traffic from the Internet. There is absolutely no logical, policy or legal basis for non reciprocal treatment. ILECs consistently refuse to pay compensation for their originated but just as consistently demand compensation – almost always at access prices – for any traffic they terminate. But that does not make their demand for access payments reasonable or lawful.

In all areas subject to this Petition (*e.g.*, *potentially* excluding exempt rural areas), the impact of grant of this petition would be as follows:

- all IP-PSTN and incidental PSTN-PSTN traffic exchanged by a LEC and Feature Group IP within the same LATA as the PSTN end-user would be exchanged on a “minute-is-a-minute” basis pursuant to Section 251(b)(5) or the *ISP Remand* rate over interconnection trunks pursuant to an interconnection agreement rather than access trunks; intercarrier compensation would be paid to the terminating carrier at the rates specified for Section 251(b)(5) or the *ISP Remand* rate pursuant to interconnection agreements;
- interstate and intrastate switched access charges would not (even arguably) apply to IP-PSTN and incidental PSTN-PSTN traffic, regardless of geographic end-points, because the Commission will have forbore from enforcing the relevant portions of Section 251(g), rules issued thereunder and the Commission’s access charge rules; and
- rules for compensation for dial-up ISP-inbound traffic would not change.

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<sup>44</sup> *ISP-Remand Order* 16 FCC Rcd at 9187-88 (¶ 79). Feature Group IP’s originating traffic that is handed to other LECs for ultimate traffic is “ESP” traffic, but that should not change the way the 3:1 ratio would work in those interconnection agreements that include the ratio.

Grant of this request for forbearance is required by Section 10 of the Act.

**IV. BY FUSING DATA AND VOICE STREAMS, VOICE-EMBEDDED INTERNET APPLICATIONS CREATE INNOVATIVE NEW SERVICE OPPORTUNITIES AND GREATER EFFICIENCIES FOR TELECOMMUNICATIONS USERS AND INTERNET VOICE USERS.**

Voice-embedded Internet communication is a revolutionary, lifestyle-changing technology and, arguably, the most vibrant innovation to come into the American economy, the global economy, in decades, perhaps centuries. IP-based communications technology has broken the mold for wireline telephony and wireline telephony regulation. Wireless is beginning to follow. Voice-embedded Internet communications allow the seamless fusing of voice and data applications in a single environment, shattering traditional conceptions of communications.

Voice-embedded IP-based applications and wholly circuit-switched wireline and wireless services are moving starkly in different directions. The greatest distinctions between the two have now emerged. Entrepreneurs and programmers develop innovative applications that take advantage of Voice-embedded IP communication's flexibility and will support and encourage the formation of Group Forming Networks. The legacy networks need to keep groups from forming and becoming efficient in their use of communications to keep the existing billing paradigm alive. Additionally, other existing Internet voice applications also show the potential of unbridled IP-PSTN Voice-

embedded IP communications:

- **Group Forming Networks** will be allowed to integrate the legacy PSTN to uniquely identify users and user groups without the need for “phone numbers,” thus extending the positive economic effect of Group Forming Networks (“GFN”) to the users of the legacy PSTN, all with no investment by the incumbents. Internet application creators and providers have just begun to tap into the social and economic impacts of GFNs. Feature Group IP is at the forefront of the intermediation of new technologies and the GFNs they represent and how such GFNs can interoperate by incorporating the old technology networks and their use and usefulness. The artificial partitioning and exclusion of GFNs from the PSTN will inhibit their development and limit their manifold economic and social benefits to society;<sup>45</sup>
- **Innovative Tele-Working**. With Voice-embedded IP, employees are less tied to schedules and geographic brick-and-mortar offices.
  - For instance, a stay-at-home parent who works in technical support could use Voice-embedded IP to direct incoming calls to his home office between the hours of 8:00 a.m. and 3:00 p.m., while his children are at school. During that “on” period, he would use his broadband connection to receive tech support calls at home, with full access to customer and product data. Periodic workers, regardless of time of day or length of availability, could log on to the network and work flexible hours.
  - This flexibility will allow telecommunications-intensive companies to use part-time employees spread out across the *country*. For example, a call that originates in Denver for an airline may first go through a voice response unit owned by the airline. Based on *staffing*, call volume or other criteria that the airline selects, that communication may be sent *across* the country to a large call center or to part-time employees located in rural and urban areas.
  - A physician might use the same capabilities to respond to patient emergency calls at home, with full access to patient

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<sup>45</sup> Feature Group IP’s theory and operation of the Universal Tele-traffic Exchange “the UTEx” is available at [http://www.featuregroupip.net/wp-content/uploads/Ex\\_Parte\\_Cover\\_Letter\\_and\\_UTEX\\_TS\\_01\\_1-03-28-07-ST-FINAL.pdf](http://www.featuregroupip.net/wp-content/uploads/Ex_Parte_Cover_Letter_and_UTEX_TS_01_1-03-28-07-ST-FINAL.pdf). We are currently engaged in interoperating tests with providers of Internet-based voice communications services working on the evolution of Group Forming Networks. In theory, all GFNs – be they socially-, economically- or politically-based -- can become “voice-embedded.” When they do, Feature Group IP’s UTEx can be an intermediary between the old and the new, enabling users or members of the GFN to participate from the technology of their choice.

records stored in her office, and have the ability to alert the system that she is not available for calls (they would be routed to a colleague), or direct that the “call” be forwarded to a cell phone or wireless PDA.<sup>46</sup>

- **Multimedia and Cross-media Conferencing.** With Voice-embedded IP, multiple users can communicate with one another via voice and video, while drawing on data sources (spreadsheets, financial statements, etc.) simultaneously. IP-PSTN voice communications would support a flexible conferencing platform, allowing some attendees to participate via traditional circuit-switched devices (such as a wireless PDA, thereby combining circuit-switched voice, such as GSM, with Internet access over WiFi or GPRS), while others use voice and data capabilities embedded in an IP-capable desktop.
  - Workgroups and play groups that are geographically dispersed can work collectively on specific data-oriented tasks. As one example, an engineering team with expertise spread around the world can collaborate via voice and share data and documents in real time to revise design specifications.
  - A university board with trustees in different cities can meet efficiently and effectively via videoconference (again, some in person, some on the phone, and others via computer). At the meeting, participants can collectively review charts, access databases, and compile reports, all in real time. Simultaneously, two or more of the participants can “instant message” each other or hold a separate and private voice conversation.
  - A geographically dispersed family could meet to share family digital photos or videos of grandchildren performing in a school play, while exchanging comments as if they were together in person.
  - Friends can also use the cross-media applications for entertainment, be it via appliance-based games such as Wii, Playstation, Xbox,<sup>47</sup> or be it via application-based games.
- **High-Power Call Centers.** Voice-embedded IP communications allow

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<sup>46</sup> See, e.g., Juanita Ellis, *Voice, Video, and Data Network Convergence* (May 21, 2003), available at <http://searchnetworking.techtarget.com> (last visited Dec. 23, 2003).

<sup>47</sup> Xbox and PlayStation online gaming constitutes a kind of group forming network. An at&t witness testified in deposition as part of the Texas case that at&t will not allow Xbox, for example, to connect to the PSTN because there is no standard telephone number associated with the application/device/service. at&t also responded in a request for admission as part of the federal case that an Xbox voice session that included a PSTN end-point would be subject to access charges (presumably to the extent it would even be allowed).

entities providing customer service to offer more focused assistance to customers. For customers with broadband access to the Internet, companies can share data, instant messages, voice communications, and URLs in real time. For all customers, IP-based communications technology with a voice application allows the operator to receive the customer's voice communication and relevant customer data simultaneously. The operator can access case histories, account and credit information, inventory data, shipping info, and much more instantly and automatically at the exact moment the customer makes contact (whether by circuit-switched or IP device).

