

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF FEATURE GROUP IP
PETITION FOR FORBEARANCE FROM SECTION
251(g) OF THE COMMUNICATIONS ACT AND
SECTIONS 51.701(b)(1) and 69.5(b) OF THE
COMMISSION'S RULES

WC Docket No. 07-256

COMMENTS OF PAETEC COMMUNICATIONS, INC.

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COMMENTS OF PAETEC COMMUNICATIONS, INC.

PAETEC Communications, Inc. (“PAETEC”) ¹ submits these comments in response to the December 18, 2007 notice issued by the Federal Communications Commission (the “FCC” or “Commission”) in this proceeding. Specifically, the Commission’s notice sought comment on a petition filed October 23, 2007 by 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”) asking the Commission to forbear pursuant to section 160(c) of the Communications Act of 1934, as amended (the “Act”), from applying access charges to voice-embedded Internet communications pursuant to Section 251(g) of the Act.² Specifically, Feature Group IP requests that the Commission forbear from applying Section 251(g) “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’ pursuant to state and federal access charge rules.”³ In addition, Feature Group IP seeks forbearance from “the clause of rule 51.701(b)(1) that excludes from the definition of telecommunications

¹ On behalf of itself and its affiliated US LEC operating subsidiaries.

² Feature Group IP Petition for Forbearance Pursuant to 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), WC Docket No. 07-256 (filed Oct. 23, 2007) (“Feature Group IP Forbearance Petition”); *see also* 47 U.S.C. § 160(c).

³ Feature Group IP Forbearance Petition at 24.

traffic subject to 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 . . .'.⁴ Feature Group IP also seeks forbearance from rule 69.5(b) "to the extent applicable" and from any numbering representation rule or signaling standard as applicable.⁵

SUMMARY

PAETEC takes no position at this time on the merits of the Feature Group IP Petition, although it may do so at a later time. Rather, PAETEC believes that the Commission should recognize this as an incentive and an opportunity to jumpstart the moribund proceeding intended to address reform of intercarrier compensation on a comprehensive, industry-wide basis, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92. Such reform, if implemented by the beginning of 2009, would render this petition (and the other petitions likely to be filed on access charge, intercarrier compensation, traffic classification and related issues in the next 12 months) moot. In Part III of these comments, PAETEC suggests the outlines for the reformed compensation mechanism the Commission should adopt in that proceeding.

⁴ *Id.* at 24-25.

⁵ *Id.* at 25.

I. Introduction

PAETEC is a premier national provider of competitive wireline local, long distance, data and Internet services based in Fairport, New York. Primarily serving medium to large business customers, PAETEC provides service to its customers through its own switches and lines leased from other carriers – either as special access services or unbundled network elements (“UNEs”). Once PAETEC completes its acquisition of McLeodUSA Inc. (“McLeod”), anticipated in this calendar quarter, the combined company will be one of the nation’s largest non-Bell communications service providers, serving forty-seven of the top fifty metropolitan statistical areas.⁶

PAETEC is both a purchaser and a provider of wholesale and retail Internet Protocol (“IP”) and Time Division Multiplexing (“TDM”) origination and termination services for transmission of voice and data traffic. In its position as a local, long distance and exchange access provider, PAETEC is acutely aware of the incentives and potential for arbitrage and misclassification created by the patchwork scheme of intercarrier compensation mechanisms presently applicable to interstate and intrastate communications traffic that terminates and/or originates on the Public Switched Telephone Network (“PSTN”).

II. This Petition Highlights Once Again the Need for Comprehensive Reform of the Intercarrier Compensation System

⁶ See www.paetec.com/media/2007_news.html.

