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	)	**WC Docket No. 07-256**
Communications Act and Sections	)	
51.701(b)(1) and 69.5(b) of the	)	
Commission's Rules	)	

OPPOSITION OF EMBARQ

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OPPOSITION OF EMBARQ

I. INTRODUCTION AND SUMMARY

Feature Group IP's forbearance petition[1] is misleading and wrong. It pretends that its request is minimal, that it is a "simple action," when it in fact calls for a radical change in law and policy, with sweeping impact on the universal service mechanism on which investment in rural America depends. It seeks to rewrite the Commission's intercarrier compensation rules by extending the exemption for enhanced service provides ("ESPs") to its interconnected voice over Internet protocol ("VoIP") traffic.[2] It

[1] 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(a)(1), and Rule 69.5(b) (filed Oct. 23, 2007). Public Notice, DA 07-5029 (rel. Dec. 18, 2007); Order, DA 08-93 (rel. Jan. 14, 2008).

[2] The petition refers to "Internet-embedded voice services," but for the purposes of the issue before the Commission, such services are no different from any other interconnected VoIP services. The petition addresses calls that originate in IP technology but are routed to the PSTN for termination to ILEC subscribers' telephones. It also seeks forbearance from originating or terminating interstate or intrastate access charges on any communications that include an "IP-based end-point" or are "connected to an IP-based platform during the call session" if "enhanced functionalities are offered to the user." *See* Petition at 10-11. Everything on its broad forbearance wish-list is premised on the ESP exemption applying to those "communications."

asks the Commission to allow its IP-originated voice traffic to evade the obligation of all carriers' voice traffic to support the public switched telephone network ("PSTN").[3]

Behind its heavy rhetoric, the petition is based on two fundamentally false assumptions. First, the petition assumes that exempting interconnected VoIP from the access regime would have little effect on universal service and the PSTN. The petition is plainly wrong in that assumption. Access revenues account for the large majority of universal service support. They provide support for network operation, maintenance, and investment in widespread areas that would otherwise be entirely uneconomic to serve. Already, the voice calls of millions of homes and businesses are served by interconnected VoIP providers, and their share of the voice market continues to grow. In an era when ILEC access lines and revenues are declining, ILECs cannot continue investing in the PSTN in high cost and rural areas if an entire class of competitor is exempted from the rules that remain the principal foundation for universal service in those rural areas.

The Commission has already found that the public interest requires that interconnected VoIP providers contribute to the universal service fund. The Commission cannot conclude the public interest supports exempting interconnected VoIP providers' traffic from the same obligation to support the PSTN. Until the Commission completes comprehensive reform of intercarrier compensation and universal service, access revenue will remain critical to ensure investment can continue in the PSTN, particularly in rural America.

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[3] Feature Group IP limits its petition to "communications" that traverse Feature Group IP's point of presence. A grant of forbearance, it says, would "extend only to Feature Group IP." Petition at 11.

Second, the petition assumes – actually, it insists – that the ESP exemption applies to voice calls terminated on the public switched telephone network if they were originated using Internet protocol technology. The petition is flatly wrong in that assumption, as well. The petition mischaracterizes existing law. The Commission's access charge rules govern all voice traffic connected to the PSTN. The ESP exemption has never properly applied to interconnected VoIP calls. Moreover, the exemption has never applied to carriers, but only to ESPs. ESPs are not carriers and have no right to interconnect with LECs, and carriers handling an ESP's traffic cannot claim the ESP exemption for themselves. Despite the petition's hyperbole, interconnected VoIP services are functionally no different than more traditional voice services provided by carriers on the PSTN.

These two false assumptions preclude granting forbearance, and largely as a consequence of them, the petition fails to meet section 10 standards.[4] To start, the petition is defective and improper. It is not filed by a carrier as a *carrier*, seeking forbearance from regulations applicable to *itself*, as section 10 requires. Rather, it is filed by a *customer* of a carrier, seeking forbearance from that carrier's filed tariffs. Section 10 is not a vehicle for a customer to seek forbearance from application of a carrier's tariffed charges.

Even apart from that defect, the petition falls far short of the individual statutory measures necessary for forbearance. The petition delivers only salesmen's hype, not

[4] 47 U.S.C. § 160.

evidence.[5] It fails to meet the requirements of section 10(a)(3),[6] because forbearance would not serve the public interest, but would actively harm it. The PSTN is the network on which the vast majority of traffic depends. It is essential that all parties using the PSTN contribute to its operation, maintenance, upgrades, and extension. If access revenues were compromised, investment in the PSTN in rural America inevitably would be undermined.

The petition likewise fails to meet the requirements of section 10(b).[7] Forbearance would grant IP-to-PSTN voice traffic a free ride on the PSTN. Feature Group IP repeatedly chants the buzz-word "innovation" and cites some amorphous "positive network effects of Internet communications" to justify giving its traffic preferential treatment, instead of enforcing its compliance with the same rules as its "legacy" competitors.[8] Forbearance, however, clearly would not promote competition, but instead would undermine it. Granting forbearance here would give one class of service provider an artificial advantage based purely on the type of technology used in originating a call, even though the carrier uses the PSTN in the very same way, enjoys the same benefits from the PSTN, and imposes the same burdens on it.

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[5] The petition (at 32) claims Feature Group IP's services "are a revolutionary, life-changing technology, and, arguably, the most vibrant innovation to come to the American economy, the global economy, in decades, perhaps centuries." If they are, then surely they can show their worth even while shouldering their share of support for the "legacy" PSTN that makes it possible for their customers to reach America's telephone subscribers.

[6] 47 U.S.C. § 160(a)(3).

[7] 47 U.S.C. § 160(b).

[8] *E.g.*, Petition at iii, iv, 3, 5, 7, 9, 10, 12, 16, 20, 21, 23, 24, 31, 32, 33, 46, 47, 48, 49, 54, 55, 64, 66, 67.