- **Unified Messaging**. Voice-embedded IP allows a user to have a single message platform for all types of communications. Rather than receive e-mail on a computer, voice-mail on the phone, faxes on fax machines, and pages on a pager, Voice-embedded IP can route them all to a single unified mailbox, and users can retrieve them all from a single point of contact, whether using an IP or a circuit-switched device. A voice-mail can be converted into text using voice recognition software, and an e-mail can be converted into a voice message. Users can organize, store, and prioritize these messages in the manner that suits them best, just like many computer users file e-mail messages in various folders, or screen e-mail messages from some senders and give high priority to others. Users can tell the network how, when and where they want to be notified – such as ensuring that a call from a doctor or teacher is routed to home, work, mobile phone or to computer desktop, depending on where a person is, the time of day, and if the particular devices are actually turned on.<sup>48</sup>
- **Expanded Call Management and Screening** Unlike the PSTN, which can handle no more than two incoming voice calls at one time, Voice-embedded IP can manage limitless incoming voice calls, video feeds, and e-mails. Voice-embedded IP can handle these incoming communications in a variety of ways, depending on the user's preferences. The system can take a voice message, page the user, convert a voice message to text (or a text message to voice), route the communication to another end-point, or deliver the communication in another format. Moreover, Voice-embedded IP users can retrieve messages in one format (*e.g.*, text) while actively using another (*e.g.*, voice). Thus, while a PSTN user must wait until a call is completed to check on messages that came in while the call was underway, Voice-embedded IP allows users to convert those messages into text and retrieve them immediately or to play them in audio format on top of

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<sup>48</sup> See, *e.g.*, Cade Metz, *The Return of VoIP* (Oct. 22, 2003), available at <http://www.pcmag.com>.

the ongoing connection. Expanded call management and screening also serves an important safety function. For example, victims of stalking can screen all calls from unrecognized phone numbers and forward them to the police or a security agency. Additionally, voice recognition capabilities can live inside the network and make the network more valuable, similar to how Google has made the surfing experience better tailored and more responsive to the specific user.

- **Availability Awareness.** On the PSTN, callers dial a number without knowing whether the party on the other end is available, whether the caller will have to leave a message, or whether the line will just ring and ring. Voice-embedded IP, by contrast, allows users to specify their availability. In other words, Voice-embedded IP customers can indicate that they are free for a voice conversation, for video-conferencing, for e-mail, for gaming, or that they are not available at all. Voice-embedded IP customers can also use this technology to wait until people are actually available to receive calls before contacting them, or to alert all attendees when everyone is available for a virtual conference.”
- **Location Scheduling.** Voice-embedded IP users can create a daily location schedule (and update it anytime from anywhere) indicating where communications should be forwarded. In other words, an user could direct communications (of any form) to a mobile device during her commute, to her office during the day, to her brother’s house during the holidays, and to a unified messaging center when she is eating dinner. As explained below, the user’s configuration preferences stay with her wherever she may be when she accesses the network.
- **Simplified Relocation.** Voice-embedded IP makes moves and changes much less complicated and less expensive. For instance, to allow an employee using a circuit-switched phone to move offices, a company must map extensions, re-program special call-handling features, and activate new phone sets, and the employee’s phone configurations have to be re-modified or re-customized. Voice-embedded IP simplifies the process. Employees moving to an office in another country (or, for that matter, families moving to another state) take their customized features with them automatically because Voice-embedded IP configuration data is tied to the user rather than a physical extension.<sup>49</sup>

Feature Group IP is on the leading edge of intermediating Voice-embedded Internet communications with the PSTN and each other. We have

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<sup>49</sup> See, e.g., Joe Hernick, *Telephony 101: Giving Voice to Your Network* (Oct. 2, 2003), available at <http://www.nwc.com>.

devoted considerable resources to determine how the “inside” of the actual communication applications should and will work in the future. Recognizing that inter-network operation is crucial to new technology adoption, we have invented the Universal Tele-traffic Exchange (the UTE<sub>x</sub>), a novel carrier/Internet interconnection fabric that allows seamless inter-operation of the legacy PSTN with new technology telephony endpoints. Currently, there is no industry-standard method for passing endpoint addressing information that is not in the form of a North American Numbering Plan (“NANP”) address commonly known as an E.164 address actively assigned to an operating carrier or Internet company.

Some service providers, for example Vonage and most cable operators, have attempted to solve this problem by forcing their IP endpoints to emulate PSTN endpoints through a formally assigned NANP number. This practice is sub-optimal for a number of reasons. First, whereas PSTN endpoints are addressed geographically, many IP telephony applications utilize functional endpoint addressing, a practice which enables a multitude of useful services. Assigning an arbitrary number of NANP numbers to an endpoint, however, is neither allowed nor tenable due to issues of number resource exhaustion. Second, IP endpoints tend to proliferate in ways that the PSTN cannot. Third, as Feature Group IP has learned from experience, emulation of NANP numbering on IP endpoints has provided at&t and other cartel members a critical entry point in which to attack the ESP with “Access Over Local”

programs because they take the traditional number that is presented in signaling and match it with the called number and if the two numbers are not “local” to each other they attempt to assess access charges on the interconnecting CLEC.<sup>50</sup> Finally, PSTN emulation necessarily hinders the group forming properties that networks and users naturally seek to create because it embeds implicit assumptions about and tight control mechanisms around the technology to be made available and how it can be used.

The UTE<sub>x</sub> will provide all service providers a mechanism through which they can pass to the PSTN the native user identifiers of the originating network. The UTE<sub>x</sub> formalizes the notion in the concept of the Universal Global Title (UGT), which represents a unique endpoint address very similar to an email address. An intentional byproduct of this arrangement will be the facilitation and extension of network functions that are conventionally served by calling party number (“CPN”) such as CallerID and call reversibility, in addition to other beneficial functions and services which have not yet been invented. The UTE<sub>x</sub> interoperates with all identity markers and make features and functions cross-platform capable.

The intrinsically decentralized nature of IP networking allows IP communications, including Voice-embedded Internet applications, to exceed legacy circuit-switched telephony in power and flexibility. An IP communications system reformats voice and data inputs and transmits them

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<sup>50</sup> *But see, AT&T Declaratory Ruling* note 92, which recognizes that even if access applies the interconnecting CLEC is a joint access provider, not the access customer. The IXC – if there is one – is the one responsible for access payments.

as a stream of packets over a digital data network, including the public Internet and private IP backbones. These packets can be directed to any location, whether an IP address or a telephone number, and at marginal differential cost. Individual IP packets are routed and flow to their destination independently, each following the best path available. This means that the packets from a single communication may reach their destination along a variety of routes. On the destination end, the IP communications system resolves any problems resulting from packets arriving out of sequence (or not arriving at all) and reassembles them. An IP application may then convert the packets into voice sounds, or it may manipulate them into a different form – such as speech-to-text conversion. The voice packets may also be combined with other packets, such as those containing data, through a variety of applications like those described above.

Moreover, IP networks create and facilitate an exceptionally flexible, robust and decentralized (*e.g.*, edge-based) environment for developing and implementing new applications. In a circuit-switched network, development and deployment of new capabilities must be carefully controlled and centrally planned. Historically, this development has been performed only by a limited number of circuit-switch manufacturers, typically at a high per-module and per-switch cost. As a result, in order to induce those manufacturers to develop those new capabilities, they must have a deployment commitment from the small handful of very large ILECs. As a result, innovation on the

circuit switched network is, for all intents and purposes, non-existent. IP networks break this mold. Call processing and applications are separated from the operation of the underlying network hardware, and can be developed at very low cost. In an IP network, intelligence can be stored anywhere or everywhere on the network, including in servers operated by a user at the first-mile “edge” of the network. Applications can be created for particular users, and loaded onto the servers serving those users, without embedding those same applications throughout the network.