PAETEC believes that the single most important issue facing the telecommunications industry and this Commission is the reform of the intercarrier compensation system. As the Commission is aware, the service of PSTN call termination can be subject to at least four different types of compensation, depending on the nature of the originating entity and the called party, and the technology used to make the call: intrastate access charges, interstate access charges, reciprocal compensation, and intercarrier compensation for ISP-bound traffic.⁷ In addition, regulatory decisions have created a series of exemptions that overlap and interplay with these categories. The most important of these exemptions for purposes of this Petition is the enhanced services provider (“ESP”) exemption first promulgated by the Commission decades ago in the wake of the AT&T divestiture.⁸

The inevitable result of this patchwork scheme is that carriers (and other entities) that pay compensation seek to have the traffic they originate classified in the regulatory traffic bucket with the lowest termination rate, while terminating carriers seek to have the traffic they terminate classified in the bucket with the highest rate. Thus, a significant portion of business planning - for incumbents and competitors alike – is taken up with consideration of ways to reduce excessive access charge expenses while also

⁷ See *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, (rel. Mar. 3, 2005) (“FNPRM”) at paras. 5-14.

⁸ See *id.* at para. 7 and note 18.

seeking to maximize access charge revenues. In addition, carriers must attempt to divine which compensation regime may apply to traffic as new services are created based on the newest technologies. The result is not only wasted planning efforts, but inefficient network designs and suboptimal technology and equipment choices. If all transport and termination services were priced the same, and the pricing regime were cost-based and stable, carriers could concentrate on competing for customers on the basis of price, quality of service, and utility of new products, rather than plotting to take advantage of artificial regulatory constructs.

This petition is only the latest in a series of petitions and ruling requests that have consumed much time and resources, and will continue to do so until the Commission bites the bullet and implements comprehensive reform of the intercarrier compensation system.⁹ The Feature Group IP

⁹ Even a merely illustrative list of the recent proceedings involving either the application of specific charges or the classification of certain types of traffic in order to determine which charges potentially apply would include, among others, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) (“*Declaratory Ruling*”); *Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (“*ISP Remand Order*”); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004); *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, 19 FCC Rcd 7457 (2004) (“*AT&T Declaratory Ruling*”); *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 (November 12, 2004); *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004); and *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004), *aff’d* *In re Core Communications, Inc. v. FCC*, 04-1423, D.C. Circuit.).

Petition raises valid questions about the classification of (and the appropriateness of forbearance for) an important and growing category of services, those that the petition refers to as “voice-embedded Internet communications.” Without expressing any opinion as to the validity of voice-embedded Internet communications as a separate regulatory classification, PAETEC notes that such services are at best only one subcategory of communications services – albeit one of the fastest growing subcategories.

The Petition highlights only one facet of this complex issue. Deciding this Petition would not be the best and highest use of the Commission’s time and resources. If the Petition were granted, more carriers (and non-carrier entities generating telecom traffic) would quite rationally attempt to shoehorn their traffic into this “voice-embedded Internet communications” bucket. At the same time, the largest incumbent local exchange carriers and exchange access providers will continue to use their market power anti-competitively, through the exercise of self-help and other legally questionable measures, to prevent, or at least slow, the inevitable erosion of their access charge revenues caused by the growth of this traffic bucket. It takes no great foresight to predict with certainty that the Commission and state PUCs will see a plethora of proceedings after this, as carriers argue about how many IP angels can dance on the head of a pin.¹⁰

¹⁰ As the Petition points out, in this proceeding alone the Commission would have to decide numerous ancillary issues related to the nature of the traffic and the originating entities. See Petition at 28-29. Those questions would be multiplied in other proceedings.

Rather than deciding this Petition, the Commission should concentrate its resources on completing the *Unified Intercarrier Compensation Regime* proceeding and adopting a comprehensive intercarrier compensation regime. By doing so, the Commission could eliminate a considerable amount of regulation and litigation. The seemingly endless disputes over the classification of calls as local or long distance, interstate or intrastate, traditional circuit-switched or IP-enabled, wireless or wireline would be eliminated. In addition, ancillary disputes such as those over “phantom traffic” and “traffic pumping” would largely evaporate.