The petition also fails to meet the requirements of section 10(a)(1) and (2).[9] Enforcement of access rules on interconnected VoIP traffic remains necessary to ensure charges and practices are just and reasonable, and not unjustly and unreasonably discriminatory. Forbearance would yield unfair and discriminatory charges for carriers competing against IP-to-PSTN voice services and to ILEC subscribers, because both groups would end up shouldering higher costs if interconnected VoIP providers fail to contribute their share of support for the PSTN. Forbearance would undermine the PSTN by forcing ILECs to curtail network investment, especially in rural America. Far from being unnecessary, enforcement of the Commission's access rules is essential to ensure charges and practices are just, reasonable, and nondiscriminatory. Forbearance would sanction discrimination based on technology. It would grossly distort competition by tilting the playing field simply based on IP technology being used in originating a call, even though those competitors use the PSTN in the very same way. Enforcement is essential to protect the interests of consumers.

The petition should be denied. Moreover, the fact that Feature Group IP has filed such a petition -- its acknowledgement of growing disputes about this issue and a need for "regulatory certainty" -- confirms instead that the Commission should grant Embarq Corporation's ("Embarq") separately filed forbearance petition,[10] which would ensure that the ESP exemption is not misapplied to the detriment of consumers and competition.

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[9] 47 U.S.C. §§ 160(a)(1), 160(a)(2).

[10] Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008) ("Embarq Petition").

II. THE FEATURE GROUP IP PETITION MISCHARACTERIZES EXISTING RULES.

A. Access Charges are an Integral Part of Universal Service.

Feature Group IP mischaracterizes access charges as simply "excessive tolls" to the PSTN.[11] It belittles their critical role in supporting universal service to rural and high-cost areas.[12] In reality, the nation's universal service system is based *principally* on access charge revenues.

1. Access Charges Are Essential to Support Universal Service.

The Commission has expressly approved access charges as "just and reasonable,"[13] and they remain essential to support universal service to high-cost and rural areas. ILECs are compelled to serve uneconomic areas, and at geographically averaged rates. Access revenues account for the large majority of support for operating, maintaining, and upgrading the PSTN in high-cost and rural areas. As a universal service funding mechanism, reliance on access revenues predates the 1996 Act and creation of the universal service fund.

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[11] Petition at v.

[12] *Id.* at 63-65.

[13] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 at ¶ 41 (2000), *aff'd in part and rev'd in part*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. National Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002) ("*CALLS Order*").

Feature Group IP dismisses the importance of access support for the PSTN. It admits that "access charges historically provided implicit support for basic local telephone service in rural and high costs areas."[14] However, it argues that exempting interconnected VoIP services will "not lead to the end of the world," because universal service survived the ESP exemption's adoption in the 1980s.[15] Feature Group IP also admits that "business and residential users are migrating to IP-based communications for at least some of their voice communications," but it suggests "their numbers are still relatively small," so that the impact can be ignored "in the near term."[16]

Feature Group IP fails to mention that, even while subject to access charges, interconnected VoIP services have been growing rapidly. IP-originated voice is already becoming standard technology in the enterprise market. Among over-the-top VoIP service providers, Vonage alone claimed 2.2 million subscribers at year-end 2006, up 75% from the year before.[17] Cable telephony already counts more than 12.1 million customers, nearly all served by VoIP, and continues to grow at 4 to 4.5 million annually, likely reaching 25% mass market share by 2010.[18] A growing percentage of long

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[14] Petition at 62.

[15] *Id.*

[16] *Id.*

[17] Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2006 Results* at Table 2 (Feb. 15, 2007).

[18] *See* National Cable & Telecoms. Ass'n, *Residential Telephony Customers 2001-2006*, available at http://www.ncta.com/ContentView.aspx?contentId=61: M. Rollins & E. Schmitz, Citigroup Global Markets – Equity Research, *Teleconomy Update – Consumer Wireline Focus: Triple-Play Urgency Rising for Telcos as Share Erosion Continues* (Dec. 9, 2007) at 4, 7. Comcast alone now claims to have more residential telephone service subscribers than Embarq -- indeed, more than any ILEC except AT&T, Verizon, and Qwest.

distance carriers are also introducing IP technology in their services. If the Commission were to allow Feature Group IP and other interconnected VoIP providers to misapply the ESP exemption to their IP-to-PSTN voice calls, the impact on universal service and the PSTN would be immediate. It is not credible for Feature Group IP to suggest that the millions of VoIP lines will have no adverse impact on universal service support if the ESP exemption were applied to interconnected VoIP services.

Feature Group IP also suggests that, since the Commission has sought to reduce reliance on implicit subsidies, it should overlook the impact on support for the PSTN by exempting interconnected VoIP providers from the access rules.[19] Although the Commission and some state commissions have taken some steps to reduce reliance on implicit subsidies to support universal service, the impact has been very limited. The Commission has open proceedings on intercarrier compensation reform and universal service reform. Embarq supports efforts to reform the existing regime, and is among the many carriers that have joined the Missoula reform coalition.[20] Until those

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[19] Petition at 62-64. Feature Group IP notes that "[t]hrough the *CALLS Order* and the *MAG Order*, the Commission shifted more than $1 billion from implicit access charge-based support to explicit federal universal service funding." *Id.* at 63. It fails to note, however, that $1 billion is a tiny fraction of the support necessary. Neither the *CALLS Order* nor the *MAG Plan Order* pretended to be more than a preliminary effort, and they have had only a very modest effect on overall universal service funding needs, particularly for larger ILECs that receive limited USF support. *See CALLS Order*, 15 FCC Rcd 12962; *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 (2001) (subsequent history omitted) ("*MAG Order*").

[20] *See Missoula Intercarrier Compensation Reform Plan*, attached to Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner

comprehensive reforms are completed, however, funding the PSTN relies on the Commission's long-standing access charge regime. Piecemeal changes in rules, such as by granting Feature Group IP's petition, would be arbitrary and unreasonable and could create new regulatory uncertainty as ILECs and other carriers try to determine how a grant would impact them.