Unlike circuit-switched telephone numbers used in conjunction with the PSTN, which bear a relationship to the location of the telephone, telephone numbers used in conjunction with Voice-embedded Internet communications have no mandatory dependence on geography. In fact, for many voice-embedded Internet applications, trying to create a unique map between telephone numbers and geographic locations would severely impair the operation of the application itself. Nowhere is this more obvious than when dealing with GFNs. For example, suppose GFN “MySpace” wished to enable voice calling “out” by loading a click-to-dial application. The originating call may represent one or many users, and may physically originate from diverse networks in a dynamic manner. Inferring a user’s geographic location based on the exchange with which a particular telephone number is assigned is futile with respect to numbers used for IP communications. Even ILECs recognize as much. “It’s hard to determine jurisdictionally where that IP end-

point is,” says a Verizon executive. “You don’t know if it’s next door, across the state or around the world.”<sup>51</sup>

This lack of geographic specificity on the IP end of the call is inherent in IP technology. IP communications do not follow dedicated circuit paths through the network. Rather, IP communications take multiple paths through many different IP networks, and they are reassembled only at the termination point (or, in the case of a communication terminating on the PSTN, at the media gateway). An IP address itself can change its geographic location without necessitating any change in the network. Circuit-switched engineering models that assume that the endpoints can be documented and traced through a network are technically inapplicable to IP networks.

Early VoIP service providers such as Vonage adopted PSTN emulation to enable interoperability. These users have interconnected with circuit-switched facilities in a variety of different ways, and a variety of different entities will perform the protocol conversions. Some Voice-embedded Internet service providers will perform the IP-to-circuit-switching protocol conversion at a media gateway, and then connect from the gateway to a LEC using business line services such as ISDN-PRI. Others may perform the IP-to-circuit-switching protocol conversion and then transmit the communication over a CLEC trunk running from the media gateway to a point of interconnection with another LEC. The Voice-embedded Internet service

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<sup>51</sup> Glenn Bischoff & Vice Vittore, States Push to Regulate Voice as Voice, TELEPHONY, Sept. 22, 2003, at 8-9 (quoting David Young, Director of Technology Policy, Verizon Communications).

provider may perform the protocol conversion, or it may contract the conversion out to a third party (perhaps another Voice-embedded Internet service provider that may or may not be affiliated with a CLEC).

**Promoting GFNs.** More important to policy now is how GFNs are now evolving to incorporate Voice-embedded IP capabilities. The inherent flexibility of IP communications also means that the service provider model has been thrown out the window in favor of new, more powerful and different business models. Ooma, for example, is a new Voice-embedded Internet communications business model that uses the GFN as its own supplier on a peer-to-peer basis. With peer-to-peer, the network interconnections are arranged by the peering users themselves, interconnecting the Internet with the PSTN in much the same manner as might occur with a “leaky PBX,”<sup>52</sup> except that the “leaky” traffic would be drawn from the entire Internet.

Ooma extends the use of the “leaky PBX” to create “interconnection” with the “PSTN.” This “technical work-around” is created only because it is needed. It is needed only because there is no other way to accomplish the goal. There is no other way only because the monopolies have barred entry and use of the new technology with respect to GFNs unless the GFN agrees to

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<sup>52</sup> A “leaky PBX” is a scenario in which PBXs do not pay access charges on long-distance calls because the network does not recognize the calls originating from a PBX as long-distance. The “leaky PBX” situation typically arises where large users with multiple PBXs in multiple locations lease private lines to connect their various PBXs. Although these lines were intended to permit employees of the large users to communicate between locations without incurring access charges, some large users permitted long distance calls to “leak” from the PBX into the local public network where they were terminated without incurring access charges.

pay for use of the PSTN on a per minute basis – which then requires a business plan that mimics ordinary phone service.

In order to allow GFNs to truly thrive, their cost structures must be defined and the cost cannot be so excessive that deployment is retarded or prevented. The ILECs want the cost of communication to stay high when their network is involved. They are attempting to tax competitors and interconnecting carriers and their users that have the temerity to use alternative products to those sponsored by the incumbents. The cost they seek to impose will, if allowed, severely retard deployment.

Feature Group IP is out front attempting to break through the artificial barriers being erected by the ILEC cartel. In our world, there are no measured charges as between providers for interconnection or traffic exchange. A network is built, and interconnected, and usage is encouraged. GFNs are more valuable the more they are used. The business model is completely changed to one that empowers users rather than holding them captive and rigidly controlling and metering all permitted uses.

**V. UNLESS THE COMMISSION FORBEARS, VOICE-EMBEDDED INTERNET APPLICATIONS WILL SUFFER FROM LEGAL AND MARKET UNCERTAINTY REGARDING IP-PSTN INTERCARRIER COMPENSATION.**

Unless forbearance is granted, Feature Group IP and every other entrant focusing on new technology and enabling voice-embedded Internet

communications will be chilled from entering the market or otherwise offering voice-embedded IP applications to GFNs and other potential consumers.<sup>53</sup>

Section 251 of the Act, which covers LECs' interconnection obligations, takes a two-layered approach to intercarrier compensation arrangements. First, Section 251(b)(5) establishes a default compensation system that obligates all LECs (competitive and incumbent) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" with other telecommunications carriers.<sup>54</sup> As the Commission recognized in its *ISP Remand Order*, this section alone "would require reciprocal compensation for transport and termination of all telecommunications traffic," without exception.<sup>55</sup>

Second, as the Commission explained in the same order, Section 251(g) "explicitly exempts certain telecommunications services from the reciprocal compensation obligations" of Section 251(b)(5).<sup>56</sup> Section 251(g) states:

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<sup>53</sup> Attached hereto as Appendices B, C, and D are pre-filed testimony of Feature Group IP executives dated October 15, 2007, in Texas PUC Docket No. 33323, a proceeding to determine whether Feature Group IP has to pay in full what we contend are trumped-up, non-cost-based and unjustified bills by at&t, which are designed to capture traffic from Voice-embedded Internet communications applications. It is important to recognize that in the Texas proceeding, at&t *has failed to provide* any actual originating detail call records from a single Legacy IXC. In essence, at&t wants a bond in excess of four million dollars posted for Feature Group IP/UTEX to seek due process rights to demonstrate that the bills had no merit because they charge for Internet calls. Importantly, the only service Feature Group IP provides is PSTN intermediation between IP-enabled voice services and applications and legacy networks. In essence, at&t is dragging every new technology provider through this procedure, which, to a debilitating degree, increases the cost and uncertainty of doing business and offering innovative IP-based voice services to would-be users.

<sup>54</sup> 47 U.S.C. § 251(b)(5).

<sup>55</sup> *ISP Remand Order*, 16 FCC Rcd. at 9166 (¶ 32) (emphasis in original).

<sup>56</sup> *Id.*

On or after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access and exchange service for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.<sup>57</sup>

The Commission has concluded that “Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g).”<sup>58</sup> This specifically includes the authority to set interstate access rates.<sup>59</sup> The Commission has also, in dicta, stated that Section 251(g) implies a parallel exemption from Section 251(b)(5) for intrastate access charges.<sup>60</sup> As discussed further below, however, the plain text of Section 251(g) clarifies that these express and implied exemptions from Section 251(b)(5) for interstate and intrastate access traffic are temporary, and that the FCC may supersede them.<sup>61</sup>

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<sup>57</sup> 47 USC 251(g).

<sup>58</sup> *ISP Remand Order*, 16 FCC Rcd. at 9169 (¶ 39).

<sup>59</sup> *See id.*, 16 FCC Rcd. at 9167 (¶ 36 & n.63). Feature Group IP restates its position that if access does somehow apply then given the interstate character of the Internet only interstate rates, and not intrastate rates can be used

<sup>60</sup> *See id.* at 9168 (¶ 37 n.66).

