

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of)	
)	
Feature Group IP)	
)	
Petition for Forbearance Pursuant to)	WC Docket No. 07-256
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))	
)	
Embarq Local Operating Companies)	
)	
Petition for Limited Forbearance Under)	WC Docket No. 08-8
47 U.S.C. § 160(c) from Enforcement of Rule)	
69.5(a), 47 U.S.C. § 251(b) and Commission)	
Order on the ESP Exemption)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Craig J. Brown
Robert B. McKenna
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

February 19, 2008

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY.....	2
II. BACKGROUND.....	5
A. The FGIP Petition.....	5
B. The Embarq Petition.....	9
C. The ESP Exemption.....	9
D. The Current Regulatory Landscape With Respect To IP-to-PSTN VoIP.	11
III. THE COMMISSION SHOULD DENY THE FGIP PETITION AND GRANT THE EMBARQ PETITION.....	13
A. FGIP Mischaracterizes The ESP Exemption.....	13
B. FGIP Also Fails To Demonstrate That Section 10 Forbearance Is Warranted.	14
C. The Commission Should Grant The Embarq Petition With Some Important Clarifications.....	16
IV. THE COMMISSION SHOULD ACT IN THE OUTSTANDING INTERCARRIER COMPENSATION AND IP-ENABLED SERVICES RULEMAKINGS.....	19
A. The Commission Should Resolve The <i>Intercarrier Compensation NPRM</i>	19
B. If Necessary, The Commission Can And Should Take Interim Action Regarding Phantom Traffic, VNXX And Other Issues.....	20
C. The Commission Should Resolve The <i>IP-Enabled Services NPRM</i>	21
V. CONCLUSION.....	22

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of)	
)	
Feature Group IP)	
)	
Petition for Forbearance Pursuant to)	WC Docket No. 07-256
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))	
)	
Embarq Local Operating Companies)	
)	
Petition for Limited Forbearance Under)	WC Docket No. 08-8
47 U.S.C. § 160(c) from Enforcement of Rule)	
69.5(a), 47 U.S.C. § 251(b) and Commission)	
Order on the ESP Exemption)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby submits these comments in opposition to the Feature Group IP West LLC, *et al.* (hereafter “FGIP”) Petition for Forbearance (hereafter the “FGIP Petition”) filed with the Federal Communications Commission (“Commission”) on October 23, 2007¹ and in support of the Embarq Operating Companies (hereafter “Embarq”) Petition for Forbearance (hereafter the “Embarq Petition”) filed with the Commission on January 11, 2008.²

¹ Petition for Forbearance of Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC, filed Oct. 23, 2007. *And see* Public Notice, DA 07-5029, rel. Dec. 18, 2007, Order, DA 08-93, rel. Jan. 14, 2008, Erratum, rel. Jan. 18, 2008.

² Petition for Forbearance of Embarq Local Operating Companies, filed Jan. 11, 2008. *And see* Public Notice, DA 08-94, rel. Jan. 14, 2008.

I. INTRODUCTION AND SUMMARY

The FGIP Petition and Embarq Petition each address the question of the proper regulatory treatment for intercarrier compensation purposes of Voice-over-Internet Protocol (“VoIP”) traffic that originates in Internet Protocol (“IP”) and terminates on the Public Switched Telephone Network (“PSTN”) -- *i.e.*, IP-to-PSTN VoIP.³ However, the two Petitions present completely divergent positions. For the reasons stated below, Qwest opposes the FGIP Petition and supports the Embarq Petition -- albeit with some clarification.

In its Petition, FGIP contends that IP-to-PSTN VoIP traffic, be it local or non-local, is completely exempt from switched access charges.⁴ Specifically, FGIP seeks a regulatory structure whereby IP-to-PSTN VoIP Internet Service Providers (“VoIP ISPs”)⁵ (or the competitive local exchange carriers (“CLECs”) that carry their traffic) would be entirely exempt from switched access charges. In its underlying legal analysis, FGIP asserts that IP-to-PSTN VoIP traffic is an information service and, therefore, that the Commission’s Enhanced Service

³ In this document, Qwest uses the term “IP-to-PSTN VoIP” to refer to IP-enabled voice services and applications (including “interconnected VoIP” as the Commission has used that term) in which all telecommunications and information components originate in IP and terminate on the PSTN.

