

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

In the Matter of )  
)  
Petition of the Frontier Local Operating )  
Companies for Limited Forbearance ) WC Docket No. 08-205  
Under 47 U.S.C. § 160(c) from )  
Enforcement of Rule 69.5(a), 47 U.S.C. )  
§ 251(b), and Commission Orders on the )  
ESP Exemption )

**COMMENTS OF GOOGLE INC.**

Richard S. Whitt, Esq.  
Washington Telecom and Media Counsel  
GOOGLE INC.  
Public Policy Department  
1101 New York Avenue NW  
Second Floor  
Washington, DC 20005

Donna N. Lampert  
Mark J. O'Connor  
LAMPERT, O'CONNOR & JOHNSTON, P.C.  
1776 K Street NW, Suite 700  
Washington, DC 20006  
(202) 887-6230 tel  
(202) 887-6231 fax

*Counsel for Google Inc.*

October 10, 2008

**TABLE OF CONTENTS**

**INTRODUCTION AND SUMMARY ..... 1**

**DISCUSSION ..... 4**

**I. The FCC Should Not Expand the Carriers’-Carrier Access Regime ..... 4**

**II. Extending Access Charges to IP Voice Services Would Stifle Innovation  
and Economic Growth, Disserve Consumers and Harm Competition in  
Multiple Markets..... 7**

**III. Forbearance is Appropriate to Minimize Regulations For  
Telecommunications Carriers, Not to Expand Regulation to Unregulated  
IP Innovators ..... 9**

**CONCLUSION ..... 11**

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

In the Matter of	)	
	)	
Petition of the Frontier Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption	)	WC Docket No. 08-205

**COMMENTS OF GOOGLE INC.**

Google Inc., by its attorneys, respectfully submits these comments in response to the above-referenced petition of the Frontier Local Operating Companies (“Frontier”) that requests significant FCC action on intercarrier compensation and the termination of IP-originated voice traffic on the public switched telephone network (“PSTN”).<sup>1</sup> As discussed below, Google urges that any Commission action in this proceeding should encourage interconnectivity of IP traffic, bolster broadband deployment, and support innovation of IP services with voice components (“IP Voice”). As such, the Commission should deny Frontier’s Petition.

**Introduction and Summary**

IP Voice today represents a tremendously diverse array of services, from over-the-top voice-over-IP (“VoIP”) to multimedia conferencing, gaming, social networking, unified messaging, commerce services and countless other applications that include a voice

---

<sup>1</sup> As Frontier states (at iii), its petition “mirrors a nearly identical petition filed by Embarq on January 11, 2008 in WC Docket 08-08,” seeking forbearance from the ESP exemption for all IP traffic that terminates on the PSTN such that interstate and intrastate carrier access charges would apply. Google incorporates here the comments it filed in the Embarq proceeding. *See* Comments of Google Inc. WC Dkt. Nos. 07-256, 08-8 (filed Feb. 19, 2008).

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

Google, like almost all web-based multimedia companies, 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.

FCC action to interject a new regulatory cost model into the torrent of IP Voice innovation should proceed only with careful consideration for what is best for consumers, competition, and innovation and requires a holistic approach incorporating reasonable and efficient carrier practices on the exchange of IP traffic, IP inconnectivity with carrier networks (including the PSTN), and the termination and origination of IP traffic on the “last mile.” Frontier’s approach to import the PSTN legacy access charge framework for IP services is precisely the opposite of what is needed, and would squelch IP innovation and harm consumers.

Notably, Frontier is factually and legally incorrect in asserting that the ESP exemption does not apply to IP-to-PSTN traffic, that the ESP exemption is creating a competitive disparity, and that information service providers offering IP Voice applications are somehow failing to contribute to the costs of the PSTN. The FCC has consistently and wisely chosen a path that allows enhanced applications and services to flourish. IP Voice applications, with their myriad consumer benefits, are a prime example.

Rather than pushing the FCC to extend legacy regulations into the IP arena, Frontier and other PSTN carriers must choose to adapt; technological innovation and progress will continue to erode their significant reliance on filed-rate revenues from PSTN terminating access payments. Already, VoIP via broadband reduces consumer costs by eliminating the costs of originating 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 and subscriber line charges.

