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Written Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: *Intercarrier Compensation for ISP-Bound Traffic*; CC Docket 99-68; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *IP-Enabled Services*, WC Docket No. 04-36

FeatureGroup IP response to Verizon's September 12, 2008 interconnection and intercarrier compensation reform plan

Dear Ms. Dortch:

Verizon and Verizon Wireless ("Verizon") submitted a "comprehensive intercarrier compensation reform plan" on September 12, 2008. This letter provides UTEX Communications Corp. d/b/a FeatureGroup IP's thoughts on that filing. We will indicate where we agree with Verizon and where we part ways. If another party has already satisfactorily presented the argument we will not repeat the argument but will instead merely cite to the filing.

Before we specifically address the Verizon plan, we will provide a bullet point summary of our overall legal and policy positions on intercarrier compensation as they have been presented in these and other proceedings. That will better allow the Commission to understand our response to the Verizon proposal.

1. What are our current issues?

A. ***<u>State commissions have failed the competitive markets</u>*** *- Time after time the state commissions fail to rule on important CLEC rights issues due to a lack of knowledge, perpetual abatements and in many instances a captured environment**.*** *This is especially so with respect to new technology issues related to interconnection and the mutual exchange of traffic. Any plan that simply "kicks back" to the* ***<u>State Arbitration Proceedings</u>*** *is anti-competitive on its face.*

B. ***<u>In practice, CLECs are not "Peers", but rather ILEC "Customers</u>"*** ***–*** *This isn't acceptable under the Act. ILECs treat CLECs including FeatureGroup IP as a "customer" of the ILEC,* *regardless of the terms of the parties ICA. In the ILEC world, we are required to pay the ILEC for "interconnection services", like common transport, tandem switching, end office switching, etc. Under law we are not a customer. We are an equal.*

C. ***Business Plan Blocking –*** *CLECs must be able to deploy their new technology not as an "ILEC" type service. Specifically, our services to ESPs are being "deemed" as toll traffic and as "fraud" by the ILECs solely because they enable new technology.*

D. ***CLECs are ILEC "Profit Centers" -*** *In effect, the ILECs have turned the 1996 Act into a way to profit off of CLECs like FeatureGroup IP, instead of the Act allowing for "true cost-based" mutual exchange of traffic. ILECs have used this strategy as a barrier to entry to prevent CLECs from competing on a "level playing field." This is especially so when it comes to deploying and using new technology.*

E. ***ILEC intercarrier compensation reform today is focused purely on "rate" rather than "rate and rights" –*** *Without the right to "signal as a peer" and to force ILECs to "route back to a CLEC's numbers," the rate alone* ***will not*** *solve the industry's problems and bi-directional traffic will be stymied by the ILEC's anti-competitive, anti-technology games.*

F. ***Signaling - ILECs refuse to directly signal with FeatureGroup IP***

- *Today, if a CLEC wants to directly signal it must buy off the ILEC's tariff at an exorbitant cost.*
- *As such, CLECs, like FeatureGroup IP, must "buy" signaling from a vendor who buys direct signaling off of the ILECs signaling tariff.*
- *The ILEC then does not allow for direct peering arrangements as no direct routing rights exist in the ILEC tariffs and no signaling connections exist under a 251 arrangement.*
- *ILECs will not interconnect via new technology, like SIP (i.e., on a direct IP to IP basis), thereby artificially increasing entry costs on the CLEC.*
- *Again, this indirect signaling creates a barrier to entry and does not provide for a "level playing field" that should exist under the Act.*

G. ***Routing –*** *ILECs will not route traffic back to FeatureGroup IP's non-geographic numbers without us buying off of an ILEC's tariff -*

- once again at an exorbitant rate, thereby artificially creating asymmetric traffic flow and decreasing the usefulness of new technology.