⁴ One of the many flaws in the FGIP Petition is its use of a variety of different articulations of a definition for the traffic at issue. FGIP described those services using different language in footnote 3 and on pages 3, 10 and 24-25. In the process, FGIP alternatively calls these services “Voice-embedded Internet-based communications services and applications” or “Voice Embedded IP-based communications services and applications.” Despite the use of vague and overly broad terminology that sometimes suggests otherwise, Qwest believes that the only traffic fairly put at issue in the FGIP Petition is IP-to-PSTN VoIP. For example, while FGIP’s overbroad definitions would appear to encompass by its strict terms traffic that originated on the PSTN and terminated in IP, FGIP, in a later footnote, states that such traffic is, in fact, not within the scope of the Petition. *See, id.* n.92. To the extent FGIP were to take the position such traffic should also be wholly exempt from access charges, Qwest would oppose such a request for all the reasons stated herein.

⁵ In this filing, unless otherwise indicated, Qwest uses the term VoIP ISP to refer to the subset of ISPs that handle IP-to-PSTN VoIP traffic. Qwest uses the term “ISP” to refer to the broader universe of all information service providers.

Provider (“ESP”) exemption (hereafter the “ESP exemption”) renders this traffic wholly exempt from access charges. FGIP also argues “in the alternative” that, should the Commission disagree with the forgoing contention, it should forbear from various statutory provisions and rules relating to the application of tariffed feature group access charges to IP-to-PSTN VoIP traffic – *i.e.*, as necessary to render such traffic wholly exempt from such access traffic.

Embarq, on the other hand, contends that non-local IP-to-PSTN VoIP traffic⁶ should be, for purposes of applying switched access charges, treated the same as any other traffic terminating on the PSTN -- *i.e.*, access charges would always apply to such traffic. As support for its Petition, Embarq asserts that the Commission’s ESP exemption does not apply to IP-to-PSTN VoIP traffic and in any event that the ESP exemption should not be construed to exempt IP-to-PSTN VoIP calls from access charges. In the alternative, Embarq asks that the Commission forbear from enforcement of the ESP exemption to the extent it may be claimed to apply to IP-to-PSTN VoIP traffic.

In the end, the FGIP Petition fails to hold water and should be denied. To begin with, FGIP misconstrues the ESP exemption when it argues that IP-to-PSTN VoIP traffic is somehow magically exempted from access charges. Nor does FGIP’s forbearance request satisfy the Section 10 forbearance criteria. Indeed, as discussed more fully below, the FGIP Petition should be denied on the grounds that it is fatally vague. While it is laden with shrill hyperbole and name-calling directed at both incumbent local exchange carriers (“ILECs”) and the Commission

⁶ Embarq is more careful in its terminology and Qwest believes Embarq makes clear that it too is only addressing the status of IP-to-PSTN VoIP. Embarq, in its Petition, consistently refers to the traffic at issue as interconnected VoIP where the traffic is for non-local calls that originate in IP and terminate on the PSTN. However, as discussed in the text, *infra*, one of Qwest’s requested clarifications relates to how, after a grant of Embarq’s requested forbearance relief, it would be determined whether traffic is local versus non-local.

itself,⁷ it is, in the end, impossible to discern precisely what relief FGIP seeks or the purported factual or legal basis for that requested relief.

The Embarq Petition, on the other hand, is premised on persuasive analysis and should be granted consistent with the important clarifications discussed below. Qwest does not agree with every aspect of Embarq's underlying legal analysis. Specifically, Qwest has previously advocated that the ESP exemption (using the construct that an ISP Point of Presence ("POP") is an end-user) allows for reasoned analysis of the rights and obligations of carriers when exchanging IP-to-PSTN VoIP traffic. However, Qwest recognizes that the Commission has, in prior rulings, indicated that it has not yet categorized IP-to-PSTN VoIP as either an information service or a telecommunications service. At the same time, it has extended to IP-to-PSTN VoIP numerous regulatory obligations typically applied to Title II services (CALEA, 911, USF, etc.). In light of this fundamentally changed landscape and in an effort to provide clarity on an interim basis until the Commission completes their intercarrier compensation docket, Qwest believes a modified approach is appropriate whereby IP-to-PSTN VoIP calls would be treated the same as Time Division Multiplexing ("TDM") calls. Embarq makes persuasive arguments to the effect that, unless and until the Commission completes holistic reform of the intercarrier compensation rules, it makes no sense from a policy perspective to treat IP-to-PSTN VoIP as any different from other like services that utilize the switching architecture of the PSTN in the very same

⁷ See, e.g., FGIP Petition at 2 (implying that ILECs, by following the existing access structure, somehow "*block* intercommunication between the Internet and the PSTN" (emphasis added)); at 23-24 (stating "at&t and its *cartel* partners are *abusing* their *political and market power* to impose new rules..." (emphasis added)); at 5 (claiming that FGIP brings its Petition "*under duress* from the actions of at&t and the inactions of the administrative and legal bodies whose duties are to implement the Act ..." (emphasis added)); at 6 (claiming forbearance is needed to preclude at&t from "*ill-gotten gains*" (emphasis added)); at 16 (claiming "legacy carriers attempt to *crush* . . . benefits of positive network effects [for]... [end] users" (emphasis added)); at 18 (claiming at&t access billing is "*fraudulent*" (emphasis added)).

manner. Accordingly, Qwest agrees with Embarq that IP-to-PSTN VoIP can be subject to switched access charges when it is non-local and reciprocal compensation or local tariffs when it is local. The forbearance approach is ideally suited to achieving this result in a principled manner while the Commission completes its reform of intercarrier compensation.