<sup>61</sup> 47 U.S.C. § 251(g). The *Worldcom* court held that section 251(g) did not apply to CLECs because they did not exist that the time. If one accepts this proposition (as does Feature Group IP) then the traffic in issue is clearly covered by section 251(b)(5) and the cost

The Commission’s reciprocal compensation regulations, contained in Part 51, Subpart H, reflect this statutory structure.<sup>62</sup> In keeping with Section 251(b)(5), Commission Rule 51.703(a) requires “[e]ach LEC [to] establish reciprocal compensation arrangements for transport and termination of telecommunications traffic.”<sup>63</sup> Consistent with the construction of Section 251(g) outlined in the *ISP Remand Order*, however, Rule 51.701(b) defines “telecommunications traffic” to exclude “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131 [the *ISP Remand Order*], paragraphs 34,36,39, 42-43).”<sup>64</sup>

As noted, Congress made Section 251(g)’s exemption of interstate and intrastate access charges from the scope of Section 251(b)(5) temporary. The Commission has recognized that Section 251(g) preserves access charge regulations only “unless and until the Commission. . . . should determine otherwise.”<sup>65</sup> As the D.C. Circuit noted, “that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to

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standard for transport and termination set out in section 252(d)(2) applies. Access is not even an available option as a matter of law.

<sup>62</sup> 47 C.F.R. Part 51, Subpart H.

<sup>63</sup> 47 C.F.R. § 51.703(a).

<sup>64</sup> 47 C.F.R. § 51.701(b)(1).

<sup>65</sup> *ISP Remand Order*, 16 FCC Rcd. at 9169 (¶ 39); see also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 407 (¶ 47) (1999).

the Act.”<sup>66</sup> Thus, the preexisting compensation arrangements – whether established by “court order, consent decree, or regulation, order or policy of the Commission” – remain in effect under Section 251(g) only until the Commission elects “explicitly [to] supersede them.”<sup>67</sup>

This logical interpretation of Section 251(b)(5) and 251(g) has been embraced by incumbent LECs. In comments submitted in response to the Commission’s *Intercarrier Compensation NPRM*, BellSouth observed that “Section 251(g) . . . contains no jurisdictional qualification or limitation on the scope of access services subject to that section . . . .”<sup>68</sup> Qwest recognized that Section 251(g) “grandfathers” certain classes out of the reciprocal compensation requirement of Section 251(b)(5), but also that Section 251(g) authorizes the Commission to implement new rules for the 251(g) traffic. Thus, Qwest reasoned, “over time, as the FCC exercises its authority to ‘supersede by regulation’” the grandfathering provisions of section 251(g), the class of traffic subject to section 251(b)(5) may increase in size.”<sup>69</sup> Similarly, after engaging in a comparable statutory analysis, SBC reached the “logical conclusion” that “the Commission has authority under Section 251(b)(5) and 251(g)” to implement new compensation requirements “for interstate and

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<sup>66</sup> *WorldCom*, 288 F.3d at 430.

<sup>67</sup> 47 U.S.C. § 251(g).

<sup>68</sup> Comments of BellSouth, *Intercarrier Compensation NPRM*, CC Docket No. 01- 92, at 27, (¶ 61) (filed Aug. 21, 2001). BellSouth also asserted that Section 251(g) created an independent grant of statutory authority. That assertion is questionable following *WorldCom v. FCC*, 298 F.3d at 430.

<sup>69</sup> Comments of Qwest Communications International, Inc., *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 41 (filed Aug. 21, 2001).

intrastate traffic.”<sup>70</sup>

The courts have held that IP-originated communications are enhanced/information services and when two carriers collaborate to handle this traffic they must do so pursuant to Section 252(b)(5) rather than the access charge regime.<sup>71</sup> At least one court has also held that an entity which does not hold itself out as a carrier and provides or supports VoIP is an enhanced/information service provider and is not subject to access charges.<sup>72</sup>

#### **VI. FORBEARANCE FROM 47 U.S.C. § 251(g), RULE 51.701(b)(1) AND, WHERE APPLICABLE, RULE 69.5(b) IS REQUIRED UNDER SECTION 10(a).**

When Congress enacted the Telecommunications Act of 1996, it recognized that the terms of the Act itself, as well as the Commission’s rules implementing the Act, could impede the goals of lower prices, higher quality, and rapid innovation. Congress empowered (and, in fact, required) the

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<sup>70</sup> Comments of SBC Communications Inc., *Intercarrier Compensation NPRM*, cc Docket No. 01-92, at 39 (filed Aug. 21, 2001); see also Reply Comments of SBC Communications Inc., *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 26-27 (filed Nov. 5, 2001) (“As the Commission recently concluded in the *ISP* Intercarrier Compensation Order, Section 251(b)(5) applies on its face to the transport and termination of *all* telecommunications traffic without exception. To the extent Section 251(g) exempts certain categories of telecommunications services from automatic application of the reciprocal compensation obligations of Section 251(b)(5), it merely gives the Commission flexibility to transition from existing access regimes to a new regulatory regime . . . .”) (internal footnotes omitted).

<sup>71</sup> *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055; 2006 U.S. Dist. LEXIS 65536 \*49-\*81 (E.D. Mo, 2006); *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005).

<sup>72</sup> *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005). The same court entered a similar finding on September 20, 2007. *In re Transcom Enhanced Servs., LLC*, Case No. 05-31929-HDH-11, Order Granting Transcom’s Motion For Partial Summary Judgment Based on the Affirmative Defense That Transcom Qualifies as an Enhanced Service Provider (Bankr. N.D. Tex. Sept. 20, 2007).

Commission to “forbear” from enforcing any regulation or statutory provision that would hamper the achievement of those goals, and it set forth a three-pronged test for forbearance.<sup>73</sup> The Commission has recognized that its forbearance obligation is an “integral part” of the Act’s ‘pro-competitive, de-regulatory’ framework designed to make available to all Americans advanced telecommunications and information technologies and services ‘by opening all telecommunications markets to competition’<sup>74</sup>

Section 10 of the Communications Act requires the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or to a class of telecommunications carriers or services, if the Commission determines that three conditions have been satisfied.<sup>75</sup> Specifically, the obligation to forbear arises when (1) enforcing the regulation or provision in question is not necessary to ensure that the charges and practices of carriers “are just and reasonable and not unjustly or unreasonably discriminatory;” (2) enforcing the regulation or provision “is not necessary for the protection of consumers;” and (3) forbearance from enforcing the regulation or provision is “consistent

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<sup>73</sup> 47 U.S.C. § 160; *see also Cellular Telecoms. & Internet Ass’n v. FCC*, 330 F.3d 502,504-05 (D.C. Cir. 2003).

<sup>74</sup> Order, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd. 24319,24321 (¶ 6)(2002) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230,104th Cong., 2d Sess. 113 (1996)).

<sup>75</sup> See 47 U.S.C. § 160(a). Section 10(c) authorizes any telecommunication carrier to submit a petition to the Commission requesting that it exercise its forbearance authority. See 47 U.S.C. § 160(c).

with the public interest.”<sup>76</sup> With respect to this last factor – whether forbearance is consistent with the public interest – Section 10(b) directs the Commission to consider the impact of forbearance on competitive market conditions, including the extent to which forbearance “will enhance competition among providers of telecommunications services.”<sup>77</sup>

Pursuant to its duty under Section 10(a), the Commission must forbear from enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) to the extent that they impose interstate or intrastate switched access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications. First, forbearance is consistent with the public interest and will promote competition. A decision to forbear would reduce regulatory uncertainty regarding Voice-embedded Internet communications and eliminate much of the associated cost and uncertainty that the cartel’s onslaught is breeding and will continue to breed. Additionally, forbearing from enforcement would spur innovation, increase the uses of GFNs by extending their capability to the PSTN and regular PSTN users (with the concomitant compounding of value due to network effects), and boost the preeminence of American enterprises in this rapidly emerging field.

Second, enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.50) is not necessary to ensure

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<sup>76</sup> 47 U.S.C. § 160(a)(1)-(3).

<sup>77</sup> 47 U.S.C. § 160(b).

that the “charges” and “practices” for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded Internet communications are just, reasonable, and not unreasonably discriminatory. In the absence of these provisions, the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications will simply be governed by Section 251(b)(5), which will ensure that charges and practices are just, reasonable and nondiscriminatory through the statutorily prescribed processes to establish the terms and conditions of interconnection among carriers.

