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

In the Matter of	)	
	)	
Feature Group IP Petition for	)	WC Docket No. 07-256
Forbearance From Section 251(g) of the	)	
Communications Act and Sections	)	
51.701(b)(1) and 69.5(b) of the	)	
Commission's Rules	)	

COMMENTS OF WINDSTREAM

Windstream Corporation on behalf of its local exchange carrier subsidiaries (collectively "Windstream") hereby submits comments in response to the Public Notice[1] seeking comment on the Petition for Forbearance filed by Feature Group IP.[2] In its Petition, Feature Group IP incorrectly asserts that the Enhanced Service Provider ("ESP") Exemption applies to IP-enabled voice calls terminated on the public switched telephone network ("PSTN"). The Petition also fails to meet the statutory showings required for a grant of forbearance. Accordingly, the Federal Communications Commission ("Commission") should deny the Petition in its entirety and, instead, clarify that: (1) the ESP Exemption does not apply to the interexchange traffic described in the Petition and (2) such traffic is subject to interstate and intrastate access charges like any other interexchange calls.

Windstream increasingly has encountered carriers – like Feature Group IP – that incorrectly claim that voice calls terminated on Windstream's PSTN facilities were originated

[1] *Pleading Cycle Established for 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, DA 07-5029 (released December 18, 2007).

by a service provider using IP technology and as such are not subject to switched access charges. These carriers often withhold payment from Windstream for terminating access services despite the fact that these carriers rely on Windstream's network to terminate the traffic. Windstream and other similarly situated companies are denied compensation that is rightfully due for the use of their networks in this manner. Prompt Commission action is needed to remedy and prevent this unlawful and abusive practice.

Discussion

Switched access charges are due for the origination and termination of traffic transported by Feature Group IP and similarly situated providers. Contrary to Feature Group IP's bold yet patently incorrect assertion, the Commission has never extended the ESP Exemption to any telecommunication carrier that delivers telecommunications traffic to and from the PSTN. Additionally, Feature Group IP failed to establish grounds sufficient to procedurally or substantively justify Commission forbearance from standard application of switched access charges.

A. **Feature Group IP's assertion that its traffic qualifies under the ESP Exemption is incorrect.**

Feature Group IP's assertion that it is exempt from paying access charges for traffic specified in its Petition is a fundamental misapplication of the ESP Exemption. The voice telephony for which Feature Group IP would have the Commission extend the ESP Exemption is delivered from one telecommunications carrier (Feature Group IP) to another telecommunications carrier (the terminating local exchange carrier) as plain old telephone

[2] *Petition for Forbearance* (filed October 23, 2007) ("Feature Group IP Petition" or "Petition").

service ("POTS"). Feature Group IP incorrectly argues that the ESP Exemption permits it to avoid paying access charges solely because of the technology being used to originate and/or transport such traffic to the PSTN. Feature Group IP's contentions are in error.

The ESP Exemption has never operated in the manner described by Feature Group IP. When the Commission first established the access charge regime, it specifically determined that access charges applied "to interexchange carriers, and to all resellers and *enhanced service providers*…."[3]

The Commission since has reiterated that it "intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings."[4] Moreover, the Commission has recently stated that as a policy matter "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP-network, or on a cable network."[5]

In contrast to the broadly applicable access charge regime, the ESP Exemption is a narrow provision for *certain* services used to deliver traffic received by ESPs.[6] This narrow exception permits an ESP to order, from a local exchange carrier's local tariffs, end-user business lines to be used by the ESP's end users accessing the enhanced service it provides.[7] Although it would not receive switched access compensation, the local exchange carrier in

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[3] *MTS and WATS Market Structure,* CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 ¶ 76 (1983) (*MTS/WATS Market Structure Order)* (emphasis added).
[4] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 ¶ 2 (1987).
[5] *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863 (released March 10, 2004) at ¶ 61.
[6] *Id*. ¶¶ 77-83.
[7] *Id*.

this instance would receive direct compensation for the end-user business line provided to the ESP.

The ESP Exemption does not extend beyond such cases where an ESP uses a local exchange carrier's facilities to deliver telecommunications traffic originated by its own end user customers in the exchange area.[8] The Commission's focus in designing the ESP Exemption was exclusively on the scenario where calls delivered to the ESP's location *in the exchange area* come *from the ESP's customers*.[9] In the access reform proceeding, the Commission explained that "ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephone solely because ISPs use incumbent LEC networks to receive calls from their customers."[10]

Despite the euphemistic description of the services it provides as "intermediation services" for IP-PSTN traffic "between a LEC and a telecommunications carrier serving a Voice-embedded Internet service provider,"[11] Feature Group IP is not an ESP. To be clear, under Feature Group IP's proposal, the traffic at issue is not exchanged between Feature Group IP and end-user customers of its own to enable them to reach an enhanced service, and the traffic does not remain in the exchange area. Thus, nothing about Feature Group IP's proposal fits within the narrow confines of the limited ESP Exemption. Rather, Feature Group IP appears merely to be providing interexchange telecommunications services to its wholesale IP service provider customers to reach the PSTN, and it is those IP service providers that in turn are providing IP voice service to their own (not Feature Group IP's) end-user customers.