As discussed more fully below, Qwest's support for Embarq's Petition comes with several important clarifications. First, the Commission should make it unambiguously clear that geographical end-points and not telephone numbers are the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether interstate or intrastate access charges apply). Second, the Commission should clarify that the requested relief applies only to non-local IP-to-PSTN VoIP. Finally, the Commission should make it clear that a grant of the Embarq Petition applies to the entire industry.

Qwest also encourages the Commission once again to act on the outstanding Notices of Proposed Rulemakings ("*NPRMs*") dealing with intercarrier compensation and IP-enabled services, respectively. However, until the Commission has developed a long-term intercarrier compensation plan that takes IP-to-PSTN VoIP and other IP-enabled services into account in the context of holistic reform, the Commission must avoid results where narrow sectors of the industry are favored.⁸

II. BACKGROUND

A. The FGIP Petition.

The core of FGIP's Petition is its request that the Commission hold that:

⁸ Qwest also continues to advocate that the Commission, should it continue to be unable to accomplish comprehensive intercarrier compensation reform in the near term, act on an interim basis to clarify the current law with respect to a handful of key issues underlying the intercarrier compensation debate. The Commission could accomplish meaningful progress in a number of other areas. *See text, infra* at IV.B.

Voice Embedded IP-based communications, services and applications that involve or are part of: (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct-to-basic enhanced functionality are enhanced services and, therefore, that the so-called “ESP exemption” from access charges still applies.⁹

According to FGIP, applying the ESP exemption to such traffic means that its traffic is wholly exempt from access charges under all circumstances.¹⁰ FGIP argues that IP-to-PSTN VoIP traffic is an information service and that the Commission’s ESP exemption renders this traffic wholly exempt from access charges. In the alternative, should the Commission disagree with that contention, FGIP requests that the Commission forbear from various provisions of the Act and the Commission’s rules relating to the application of tariffed feature group access charges to IP-to-PSTN VoIP traffic. FGIP describes the forbearance it seeks as forbearance from the enforcement of:

- Section 251(g) of the Act (“insofar as it applies to the receipt of compensation for switched ‘exchange access, information access and exchange services for such access to interexchange carriers and information service providers,’ pursuant to state and federal access charge rules”);
- Any limitation on the scope of Section 251(b)(5) that is implied from Section 251(g) preserving LEC receipt of intrastate switched access charges;
- The clause of Rule 51.701(b)(1) that excludes from the definition of telecommunications traffic subject to Subpart H of Part 51 of the Commission’s rules [entitled “Reciprocal Compensation for Transport and Termination of Telecommunications Traffic”] “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access...;”
- Rule 69.5(b), “to the extent applicable;”
- Any “numbering representation rule” to the extent applicable; and

⁹ See FGIP Petition at 3.

¹⁰ *Id.*

- Any signaling standard that requires or assumes a particular geographic reference point (such as a rate center) which could be used to support a billing platform to treat such traffic as ordinary “telephone toll” traffic.¹¹

Despite this superficial detail, the FGIP Petition leaves huge areas of ambiguity concerning the nature of the relief sought or the scope of services or applications intended to be covered. For example, FGIP fails to make clear with any specificity what the regulatory rules would be for IP-to-PSTN VoIP traffic following forbearance. The most that FGIP says on this subject is at page 31 of the Petition where it states that the traffic at issue would be “exchanged on a ‘minute-by-minute’ basis pursuant to Section 251(b)(5) or the *ISP Remand* rate over interconnection trunks pursuant to an interconnection agreement rather than access trunks.”¹² This would suggest that FGIP may be asking that, as a blanket general rule, all IP-to-PSTN VoIP traffic whatsoever would be treated as local traffic -- *e.g.*, regardless of the location of the VoIP ISP’s POP, regardless of the geographic end-points of the call, etc. However, FGIP does not come out clearly and state this.¹³

Other significant ambiguities arise from the fact that FGIP includes within the scope of relief so-called “incidental” IP-PSTN traffic. The Petition defines this as:

¹¹ *Id.* at 24-25.

¹² *Id.* at 31 (emphasis added).