Third, enforcement of this rule and statutory provision is not necessary for the protection of consumers. In fact, forbearance from the rule and statutory provision will advance the interests of American consumers. Most fundamentally, access charges for Voice-embedded IP-PSTN and incidental PSTN-PSTN IP communications service cannot be “necessary” to achieve the consumer protection objective of universal service because the Act itself authorizes (and, in the case of interstate support, prescribes) the use of explicit universal service support to ensure affordable and reasonably comparable end-user rates in lieu of implicit subsidies buried in access charges. In any event, the best way to address the pressures that Voice-embedded Internet communications would place on the outmoded access charge regime is to reform entirely intercarrier compensation on circuit-switched networks, as the Commission has proposed to do. The growth of IP-PSTN and incidental PSTN-PSTN Voice-embedded Internet communications

are unlikely to grow to such a significant extent to fundamentally upset ILEC finances and certainly not to an extent that the delivery of universal service will be endangered.<sup>78</sup> Furthermore, allowing GFNs and other Internet-based social networks to communicate with members of other networks, including the PSTN, would, in fact, serve to advance the goals of universal service and create positive network effects across communications platforms and networks.

**A. Forbearance from Extending Interstate and Intrastate Access Charges to IP-PSTN and Incidental PSTN-PSTN Voice-Embedded Internet Communications Serves the Public Interest**

First and foremost, pursuant to Section 10(a)(3), the Commission must consider whether forbearance from enforcing the regulation or provision is “consistent with the public interest.”<sup>79</sup> The Act provides that this condition can be satisfied if the Commission concludes that forbearance “will promote competition among providers of telecommunications services.”<sup>80</sup> Likewise, the Commission has reasoned that forbearance is appropriate if it is likely to result in increased competition and innovation.<sup>81</sup>

Forbearing from the application of switched access charges to IP-PSTN

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<sup>78</sup> When the two largest monopolies are reaping more than \$30 billion in trailing 12 month EBITDA each, one has to wonder if competition does in fact exist, and one certainly wonders why any policy which supports non-cost based rates are needed for such profits.

<sup>79</sup> 47 U.S.C. § 160(a)(3).

<sup>80</sup> 47 U.S.C. § 160(b).

<sup>81</sup> If enforcement of the provision would “impede[] [the petitioner] from quickly introducing new services in response to customer demands and opportunities created by technological developments” or if it would “diminish[] [the petitioner]’s ability to reduce prices and improve service in response to competitive pressures,” then the third criterion is satisfied Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunication Services*, 17 FCC Rcd. 27000,27014-15 (¶ 26) (2002).

and incidental PSTN-PSTN Voice-embedded IP communications, and making a clear statement that the exchange of such traffic will be governed by Section 251(b)(5), will boost competition and the introduction of innovative new services in a number of ways. Specifically, forbearing from enforcement would reduce regulatory uncertainty and associated costs. Feature Group IP, for one, will be able to immediately expand its operations because the ILECs (and particularly at&t) will no longer be able to tie us down in litigation for years on end in any and every state. Forbearance will increase investment in advanced services specifically and in the telecommunications sector generally. This will promote innovation, lead to greater efficiencies for customers, preserve U.S. preeminence in the field of Internet and telecommunications applications, and spur job growth throughout the U.S.

***1. Forbearance would reduce regulatory uncertainty and avoid unnecessary costs during a transition to a uniform intercarrier compensation regime.***

In general, interconnected LECs were not collecting interstate or intrastate access charges from telecommunications carriers serving IP-PSTN voice-embedded IP communications providers when Level 3 filed its petition for Forbearance. In the absence of policy creation over the past three years, individual LECs like at&t accelerated their efforts to levy and collect access charges on IP-PSTN communications that they exchange with CLECs. In fact, they have also succeeded in blocking such traffic, to the detriment of

users.<sup>82</sup> Regardless of whether the FCC ultimately concludes that IP-PSTN traffic is wholly interstate, or somehow contains a separable mix of interstate and intrastate traffic, disputes over whether access charges should apply to IP-PSTN traffic have arisen as between Feature Group IP and at&t in the context of interconnection arbitrations. We have welcomed an arena to litigate the details of signaling, routing and rating of all new technology traffic, whereby we could take the results and build our business. Our reasoned and measured attempts have failed and failed miserably as evidenced by five plus years of stagnation and intransigence at the Texas PUC.<sup>83</sup> Level 3 opined that pursuing the signaling, routing and rating treatment VoIP would be a “cauldron of regulatory hell.” They were almost right. As it turns out, at&t has succeeded to create a “Regulatory Purgatory,” which is slowing and distorting the development and implementation of IP-PSTN voice-embedded IP communications.

Moreover, the Commission, state commissions, and the courts would not only face the question of whether access charges or reciprocal compensation arrangements would apply, but, if access charges apply, judicial and regulatory bodies would also have to determine how such arrangements would be implemented. Would every inventor of a new technology be deemed

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<sup>82</sup> Feature Group IP has launched a non-geographic “500” number based service and at&t has refused to route to such numbers.

<sup>83</sup> *See* Texas PUC Docket 26381 which is six years old, and has come to the eve of arbitration three times, each time to be delayed by at&t. It has now has been put in official “hibernation” for an undetermined period by the Texas PUC while they await a determination by the Commission on VoIP issues.

a carrier? Are the people who use Asterisk carriers?<sup>84</sup> Is a corporate entity that uses an IP PBX now a carrier, and, if so, even if the application is a classic “leaky PBX” approach? What about the ISP that provides Internet access to them and may not even know this use is being made of the Internet access? Are those who sell Ooma-like edge devices carriers?<sup>85</sup> Are GFNs carriers? What if members of one GFN are also members of another GFN? If they are not carriers, is it reasonable to impose carrier-related economic burdens but deny carrier-related rights, such as interconnection under Sections 201, 251, 252 and 332 of the Communications Act? Would the Sections 251/252 regime apply with the attendant state filed agreements and state-level arbitrations to reach contract terms? If not, then what regime does apply? Would ILECs, for example, have the right to insist that interconnecting carriers, once deemed carriers, purchase or use access trunks in addition to “local” interconnection trunks, even when traffic volumes would not justify separate facilities and differential routing of traffic based on some perceived method of “jurisdictionalizing” the traffic for rating purposes? Would virtual foreign exchange IP-PSTN communications be subject to access charges or reciprocal compensation? Would LECs be permitted to require Voice-embedded IP communications providers to engineer their networks, equipment and systems in a manner that allows regulators to track

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<sup>84</sup> Asterisk is an open source platform that allows the user to download software to essentially become his or her own provider of telecommunications services without the need for an intermediating service provider. <http://www.digium.com/en/index.php>

<sup>85</sup> <http://www.ooma.com/>

origination and termination locations for IP services, or pay access rates by default? What will become the signaling standards, Session Initiation Protocol, SS7, UGT, and other standards, protocols, applications and services on the frontier borderland between telephony and Internet-based communications applications? Fighting these and innumerable other details before each and every state commission, the FCC, and the courts would add further substantial, but unnecessary, costs and regulatory uncertainty.

Apart from the unnecessary costs that piecemeal, state-by-state battles over access charge issues would impose, a more fundamental consideration supports forbearance. To apply access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic now means applying access charges during the transition to a uniform intercarrier compensation regime, only to remove those charges as part of that transition.<sup>86</sup> This result simply makes no sense. Applying access charges to these Voice-embedded IP communications only will serve to enhance ILECs' reliance on perpetuating the existing broken patchwork of intercarrier compensation mechanisms, rather than propelling their evolution to a unified regime. The best approach, consistent with the Commission's objective of achieving a uniform intercarrier compensation regime, is to allow IP-PSTN Voice-embedded IP communications to operate on a rationalized, "minute-is-a-minute" basis, with all traffic exchanged under Section 251(b)(5)'s reciprocal compensation

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<sup>86</sup> See, e.g., *Inter-carrier Compensation NPRM*, 16 FCC Rcd. 9610.

rules. As Voice-embedded IP grows, the base of traffic subject to a rationalized compensation mechanism also will grow. This evolutionary path will increase the incentive for all participants in the legacy circuit-switched access charge regime to work toward a rapid transition to a uniform intercarrier compensation mechanism.