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[8] *Id*. ¶ 78.
[9] *Id*.
[10] First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997), *petitions for review denied, Southwestern Bell Tel. Co. v FCC*, FCC, 153 F.3d 523 (8th Cir. 1998).
[11] Petition at 20.

In this way, Feature Group IP serves the same function as a traditional interexchange carrier – transporting telecommunications services from one exchange to another. But unlike traditional interexchange carriers, Feature Group IP contends that it should be permitted to avoid application of lawful access charges despite the fact that it otherwise relies on the PSTN to terminate the traffic in question.

It would be contrary to Commission rules and practice to extend the ESP Exemption to carriers, like Feature Group IP, that deliver voice telephony to third party local exchange carriers. Accordingly the Commission should reject Feature Group IP's claims and clarify that the ESP Exemption does not apply to the interexchange traffic described in Feature Group IP's Petition.

B. Feature Group IP's Petition fails to meet the three-prong test for forbearance.

Section 10 of the Telecommunications Act of 1996 ("the Act") permits the Commission to forbear from applying any regulation or provision of the Act in the event a petitioner demonstrates that (1) the enforcement of such regulation or provision is not necessary to ensure that charges and practices are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such regulation or provision is consistent with the public interest, an assessment that requires the Commission to consider whether forbearance will promote competitive market conditions. As the Circuit Court of Appeals for the District of Columbia has explained, a party petitioning the

Commission for forbearance must satisfy *all three* prongs of the test.[12] In the event a petitioning party fails to satisfy all three criteria, the Commission must reject the Petition.[13] As described below, Feature Group IP fails to satisfy any of the three requirements for forbearance, so the Petition should be denied.

Feature Group IP has not satisfied the requirements of Section 10(a)(1)

Section 10(a)(1) of the Act requires a petitioner to demonstrate that enforcement of the applicable regulation or provision of the Act is not necessary to ensure that charges and practices are just and reasonable and are not unjustly or unreasonably discriminatory.[14] Feature Group IP's proposal – to replace the switched access structure applicable to its traffic with either a bill and keep or reciprocal compensation structure – is devoid of facts necessary to satisfy this prong of the forbearance test, not to mention outside the scope of forbearance as it would require a rulemaking.

Feature Group IP appears to believe that it is just and reasonable to use Windstream's network infrastructure, and profit from this use, without providing appropriate compensation to Windstream. Feature Group IP's belief is flawed and tantamount to a cost avoidance scheme. If permitted, Feature Group IP's proposal would fundamentally undermine Windstream and other local exchange carrier's ability to recover the costs associated with the use of their networks or to provide their end-user customers with affordable, quality voice and broadband services as carriers-of-last-resort. Continued enforcement of, rather than

[12] *Cellular Telecommunications and Internet Association v. FCC*, 330 F.3d 502, 509 (2003).
[13] *Id.*
[14] 47 U.S.C. Section 160

forbearance from, access charge regulations is necessary to ensure just and reasonable charges and practices.

Moreover, exempting Feature Group IP from paying switched access charges while requiring similarly situated carriers, including interexchange carriers ("IXCs"), to pay access charges for the same use of the local exchange carrier's network would give carriers like Feature Group IP an unfair cost advantage over traditional IXCs. This result would be unjust and would unreasonably discriminate against the traditional IXCs.[15] One-sided application of the access charge regime is directly contrary to the requirements stated in Section 10(a)(1) of the Act. Approval of Feature Group IP's Petition also would run counter to express Commission objectives. As recognized in the ISP Remand Order, "one of the Commission's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications."[16]

Consistent with its goals for the access charge regime, the Commission previously has denied petitions for forbearance that would result in a discriminatory compensation mechanism. One example of this Commission precedent is found in the denial of the forbearance petition submitted by Oncor Communications, Inc. ("Oncor"). In its petition, Oncor argued that its universal service fund ("USF") obligations should be reduced, because its revenues were decreasing. The Commission rejected the petition on the basis that

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[15] In *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 ¶ 12 (2001), the Commission stated that "any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for regulatory arbitrage."

