

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

In the Matters of:	)	
	)	
Petition of Embarq for Forbearance	)	
from Section 69.5(a) of the Commission's	)	WC Docket No. 08-8
Rules, Section 251(b) of the	)	
Communications Act and Commission	)	
Orders on the ESP Exemption	)	
	)	
Petition of Feature Group IP for Forbearance	)	
from Section 251(g) of the Communications	)	
Act and Sections 51.701(b)(1) and 69.5(b) of	)	WC Docket No. 07-256
the Commission's Rules	)	

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Google Inc., by its attorneys, respectfully submits these comments in response to the above-referenced petitions of Embarq and Feature Group IP (the “Petitioners”) that request significant FCC action on intercarrier compensation and the termination of voice over Internet Protocol (“VoIP”) and other IP traffic on the public switched telephone network (“PSTN”). As discussed below, Google urges that any Commission action in these proceedings should encourage interconnectivity of IP traffic, bolster broadband deployment, and support innovation of IP services with voice components (“IP Voice”).

**Introduction**

IP Voice today represents a tremendously diverse array of communications services, from over-the-top VoIP to multimedia conferencing, gaming, social networking, unified messaging, commerce services and countless other applications that include a voice communications component to a greater or lesser degree. The virtuous cycle of rapid innovation continues every day to re-define the breadth and variety of IP Voice services, enriching consumers that choose

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them and spurring on the U.S. economy with new cost-savings, productivity gains and the creation of small businesses and jobs in the IP and related sectors.

Like almost all web-based multimedia companies, Google is an active provider of IP Voice services and is continuously innovating in response to consumer demand. Many services at the “bleeding edge” of IP innovation that effectively raise the consumers’ communications experience well-beyond that of Plain Old Telephone Service (“POTS”) include voice components in conjunction with enhanced data processing, interaction with stored information, routing and software applications. Google’s GrandCentral service, for example, offers consumers the use of software applications to simplify voice communications (*e.g.*, a single “unified” phone number) and to enhance personal productivity and enjoyment (*e.g.*, call screening, “unified” voicemail, linked contact lists). Similarly, GOOG-411 allows consumers to search and connect to homes and businesses throughout the U.S. and Google Talk enables individual and group chats with voicemail capabilities for use in email, social networking or stand-alone, facilitating connections among friends and colleagues.

Any FCC action that would interject a new regulatory cost model – ranging from “bill and keep” to full-scale intrastate access charges – into the torrent of IP Voice innovation should proceed only with careful consideration for what is best for consumers, competition, and innovation. Thus, Google agrees with Petitioners that the Commission should continue to address the treatment of IP traffic “holistically and comprehensively” in its general intercarrier compensation proceedings. In doing so, the FCC would be well-served to examine holistically questions of reasonable and efficient carrier practices on the exchange of IP traffic, IP inconnectivity with carrier networks (including the PSTN), the termination and origination of IP traffic on the “last mile,” and the interconnection of IP networks.

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To be sure, a piecemeal approach to IP intercarrier compensation, focusing on just a single aspect of the matter – terminating access pricing – with regard to just one of several networks – the wireline incumbent LEC PSTN – would invite reign by the law of unintended consequences, and allow the situation of a few incumbent carriers to overwhelm IP innovation and harm consumers. Importing the PSTN legacy access charge framework for IP services is precisely the wrong approach, and the FCC should decline Embarq’s invitation to extend carrier per-minute terminating access charges to IP traffic solely because an IP service has a voice component. As Feature Group IP correctly points out, the FCC should encourage IP innovation and allow software applications including voice components to flourish. The Embarq petition invites a less fortunate outcome.

Rather than resort to legacy regulations from another era, Embarq and other PSTN carriers must accept that economic and technological evolution will continue to erode their historical and significant reliance on revenues from PSTN terminating access payments. Already, VoIP via broadband reduces consumer costs by eliminating origination PSTN access charges. Current and next-generation wireless networks (both licensed and unlicensed) as well as cable networks also continue to avoid the PSTN legacies of terminating and originating per-minute access charge costs.

Indeed, even if granted, the Embarq Petition would at best achieve only a short-term and pyrrhic victory for incumbent LECs, at the expense of consumers. For example, if forbearance authority were exercised, Embarq customers unable to transition to broadband or wireless would be forced to live with the stifling effects of being callers to whom per-minute access charges apply. These same unfortunate customers would bear even heavier costs of forbearance over time, as Embarq would have obvious economic disincentives to invest extensively in broadband

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networks or IP services for such customers if those services would cannibalize Embarq's per-minute access revenues. For Embarq customers that have broadband or wireless choices, forbearance would only further encourage them to abandon the PSTN at an even more rapid rate in favor of lower-cost and more feature-rich IP services. Ultimately, the virtuous cycle of market factors that are enabling IP services and devices to meet consumer demand better than the PSTN is a force more powerful and permanent than the sought-for regulatory protections.