Access revenues are especially important for an ILEC like Embarq. Its service territories are chiefly rural,[21] but because of its size it receives little Interstate Access Support or state universal service support. Like other ILECs, Embarq has been obliged to continue relying heavily on access charges to provide the implicit subsidies necessary to serve high-cost and rural areas. Moreover, as an independent ILEC, Embarq serves non-contiguous service areas that, taken together, cover only portions of the many states in which its operates. Yet it is compelled to provide service at statewide averaged rates, and, as the carrier of last resort, it must extend its network to serve virtually any customer within its region, even when it is plainly uneconomic to do so. Easily a quarter of Embarq's total capital expenditures (or about $250 million in 2007 alone) is invested annually in network that is uneconomic without the support of the continued implicit support of access revenue.

Access revenue remains the universal service mechanism that funds the PSTN for rural America. Access revenues are declining as ILECs lose access lines to competitors, and access avoidance arbitrage grows. The pressure on ILECs to stop investing in high

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and Vice-Chair, NARUC Task Force to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Jul. 24, 2006).

[21] Embarq is a rural LEC, as defined by the Act, in every one of its eighteen states, except Nevada.

cost and rural areas is already growing. Feature Group IP's petition, if it were granted, would quickly and significantly undermine universal service support for rural America.

Feature Group IP presumes that implicit support through access revenue -- if it is to be allowed to continue at all -- should be limited only to the smallest rural ILECs. The petition says it is willing to "voluntarily exclude from this forbearance request any incumbent LEC from any rural area" where the Commission finds "need for implicit support" outweighs the supposed "benefits" of forbearance.[22] Feature Group IP will not "agree to any geographic exemptions, or any exemption based on the type of ILEC (e.g., small or large, rural or urban)." However, it "suggests" the Commission could "selectively exclude" only rural ILECs qualifying under section 251(f)(1) or perhaps having fewer than 5,000 access lines.[23] This reasoning underscores the inherent flaw of Feature Group IP's claim that the ESP exemption applies to IP-to-PSTN traffic at all. If the ESP exemption already applied to IP-to-PSTN voice traffic, forbearance could not be used selectively to give *some* ILECs a right to charge for access that, theoretically, they had previously had no legal right to charge in the first place. Creating that new right would require a rulemaking. And while the smallest rural carriers are the most immediately vulnerable to loss of access revenue, larger ILECs face the same carrier-of-last-resort obligations and are no less dependent on implicit universal service support to fund uneconomic network.

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[22] Petition at 11-12.

[23] *Id.* at 12.

2. <u>The Commission Has Found VoIP Traffic Shares the Obligation to Support Universal Service</u>.

In the *USF Contribution Order*, the Commission concluded that providers of interconnected VoIP services must contribute to the federal universal service fund.[24] The public interest necessarily led to the conclusion that those providers share the obligation to provide the same universal service support as traditional voice service providers, and for very compelling reasons.

i. Interconnected VoIP Providers Benefit From the PSTN.

First, the Commission reiterated that all service providers that interconnect to the PSTN receive benefit from universal service. The public interest dictates that they share the same obligation as other interconnecting service providers to support universal service funding systems.

> The Commission has previously found it in the public interest to extend universal service contribution obligations to classes of providers that benefit from universal service through their interconnection with the PSTN. We believe that providers of interconnected VoIP services similarly benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms.[25]
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> * * *
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> [I]nterconnected VoIP providers, like telecommunications carriers, have built their businesses, or a part of their businesses, on access to the PSTN. For these reasons, we find that the public interest requires interconnected VoIP providers, as providers of interstate

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[24] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at ¶ 34 (2006), *aff'd in rel. part, Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) ("*USF Contribution Order*").

[25] *Id.* at ¶ 43, *citing*, *e.g.*, *Universal Service Report and Order*, 12 FCC Rcd at ¶ 797.

> telecommunications, to contribute to the preservation and advancement of universal service in the same manner as carriers that provide interstate telecommunications services.[26]

That result makes sense, because interconnected VoIP providers are "'dependent on the widespread telecommunications network for the maintenance and expansion of their business,' and they "directly benefit[] from a larger and larger network."[27] The Commission found it "therefore consistent with Commission precedent to impose obligations that correspond with the benefits of universal service that these providers already enjoy."[28]

Feature Group IP unquestionably benefits from interconnection to the PSTN in the same way as competing service providers. It just wants to be exempted from this obligation -- from the duty to comply with the "quagmire" of access rules -- because it believes giving interconnected VoIP this artificial advantage will promote "growth" and the unspecified "promise of innovative IP-based communications applications."[29] The Commission need not be impressed by the petition's hype about the supposed "innovation" of interconnected VoIP applications. In truth, there is no shortage of innovation in what Feature Group IP derides as the "legacy circuit switched" industry.

Competition is driving innovation everywhere. All carriers, including ILECs, are introducing IP technologies and fiber in their networks. Embarq, for example, has been upgrading from circuit-switching to packet-switching, expanding high speed Internet

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[26] *USF Contribution Order* at ¶ 43.

[27] *Id.*, *quoting Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 (5th Cir. 1999), *cert. denied sub nom. Celpage, Inc. v. FCC*, 530 U.S. 1210 (2000).

[28] *Id.* at ¶ 43.

[29] Petition at 64-65.

coverage farther and farther into its local service territories, and adding fiber to its network. Embarq recently completed network upgrades in its Las Vegas, Nevada service territory providing industry-leading data speeds. Embarq has also made a name for itself as an innovator, including with its industry-leading "Smart Connect" product, which allows business customers to move calls between wireless and wireline networks, without interrupting the call.[30]

The petition's breathless enthusiasm about "innovative new services" is an attempt to obscure the mundane reality that, regardless of the technology used in originating the call, IP-to-PSTN voice traffic consists of calls from one person to a telephone subscriber on the PSTN. The voice calls of interconnected VoIP providers use the PSTN, and benefit from the PSTN, in the same way that traditional carriers' calls do.

ii. Competitive Neutrality Compels that Interconnected VoIP Support the PSTN Through Access Charges.

Second, the *USF Contribution Order* recognized that the principle of "competitive neutrality" requires that interconnected VoIP providers contribute to universal service funding systems.

> Competitive neutrality means that 'universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.' As the Commission has noted, interconnected VoIP service 'is increasingly used to replace analog voice service.' As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly

[30] On October 7, New Paradigm Resources Group gave Embarq its "Communications Innovator Award" for this new product.