2. What are specific reforms FeatureGroup IP is seeking?

A. ***This Commission must emphatically resolve how multiple LECs "signal, route and rate" the traffic they jointly handle as co-carriers and peers. Our focus is on traffic to and FROM the internet. Our needs with respect to these issues are:***

Issue	***Relief required***
Signaling	*LECs **must** directly signal via SIP or B-Links as "peers" without charging for this "**right**"*
Routing	*LECs **must** route all numbers, including non-geographic numbers, without charging for this "**right**" on a bilateral basis*
Rate	*"Bill & keep is preferred"; $0.0007 is acceptable conditioned on signaling / routing "**rights"** and that the rate is bi-directional or reciprocal and with no other hidden charges.*

B. ***If this Commission does not grant similar relief as part of holistic reform it must grant FeatureGroup IP's petition in WC Docket 07-256.***

3. The following discussion provides additional specifics for the above reforms we are seeking:

A. ***Termination charges*:**

- All LEC-LEC intercarrier compensation ***must*** and all intercarrier compensation ***should*** reflect only the "additional cost" of terminating a call.
- When two LECs exchange traffic and the originating LEC is not functioning as a provider of telephone toll then §§ 251(b)(5) and 251(d)(2) directly apply.
- Voice-capable IP-enabled providers are Enhanced/Information Service Providers, are not carriers and do not provide telephone toll. They therefore "cannot" be held subject to exchange access charges.
- There is no technical, factual, policy or legal basis to distinguish one kind of "ESP" traffic from another when it comes to intercarrier compensation. It would be unlawful to impose one regime for "ISP-bound" traffic and a

different regime for Voice-enabled IP-based traffic that "touches" the PSTN.

- So-called "Virtual NXX" is not "telephone toll service" and therefore cannot be subjected to "exchange access" charges; it is covered by §251(b)(5) and §252(d)(2).
- The Commission should explicitly encourage LECs to voluntarily agree to a "mutual waiver" as allowed by §252(d)(2)(B)(i).
- In the absence of a "mutual waiver," the price charged by one LEC to another LEC for the transport and termination of ESP traffic (both "ISP-bound" and Voice-enabled IP-based services) must be a cost-based rate that is consistent with §252(d)(2).
- FeatureGroup IP believes that "bill and keep" is the preferred method for carrier to carrier traffic exchange. Should bill and keep not be adopted, FeatureGroup IP believes that the FCC's $0.0007 rate for "ISP-bound" traffic is a "reasonable approximation" of the "additional cost" of terminating any and all calls, without regard to "classification. That price could be used for all "telecommunications" traffic, including "telephone toll service" traffic that is subject to "exchange access." If the Commission does not or believes it cannot prescribe a specific rate under §251(b)(5) and §252(d)(2), then state-specific cost determinations handled under §252(b) "arbitrations" must be made. The Commission can require states to apply §252(d)(2) to all calls without regard to classification.
- If and to the extent traffic exchanged between two LECs is subject to exchange access then they are joint providers and one LEC cannot charge the other but must instead look to the entity providing telephone toll service for payment. ILECs and states cannot force CLECs to implement the MECAB "Single Bill Option."
- The Commission must resolve how multiple LECs signal, route and rate the originating and terminating traffic they jointly handle as co-carriers and peers; ILECs must route calls their customers originate to numbers assigned to interconnected LECs and cannot require the interconnected LEC to become an "access customer" merely in order to receive a call.
- From a <u>policy perspective</u> all traffic on the PSTN[1] that incurs a similar cost should receive a similar charge.

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[1] The ILECs sometimes imply that the "PSTN" is limited to the legacy ILEC wireline telephone network and excludes CLECs and CMRS networks. FeatureGroup IP believes that the PSTN is the same thing as the "Public Switched Network" as defined in 20.3: "Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services." We and our wireless affiliate are therefore part of the PSTN.

- Implicit subsidies must be moved over to universal service support, which has to be explicit, nondiscriminatory and competitively neutral.[2] Exchange access charges should be held to the "additional cost" standard to remove the implicit subsidies remaining in those rates today.