¹³ Yet another ambiguity arises because FGIP, in just one of its various definitions of the services at issue, limits its IP voice traffic definition to only that IP voice traffic where “the point of interconnection between the LEC serving the voice-embedded Internet application or service provider and the LEC serving the PSTN user end-point is located in the same LATA as the PSTN end-point.” *Id.* at 25. This is ambiguous for a number of reasons. To begin with, FGIP does not otherwise seem to suggest that there necessarily must be two LECs involved in a traffic flow in order to fall within its definition of IP voice traffic. Moreover, this discussion appears to conflate the distinct regulatory rules with respect to LATA-wide termination applicable to ISP end users and CLECs. Unlike the LATA-wide access available through ILEC tariffed switched access services, an end user (*e.g.*, an ISP) generally has LATA-wide access only through the purchase of toll service. At the same time, CLECs have the ability to establish a single point of interconnection within a LATA. But, the existence of such a single point of interconnection does not affect the basic differentiation between local and toll (intra and interexchange) calls.

traffic that ... originates on the legacy TDM circuit-switched network and terminates on the legacy TDM circuit-switched network but (a) [the traffic] is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform, there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user.¹⁴

However, it is not clear just what services FGIP intends to include within this definition. For example, FGIP appears to state, at page 26 of its Petition, that it does not intend to include IP-in-the-middle within the scope of its request.¹⁵ However, the vague language used to define “incidental” IP-PSTN traffic would appear to encompass traffic for which there is no net protocol conversion and which is thus covered by the Commission’s *IP-in-the-Middle* decision.¹⁶

Still further ambiguity arises in FGIP’s extensive discussion of a variety of what it calls “Voice-embedded IP-based applications.” FGIP never attempts to connect the discussion to an underlying factual or legal basis for its Petition. FGIP fails to detail with any specificity just what interaction with the PSTN FGIP would intend to cover or how that interaction is like or unlike the other categories of IP voice traffic, and otherwise fails to articulate any basis for forbearance for these facilities.

In the end, very little is clear about FGIP’s Petition except that it seeks some form of a regulatory structure whereby there would be a unique access category entirely outside of the existing regulatory structure for providers of what it calls “Voice-embedded Internet communications” for which no access charges would apply.

¹⁴ See *id.* at 10-11 (emphasis in original).

¹⁵ *Id.* at n.38.

¹⁶ See *In the Matter of 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) (“*IP-in-the-Middle Order*”).

B. The Embarq Petition.

In its Petition, Embarq contends that non-local IP-to-PSTN VoIP traffic should be treated the same as any other traffic terminating on the PSTN for purposes of applying switched access charges -- *i.e.*, access charges would always apply to such traffic. As support for its Petition, Embarq asserts that the Commission's ESP exemption should not be construed to exempt IP-to-PSTN VoIP calls from access charges.¹⁷ According to Embarq, the justifications for the ESP exemption have never applied to IP-to-PSTN VoIP traffic.¹⁸ Embarq also contends that the ESP exemption was intended to cover "only the connection between the ESP and its subscribers, not between the ESP and its non-subscribers."¹⁹ Embarq argues that IP-to-PSTN VoIP traffic is not an enhanced service when it terminates on the PSTN and, even if it were, the ESP exemption does not apply.²⁰ In the alternative, should the Commission disagree with this contention, Embarq asks that the Commission forbear from enforcement of the ESP exemption.²¹ Specifically, Embarq asks that the Commission forbear from enforcing the ESP exemption (as adopted by Commission orders), Section 69.5(a) of its rules and 47 U.S.C. Section 251(b)(5) with respect to IP-to-PSTN VoIP traffic.²²

C. The ESP Exemption.

Fundamental to the FGIP Petition is a basic misunderstanding of the so-called "ESP exemption." FGIP seems to think that the ESP exemption provides, and was intended to provide, a massive freedom from access charges for every service that could be designated (in whole or in

¹⁷ Embarq Petition at 23-28.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ *Id.* at 5-6.

²² *Id.* at 17-18.

part) as an enhanced or information service. FGIP is mistaken on multiple counts. Because a proper analysis of the ESP exemption is important to examining both the FGIP and the Embarq Petitions, the following discussion elaborates briefly on the genesis and meaning of this unique quirk in the Commission's access charge structure.