III. Intercarrier Compensation Reform Must Result in a System That is Fair, Comprehensive, Cost-based, and Technology Neutral

This Petition presents the Commission once more with the opportunity to unify the divergent intercarrier compensation mechanisms into a single regime that could greatly simplify traffic exchange arrangements and provide much-needed rationality to the process of carriers using each others’ networks to complete telephone calls. PAETEC has provided its views on the parameters of an appropriate unified intercarrier compensation regime in a number of filings in the *Unified Intercarrier Compensation Regime Proceeding*, CC Docket No. 01-92.¹¹ We summarize those views here.

a. All Intercarrier Compensation Should Consist of the Same Components

¹¹ See, e.g., Comments of PAETEC Communications, Inc., et al, WC Docket No. 01-92 (filed May 23, 2005) (“PAETEC/CLEC Comments”); and Ex Parte Communications of PAETEC Communications, Inc., WC Docket No. 01-92 (filed October 7, 2004 and October 7, 2005).

All traffic terminated on the PSTN, regardless of origin or technology, should be subject to the same intercarrier compensation mechanism. An optimal and equitable system would remove the opportunity for arbitrage based on the technology, the carrier or provider involved, or the jurisdictional nature of the traffic. In essence, no party should receive a pass or be penalized because they are an IP originator or a rural ILEC, or because they fall into any other regulatory class. Traffic that uses the same services or facilities on a carrier's network—whether it be tandem switching, local switching, interoffice transport or the local loop—should be subject to the same rates, regardless of the origin or originator.

b. All Intercarrier Compensation Should be Cost-Based

A compensation rate that applies across all technologies and to all types of traffic must be cost-based. For many types of traffic, cost-based termination rates are required by statute, particularly Sections 251(b)(2) and 251(g) of the Act,¹² regardless of technology used. Given this fact, it only makes sense to apply the same cost-based rates to all types of traffic and technologies.

Cost-based rates are economically efficient and will promote rational decisions regarding the deployment of network facilities. Non-cost-based rates encourage inefficient use of network facilities and arbitrage, and impede rational decisionmaking regarding facilities deployment. If the

¹² See the discussion in the PAETEC/CLEC Comments at 8-16.

pricing regime for intercarrier compensation is only partially cost-based, as is the case today, all parties can be expected to continue to expend time, effort, and money to find ways to classify traffic so as to maximize their returns, as well as to dispute and litigate rates that appear unreasonable and unsubstantiated. This behavior has been endemic in the industry at least since the Telecommunications Act of 1996, particularly where compensation rates for a particular class of traffic are well above cost.

Similarly, below-cost rates, including bill-and-keep (which is the ultimate below-cost rate), offer mirror image incentives for arbitrage and inefficiency. Bill and keep works with economic efficiency if traffic is perfectly in balance. The reality is otherwise. PAETEC has already demonstrated how mandatory bill-and-keep fails to comply with Sections 201 and 252(d) of the Act.¹³ Even if they were consistent with the Act, bill-and-keep and other below cost rates generate arbitrage behavior that is economically rational individually, yet inefficient and wasteful for society as a whole.¹⁴

The “heavy lifting” necessary to establish a cost-based intercarrier compensation regime has been completed.¹⁵ States long ago set reciprocal compensation rates for the BOCs and most other major ILECs under the Commission’s TELRIC cost standard, and most state commissions have

¹³ See *id.* at 13-15. PAETEC notes that bill-and-keep provisions negotiated between carriers pose no such statutory problems.

¹⁴ See *id.* 41-42 and 44-45.

¹⁵ See *id.* at 8-13 and 36-38.

already revised those rates downward, some more than once. By adopting the existing cost-based reciprocal compensation rates as default rates for all intercarrier compensation, the Commission would be building upon a substantial amount of hard work already performed by state commissions on this issue. On the other hand, adoption of an intercarrier compensation regime that does not rely on cost-based rates would discard almost eleven years of state proceedings examining reciprocal compensation rates.

c. Reform Must Be Implemented Gradually

In the best of all possible worlds, a unified, cost-based intercarrier compensation regime would be implemented in one fell swoop. This is not such a world. As the Commission has recognized in the past, fundamental change in the economics of a part of the telecommunications industry must come gradually to allow for existing business plans and financial targets to take the changes into account, and to avoid systematic destabilization.¹⁶ To that end, PAETEC believes that the changes advocated here should be implemented gradually but by a date certain, over a period of five years. This will minimize the shock to existing carriers and business plans and allow sufficient time for adjustment, while at the same time providing certainty