In any case, Embarq here is pursuing a flawed remedial choice, and asks the FCC to employ its forbearance authority where it would be both unfounded and unlawful. To take Embarq's allegations at face value – that it seeks forbearance because “carriers” are defying terminating access charge obligations on groundless access charge exemption defenses – leads to the inexorable conclusion that Embarq is complaining of an *enforcement* matter. While a forbearance petition may be less expensive and more time efficient for Embarq than multiple federal court collection actions, the use of forbearance in this case would not only harm consumers and competition but also amount to an abuse of that authority.

### Discussion

#### **I. Extending Access Charges to Voice IP Services Would Stifle Innovation and Economic Growth, Disserve Consumers and Harm Competition in Multiple Markets**

Embarq's proposed extension of long distance carrier access charges to the IP world should be denied. Imposing such per-minute charges on IP-enabled applications and services would drive our nation's communications policy backwards, harming consumers and competition alike. As IP technology and the services it enables blossom, both consumers and businesses have increased the array of communications services they may access, literally changing the way our society functions. Unlike the classic PSTN, IP applications are evolving to

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bring consumers myriad services including integration of data, video and voice applications; presence detection features; user-driven call-routing and response services; and enhanced/personalized call center functionality, to name a few. IP services also can reduce distinctions between networks and applications in a manner that allows seamless integration of formerly separate endeavors (such as between fixed and mobile features). These services not only allow existing functions to be performed with greater efficiency and lower cost, they create new opportunities for commerce, socializing and connection.

It is now well accepted that technological innovation drives a nation's progress.<sup>1</sup> Indeed, we live increasingly in a networked, innovation economy, where adaptive agents use the Internet to engage in evolutionary processes of differentiation, selection, and amplification, and drive a host of positive emergent economic and non-economic phenomena.<sup>2</sup> In particular, we have learned that technological change is endogenous to the economy, and that new ideas power economic growth,<sup>3</sup> along with innovation spillovers, peer production, and social values like diversity and democracy.<sup>4</sup> Internet-based technologies like IP Voice enable all of this.

Under the guise of "regulatory relief," Embarq effectively is asking the FCC to ignore these compelling empirical findings, and the numerous advances and benefits that IP Voice-

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<sup>1</sup> Peter Drucker, Innovation and Entrepreneurship, HarperCollins (2006).

<sup>2</sup> Eric Beinhocker, The Origin of Wealth: Evolution, Complexity, and the Radical Remaking of Economics, Harvard Business School Press (2006).

<sup>3</sup> David Warsh, Knowledge and the Wealth of Nations: A Story of Economic Discovery, W. W. Norton (2006).

<sup>4</sup> See, e.g., Yochai Benkler, The Wealth of Networks, 133, Yale University Press (2007); Brett Frischmann and Mark Lemley, *Spillovers*, John M. Olin Program in Law and Economics, Stanford Law School, (April 2006); Susan Crawford, *The Project of Communications Law*, 55 *UCLA L. REV.* 359 (2007).

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based applications and services can and will bring to the market. Instead, the petition seems an unfortunate but not unexpected attempt by an incumbent telephone company to hold back the emerging competitive broadband web-driven environment. The FCC is reminded that this is hardly a new tactic pursued by those who are not prepared for change and innovation. Invention, while beneficial to most, threatens the few who are invested heavily in the *status quo*. Just as previous strategies designed to forestall innovation and competition were rightly rejected, the Commission should do the same in this instance.

Today's IP service pioneers are vital to our society's future and their services should be encouraged, not saddled with the vestiges of a regulatory regime designed for another era (and one, like the access charge regime, that was designed to be "temporary" at that). Innovative IP services represent the classic "creative destruction" that creates new value, increasing consumer welfare but destabilizing the economic returns for producing the older or prevailing products.<sup>5</sup> The FCC should encourage this new value and recognize that for innovations to benefit consumers, they must be given an opportunity to succeed in the market, not be burdened by those who would prefer to protect business as usual. Whatever their merit as a solution post- AT&T divestiture, per-minute access charges do not reflect today's emerging IP and broadband environment.