The Commission has been wrestling with the issue of how providers of "enhanced services" should pay for interstate use of local exchange switching facilities and services since the very beginning of the access charge regime.²³ In what was intended to be an "interim" solution, the Commission created the so-called "ESP exemption" whereby enhanced service providers were entitled to connect their "POPs" to local exchange switching facilities via local exchange access services (as opposed to the tariffed feature group services that carriers were required to purchase) even though they used the local exchange facilities for interstate access.²⁴

Thus, the ESP exemption was simply a regulatory decision whereby, for a variety of policy reasons, interstate access by ESPs located within the local calling area of a customer would be treated as local for the purpose of assessing the correct access charge, at least if local service were ordered. The same status was accorded to private networks that accessed local exchanges for interstate origination and termination of interstate calls -- these private networks were likewise treated as end users for access charge purposes based on the location of the PBX or other terminating device (including Centrex) through which the traffic was delivered into a

²³ See *In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 254-55 ¶ 39 and n.15, 320 ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("First Order on Reconsideration"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("Order on Further Reconsideration"), *aff'd in principal part and remanded in part sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

²⁴ See, e.g., *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16131-34 ¶¶ 341-48 (1997); see, also, generally, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

local exchange.²⁵ In both cases, interstate cost recovery was designed to be achieved through assessment of a particular access surcharge on ILEC interstate special access lines used by ESPs or “leaky PBXs.”

Qwest has previously argued that IP-to-PSTN VoIP should be classified as an information service, and that, accordingly, its access to local exchange switching facilities should be governed by the ESP exemption. In this case, the end-user designation of an ISP POP allows for reasoned analysis of the rights and obligations of LECs when exchanging VoIP ISP traffic with each other. Based on the location of the VoIP ISP POP, whatever mechanism is used to treat calls between traditional end users (reciprocal compensation, tariffed access, or some other approach) can be applied to this traffic and used by the respective carriers to recover the costs incurred in exchanging IP-to-PSTN VoIP traffic. Under this approach, a VoIP ISP POP is not the same thing as an IXC POP or a CLEC point of interface, because neither an IXC POP nor a CLEC point of interface is treated as an end user for access purposes and neither would be entitled to purchase retail services reserved for end users (although CLECs may purchase local services for resale under Section 251(c)(4) of the Act).

D. The Current Regulatory Landscape With Respect To IP-to-PSTN VoIP.

Qwest now believes that the current regulatory landscape with respect to IP-to-PSTN VoIP services is such that a modified approach whereby IP-to-PSTN VoIP traffic would be treated the same as TDM calls for access is more appropriate at least on an interim basis -- *i.e.*, until the Commission has resolved the IP-Enabled Services docket and/or developed a long-term intercarrier compensation plan that takes IP voice and other IP-enabled services into account in the context of holistic reform. To begin with, the Commission recently indicated that it has not

²⁵ See *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 7424, 7425 ¶¶ 13-15 (1987).

yet determined whether IP-to-PSTN VoIP service is an information service.²⁶ Additionally, over the last few years, the Commission has issued a number of rulings in which it has applied numerous regulatory obligations to IP-to-PSTN VoIP service. While normally the application of such obligations depends upon the classification of the service at issue, with the regulatory consequences following from that classification, the Commission has taken a different tack here. Without deciding whether IP-to-PSTN VoIP is an information service or a telecommunications service, the Commission has issued orders subjecting such services in one form or another to USF obligations, access to numbering resources and numbering obligations, 911 obligations, CPNI and privacy obligations and obligations with respect to persons with disability.²⁷ Also,

²⁶ See, *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, 22 FCC Rcd 11275, 11281, n.50 (2007) (“*TRS Report and Order*”).

²⁷ See, *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007); *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007); *TRS Report and Order*, 22 FCC Rcd 11275; *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006); *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed

more and more carriers are asserting the clearly incorrect position that IP-to-PSTN VoIP traffic is magically exempt from access charges regardless of how it is terminated to the PSTN or from where. The present situation, where half of the industry is apparently treating these services as telecommunications services and the other half is treating them as information services, is clearly not an optimal state of affairs. In light of these developments, Qwest agrees that the optimal approach to IP-to-PSTN VoIP access is to treat IP voice services in the same manner as any other voice calls that touch the public switched network without regard to the ultimate regulatory classification of the service.

III. THE COMMISSION SHOULD DENY THE FGIP PETITION AND GRANT THE EMBARQ PETITION

A. FGIP Mischaracterizes The ESP Exemption.

Even assuming IP-to-PSTN VoIP traffic were treated as an information service and subject to the ESP exemption, FGIP, in its Petition, misstates the manner in which compensation for local and non-local traffic would be calculated and assessed among carriers under that rule. FGIP asks that the Commission hold that IP-to-PSTN VoIP traffic is wholly exempt from access charges, regardless of the other characteristics of the traffic (*e.g.*, the location of the VoIP ISP's POP, the geographic end points of the call, etc.). In other words, rather than relying on an application of the ESP exemption to IP-to-PSTN VoIP traffic, FGIP wants the Commission to rule that all IP voice traffic is magically exempt from payment of tariffed access charges by virtue of that classification alone. Accordingly, FGIP's initial contention -- that, assuming IP-to-PSTN VoIP traffic is an information service, the Commission's ESP exemption renders this

Rulemaking, 20 FCC Rcd 10245 (2005), *aff'd. sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

traffic wholly exempt from access charges -- is patently wrong and should be rejected out of hand.²⁸

B. FGIP Also Fails To Demonstrate That Section 10 Forbearance Is Warranted.

FGIP's "in the alternative" argument -- that the Commission should forbear from various provisions of the Act and the Commission's rules as necessary to render IP-to-PSTN VoIP traffic exempt from tariffed feature group access charges -- should also be rejected. FGIP fails to demonstrate that forbearance is warranted or lawful under Section 10.