Furthermore, the administrative cost of implementing two massive changes (a piecemeal conversion to an access charge regime and, later, a wholesale conversion to a unified intercarrier compensation regime) would be vast for the Commission, state regulators, ILECs, and providers of Voice-embedded IP communications services. Changes would have to be made to existing network architecture, such as ordering Feature Group D trunks in addition to local interconnection trunks. Billing systems and equipment would have to be developed. Voice-embedded IP communications providers would face the challenge of attempting to determine the endpoints of communications for which there is no network-provided geographic endpoint information. Such expenses would represent pure deadweight loss when the Commission moves to a uniform intercarrier compensation mechanism in the future. Because enforcement would lead to such unnecessary uncertainty and expense, the Commission should conclude that forbearance is in line with the public interest.

## ***2. Forbearance would promote innovation.***

Additionally, forbearing from enforcement of Section 251(g), the

exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) would prompt more widespread innovation for the benefit of consumers. Because Voice-embedded IP providers and Voice-embedded IP application developers would know the precise scope of the single compensation regime covering all of their traffic, their business risks would be reduced. Absent forbearance, they would be forced to rely on inefficient business models and network architectures capable of supporting the patchwork of existing regimes – reciprocal compensation, interstate access and intrastate access. And they will have to continue defending against the ILECs’ attack on their right to attach to and interconnect with the PSTN as end users rather than some form of *quasi* carrier. Nowhere is this more important than in supporting the continued formation and development of voice enabled GFNs.

If the cost of regulatory uncertainty is eliminated, investment would increase, and providers and application developers would be able to devote more resources to the development of more innovative products to throw into the competitive mix. Moreover, when crafting new products and services, providers and application developers would not have to include mechanisms designed to apply the outdated and obsolete access charge regime to technologies that are not inherently capable of jurisdictional separation. They can focus on deployment of their application rather than construction or assembly of a carrier-like network. Problems that would be confronted by innovators of Voice-embedded IP communications business models servicing and relying upon symbiosis and a mutually-virtuous relationship with GFNs, and the attendant “leaky PBX”

issues created by their technology become moot. The issue then becomes simply a pure marketplace competition question over whether one provider's GFN is better or worse than the next model.

The potential innovations on the horizon could be truly extraordinary. New Voice-embedded IP applications could blaze an entirely new trail, as an increasing number of IP-based devices are used to communicate both with other IP devices and with legacy PSTN devices and linking and changing the usefulness of the devices through the continued development of GFNs. These devices will integrate voice with data applications; they will provide advanced functionalities that are only available in crude form on the circuit-switched network. Forbearance would speed the development of these new products and social and economic networks and pave the way for other, as yet undreamed applications.

Furthermore, GFNs will drive broadband use and deployment. Historically, a major impediment to even greater increases in broadband penetration is consumers' perception that broadband lacks significant value.<sup>87</sup> Driving up broadband penetration will stimulate further innovation, both in Voice-embedded IP communication and in other uses for "always-on" broadband connections. The Commission can ensure that legacy access charge rules do not impede this additional broadband penetration and innovation by granting the forbearance requested herein.

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<sup>87</sup> *See, e.g.*, Nat'l Telecomm. Coop. Ass'n, 2003 Internet/Broadband Availability Survey Report at 7 (May 2003) available at [http://www.ntca.org/content\\_documents/ACF36B6.pdf](http://www.ntca.org/content_documents/ACF36B6.pdf)

***3. Forbearance would create greater efficiencies, versatility and control for users.***

By forbearing, the Commission would also establish a framework that would put the widest possible array of applications in the hands of consumers. Because a uniform reciprocal compensation regime for IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications would lead to the quicker development of innovative applications, consumers would benefit most immediately and most profoundly.

***4. Forbearance would reestablish U.S. preeminence in the field.***

Finally, forbearance also would drive continued growth in the U.S. high-tech and communications industry, and would be a major driver toward reestablishment of American preeminence in the field of emerging technologies. Let's face it: the ILECs are not innovators, and they are purposefully holding back others who are. Just as American firms have been at the forefront of the development and expansion of Internet access and the rapid development of Internet-based applications, so too are they poised to lead with technologies and applications geared toward the convergence of voice and data applications as it relates to GFNs. If the Commission grants this Forbearance Petition, U.S. Voice-embedded IP firms – established companies, small start-ups, research universities, and garage-based

entrepreneurs alike – will be able to compete with each other and with foreign competitors, without suffering from the disadvantage of regulatory uncertainty and expense.

For all these reasons, grant of this Petition is in the public interest, and, therefore, the requirements of Section 10(a)(3) are satisfied.

**B. Enforcement is Not Necessary to Ensure That Charges or Practices by, for, or in Connection with the PSTN Origination or Termination of Voice-Embedded IP Communications Are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory.**

Enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that the charges and practices for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable, and not unjustly or unreasonably discriminatory; thus, the requirement of Section 10(a)(1) is satisfied.<sup>88</sup> Notably, even in the absence of Section 251(g), the exception clause of Rule 51.701(b)(1) and Rule 69.5(b), there will remain a statutory and regulatory framework to govern intercarrier compensation between the LEC and the telecommunications carrier serving the Voice-embedded IP communications provider – the reciprocal compensation provisions of Section 251(b)(5) and Part 51, Subpart H of the Commission’s rules.

Pursuant to Section 252(d)(2)’s pricing standards, the Act assures that

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<sup>88</sup> 47 U.S.C. § 160(a)(1).

the LEC terminating IP-PSTN or incidental PSTN-PSTN Voice-embedded IP communications will recover the “costs associated with the transport and termination on [that] carrier’s network facilities of calls that originate on the network facilities of the other carrier.”<sup>89</sup> Under the Act, such costs are determined “on the basis of a reasonable approximation of the additional costs of terminating such calls.”<sup>90</sup> The rates for termination are set by the parties in interconnection agreements and, if necessary, through arbitration before state commissions. When the state commission hears an arbitration, it is charged with setting termination rates at a level that is just and reasonable as defined by Section 252 and the Commission’s Part 51 pricing rules.<sup>91</sup> Thus, the charges and practices for exchange of traffic from a Voice-embedded IP communication provider’s telecommunications carrier service to a terminating LEC pursuant to Section 251(b)(5) will be just and reasonable.

ILECs can be expected to argue that exchanging traffic pursuant to Section 251(b)(5) does not provide them with just and reasonable compensation when an IP-PSTN or incidental PSTN-PSTN Voice-embedded IP communication originates over the ILEC’s legacy PSTN network. This is incorrect. Much of the argument pertains to terminating traffic. To date no real claim that ILECs are being deprived of any originating access to which they are in fact or even arguably entitled. On the originating side the ILECs

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<sup>89</sup> 47 U.S.C. § 252(d)(2)(A)(i).

<sup>90</sup> 47 U.S.C. § 252(d)(2)(A)(ii).