> inappropriate to exclude interconnected VoIP service providers from universal service contribution obligations.[31]

The Commission also recognized that any other conclusion would distort the marketplace and encourage and reward regulatory arbitrage.

> Moreover, we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice service to customers or to create opportunities for regulatory arbitrage. The approach we adopt today reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations.[32]

The Commission also "note[d] that the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers."[33]

Feature Group IP's petition, in contrast, is premised on giving interconnected VoIP providers preferential treatment. It seeks to exempt their IP-to-PSTN voice traffic from the obligation to support the PSTN that all carriers are supposed to share equally. It would create the ultimate example of regulatory arbitrage, distorting competition by giving IP-to-PSTN voice traffic a purely artificial regulatory advantage.

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[31] *USF Contribution Order* at ¶ 44, *quoting Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 at ¶ 42 (2005) ("*CALEA Order*").

[32] *USF Contribution Order* at ¶ 44.

[33] *Id.* at ¶ 45.

3. It Would Be Arbitrary and Capricious to Exempt IP-to-PSTN Voice Traffic From the Access Charge Regime.

The Commission cannot find it in the public interest to allow carriers to avoid paying access charges on IP-originated traffic delivered to the PSTN, when it has already found the public interest requires that interconnected VoIP providers contribute to "the support mechanisms" of universal service.[34] Access revenues are an integral part of the mechanisms of universal service. Having found that interconnected VoIP providers benefit from the PSTN in the same way as carriers, the Commission cannot reasonably find that the IP-originated voice traffic that they route for termination to the PSTN does not need to support universal service through the access regime. Moreover, having found that competitive neutrality requires interconnected VoIP providers to contribute to universal service funding, the Commission cannot reasonably find that IP-to-PSTN voice calls should be exempted when competing service providers are required to support the PSTN through access charges for their voice calls.

Feature Group IP's petition would be more than just bad policy. It would directly contradict established Commission rules and policy precedent. Granting the petition would be arbitrary and capricious.

B. Under Existing Law, IP-to-PSTN Calls Are Subject to Access Charges.

Feature Group IP claims that ILECs (AT&T in particular) are "wrongfully" insisting that access charges apply to IP-to-PSTN voice traffic. The petition objects to being "forced" to interconnect subject to the same "archaic" rules that apply to all other

[34] *Id. at* ¶ 44

carriers as other all other phone-to-phone traffic. In reality, the ESP exemption has never applied to IP-to-PSTN voice traffic.

1. The Commission's Access Rules Govern all Voice Traffic Connected to the PSTN.

The Commission's access charge regime ensures ILECs can "recover the costs" of originating and terminating other service providers' non-local telecommunications traffic.[35] ILECs have been required to look to other carriers for revenue to help cover the high costs of meeting government mandates to build, maintain, and upgrade ubiquitous local networks and to provide service at averaged, affordable rates. Under the Commission's rules, ILECs are expected to bill access charges to other carriers for all non-local traffic delivered to them for termination on the PSTN. The ESP exemption is a very narrow exception to that rule.

Access charges apply broadly. The Commission recognized that access revenue is necessary so that ILECs can recover costs of providing the ubiquitous local networks that make up the PSTN. As carriers-of-last-resort, ILECs are required to build, maintain, and operate their networks even in high cost and rural areas where it is uneconomic without access revenue. Rural carriers like Embarq are especially reliant on access charges to invest in their networks. Without that revenue, they would have no choice but to stop investing in rural areas, eliminating hope of continued rural broadband upgrades and eventually compromising service quality and network capabilities.

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[35] *CALLS Order* at ¶ 130.

In the *IP Enabled Services* proceeding, the Commission explained that the "cost of the PSTN should be borne equitably among those that use it in similar ways."[36] That means that "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."[37] Feature Group IP's petition pretends otherwise, but access charges apply the same to all carriers' voice traffic terminated on the PSTN, regardless of how it originated.

2. The ESP Exemption Does Not Extend to IP-to-PSTN Voice Traffic.

The Commission allowed ESPs a limited exemption from the access charge regime, because they are not carriers and do not use the PSTN in the way carriers do. The *Access Charge Reform Order* explained that ESPs should not be assessed access charges "solely because [they] use incumbent LEC networks to receive calls from their customers."[38] They do not "use the public switched network in a manner analogous to IXCs." The "characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers)" make them more like "other classes of business customers."[39] ESPs are not carriers delivering calls to other carriers' subscribers on the PSTN. They are end users, akin to toll-free service subscribers, whose own customers use the PSTN to contact them to receive their information services.

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[36] *IP Enabled Services NPRM* at ¶ 61.

[37] *Id.*

[38] *Access Charge Reform Order* at ¶ 343.

[39] *Id.* at ¶ 345.

The Eighth Circuit expressly relied on this distinction in use when it upheld *Access Charge Reform Order*. The court pointed out that ESPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."[40] Although two types of service providers may "use the LEC network services and facilities that might be 'technologically identical,'" it found the exemption was not unreasonably discriminatory, because "the services and facilities provided by the LEC are 'distinct' if the carriers are making different uses of them."[41]

More recently, the Commission's decision in the *Free World Dialup Order* reflected this same distinction based on use of the PSTN.[42] The Commission concluded that Pulver.com was offering an information service, not a telecommunications service. Peer-to-peer services do not use the ILEC networks in the same way as traditional voice services -- or in the same way as IP-to-PSTN voice services. The Commission found that Pulver.com provides no "transmission" service, and since it requires a broadband connection at both ends, it does not even contact the PSTN. Its users cannot call telephones on the PSTN.

Feature Group IP's petition is not about information services or any enhanced services to which the ESP exemption has legitimately applied. Its petition claims the

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[40] *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

[41] *Id.* at 542. *See also id.* at 544 (noting the exemption applies to "ISPs that … utilize the local networks differently" than carriers).

[42] *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) ("*Free World Dialup Order*").

ESP exemption stretches to IP-to-PSTN voice services. The Commission, however, has never intended the ESP exemption to apply to IP-to-PSTN voice services. The petition overlooks the history of the ESP exemption and refuses to acknowledge that interconnected VoIP services are just IP-originated substitutes for more traditional voice services. Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any traditional voice provider. When carriers route their calls to ILECs for termination, they are not acting as ESPs, and they cannot qualify for the ESP exemption.