Similarly, the FCC should reject the well-worn claim that IP innovators somehow are getting a "free ride," or are engaging in "regulatory arbitrage," unless carrier per-minute long distance access charges are extended to IP Voice services. This premise is patently false, as all

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<sup>5</sup> Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, 3d Edition, Harper & Brothers (1950).

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users -- including consumers and web providers of services with an IP Voice component, and the carriers that provide the transmission to enhanced service providers (“ESPs”) -- pay for the network services they use.

Indeed, Section 69.5(a) of the Commission’s rules expressly provides that end user charges will be assessed upon public end users.<sup>6</sup> Communications consumers pay their carriers for “last mile” and other telecommunications services, including narrowband and broadband. Web companies also pay network operators for their services, including last mile, special access and backbone services. In fact, in some areas, despite the falling costs of providing services, rates are increasing, and carriers persist in insisting that they will not undertake network

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<sup>6</sup> See, 47 C.F.R. § 69.5(a) (“End user charges shall be computed and assessed upon end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.”). While the FCC and others have subsequently adopted the phraseology “ESP exemption,” that is an inaccurate and misleading characterization. In point of fact, the FCC never formally determined that carrier access charges should apply to ESPs in the first place, absent such an “exemption.” Instead, the agency consistently has classified providers of enhanced services as end users of the communications network. In 1981, the FCC recognized that it should not apply carrier access charges to ESPs. See MTS and WATS Market Structure, Memorandum Opinion and Order, 97 F.C.C.2d 682, ¶¶ 75-80 (1983). In 1987, the Commission expressly held that “under our current rules, enhanced service providers are treated as end users for access charge purposes.” See Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order, 2 FCC Rcd. 5986, ¶ 1 (1987). Thereafter, the Commission has consistently concluded that application of interexchange access charges to ESPs is inappropriate and that ISPs are not telecommunications carriers. See, e.g., Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631, Order, ¶ 19-20 (1988); In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd. 4524, ¶ 60 (1991); Access Charge Reform, First Report and Order, 12 FCC Rcd. 15982, ¶ 341 (1997) (citing, MTS and WATS Market Structure, Memorandum Opinion and Order, 97 F.C.C.2d 682, ¶¶ 75-90 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd. 2631 (1988)).

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investment and upgrades unless they are guaranteed even more revenues by regulators and tariffs.

Just as the FCC soundly rejected arguments almost identical to these a decade ago, as carriers urged that the PSTN was endangered if Internet Service Providers were treated as end users outside of the long distance access charge framework, so too should it do so here.<sup>7</sup> Instead, the FCC should recognize these arguments for what they are – special pleadings that are not supported by valid policy, economic, or technological foundations.

### **II. Forbearance is Appropriate to Minimize Regulations For Telecommunications Carriers, Not to Expand Regulation to Unregulated IP Innovators**

Beyond the strong policy reasons for denying the Embarq Petition, there are also substantial legal grounds for doing so. Forbearance authority is a valuable tool for the FCC to tailor regulations of general application to telecommunications carriers as particular and specific circumstances warrant deregulatory relief. Section 10 of the Communications Act is plain: “the Commission shall forbear from applying any regulation or provision of this Act to a telecommunications carrier or telecommunications service.” 47 U.S.C. § 160(a). What Embarq proposes, however, is to turn the authority on its head. Rather than encourage deregulation,

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<sup>7</sup> See, *Access Charge Reform, First Report and Order*, 12 FCC Rcd. 15982, ¶¶ 345-45 (1997) (“We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. . . . We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services.”), *aff’d*, *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

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Embarq asks the FCC to *add regulatory burdens upon unregulated non-carrier businesses*, including IP application providers, ESPs, and innumerable other businesses that are decidedly not “carriers” or telecommunications service providers under Section 10 and the Communications Act. If the FCC were to grant Embarq’s request to expand carrier access charge regulations, and the per-minute access fees supported by the access charge regulatory edifice, it would be acting in a manner diametrically opposed to the express limits of the FCC’s Section 10 authority and the underlying Congressional purposes of Section 10.

To the extent Embarq implies that the FCC should use forbearance powers to blur the mutually distinct statutory categories of a “telecommunications service” and an “information service” provider<sup>8</sup> in order for Embarq to assess carrier per-minute access charges on the latter,

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<sup>8</sup> It is well-established by both FCC and judicial precedents that the 1996 Act establishes “carrier” and “information service provider” as mutually distinct and non-overlapping categories of providers, which are subject to two very distinct sets of regulatory oversight. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-976 (2005) (“The Act, as amended by the Telecommunications Act of 1996, 110 Stat. 56, defines two categories of regulated entities relevant to these cases: telecommunications carriers and information-service providers. The Act regulates telecommunications carriers, but not information-service providers, as common carriers. . . . Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications. . . .”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶ 41 (2002) (“[T]he Act's ‘information service’ and ‘telecommunications service’ definitions establish mutually exclusive categories of service. . . .”); *See, Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶ 39 (1998) (“[W]e affirm our prior findings that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers ‘telecommunications.’ By contrast, when an entity offers transmission incorporating the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” it does not offer telecommunications. Rather, it offers an “information service” even though it uses telecommunications to do so.”) (internal citations omitted).