<sup>91</sup> *See* 47 U.S.C. § 252(d)(2).

are recovering originating access when their customers dial 1+, a dial around prefix or an 8YY number.<sup>92</sup> To the extent they are not recovering access, they recover. The incumbent LEC is not denied recovery of any costs it incurs to originate traffic; it simply must turn to its own customer for recovery of those costs rather than to interconnected carriers and the customers of those interconnected carriers.<sup>93</sup>

ILECs may argue that they cannot recover origination costs from users because of state commission limits on retail end-user prices and FCC limits on the level of the subscriber line charges. These arguments, however, sweep too broadly and ignore regulatory constitutional safeguards with respect to limits on retail end-user prices. Existing ILEC rates are more than adequate to ensure LECs have a reasonable opportunity to recover their prudently incurred costs.<sup>94</sup> Even more importantly, however, ILECs generally have other remedies available to them. With respect to interstate subscriber line charge limits, for example, ILECs could, in an appropriate case, petition the Commission for a waiver of such caps, or make an above-band filing under

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<sup>92</sup> This would not change under Feature Group IP's request. If a telephone toll call is necessary to reach an IP-based platform, then it will still be treated as a telecommunications service and subject to access charges under Rule 69.5(b). If the ILEC user dials a local number to reach an ESP platform, then the ILEC will recover the cost through local rates. If the ESP platform is served by a CLEC, then the ILEC will pay the *ISP Remand* or state § 251(b)(5) rate to the serving CLEC, since the latter situation is in all ways the same as dial-up traffic to an ISP.

<sup>93</sup> The Commission has previously required carriers to seek compensation from their own customers rather than interconnected carriers. In the *ISP Remand Order*, the Commission, acting pursuant to Section 251(g) and Section 201, required CLECs terminating ISP-bound traffic to recover the cost of terminating this traffic from their ISP customers. See *ISP Remand Order* 16 FCC Rcd. at 9181-90 (¶¶ 67-83).

<sup>94</sup> See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

the price cap rules. An ILEC also may seek to initiate new state rates, or to have state or Federal retail rate limits set aside as confiscatory takings. For these reasons, the requested forbearance would not result in unjust or unreasonable charges or practices.

The ILECs' plea for subsidy by competitors and new technology uses and entrants is ultimately an assertion that they must be made whole when they lose revenues as a result of competition. They want immunity from the competitive market – at the same time they extol “market principles” when it comes to their own operations and services. The Commission long ago rejected this notion when it held that the then-GTE's “Efficient Component Pricing Rule” (which was purposefully designed to maintain the same level of profit from unbundling and interconnection as would be extracted in the absence of competition) in the *Local Competition Order*.<sup>95</sup>

Nor would grant of this petition be unreasonably discriminatory. The access charge regime today can hardly be considered part of a coherent system of intercarrier compensation with logically defined boundaries. It is a regime that is clearly and inevitably in a transition, as the Commission has recognized in issuing its *Inter-carrier Compensation NPRM*. During this transitional period, while the Commission is formulating a uniform intercarrier compensation regime, it is not unreasonably discriminatory for

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<sup>95</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, ¶¶ 633, 660-662, 708-711, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”).

the Commission to take a class of traffic – IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications – which today generally is not subject to intrastate or interstate access charges, and to treat that traffic in a uniform manner consistent with making a transition to a uniform intercarrier compensation regime. In fact, explicitly excluding this traffic from the legacy access charge regime, a regime to which Internet communications were never party, would serve to propel movement towards a forward-looking, more justifiable, uniform intercarrier compensation regime, by categorically stating that ILECs cannot rely on the access charge system to extract monopoly rents from voice-embedded IP applications. ESP traffic has always been exempt. The ILECs want to change the rules and eliminate the exemption. They just decided it was gone and have acted accordingly with extraordinary enforcement and harassment. They forgot, however, that this Commission must be the one to promulgate any rule change.

It is wholly legitimate for the Commission to recognize that it would be difficult, if not impossible, to determine whether specific IP-PSTN traffic begins and ends within the same LEC local calling area, different LEC local calling areas within the same state, or different LEC local calling areas across state lines. Indeed, it already did so in the *Vonage Order*.<sup>96</sup> The inability to determine the geographic end-points of a Voice-embedded IP

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<sup>96</sup> Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling on Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, 19 FCC Rcd 22404 ¶ 9 (rel. Nov. 2004) (“*Vonage Order*”).

communication justifies selecting the only mode of intercarrier compensation – the statutory default of Section 251(b)(5) – that can be applied to all Voice-embedded IP communications regardless of geographic endpoint.

Accordingly, the requirements of Section 10(a)(1) are fully satisfied. Enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that rates and practices for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable and non-discriminatory.

### **C. Enforcement Is Not Necessary for the Protection of Consumers.**

Enforcement of Section 251(g), Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) with respect to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications is also not necessary for protection of consumers.<sup>97</sup> There is simply no tenable argument that grant of this Petition would adversely affect consumers. The ILECs cannot show that the exclusion of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications applications from the access charge regime would somehow lead to such substantial increases in end-user rates that those rates would become

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<sup>97</sup> 47 U.S.C. § 160(a)(2). The D.C. Circuit has upheld the Commission’s determination that, as used in this context, “necessary” does not mean “essential” for the achievement of the statutory or regulatory purpose. Rather, “the term ‘necessary’ . . . mean[s] that there must be strong connection between what the agency does by way of regulation and what the agency permissibly seeks to achieve with that regulation.” *Cellular Telecoms. & Internet Ass’n v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003).

unaffordable and subject to wide discrepancies between urban and rural areas, and the FCC and state commissions would refuse to address such discrepancies through statutorily-authorized universal service mechanism.<sup>98</sup> There is absolutely no evidence to suggest that these consequences would arise. There is no evidence that the Commission and state commissions would fail to exercise their statutory authority pursuant to Section 254 to address any such result.

The other side of the issue – one the ILECs pretend does not and cannot exist – is that there will be an incredible net-positive result to society when as a consequence of forbearance, more consumers began to use voice-embedded IP applications and rapid deployment of more ubiquitous GFNs are deployed. Imposing access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic (which, as noted above, is generally not subject to interstate or intrastate access charges today) is wholly unnecessary to protect the future of universal service, and could actually promote more user control and variance in communications and promote universal service for advanced Internet communications.

Although access charges historically provided implicit support for basic local telephone service in rural and high cost areas, grant of this Petition will not – as some ILECs are likely to suggest – lead to the demise of universal, affordable, and reasonably comparable telephone service in rural and high-

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<sup>98</sup> See 47 U.S.C. § 254(e)-(f).

cost areas. The ESP exemption that was first enunciated in the 1980s and preserved in the 1990s did not lead to the end of the world. Making it clear that IP-PSTN and incidental IP-PSTN traffic is included in that exemption and the intercarrier compensation regime that covers it will not either.

While some business and residential users are migrating to IP-based communications for at least some of their voice communications, their numbers are still relatively small and, as the chart presented below demonstrates, unlikely to have a significant impact on PSTN revenues in the near term. Additionally, to the extent that there is some movement towards voice-embedded IP applications and away from PSTN communications, wouldn't this serve as a dramatic boon to American communications capabilities and productivity?

Moreover, any argument that grant of this Petition would disrupt implicit support flows necessary to support universal service ignores the fact that this Commission has already decided to charge "revenue producing business models" in the VoIP area with USF obligations.<sup>99</sup> Further, this Commission has been removing implicit universal service support from interstate access charges. (Likewise, many state commissions have removed implicit universal service support from intrastate access charges.) Through

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<sup>99</sup> Interestingly, this Commission has refrained from addressing the fact that many VoIP applications are free and the positive universal service attributes these services bring to society. Feature Group IP wonders if perhaps more attention, from the universal service perspective, should be given to the utilization of free and lower cost services thus creating a competitive environment for Universal Service and thereby reducing the amount needed for universal service support subsidies.

the *CALLS Order* and *MAG Order*, the Commission shifted more than \$1 billion from implicit access charge-based support to explicit federal universal service funding.<sup>100</sup> By increasing Subscriber Line Charges (“SLCs”), those orders also eliminated billions of dollars of implicit subsidies that were not necessary to maintain affordable and reasonably comparable end-user rates. Furthermore, the Commission recently issued its *Tenth Circuit Remand Order on Universal Service*, in which it took additional steps to make certain that states receive sufficient federal universal service funding to ensure that end-user rates in “non-rural” study areas remain reasonably comparable to nationwide averages.<sup>101</sup>

In addition, the access charges preserved by the exception clause of Rule 51.701(b)(1) and Section 251(g) cannot lawfully be considered necessary for the protection of consumers because of purported effects on access-based implicit subsidies. Section 254(e) requires all interstate universal service support to be “explicit.”<sup>102</sup> The United States Court of Appeals for the Fifth Circuit, in its *TOPUC* and *Comsat* opinions, has made very clear that “the

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<sup>100</sup> *CALLS Order* 15 FCC Rcd. at 12974-76 (¶¶ 30-32) (“The CALLS Proposal identifies and removes \$650 million of implicit universal service support.”); *MAG Order*, 16 FCC Rcd. 19613. See also Universal Service Administrative Company, First Quarter 2004 FCC Filing, Appendix HCO1, “High Cost Support Projected by State by Study Area” (quantifying the *MAG Order’s* Interstate Common Line Support at \$14,936,678 per quarter, which amounts to \$459,746,712 per year).