3. Interconnected VoIP is Functionally No Different Than More Traditional Voice Services Supported by the PSTN.

The petition tries to portray "Internet embedded voice communications" as something entirely different from other services. Any interconnected VoIP service, however, is functionally the same as traditional voice service. Most VoIP services today are marketed as direct substitutes for traditional telephone services. Ultimately, it does not matter what type of technology is used to originate a voice call, or what type of equipment is used, or what supposed innovations are attached to the service. Consumers use interconnected VoIP services to make voice calls to telephone subscribers on the PSTN. The core functionality of interconnected VoIP service is the ability to have a voice conversation with another service provider's customer on the PSTN. Other services or other enhancements -- call forwarding, networking, voice mail, or unified messaging -- do not change the underlying character of the service.

As far as the PSTN is concerned, an IP-originated voice call (whether fixed or nomadic) is technologically no different from any call originated by a traditional telephone. When the ILEC receives the IP-to-PSTN call, it is delivered by a carrier, not

an ESP. It is delivered in TDM format, not in IP format. It is for all practical purposes indistinguishable from any conventional telephone call being routed to the ILEC for termination on the PSTN.

Since the functionality of interconnected VoIP is no different than traditional services once the traffic hits the PSTN, Feature Group IP cannot fairly claim the ESP exemption justifies giving it preferential regulatory treatment over its competitors, solely because their traffic used a different technology before being delivered to the PSTN for termination. Interconnected VoIP providers "utilize LEC services and facilities in the same way [and] for the same purposes as other customers" subject to access charges.[43] Their calls impose the same burden on the PSTN, uses the same facilities, and enjoy the same benefits from the PSTN as traffic from conventional carriers. Feature Group IP and other interconnected VoIP providers have no reason to expect that carriers bearing their traffic should contribute a lower share of support for the PSTN than everyone else.

III. FEATURE GROUP IP HAS NOT MET THE STANDARDS FOR FORBEARANCE.

A. The Petition Is Improper Under Section 10.

Feature Group IP fails the most basic requirement for forbearance. The petition does not establish standing to seek forbearance. The Commission should dismiss the petition on that ground alone.

[43] *Southwestern Bell Tel. Co.*, 153 F.3d at 542.

Section 10 permits a "telecommunications carrier" to petition for forbearance "with respect to that carrier" or that "class of carrier."[44] The petitioners are not addressing regulations applicable to themselves as carriers. Four of the five petitioners are not even *carriers*,[45] and they unquestionably have no standing under section 10.

Feature Group IP seeks forbearance from section 251(g), a statutory provision that imposes requirements on dominant common carriers and confirms their right to receive compensation for the access services they are compelled to offer under tariff. That statutory section does not apply to Feature Group IP. Section 10 does not grant standing to a carrier to seek forbearance from regulations that apply to another, different class of carrier. It follows that forbearance also cannot be used to invalidate another carrier's lawfully tariffed charges.

Moreover, the petitioners themselves contend they are not subject to access charge rules for IP-to-PSTN voice calls. They claim their IP-to-PSTN voice calls are "enhanced services" under section 64.702(a) of the Commission's rules. They certainly can have no standing under section 10 if they are acting in their capacity as enhanced service providers, since by definition ESPs are not carriers. ESPs also have no right to

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[44] Section 10(c) provides that "Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers."

[45] Feature Group IP West LLC, Feature Group IP Southwest LLC, Feature Group North LLC, and Feature Group IP Southeast LLC are not listed in the FCC Carrier Locator Directory as federally registered carriers. The petition claims that Feature Group IP's businesses currently provide services only in Texas. They "do not provide any intrastate services," ostensibly because its use of IP renders all of its services "purely and solely interstate." Petition at 19 n.27.

demand interconnection, which of course is a key reason the ESP exemption has never applied to IP-to-PSTN voice traffic.

Feature Group IP thus is in a very curious position. Four of its five petitioning companies are not carriers, and it purports not to be a carrier subject to these access rules from which it seeks forbearance. Instead, it seeks forbearance from regulations that apply to a different carrier -- indeed, a class of carrier of which it is not a member. Its petition turns the concept of forbearance on its head.

Section 10 is not an invitation for a customer of carriers to seek forbearance from its obligation to pay those carriers' tariffed charges. The petitioners lack standing to seek this forbearance under section 10.

B. The Petition Fails to Show That Forbearance From Enforcing Access Charge Rules Would Be in the Public Interest.

The petition fails to meet section 10(a)(3)'s standards. Feature Group IP claims forbearance is in the public interest, because it "will reduce regulatory uncertainty and associated costs" and thereby "boost competition and the introduction of innovative new services."[46] Feature Group IP claims it and other interconnected VoIP providers would be able to expand their operations if "ILECs (and particularly AT&T) will not be able to tie us down in litigation for years on end in any and every state."[47]

Embarq values regulatory certainty and agrees that litigation over these issues should be brought to an end. The public interest in regulatory certainty, however, dictates *denying* Feature Group IP's petition and instead granting Embarq's petition in

[46] Petition at 49.

[47] *Id.*

WC Docket No. 08-8. The ESP exemption has never properly applied to IP-to-PSTN voice calls. It applies to enhanced services providers -- acting like end-user business customers -- being contacted by their own subscribers. It does not apply to carriers routing voice calls for termination to third-party PSTN subscribers. Ironically, it is misguided service providers like Feature Group IP that create uncertainty by pretending that the ESP exemption applies to IP-to-PSTN voice calls, and then by insisting it is "ILECs that want to change the rules."[48]

As for litigation burdens, Feature Group IP has failed to win its Texas arbitration battles not because of intransigence by "entrenched monopolists" at AT&T, but because Feature Group IP has not persuaded the Texas commission that its IP-originated voice traffic is entitled to exemption from access charges that support the PSTN.[49] Other carriers with IP-to-PSTN voice traffic have pressed similar litigation in other states, wasting the resources of state commissions and courts in an attempt to game the system. While those challengers have not succeeded on the merits of this issue,[50] some courts and state commissions have hesitated to issue decisions on the appropriate treatment of ESP traffic, expecting the Commission to take the lead and resolve these issues cleanly for

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[48] *Id.* at 60.