B. *Interconnection issues*:

- Interconnection-related charges must comport with §252(d)(1). ILECs cannot require interconnecting LECs or CMRS providers to pay special access prices for interconnection-related facilities or trunks.
- Interconnecting carriers should bear facilities costs for traffic they send to the other carrier for termination and should not be required to cover the facilities costs of traffic they receive for termination. An ILEC cannot require a requesting carrier to bear the facilities costs related to the ILEC's originating traffic.
- "Signaling" is part of §252 interconnection. A requesting carrier has the right to interconnect with the ILEC's signaling network as a peer; ILECs cannot force CLECs or CMRS carriers to "buy" signaling links or signaling "services" from the ILEC's access tariffs.

4. **<u>Specific response to Verizon</u>**. Verizon's plan has some useful parts. To the extent Verizon would implement §251(b)(5)/§252(d)(2) and §251(c)/252(d)(1) then the plan can be implemented. To the extent Verizon would move exchange access charges in the direction of "additional cost", the plan would be reasonable. Some of the details, however, appear to diverge from applicable statutory requirements.

A. Definitions.

1. "**Transport**". Verizon proposes a new definition of "transport" that significantly departs from the current definition in 51.701(c). The <u>current</u> definition applies to transmission facilities on the *terminating* carrier's side of the POI. Verizon's definition would apply to the transmission facilities on the *other* side of the POI. As a result, under Verizon's proposal the terminating carrier would have no "transport" facilities or costs. This usage presents potential difficulties given the wording in §252(d)(2)(A)(i), which clearly assumes that the terminating carrier will incur "transport" costs that must be recovered.

2. "**Termination**." Similarly, Verizon proposes to change "termination." The current definition in 51.701(d) covers "switching … at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." Verizon would add the "network functions" of dedicated and common transmission, tandem switching and SS7 messaging.

[2] We will not further address Universal Service issues in this letter. Our position (as explained in filings by our parent and an affiliate) on that topic is exhaustively detailed in a recent *Notice of Ex Parte* filed in these and other proceedings.

We do not fully understand all of the implications of these two proposed definitions. If the Commission implements this change it must ensure all relevant "additional costs" a terminating carrier incurs are completely "folded" into the definition of "termination" and will be recovered through the "termination charge."[3]

Verizon's approach seems to keep in place the functional effect of the current rule that requires an originating carrier to bear the cost of transmission facilities on its side of the POI in proportion to originating use. *See* §51.709(b). If that is the purpose, then FeatureGroup IP does not oppose. If and to the extent, however, Verizon's plan would require the terminating carrier to bear (or not recover) transmission costs associated with the other carrier's traffic – regardless of side of the POI on which they lay – Verizon's plan does not comport with the statute.

3. "**Termination charge**." Verizon's definition of "termination charge" would not "cover" "multiplexing or other conversions necessary to make traffic compatible with the terminating carrier's switch." We cannot discern which carrier will be responsible for "additional" multiplexing or conversion costs the terminating carrier incurs when handling a call delivered from an interconnecting carrier. While any incremental costs are likely to be small, they will not be zero. But what we view to be more important is that this exclusion might be read to implicitly resolve a fundamental and substantive interconnection-related <u>technical issue</u> in the guise of a definition used for <u>cost recovery</u>. How the technical issue would be actually resolved under Verizon's definition is a complete mystery.

Many ILECs refuse to interconnect on any basis other than through an SS7-based architecture. At the same time the entire industry is moving towards IP-based networks, which use different "signaling" and "bearer" methods. FeatureGroup IP is very concerned that this language may be used by ILECs to require interconnecting carriers to bear the cost of "multiplexing" or "converting" IP-based traffic to "SS7" before delivering it to the ILEC for termination. We believe that the ILECs will <u>also</u> try to require interconnecting carriers that already have modern networks to take ILEC-originated traffic via "SS7" and bear the cost of "multiplexing" or "converting" to IP so the interconnecting carrier can then process the calls over an IP-based network.