<sup>101</sup> Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, FCC 03-249, 2003 FCC LEXIS 5892 (rel. Oct. 27, 2003) (hereinafter “*Tenth Circuit Remand order*”). “Non-rural” study areas are those in which the ILEC is not a “Rural Telephone Company” as defined in Section 3(37) of the Act, 47 U.S.C. § 153(37). There are many areas that are rural in character within these “non-rural” study areas. See *id.* ¶ 1 n.1.

<sup>102</sup> 47 U.S.C. § 254(e).

plain language of Section 254(e) does not permit the FCC to maintain any implicit subsidies.”<sup>103</sup> To the extent that any implicit support for universal service remains buried within interstate access charges, those charges “countermand Congress’s clear legislative directive. . . that universal service support must be explicit.”<sup>104</sup>

To the extent that intrastate switched access rates retain implicit support for universal service, such support also is not “necessary” to support universal service. Section 254(f) of the Act grants state commissions the authority to establish state universal service funds.<sup>105</sup> Although the Commission has held that Section 254(f) does not require states to make universal service support within intrastate access charges explicit,<sup>106</sup> many states have, at least to some extent, adopted state universal service funds that supplement the federal universal service fund.<sup>107</sup> To the extent states have not done so, or have not done so completely, the states commissions failure to address implicit universal service subsidies in a straightforward and competitively neutral manner nearly twelve years after enactment of the 1996 Act does not justify foisting uneconomic intrastate access charges on

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<sup>103</sup> *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393,425 (5th Cir. 1999) (hereinafter “*TOPUC*”) (emphasis in original); see also *Comsat Cop. V. FCC*, 250 F.3d 931,938 (5th Cir. 2001)(hereinafter “*Comsat*”). Under *TOPUC* and *Comsat*, it would be unlawful for the Commission to extend access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic in order to preserve implicit subsidies in switched access charges.

<sup>104</sup> *Comsat*, 250 F.3d at 938.

<sup>105</sup> 47 U.S.C. § 254(f).

<sup>106</sup> See *Tenth Circuit Remand Order*, 2003 FCC Lexis 5892, \*39-40 ( ¶ 26).

<sup>107</sup> United States General Accounting Office, *Telecommunications: Federal and State Universal Service Programs and challenges to Funding*, GAO-02-187, at 12-17 (Feb. 4, 2002).

carriers serving IP communications providers. State inaction after eleven years cannot render subsidy-laden intrastate access charges “necessary” to the protection of consumers. States have alternatives, and they must use them without enabling ILECs to stifle the growth and promise of innovative IP-based communications applications. The *Missoula Plan* supporters forcefully argued that the Commission could preempt state access charges when it suited their needs. But formal preemption is not necessary. A simple reaffirmation that this is an exclusively interstate matter, and the Commission has exclusive jurisdiction to determine the compensation regime will more than suffice. Feature Group IP does not request preemption, only a ruling of the obvious: state access does not apply because the traffic is jurisdictionally interstate. This would be nothing more than a reminder that the principles stated in the *Vonage Order* apply and remain.

Accordingly, the exception clause of Rule 51.710(b) and Section 251(g), as it pertains to receipt of switched-access charges for origination or termination of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications, is not necessary for the protection of consumers. The statutory forbearance requirement in Section 10(a)(2) is therefore satisfied.

## VII. CONCLUSION.

Chairman Martin has noted that “[f]undamentally, entry into the phone market benefits consumers, and I will support regulatory action to promote

that entry and the competition it enables.”<sup>108</sup> The simple action requested in this Forbearance Petition is the missing piece necessary to ensure that Voice-embedded IP applications allow users to avail themselves of the full promise of IP-based communications. Grant of this Forbearance Petition gives providers and users of voice-embedded IP applications the needed certain to deploy and use advance Internet-based communications tools that will propel and revolutionize the ways in which Americans communicate and network.

The Commission must grant this Petition for Forbearance because, as demonstrated above, each of the three statutory criteria is satisfied in this case: (1) forbearance is in the public interest (Section 10(a)(3)); (2) the regulations and statutory provisions from which forbearance is sought are not necessary to ensure that rates and practices are just and reasonable or not unjustly or unreasonably discriminatory (Section 10(a)(1)); and (3) the regulations and statutory provisions from which forbearance is sought are not necessary for the protection of consumers (Section 10(a)(2)). Forbearance is therefore mandatory under Section 10(a), which states that “the Commission shall forbear” when each of the three criteria is satisfied.<sup>109</sup>

The Commission should forbear without delay. By so doing, the Commission will not only ensure that IP communications and the next wave of truly innovative applications develop quickly and without the unnecessary

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<sup>108</sup> Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV, May 7, 2007.

<sup>109</sup> 47 U.S.C. ¶ 160(a).

shackles of intrastate and interstate access charges, but also benefit the country and economy as a whole. “It’s incumbent on us to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeonholes without adequate justification,” stated Commissioner Michael J. Copps at the Commission’s forum on Voice over Internet Protocol years ago. “It’s no slam-dunk that the old rules even apply.”<sup>110</sup> The Commission must heed this wisdom and forbear from old rules (to the extent they even apply) that stifle innovation, consumer choice and opportunity, and serve only to allow would-be monopolists a colorable claim to extract unjustified, monopoly rents from innovative new services and applications while the monopolist maintains a stranglehold on captive consumers and would-be innovators, who could drive revolutionary changes in America’s networking and communications capabilities.

The citizens of this country cry for release from “the phone age.” The greatest innovation brought to users by the ILECs is the Princess Phone (and some users got only the shell and rented the guts). This tells us a lot about why the United States is falling behind the rest of the world. Being tied to the selfish interests of entrenched monopolists whose natural incentive is to ration and starve because it limits capital requirements and increases profits is not the way to propel our country back in front of the rest of the pack. This Commission now has a chance to let the change happen. Make the PSTN tail

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<sup>110</sup> Opening Remarks of Michael J. Copps, FCC Voice Over Internet Protocol Forum (Dec. 1, 2003), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241765A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241765A1.pdf) (last visited Dec. 19, 2003).



**Certificate of Service**

I, Jonathan Askin, do hereby certify that I have caused the forgoing  
PETITION FOR FORBEARANCE of Feature Group IP to be filed with the  
Office of the Secretary of the FCC via the FCC's Electronic Comment Filing  
System.

*/s/*

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Jonathan Askin

October 23, 2007

**APPENDIX A**

**FEATURE GROUP IP'S INTERNET GATEWAY INTERMEDIATION  
POINT OF PRESENCE ("IGI-POP") TARIFF**

**APPENDIX B**

Pre-Filed Direct Testimony of Lowell Feldman in Texas PUC Docket No.  
33323 dated October 15, 2007

**APPENDIX C**

Pre-Filed Direct Testimony of Soren Telfer in Texas PUC Docket No. 33323  
dated October 15, 2007

**APPENDIX D**

Pre-Filed Direct Testimony of Rich Lewis in Texas PUC Docket No. 33323  
dated October 15, 2007