[16] In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order*, FCC 01-131 (released April 27, 2001) ¶ 36 n.63 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984), *cert.denied,* 469 U.S. 1227 (1985)).

exempting Oncor from the USF contribution rule, while continuing to require carriers with stable or increasing revenues to comply with the rule, would result in a discriminatory and inequitable mechanism. According to the Commission, "Oncor…would benefit from an unfair advantage because they would not incur the expenses incurred by other carriers."[17] The unfair cost advantage sought by Feature Group IP is no different than that sought by Oncor and should be rejected by the Commission for the same reasons.

Feature Group IP has not satisfied the requirement of Section 10(a)(2)

Section 10(a)(2) of the Act requires a petitioner to demonstrate that enforcement of the applicable regulation or provision of the Act is not necessary for the protection of consumers.[18] Feature Group IP's proposed access avoidance scheme cannot satisfy this prong of the forbearance test either. Consumers would not be protected if the Commission absolved Feature Group IP of its compensatory obligations and left local exchange carriers to recover the entire cost of maintaining their networks from other classes of customers, including end user customers of local exchange carriers.

Instead of providing the Commission with requisite support for its Petition, Feature Group IP first makes the incorrect and unsubstantiated claim that all existing local exchange carriers' end user rates are "more than adequate to ensure LECs have a reasonable opportunity to recover their prudently incurred costs."[19] Feature Group IP then attempts to shift the

[17] Memorandum Opinion and Order, *Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc., D/B/A Oncor Communications, Inc.,* 16 FCC Rcd 4382, ¶ 9 (2001).
[18] 47 U.S.C. Section 160.
[19] Petition at 58.

burden of recovering costs back to the local exchange carriers by suggesting *they petition* the Commission to waive caps on subscriber line charge limits and to seek local rate increases.

This narrow, technology-specific approach to intercarrier compensation reform threatens to undermine the entire compensation system without any recognition of the impact it would have on consumers. Granting Feature Group IP's Petition would adversely affect the intricate balance of the compensation received by carriers through intercarrier compensation, end user rates, and federal universal service support. Attempting to grant special status to a specific class of carriers only then to suggest that the local exchange carriers resolve the other "legs" of compensation with federal and state regulatory agencies would jeopardize the ability of many local exchange carriers to invest in their networks, and provide their consumers quality and comparable services at affordable rates.

The forbearance test does not allow the Commission to approve Feature Group IP's defective plan for restructuring intercarrier compensation. Switched access charges are an integral part of carrier compensation. Changes to these charges – to ensure protection of consumers – should be comprehensive and include a complete understanding of the impact on all affected parties, including carriers and end-users. [20]

Feature Group IP has not satisfied the requirement of Section 10(a)(3)

Section 10(a)(3) of the Act requires that forbearance is consistent with the public interest.[21] In determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market

[20] *See* Comments of USTelecom, Missoula Plan for Intercarrier Compensation Reform, filed in CC Docket No. 01-92, October 25, 2006.
[21] 47 U.S.C. Section 160.

conditions.[22] This assessment, just like application of the other prongs of the forbearance test, weighs against approval of Feature Group IP's Petition.

Granting the Feature Group IP Petition would amount to sanctioning regulatory arbitrage for the benefit of one particular group of carriers that deliver traffic between IP networks and the PSTN to the detriment of the rest of the telecommunications industry. This action would not promote competition. Rather, artificially reducing costs for one group of carriers would only skew competition, because carriers like Feature Group IP impose the same burden on the PSTN as those carriers that would remain subject to switched access charges.

Any action by the Commission other than flatly rejecting the Petition would be "at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications needs."[23] The Petition, therefore, is not in the public interest.

I. Conclusion

Windstream respectfully requests that the Commission deny Feature Group IP's Petition and clarify contrary Commission intent. Through its Petition, Feature Group IP attempts to gain an unfair cost advantage over other carriers originating or terminating interexchange traffic with the PSTN by engaging in improper and harmful regulatory arbitrage. Feature Group IP incorrectly asserts that the ESP Exemption precludes local exchange carriers from assessing access charges to POTS traffic terminating to the PSTN simply because the technology used to originate the call is something other than POTS.

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[22] *Id.*
[23] Order on Remand, *Deployment of Wireline Service Offering*, 15 FCC Rcd 385, 390 ¶ 12 (1999).

Feature Group IP also requests, in the alternative, that the Commission forbear from the imposition of access charges to this traffic. For the reasons described in this response, however, Feature Group IP fails to prove that its expense-avoidance request meets the forbearance criteria required by the Act. Thus, Feature Group IP's thinly veiled cost-savings maneuver should be rejected by the Commission.

Respectfully submitted,

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