The Commission must resolve the issue of whether ILECs must agree to interconnect using IP-based methods. IP-based interconnection is clearly technically feasible. We believe that the Commission must encourage the transition to new technology. New networks should not have to significantly dumb down their capabilities – and bear the cost – merely because the legacy providers have not yet chosen to upgrade their networks. Requiring the incumbents to interconnect using IP (and then bear the cost of conversion, if necessary) if that is the interconnection form desired by

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[3] The wording in Verizon's proposed definitions of "termination" and "termination charge" can be read to lead to this result. But there could be subtle intended effects that we cannot fully discern. To the extent Verizon's definition would ignore incremental facilities costs on the terminating carrier's side of the POI it should not be used.

the requesting carrier will encourage them to go ahead and fully implement IP, which will allow them to offer new services and capabilities to their own users.

FeatureGroup IP will only support the exclusion of "multiplexing" or "converting" from the definition of "termination charge" *if the Commission expressly rules that ILECs must interconnect in any technically feasible manner, including IP*. Further, the Commission must expressly hold that ILECs cannot force new entrants to always bear the cost of any necessary conversions from or to SS7. If there is to be some *sub silentio* obligation to present a call in a format "compatible with the terminating carriers switch" then that obligation must run both ways, meaning that ILECs must bear conversion costs from SS7 to IP when they deliver a call addressed to an IP-based network.

B. Sprint's October 1, 2008 letter.

Sprint/Nextel filed a letter on October 1, 2008 addressing Verizon's proposal. Rather than burden the record with redundant argument and analysis, FeatureGroup IP will state that it concurs with the points made in Sprint's letter regarding "Points of Interconnection" (Sprint letter, pp. 5-6); "Rates Left at Existing Levels" (Sprint Letter pp. 6-8; "Transport to Meet Point" (Sprint letter pp. 8-9); and "Forward Looking Interconnection Obligations" (Sprint letter pp. 9-11). FeatureGroup IP must, however, specifically reiterate and emphasize Sprint's argument that §252(d)(1) prohibits recourse to interstate or state access rates for any dedicated or common transport charges as between an ILEC and a CLEC or CMRS provider. That part of Verizon's proposal simply cannot be adopted.

C. "Originating transport costs for ISP-bound traffic and other convergent traffic."

Verizon's proposal says that "[t]he Commission's Order should address the assignment of financial responsibility for originating transport costs for ISP-bound and other convergent traffic." But Verizon does not share its thoughts on what the order should actually say. We assume that Verizon wants the Commission to adopt some subjective measure of an appropriate originating to terminating mix it wants carriers to have, and if a carrier's traffic mix differs then it will "pay" by having to cover additional transport costs on the ILEC's side of the POI. If that is what Verizon seeks FeatureGroup IP opposes the request.

There is no doubt that some new entrants focus on one or only a few specific lines of business. One can hardly expect a CLEC or CMRS provider – particularly one that is a small business – to immediately become a large-scale, multi-product, multi-customer class vendor with a broad mix of traffic "types" and "balanced" traffic. Nor should anyone reasonably expect or demand all new entrants to implement a wholly retail or consumer-class business plan in the beginning or ever.[4] Some carriers will in

[4] The 1996 amendments were passed with the express goal of encouraging entry by a host of new providers with individual business plans involving the offer of innovative new services. Congress was not merely trying to create a bunch of ILEC clones. "Different" is ***good*** – not evil. Innovation and uniqueness should be encouraged, not penalized or discouraged.

fact have convergent traffic, and there is nothing at all wrong with that. This is particularly so since the intercarrier compensation regime incents carriers to structure a business plan that involves trying to terminate more traffic than one originates.

Verizon's opaque request also ignores that many of the new entrants today have what could be called "convergent" traffic, but it is going the other direction. "Yesterday's" "ISP-bound" controversy involved CLECs that largely terminated traffic originated by ILEC customers. "Today's" dispute involves carriers that serve ESPs and other providers who are addressing calls to ILEC users. The traffic is still "convergent," but it is now going the other direction. If the Commission sets a unitary "additional cost" price for all traffic then non-incumbent specialized carriers will have the incentive to sell connections to all kinds of ESPs – those that receive dial-up traffic, those that have Voice-enabled IP-based traffic with an end-point on the PSTN, and some with other kinds of enhanced/information services that both initiate and receive calls – with the result that the carrier will actually have balanced traffic. If the "rate" is right then traffic will tend to be balanced, but even if it remains imbalanced there is no harm.