To begin with, the FGIP Petition should be denied as failing to demonstrate the Section 10 criteria solely on the grounds that the Petition fails to even describe with any reasonable clarity the relief it seeks. As far as Qwest can determine, FGIP is seeking a blanket exemption from access charges for voice calls utilizing particular technologies, but even this conclusion is inferential rather than obvious. As discussed above, among other significant defects, FGIP fails to adequately describe what the regulatory rules would be for IP-to-PSTN VoIP traffic following forbearance. Additionally, FGIP includes within the scope of relief a category of traffic called "incidental" IP-PSTN traffic that is vaguely defined and would appear to bring a result that is in direct conflict with the Commission's *IP-in-the-Middle Order*. It would thus lead to precisely the kind of arbitrage and gaming of the system that the *IP-in-the-Middle Order* intended to eliminate.²⁹

Nor does FGIP otherwise articulate any real factual or legal basis for its argument that the Section 10 criteria are met here -- notwithstanding the pages upon pages of redundant, high-pitched hyperbole contained in its Petition. FGIP's arguments largely break down to contentions

²⁸ Of course, the FGIP Petition would also fail outright if, as Embarq and others argue, IP-to-PSTN VoIP is not an information service and/or it is not subject to the ESP exemption.

²⁹ *IP-in-the-Middle Order*, 19 FCC Rcd 7457.

that such a ruling will: (1) reduce the costs of VoIP ISPs and save them from economic peril; and (2) reduce regulatory uncertainty and, consequently, promote innovation. These arguments do not even address the statutory criteria of Section 10 of the Act. They are also wrong even on their own terms.

The first contention is wholly unsupported. Nor does FGIP cite to any factual support for it. FGIP assumes, and asks the Commission to assume that, if IP-to-PSTN VoIP providers are not granted special treatment under today's access structure not available to any other voice providers or providers of all other IP-enabled services, the deployment of IP voice technology and service will be fatally wounded. This is a questionable assumption to say the least. In fact, any claim that IP voice providers are languishing is contradicted by all evidence.

With respect to the second contention, any assertion that a change in the law is necessary to adequately spur innovation is also wholly unsupported. This contention is also based upon a false assumption that innovation will not occur unless IP-to-PSTN VoIP providers are granted special treatment under today's access structure.

In the end, the FGIP Petition simply does not satisfy the Section 10 forbearance criteria. This is demonstrated perhaps most clearly by the fact that FGIP's position would undercut the existing access charge structure by allowing carriers to utilize local exchange switching facilities to originate and terminate interstate interexchange telecommunications without paying the proper interstate tariffed rates for such use. Again, while much is unclear about FGIP's requested relief, FGIP clearly contends that IP-to-PSTN VoIP traffic should simply be "exempted" from paying the proper rate for access no matter what services a carrier carrying traffic for an IP-to-PSTN VoIP provider purchases or is required to purchase from an ILEC or CLEC. Given that one of the key criteria of Section 10 of the Act is that the forbearance requested will not create an

opportunity for discrimination,³⁰ FGIP's attempt to use the forbearance provisions to create a discriminatory regulatory regime is obviously not legally supportable.

FGIP simply can not make (and has not made) a plausible case that continued enforcement of the statutes and rules that permit the application of access charges to IP-voice traffic consistent with existing law (including the ESP exemption) is: (1) not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unjustly or unreasonably discriminatory;" and (2) not necessary for the protection of consumers. Nor can it demonstrate that the forbearance it seeks is in the public interest.

For all the reasons stated above, the Commission should deny the FGIP Petition.

C. The Commission Should Grant The Embarq Petition With Some Important Clarifications.

On the other hand, the Commission should grant the relief requested in Embarq's Petition on an industry-wide basis and rule that non-local IP-to-PSTN VoIP traffic is, under the current regulatory regime, subject to access charges. In granting Embarq's Petition, however, the Commission must make several important clarifications.