[49] Petition at 67. Their arbitration dispute is before the Texas Public Utilities Commission in *Petition of UTEX Communications Corp. for Post Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Corporation*, Docket No. 3323 (Tex. P.U.C.). AT&T has introduced evidence in that proceeding showing UTEX Communications is laundering traffic, routing nonlocal traffic over local trunks for termination on the PSTN to evade its tariffed access charges .

[50] *See, e.g., Cox California Telecom v. GlobalNAPs* California, Decision 07-01-004 (Cal. P.U.C. Jan., 11, 2007) (rejecting Global NAPS claim to be exempt from access charges for IP-to-PSTN voice traffic).

them.[51] In the meantime, the uncertainty created by challengers like Feature Group IP serves only to erode investment in the PSTN in rural America. The public interest warrants curtailing such litigation and disputes. The Commission should deny Feature Group IP's petition and grant Embarq's.

The petition claims forbearance is in the public interest, because it "will increase investment in advanced services and in the telecommunications sector generally," which will "promote innovation," create "greater efficiencies," "spur job growth," and "preserve U.S. preeminence in Internet and telecommunications applications."[52] This is just more self-aggrandizing rhetoric. The telecom industry is already innovating rapidly, and ILECs are in fact leaders in technology and innovation. Where IP-based technologies and applications provide benefits to customers or efficiencies to service providers, they must prove their merit in a competitively neutral regulatory environment. IP-based technologies do not need an artificial regulatory advantage, which would be the result if IP-to-PSTN voice calls were exempted from the obligation to support the PSTN.

The petition wrongly assumes that continued investment in the PSTN is somehow automatic. ILECs provide the network on which the vast majority of the nation's

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[51] *E.g., Frontier Tel. Co. v. USA Datanet Corp.*, Decision and Order, No. 05-CV-6056 (W.D.N.Y. Aug. 2, 2005) (denying motions to dismiss but staying proceedings pending Commission action); *Southwestern Bell Tel. v. Vartec Telecom,* Memorandum and Order, No. 4-04-CV-1303 (E.D. Mo. Aug. 23, 2005) (dismissing issues based on primary jurisdiction); *Level 3 Communications v. Qwest Corp.*, Order (W.T.U. Aug. 26, 2005) (denying summary determination); *Southwestern Bell Tel. v. Global Crossing*, Memorandum and Order, No. 4-04-CV-1573 (E.D. Mo. Feb. 7, 2006) (staying proceedings pending referral to the Commission); *SNET v. Global NAPS, Inc.*, Ruling, No. 3:04-CV-2075 (D. Conn. Mar. 26, 2007) (granting and denying partial summary judgment).

[52] Petition at 49-50.

telecommunications and Internet traffic depends. In rural America especially, the PSTN is the critical network. Allowing IP-to-PSTN traffic to free-ride the PSTN -- exempting some carriers from supporting the PSTN through access revenues -- will serve only to decrease investment in that network. Facing access line loss and declining revenues, ILECs are already under pressure to reduce capital expenditures, particularly in rural and high-cost areas. Far from encouraging investment and job growth, if Feature Group IP's petition were granted, the nation would see a decline in investment in rural areas as ILECs are denied ever more of the access revenue necessary to support the PSTN.

The petition volunteers that explicit high-cost universal service funding could be increased to replace the implicit subsidies provided by access revenues. Admittedly, if the Commission were to decrease implicit subsidies by exempting IP-to-PSTN voice traffic, it would need first to increase explicit high-cost universal service support. However, Congress and the Commission have determined that growth of the universal service fund should be restrained, at least until intercarrier compensation and universal service reforms are completed. In the meantime, if the Commission intends to limit growth in the fund, it must resist efforts by parties like Feature Group IP that would undermine the universal service support received through access revenues.

Regardless, the Commission already concluded that it cannot find that forbearing from enforcement of access charges is in the public interest. In 2006, Core Communications petitioned for forbearance from section 251(g), arguing that intercarrier compensation should be subject to interconnection agreements negotiated under section

251(b)(5).[53] Denying the petition, the Commission found the Act clearly envisions new rate regulation by the Commission. Until access reforms are completed, that makes forbearance from section 251(g) incompatible with Congressional intent and with any finding that forbearance meets section 10's requirements.[54]

C. The Petition Fails to Show That Enforcing Access Rules on Interconnected VoIP Calls Is Unnecessary to Ensure Just, Reasonable, and Nondiscriminatory Charges and Practices.

The petition claims that forbearance would yield just and reasonable "charges and practices for exchange of traffic from a voice embedded IP communications provider's telecommunications carrier service to a terminating LEC," because their charges would be set in interconnection agreements (arbitrated if necessary), and presumably lower than if their calls were subject to terminating access charges.[55] It should be sufficient, Feature Group IP asserts, that ILECs will receive reciprocal compensation under section 251(b)(5).[56] It believes that "existing ILEC rates are more than adequate to ensure LECs have a reasonable opportunity to recover their prudently incurred costs," and volunteers that ILECs could ask the Commission to waive price caps.

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[53] Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Rate Regulation Pursuant to § 251(g) and for Forbearance from Rate Averaging and Integration Regulation Pursuant to § 254(g), WC Docket No. 06-100 (filed Apr. 27, 2006).

[54] *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118 (21007), *pet. for rev. pending*, *Core Communications v. FCC*, No. 07-1381 (D.C. Cir. 2007).

[55] Petition at 57. Given that Feature Group IP refuses to recognize ILECs' need for revenue to help offset carrier-of-last-resort obligations, if forbearance were granted, state commissions could expect an increase in arbitrations.

[56] *Id.*, *referring to* 47 U.S.C. § 251(b)(5).