FeatureGroup IP's business focus is on serving ESPs. At present our traffic is largely outbound. But that is only because the dominant ILEC in our area will not route calls addressed to our network using numbering resources we obtained to offer a telephone exchange service[5] product that ESPs could use to in turn offer Voice-enabled IP-based services to users on the Internet. We devised a solution that would allow "PSTN" users to "call" IP-based users like Skype or GoogleTalk or other clients without forcing the Internet user to have and use a new, different or "static" "telephone number."[6] AT&T has refused to perform the switch translations necessary to make calls addressed to our network route to our network, unless we "agree" to pay AT&T significant access tariff based nonrecurring "translation" charges, and then "agree" to pay originating switched access for calls that ***originate*** on AT&T's network. AT&T simply refuses to honor the clear terms of Rule 51.703(b). AT&T will not route traffic to our network and then it and other ILECs try to tar us with the "convergent" label. If the ILECs would do what the law requires – by performing switch translations without "access" non-recurring charges and then routing their originating traffic to our network without attempting to impose originating switched access – then FeatureGroup IP would have a balanced traffic mix.

[5] FeatureGroup IP has consistently asserted that its telecommunications service products used by ESPs are "telephone exchange service" rather than "exchange access" service. But even if we are incorrect and our products are "exchange access service" they are still not "telephone toll service." AT&T, however, absolutely insists on treating FeatureGroup IP – a co-LEC carrier and a peer – as if we are an AT&T "IXC" "access customer" that is not entitled to "LEC" rights. The statute does not allow ILECs or states to impose the "access" regime on requesting carriers because it is completely at odds with §251(b)(5), §251(c) and §252(d).

[6] FeatureGroup IP would not recover "reciprocal compensation" or any other "intercarrier" charges for calls to our network that originate on AT&T's network. We have "waived mutual cost recovery."

D. Originating Access.

FeatureGroup IP would prefer to – and largely does – not care what "originating access" rates the ILECs charge to their IXC customers.[7] While we have a switched access tariff that comports with the Commission's *CLEC Access Charge* rules we have never issued a "switched access" bill to any carrier. Our business depends entirely on the revenues we receive from our non-carrier customers. FeatureGroup IP lives "bill and keep." Sadly, however, the ILECs consistently attempt to subject <u>us</u> to <u>their</u> access tariffs, in general and for both originating and terminating traffic. As noted, AT&T currently will not route originating traffic to FeatureGroup IP's network unless we pay originating access to AT&T. Further, AT&T and other ILECs consistently insist that FeatureGroup IP must subscribe to "access" service in order to interconnect at the signaling layer, or to establish physical bearer or signaling interconnection links.

Our concern, therefore, is not about the "rate" part of Verizon's originating access proposal. It is the "**rights**" that matter. FeatureGroup IP is an LEC that provides only telephone exchange and/or exchange access service. We do not provide telephone toll service. We are not subject to the ILECs' access tariffs; our rights derive from §§251 and 252 and we are a peer and co-carrier – not a "customer" – of the ILECs. The only potential "access" relationship we could have with any ILEC is that of a <u>***joint access provider***</u> where each of us would look to a third party joint access customer for payment.

The Commission must expressly and emphatically remind the ILECs that co-carriers and peers are <u>***co-carriers***</u> and <u>***peers***</u>, and they are not "access" or even "interconnection" "customers." Access rates do not comport with §252(d)(1) or §252(d)(2). Interconnection agreements – not "exchange access tariffs" – form the basis of the relationship and neither the ILECs nor the states can lawfully force requesting carriers to become "access customers" of an ILEC in any arbitration except to the extent and only to the extent the requesting carrier is providing "telephone toll" service rather than "telephone exchange service" or "exchange access service."