As demonstrated above, Qwest now believes that the current regulatory landscape with respect to IP-to-PSTN VoIP services is such that a modified approach to such traffic is called for, at least on an interim basis. The Commission has, in prior rulings, indicated that it has not yet determined whether IP-to-PSTN VoIP is an information service or a telecommunications service, and that it plans to examine regulatory issues pertaining to IP-voice services on their individual merits, rather than based on the classification of IP-voice service. At the same time, it has extended numerous regulatory obligations typically applied to Title II services to IP-to-PSTN VoIP service. In light of this fundamentally changed landscape, the Commission should, until

³⁰ 47 U.S.C. § 160(a).

such time as it has resolved the *IP-Enabled Services* docket and/or developed a long-term intercarrier compensation plan that takes IP voice and other IP-enabled services into account in the context of holistic reform, treat IP-to-PSTN VoIP traffic in the same manner as standard TDM voice traffic for access charge purposes. Embarq makes persuasive arguments to the effect that it also makes no sense from a policy perspective to treat IP-to-PSTN VoIP as any different from other like services that utilize the access architecture of the PSTN in the very same manner. Until the Commission completes holistic reform of the intercarrier compensation rules, Qwest agrees with Embarq that IP-to-PSTN VoIP should be subject to switched access charges when it is non-local and reciprocal compensation or tariffed end-user charges when it is local. The forbearance approach is ideally suited to achieving this result in a principled manner while the Commission completes its reform of intercarrier compensation.

Embarq makes persuasive arguments that the Section 10 forbearance criteria are met in its petition and that forbearance is optimal. As Embarq demonstrates, the requested relief will ensure that the ESP exemption is not used to artificially give a competitive advantage to one group of service providers. It will also ensure that current assumptions about fair compensation for use of the PSTN are satisfied because like use will be subject to like compensation regardless of the type of service provider. Forbearance will also avoid a result where ILECs are under-compensated because of overstatements of traffic subject to reciprocal compensation.

For all these reasons, Qwest believes that Embarq has demonstrated persuasively that its request satisfies the Section 10 forbearance criteria. In short, application of access charges to IP-to-PSTN VoIP traffic when it utilizes the PSTN in the same manner as other traffic indisputably subject to access charges *is* fundamentally necessary to ensure that the charges and practices of carriers “are just and reasonable and not unjustly or unreasonably discriminatory.” Nor can a

case be made that this special treatment for one group of providers is necessary for the protection of consumers or is in the public interest.

In granting Embarq's Petition, the Commission should make a few important clarifications. First, the Commission should make unambiguously clear that geographical endpoints and not telephone numbers are the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether interstate or intrastate access charges apply). Carriers may use telephone numbers as a surrogate for billing purposes provided, however, that, as in other contexts such as nomadic wireless usage, there must be an ability for carriers to ensure that, in the end, billing accurately reflects jurisdiction. For example, there must be an ability to address the fact that in some situations (*e.g.*, due to the nomadic characteristics of VoIP telephones) telephone numbers may not, in fact, reflect geographical location. Second, the Commission, in granting the Embarq Petition, should clarify that the requested relief applies only to non-local IP-to-PSTN VoIP. Qwest believes this is implicit in the Embarq Petition as Embarq consistently refers to the traffic at issue as non-local calls that originate in IP and terminate on the PSTN. However, the Commission should clarify this explicitly to eliminate any doubt. This is appropriate and necessary. There is no basis in law or logic to apply interstate access charges to local traffic, whether in the IP protocol or not. Finally, it is important that the forbearance sought by Embarq not apply solely to Embarq, and instead be granted on an industry-wide basis. The Commission should therefore make it clear that a grant of the Embarq Petition applies to the entire industry.

IV. THE COMMISSION SHOULD ACT IN THE OUTSTANDING INTERCARRIER COMPENSATION AND IP-ENABLED SERVICES RULEMAKINGS

A. The Commission Should Resolve The *Intercarrier Compensation NPRM*.

For nearly seven years, the Commission has been seeking, in its *Intercarrier Compensation* proceeding, to reform its system of intercarrier compensation. Qwest, once again, encourages the Commission to act in that proceeding and to develop a long-term intercarrier compensation plan that, among other things, properly takes IP-to-PSTN VoIP and other IP-enabled services into account.