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the petition makes a patently inadequate showing. Indeed, the Embarq petition does not even request for the FCC to eviscerate the statutory “information service” distinctions, nor does Embarq present an analysis of how such a reversal of the 1996 Act classification scheme would serve the three prongs of promoting consumer welfare, competition and the public interest.

By contrast, the Feature Group IP petition, with its emphasis on FCC assurance of a stable and deregulated environment for IP innovation, moves the Commission’s attention in the right direction. While Google takes no specific position here on whether Feature Group IP’s particular proposals and technical solutions would be optimal for all forms of IP interconnection, Google agrees wholeheartedly that the PSTN limitations and regulatory anachronisms developed years ago should not, and even cannot, feasibly be grafted onto IP Voice services. For example, Google agrees with Feature Group IP’s observation that the traditional PSTN rating/routing parameters, whereby all carriers must conform to and rate services based on LATA boundaries and the ILEC’s traditional geographic service area boundaries or central office locations, is stifling and unnecessary in the IP world. This example also underscores Google’s view that the FCC should look at IP interconnectivity, rating, and carrier compensation in a comprehensive and holistic manner, and not through a cramped proceeding that forces the FCC to react on a limited timeframe to one carrier’s situation.

Even more troubling is that the Embarq Petition essentially asks the FCC to extend carrier access charges to a vast array of unnamed applications and services, both existing and future, that share the common characteristic of having an IP Voice component. This request, therefore, is the antithesis of specific deregulation applied to a specific service. FCC precedent on this point, however, is clear: forbearance is inappropriate where the petitioner has failed to identify a specific service and explain how the particular regulation in question meets the three-

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pronged statutory scheme.<sup>9</sup> Far from being narrowly-tailored forbearance relief on a specific and well-defined set of carrier services, the Embarq petition “casts as wide a net” over all IP Voice applications as is conceivable.<sup>10</sup>

Finally, the Embarq petition would appear to be a dressed up effort to use the forbearance process in order to advance its position for more speedy enforcement relief. In its Petition, Embarq complains that the majority of entities seeking to avoid access charge payments are not ESPs at all, but are (unnamed) telecommunications carriers that serve as the connection between VoIP providers and terminating LECs. *See*, Embarq Petition, at 3-4. Embarq, therefore, asks the FCC to employ its forbearance authority in a manner that accepts without question Embarq’s inchoate claims against existing but unnamed carriers by wiping out the “ESP exemption” *in toto* so that those carrier-defendants cannot use it as a defense. Granting forbearance from the “ESP exemption” in its entirety, however, would be an overly broad solution to a narrow set of

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<sup>9</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 40 (2007) (“We believe that limiting our forbearance grant to the identified services that are currently offered is consistent with our analysis under the forbearance framework. We do not know the precise nature of such future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here. Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).”) (internal citations omitted).

<sup>10</sup> As Commissioner Tate recently urged, regulators’ predictions about yet-to-be-developed services are fraught with peril: “As I consider the proper role of regulatory policy in this dynamic and ever-changing world, I am reminded of a simple fact that regulators often ignore: We will not know – and cannot know – where the market will take us next. And when one tries to predict the future, even the experts often get it wrong.” Remarks of Commissioner Deborah Taylor Tate, Federalist Society, February 5, 2008, at 2.

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enforcement claims. Moreover, the Commission has already addressed such matters in the *AT&T IP-in-the-Middle Order*,<sup>11</sup> and so Embarq’s proper remedy is to pursue a collection action against these unnamed carriers in federal district court. What Embarq has asked for – enforcement styled as “forbearance” – is entirely too broad, unnecessary, and inappropriate to support a valid forbearance petition.

**Conclusion**

For the foregoing reasons, Google urges the Commission to deny the Embarq Petition. As urged by Feature Group IP, the FCC should make clear that consumers and competition are best served by ensuring that IP innovators are encouraged to bring consumers new applications and services, free from outmoded charges and regulations.

Respectfully submitted,

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<sup>11</sup> See, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457 (2004).