E. Preemption as necessary to achieve unitary price for all traffic.

FeatureGroup IP would much prefer "bill and keep" as the intercarrier compensation regime for all traffic, without exception, for both originating and terminating. But to the extent the law can not be read to reach that result, then we believe that it is imperative that the Commission set a single price to be paid to "transport and terminate" each and every kind of traffic, regardless of type, jurisdiction, technology, customer, or provider and without exception. We support the effort to adopt the current $0.0007 rate as the default price to be used, unless two carriers agree to a different price or a mutual waiver. We believe the Commission has the authority to

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[7] From a policy perspective we believe that the "additional cost" standard should be applied to originating traffic in those instances where originating charges are allowed. But we also generally believe that there should be relatively few, if any, instances where originating charges as between carriers should be allowed to begin with.

prescribe that rate – even for traffic that might be deemed "intrastate" – under the Act. We believe the Commission has the authority to prescribe $0.0007 as "the" "additional cost" to be recovered under §252(d)(2), and we believe there is evidence in the record to justify that price.[8]

There can be no exceptions, however. None. The ILECs cannot be allowed to game the system by claiming that a certain call is not covered based on some perceived distinguishing characteristic. No more arguing about whether something is "local." They cannot be allowed to apply originating "access" (or "bill and keep") to so-called "Virtual NXX" traffic exchanged between an ILEC and a CLEC or CMRS provider. They cannot be allowed to treat so-called "ISP-bound" traffic differently from any other traffic type, with regard to transport and termination or interconnection links and associated charges. No more whining about "convergent" traffic. They cannot be allowed to force requesting carriers to become access customers for any purpose. We will gladly pay them $0.0007 to terminate every call we hand them for termination, if they will (1) honor our numbering resources by <u>routing traffic addressed to our network</u> and (2) pay <u>us</u> $0.0007 for every call they route.

It is simply no longer remotely viable to have differential intercarrier charges based on notions of geography, service, value or technology. If any one thing is clear by now it is that it is impossible to create effective rules that can be adequately policed and enforced, particularly since the cost is the same.[9] The uncertainty and cost associated with all the litigation is retarding technological development, to the detriment of our citizens and the national economy. The Commission has the power to prescribe intercarrier compensation terms, and it can pre-empt state regulations (and even intrastate access rates) that would interfere with or frustrate the Commission's determination that a single, unitary price is essential to obtain the goals set out throughout the Act. There is more than enough evidence that only single, unitary intercarrier compensation price will "make available, <u>so far as possible</u>, to <u>all the people of the United States</u>, without discrimination on the basis of race, color, religion, national origin, or sex, <u>a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges</u>, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication…"

FeatureGroup IP recognizes that the states have an important role as well. If a state believes that a given carrier must be allowed to recover revenue from some other

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[8] If for some reason the Commission believes it cannot prescriptively impose the $0.0007 rate then it should adopt rules that better define "additional cost", provide by rule that <u>all traffic without exception</u> is subject to that standard and reaffirm that the compensation regime is both <u>reciprocal</u> and <u>mutual</u> (again, without exception). The states can then apply the rules to set the §252(d)(2) price that will obtain in that jurisdiction.

[9] Unlike most of the participants, FeatureGroup IP does not believe that "arbitrage" is an evil that must be identified and punished. We believe it is merely a natural, anticipated and expected economic reaction in a market economy to prices that are not based on cost. If you want to "end" arbitrage, set a cost-based unitary price.

source, they can plainly provide for that revenue through some means other than inter-provider charges. The states still have significant responsibilities under §§251 and 252. But it is no longer possible to neatly or even roughly "jurisdictionalize" individual calls based on any single or even set of characteristics, and it is now pointless and massively inefficient and counterproductive to the essential goals of the Act. The Commission must prescribe a single unitary intercarrier compensation price and end this game of whack-a-mole, and it has the authority to do so under the Act and on the record of these proceedings.

Sincerely,

Jonathan Askin, Esq.
on behalf of

UTEX Communications Corp. **d/b/a**

FeatureGroup IP