¹⁶ See the discussion in PAETEC/CLEC Comments at 13-15; and see also, e.g., *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*) (“the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired”).

and a definitive time for substitution of a unified and economically rational compensation system.

d. The Commission Should Work with State Commissions to Bring Intrastate Rates Down in the Same Time Period

PAETEC is well aware that, while the Commission has preemptive jurisdiction over interstate traffic, its ability to preempt state rules governing compensation for intrastate traffic is less settled and more narrow.

Determining whether the Commission may or may not preempt state commission jurisdiction over an intercarrier compensation mechanism for intrastate services is not a struggle worth undertaking. Instead, the Commission should adopt an approach similar to that proposed by the NARUC Intercarrier Compensation Task Force, which would involve sharing jurisdiction with the states. That approach, unlike some other proposals, is consistent with the structure envisioned by the Telecom Act and upheld by the Supreme Court.¹⁷ Regardless, this effort is wasted unless and until geographic boundaries are eliminated as a means to measure intercarrier compensation.¹⁸

e. If Intercarrier Compensation Reform is to Include The Universal Service Funding System, It Must Make Support Explicit And Funding Fair

¹⁷ See the discussion in the PAETEC/CLEC Comments at 24-26 and the NARUC Intercarrier Compensation Task Force proposal, CC Docket 01-92 (filed March 1, 2005).

¹⁸ Decoupling geography from area codes, which is already a widespread practice in VOIP services and becoming more common in wireless, could also potentially relieve much of the number exhaustion problem.

PAETEC believes that intercarrier compensation reform can and should be decoupled from reform of the universal service funding (“USF”) system and implemented ahead of USF reform. If the Commission should conclude nonetheless that USF and intercarrier compensation reform should proceed in tandem, then it should revisit the USF solution previously recommended by PAETEC. PAETEC wholeheartedly supports the concept of universal service and contributes to and participates fully in existing programs. However, as a practical matter, if the American people, Congress and the Commission want the country to have subsidized telephone and, perhaps, broadband service, a direct tax is the most economically efficient solution to achieve that end. Without delving into the obvious implications such a radical change of practice would engender, PAETEC assumes that implementation of a direct tax or even reallocating an existing federal tax (e.g., the excise tax on telephone services) is politically impractical. Regardless, in lieu of the inability of the “collective we” to get past political considerations in any policy decision we make, then the next best efficient way to provide for the common good is a ubiquitous fee mandated on all communications revenues. That simplistic formula, devilishly tricky in detail, at least on its face closes the technology/jurisdictional loopholes the existing subsidy structure provides to certain telephone and broadband service providers. The playing field would be further leveled and the American people would benefit.

The longer the universal service gridlock goes on, the fewer high cost, low income customers and areas will benefit from the broadband technologies available to those who can afford them. The paralysis that has characterized this area for years must be shaken off. As NASUCA has noted, universal service policy should focus on what is best for the consumers who deserve universal service support, not on the carriers that serve those customers.¹⁹ To that end, the Commission should make explicit that protection of existing ILEC revenues cannot be a central goal of the reform of universal service policies absent a substantial showing that such revenues are essential to the Act's universal service policy goals. No such showing has been made to date, and PAETEC doubts that such a showing is possible.

CONCLUSION

For the foregoing reasons, PAETEC respectfully urges the Commission to expend its resources in bringing the *Unified Intercarrier Compensation Regime Proceeding*, CC Docket No. 01-92, to a conclusion in 2008 and implementing fair, comprehensive and cost-based intercarrier compensation reform. That result will moot the Petition in this proceeding.

Respectfully submitted,

¹⁹ NASUCA Intercarrier Compensation Proposal, attached to Letter from Philip F. McClelland, CC Docket No. 01-92 (filed Dec. 14, 2004).

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