With respect to permanent, comprehensive reform, Qwest continues to advocate for a bill-and-keep at the edge approach to intercarrier compensation, rather than a system where carriers pay regulated rates to each other for transport and termination. Qwest believes that this is the only approach that incorporates all the necessary components of a successful plan. These components are, again, that: any intercarrier compensation regulatory structure must be comprehensive and include intrastate traffic as well as interstate; reform must permit carriers a realistic opportunity to recover through other sources any revenues that are lost through mandatory access and reciprocal compensation rate reductions and mandated expense increases (*e.g.*, increased rates for ISP-bound and ILEC extended area service (“EAS”) traffic proposed in the Missoula Plan); reform must be “holistic” -- *i.e.*, any new plan cannot be implemented on a piecemeal basis; the plan must be competitively neutral; the plan must not create new arbitrage opportunities; the plan must be timely; the plan must be lawful; the plan must be easy to implement, with minimal need for capital investment or major changes to recording/billing systems; the plan must be simple to administer and enforce; and the plan must ultimately be deregulatory. Qwest’s bill-and-keep proposal, based on universally defined “edges” of carrier networks with each carrier having the obligation to transfer its own traffic to the appropriate

edge of a terminating carrier's network, is just such a plan. Subject to the holistic approach described above, Qwest continues to believe that bill-and-keep is the optimal solution to intercarrier compensation. It is also the only plan that will remove uneconomic incentives for carriers to game the system as has been done in a myriad of ways over the last few years (*e.g.*, phantom traffic, including Virtual NXX (VNXX) traffic, and traffic pumping).

B. If Necessary, The Commission Can And Should Take Interim Action Regarding Phantom Traffic, VNXX And Other Issues.

As Qwest stated in its 2006 comments and reply comments regarding the Missoula Plan, Qwest had hoped that the initial round of filings regarding that plan would bring the Commission closer to comprehensive intercarrier compensation reform. However, this has not occurred.³¹

In the meantime, as Qwest has previously advocated, should the Commission not be able to accomplish comprehensive intercarrier compensation reform in the near term, it could still accomplish meaningful progress by acting, on an interim basis, to clarify the current law with respect to a handful of key issues underlying the intercarrier compensation debate. Qwest once again encourages the Commission to address phantom traffic reform consistent with Qwest's prior comments and *ex partes* on that subject.³² Qwest also believes the Commission can take important steps by entering other interim rulings clarifying current law on wireless traffic and the

³¹ Qwest detailed in its initial comments regarding the Missoula Plan that some of the ideas and concepts elucidated in the Missoula Plan (ideas that unfortunately are not actually realized in the details of the Plan itself) form a starting point from which it is conceivable that a viable restructuring of intercarrier compensation might be accomplished. Qwest also carefully noted that the flaws in the Missoula Plan are very significant. One of the many flaws which Qwest discussed in detail in its comments was the failure of the Missoula Plan to give proper effect to the ESP exemption and the Plan's flawed proposed rules for ISP reciprocal compensation.

³² See Reply Comments of Qwest Communications International Inc., CC Docket No. 01-92, filed Feb. 1, 2007 ("Qwest Reply Comments"). Also see, *e.g.*, Qwest *ex partes*, CC Docket No. 01-92, filed Feb. 3rd and 6th, 2006 ("Qwest Feb. 3rd *ex parte*" and Qwest Feb. 6th *ex parte*" respectively).

intra-MTA rule and on transiting.³³ Similarly, the Commission should also issue an interim order clarifying the intercarrier compensation issues arising from the mischaracterization of local traffic and the VNXX issue.³⁴ While falling short of the comprehensive reform that is needed, such an approach could result in meaningful reform and greatly reduce the amount of arbitrage while debate continues about a permanent, comprehensive intercarrier compensation reform plan. It would simply clarify or extend existing law in important areas while the industry awaits comprehensive reform.

C. The Commission Should Resolve The *IP-Enabled Services NPRM*.

The Commission issued its *IP-Enabled Services NPRM* approximately four years ago. Qwest once again encourages the Commission to act in that docket. In the meantime, as Embarq expressly states in its petition, the relief described above will provide important help for the industry without prejudging or limiting the Commission's ability to act in the *IP-Enabled Services NPRM* proceeding.

³³ See Qwest Reply Comments at 4-10; Qwest Feb. 3rd *ex parte* at 6-7; Qwest Feb. 6th *ex parte* at 6-7; Qwest *ex parte*, CC Docket No. 01-92, filed Mar. 16, 2007 at 2-4 (“Qwest Mar. 16th *ex parte*”) on these subjects.

³⁴ See Qwest Reply Comments at 18-21; Qwest Mar. 16th *ex parte* at 2-4; Qwest *ex parte*, CC Docket No. 01-92, filed Apr. 17, 2007 at 2 on these subjects.

V. CONCLUSION

For the reasons stated above, Qwest requests that the Commission take the action described herein.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Timothy M. Boucher
Craig J. Brown
Robert B. McKenna
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

Its Attorneys

February 19, 2008

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed via ECFS with the Office of the Secretary of the FCC in WC Docket Nos. 07-256 and 08-8; 2) served via e-mail on Ms. Lynne Hewitt Engledow, Wireline Competition Bureau, Pricing Policy Division at Lynne.engledow@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpweb.com.

/s/ Richard Grozier
Richard Grozier

February 19, 2008