In essence, the petition suggests that ILECs' consumers can pay more, other interconnecting carriers can pay more, and ILECs can live with less revenue -- all to exempt IP-to-PSTN voice calls from the obligation to support the PSTN. Granting forbearance would artificially lower costs for interconnected VoIP providers, and shift their costs to other parties.[57]

Such a policy would be patently discriminatory, and it inevitably yields unjust and unreasonable rates for everyone else. Granting the petition would exempt one group of competitors purely because of the technology they use in originating a voice call. Interconnected VoIP customers use their services for the same purpose as other customers: to make a voice call to a subscriber on the PSTN. They use the PSTN in the same way, and impose the same costs. Indeed, though their calls may originate in IP, they are translated into conventional TDM before being delivered to the ILEC for termination.

The Commission has already found that competitive neutrality requires that interconnected VoIP providers should contribute to the universal service fund, because exempting them would be discriminatory and unfair to competitors.[58] Yet the petition pretends that interconnected VoIP providers can, even should, be treated differently from other voice calls in supporting the PSTN that they use. It expects the Commission to rationalize this discrimination in favor of IP-originated voice services based on vague notions that "innovation" would justify it.

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[57] Petition at 58.

[58] *USF Contribution Order* at ¶¶ 37, 44, 45.

Such a policy would also yield unjust and unreasonable charges and practices for other parties. Feature Group IP suggests ILECs could raise rates to other carriers to recoup revenues that otherwise would have been paid on IP-to-PSTN voice traffic. In other words, other customers would be obliged to pay a disproportionate share of access-based support for the PSTN, just so interconnected VoIP providers can have their calls terminated on the PSTN artificially cheaply. Under section 10(a)(1), the Commission must consider the impact of forbearance on all affected parties, not just the interests of the petitioner.

D. The Petition Fails to Show That Access Charge Rules Are Unnecessary to Protect the Interests of Consumers.

The petition blithely asserts there is "no tenable argument that grant of [its] Petition would adversely affect consumers."[59] It acknowledges that access charges provide "implicit support for basic local telephone service in rural and high costs areas,"[60] but says the Commission should ignore the impact of exempting interconnected VoIP calls from those rules. Feature Group IP says that consumers' rates would not "become unaffordable," and the Commission need not worry about resulting "wide discrepancies between urban and rural areas," because the Commission and state authorities could act "to address such discrepancies" by increasing explicit universal service subsidies.[61] Feature Group IP also contends that the creation of the ESP exemption in the 1980s itself did not bring about "the end of the world," its extension to

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[59] Petition at 61.

[60] *Id.* at 62.

[61] *Id.* at 61.

IP-to-PSTN voice traffic likely will not be a problem.[62] It also argues that it should be enough that interconnected VoIP providers now contribute to the universal service fund.

Feature Group IP ignores the fact that consumers necessarily pay for much of the cost of universal service. One can debate whether end users should be paying more than they currently pay to support universal service goals, and whether interconnecting carriers should be paying less. That is an issue before the Commission in the pending intercarrier compensation and universal service reform proceedings. One cannot fairly argue, however, that it is in the interest of consumers to pay more in universal service assessments simply to subsidize interconnected VoIP services providers who want their traffic exempted from the existing access rules. The Commission has been trying to reduce the growth of the universal service fund, at least until its comprehensive reform efforts have been completed), principally to protect the interests of consumers.[63] As for end user service rates, it is unrealistic to assume ILECs can solve the problem by charging higher end user rates, even if state commissions approved. Many of Embarq's rural service areas generate monthly costs of over $120 a month,[64] and in lower-cost service areas Embarq competes with service providers that do not bear any carrier-of-last-resort obligation.

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[62] *Id.*

[63] For the last three years, the universal service contribution factor has averaged above 10%.

[64] For example, serving each household in the Sylvia, Kansas exchange costs Embarq $122.56 per month. In Kenansville, Florida exchange, the average monthly cost is $143.72; Koon Creek Texas, $123.42; and Reinersville, Ohio, $152.77.

The petition also ignores the fact that the universal service fund provides only a portion of the support necessary for the PSTN. Far from being "wholly unnecessary to protect the future of universal service,"[65] access revenues remain critical to the PSTN. Embarq, for example, has high-cost rural service territories in 17 of its 18 states, yet it receives relatively little direct universal service support. Feature Group IP also is patently wrong in suggesting that granting its petition is "unlikely to have a significant impact on PSTN revenues in the near term." Even without the artificial subsidy of exemption from access charges, IP-originated voice services have been growing dramatically. If the petition were granted, IP-originated voice calling would receive a major cost advantage over competing voice services, causing its share of the voice calling market to rise artificially. The incremental reductions in ILEC access revenues would have a genuinely significant impact on the ability to fund the operation, maintenance, and upgrade of networks in rural America.

It is not enough to blame state commissions, as Feature Group IP does, for failing to adopt new explicit subsidies to replace the implicit one included in access rates. It is not enough to say the Commission has taken some steps to reduce implicit subsidies in the *CALLS Plan* and the *MAG Order*.[66] The interest of consumers calls for ensuring all voice calls contribute to support the PSTN.

The petition is also wrong in claiming there would be some "dramatic boon," some "incredible net positive result to society when as a consequence of forbearance more consumers begin to use voice-embedded IP applications." Fundamentally, people

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[65] Petition at 62.

[66] *Id.* at 63.

utilize interconnected VoIP services to make telephone calls, in the same manner as subscribers on the PSTN. The service innovations trumpeted by the petition are really little different from services being developed and deployed by other carriers, including Embarq. Judging from the petition, Feature Group IP's business plan is less about delivering innovation than about regulatory arbitrage -- about the evasion of access charges applicable to all IP-to-PSTN voice traffic.

In this instance, consumers' interests and the public interest are one and the same. The Commission has already found that the public interest requires competitively neutral rules for supporting the PSTN. It requires "universal service support mechanisms and rules [that] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[67] Feature Group IP argues that it is enough that the Commission has ordered interconnected VoIP providers to contribute to the universal service fund. Feature Group IP's petition would harm consumers by raising costs for most consumers and undermining the PSTN on which the vast majority of voice and Internet traffic depends. At the same time, there is no truth to the petition's self-promoting assertion "that there will be an incredible net-positive result to society" because of the supposed wonders of "voice-embedded IP applications" and "group forming networks."[68]

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[67] *CALEA Order* at ¶ 42.

[68] Petition at 61.

IV. THE COMMISSION SHOULD GRANT EMBARQ'S PETITION TO ENSURE THE ESP EXEMPTION IS NOT MISAPPLIED.

Feature Group IP claims that it is concerned that VoIP service providers "suffer from legal and market uncertainty regarding IP-PSTN intercarrier compensation."[69] To the extent that any interconnected VoIP provider may be uncertain about the obligations of carriers to pay access charges even on IP-originated voice calls, the Commission can remove that uncertainty by denying Feature Group IP's petition and granting Embarq's petition.

It is clear enough that the ESP exemption does not apply to carriers routing IP-to-PSTN voice traffic. It is certainly clear that Feature Group IP's petition does not meet section 10 standards, and indeed would be harmful to the public interest. Nevertheless, the very fact that Feature Group IP filed such a request -- and that fact that some self-interested parties will doubtless support it -- shows the incentive that some interconnected VoIP providers have to mischaracterize the ESP exemption and to try to create confusion about carriers' obligation to support the PSTN when sending IP-originated voice calls to ILECs for termination.

Feature Group IP's petition, therefore, shows that it is not enough for the Commission just to deny the petition. It shows the Commission should grant Embarq's forbearance petition, to ensure the ESP exemption is not misapplied IP-to-PSTN voice calls.

Granting Embarq's petition would resolve the problem reflected by Feature Group IP's filing. Embarq's petition asks the Commission (1) to forbear from enforcing the

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[69] *Id.* at 41.

ESP exemption, as adopted by Commission orders, wherever it is claimed to apply to IP-to-PSTN voice traffic; (2) to forbear from applying section 69.5(a) of its rules to IP-to-PSTN voice traffic; and (3) to forbear from enforcing section 251(b)(5) of the Act to the provision of non-local traffic terminated as voice traffic on the PSTN.[70]

Embarq's petition is appropriate for several reasons.[71] First, granting Embarq's petition will ensure that the ESP exemption is not used to give an artificial competitive advantage to one group of service provider. The ESP exemption was intended to promote the growth of the early ESP industry, but it never gave any particular provider a regulatory advantage. In contrast, extending the ESP exemption to IP-originated voice calls would give a grossly unfair advantage to one class of voice service providers, just because they use IP-technology in originating voice calls. Services like those trumpeted by Feature Group IP are not different in any meaningful way from those provided by ILECs; Embarq and other ILECs are increasingly using IP technology in their networks and are introducing services and features very similar to what Feature Group IP claims to offer.[72] Their calls use the PSTN in the very same way.

Second, granting Embarq's petition will maintain needed support for the PSTN.[73] Despite the growth in IP-enabled voice services, the PSTN provided by LECs like Embarq is the network on which the vast majority of the nation's traffic will continue to depend for many years. Regardless of technology, the Commission's intercarrier

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[70] Embarq Petition at 17-18.

[71] *Id.* at 6-12.

[72] *Id.* at 10 & n.27.

[73] *Id.* at 23-29.

compensation system remains vital to the health of the PSTN. It helps ensure that all users of the PSTN provide support for the very real costs of maintaining and upgrading that expensive network. Without that support, investment in the PSTN will only be short-changed, especially in rural, high-costs environments that most need infrastructure and broadband investment. Rural ILECs like Embarq are particularly reliant on access revenues to support their carrier-of-last-resort obligations. In its service areas, Embarq is the only entity that is obligated to provide service to virtually anyone on request, and at averaged rates often far below actual costs. The access charges applied to non-local calls are a critical part of universal service support. Granting Embarq's petition will protect investment in the PSTN and promote the extension of advantaged telecommunications capability to rural areas where such investment otherwise will become increasingly difficult to justify.

Third, the Commission has open proceedings on intercarrier compensation and universal service reform. Embarq supports those efforts. Reform, however, must be done comprehensively and not piecemeal.[74] It would be arbitrary and unreasonable to allow some carriers to claim a regulatory exemption base on just one aspect (access charges) of the complex and interrelated rules governing how the PSTN is supported. Until the Commission completes intercarrier compensation and universal service reform, it should take steps to protect the integrity of the existing regime. Embarq believe it is self-evident that IP-to-PSTN access traffic does not fall within the narrow scope of the ESP exemption. The Commission can and should reduce regulatory arbitrage, minimize

[74] *Id.* at 21-22

disputes, and protect and promote competition by forbearing from any application of the ESP exemption whenever it is claimed to treat IP-originated voice calls differently from any other calls that terminate on the PSTN.

Accordingly, unlike Feature Group IP's petition, Embarq's meets section 10's standards for forbearance.[75] Section 10(a)(1) is met because enforcing the ESP exemption, to the extent it may be claimed to apply to IP-originated phone-to-phone voice traffic that terminates on the PSTN, is not necessary to ensure that charges or practices are just and reasonable, and no unjustly or unreasonably discriminatory. On the contrary, forbearance will ensure that all phone-to-phone calls are subject to the same access charges -- instead of discriminating in favor of one class of service provider or consumer. Section 10(a)(2) is met because enforcement is not necessary to protect consumers. Instead, forbearance will benefit consumers by ensuring that IP-enabled voice calls contribute their fair share of the costs of the PSTN, and so ensuring that non-VoIP consumers are not forced to pay higher costs. Section 10(a)(3) is met because forbearance is in the public interest. It will protect and promote competition by ensuring the same rules apply to all service providers, and it will preserve support that is critical for the PSTN and for the deployment of advanced telecommunications infrastructure, particularly in rural America.

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[75] *Id.* at 18-29.

V. CONCLUSION

The ESP exemption has never properly applied to IP-to-PSTN voice traffic, and it would be wrong to accept Feature Group IP's invitation to compromise universal service support, undermine investment in the PSTN and in rural America, and undermine competition through such a policy. The Commission should deny Feature Group IP's petition. It should instead grant the petition filed by Embarq in WC Docket No. 08-8, and confirm that interconnected VoIP calls share, with all other phone-to-phone calls, an obligation to support the PSTN through access charges.

Respectfully submitted,

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