Ironically, even if granted, the Frontier Petition would at best achieve only a short-term and pyrrhic gain for incumbent LECs, at the expense of consumers. Not only would the sought-for regulatory protections create obvious economic disincentives for Frontier to invest extensively in fiber-based broadband networks or IP services for its customers if those services would cannibalize Frontier's per-minute access revenues, it will effectively penalize Frontier customers unable to transition to broadband or wireless as they shoulder the stifling effects of being callers to whom per-minute access charges apply.

In any case, Frontier here is pursuing a flawed remedial choice, and asks the FCC to employ its forbearance authority where it would be both unfounded and unlawful. Frontier's allegations – that forbearance is needed to stop “carriers” from defying terminating access charge

obligations on groundless defenses (so called “access evasion”) – are an *enforcement* matter.

While a forbearance petition may be less expensive for Frontier than federal collection actions, the sledge-hammer of forbearance here would harm consumers, impair competition, and abuse the statutory authority.

### **Discussion**

#### **I. The FCC Should Not Expand the Carriers’-Carrier Access Regime**

The premise of Frontier’s Petition is that the ESP exemption is causing “access evasion” and should be eliminated by the FCC through forbearance, or in the alternative, a declaratory ruling that “the ESP exemption does not apply to IP-to-PSTN voice traffic.” Frontier Petition, at 1. According to Frontier, the ESP exemption applies only to a single type of communication – when an information service provider receives a call from its customer connected via the PSTN. *Id.*, at 8-9. FCC regulation and FCC and judicial precedent thoroughly refute this cramped interpretation.

Section 69.5(a) of the FCC’s rules expressly provides that end user charges are assessed upon end users of the PSTN.<sup>2</sup> End users pay carriers for “last mile” and other telecommunications services, including narrowband and broadband. As end users, web companies and other information service providers also pay network operators for their services, including last mile, special access and backbone services. FCC Part 69 regulations, on the other

---

<sup>2</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 some use the phraseology “ESP exemption,” that is an inaccurate and misleading characterization. In point of fact, the FCC never determined that carrier access charges should apply to ESPs in the first place. Instead, the agency consistently has classified providers of enhanced services as end users of the communications network. See *MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 F.C.C.2d 682, ¶¶ 75-80 (1983).

hand, also stipulate that carriers (and *only* carriers) pay the incumbent LECs' per-minute "carrier's carrier charges." 47 C.F.R. § 69.5(b). It is well-established by these regulations that non-carrier providers are *end users* under the Commission's current federal access charge regime, and so have no liability to the incumbent LECs for originating or terminating access charges that apply to interexchange carriers.<sup>3</sup>

FCC precedent amply and clearly confirms that a service provider offering an "information service" or otherwise not offering a "telecommunications service" (*e.g.*, an IP application or information service) is an "end user," meaning *not* a "carrier" obligated to pay the ILECs' per-minute carrier access charges.<sup>4</sup> As the FCC explained in the 1997 *Access Charge*

---

<sup>3</sup> From its inception in 1983, the FCC's "end user" classification applied to all entities that are not Title II interstate carriers, such as "[o]ther users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers . . ." *In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 F.C.C.2d 682, ¶ 83 (1983). In 1987, the Commission affirmed 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). The FCC re-affirmed these rules in 1988, 1991, and in 1997. *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order*, 3 FCC Rcd. 2631, ¶¶ 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) ("*1997 Access Charge Order*"). This aspect of the *1997 Access Charge Order* was expressly upheld by the Eighth Circuit. *See, Sw. Bell. Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

<sup>4</sup> *See, 1997 Access Charge Order*, ¶ 341. Indeed, the claim that an IP Voice provider is subject to interstate terminating access charges as a matter of law would render moot the FCC's determination in the *AT&T IP-in-the-Middle Order*. In that case, the FCC determined first that AT&T's service was a "telecommunications service" in order to hold AT&T subject to ILEC terminating carrier access charges. *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, ¶ 1 (2004) ("*AT&T IP-in-the-Middle Order*") ("We clarify that, under the current rules, the service that AT&T describes is a telecommunications service upon which interstate access charges may be assessed.").

*Order* (¶ 341), “[i]n the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities *to originate and terminate interstate calls*, ISPs should not be required to pay interstate access charges” (emphasis added). Thus, the “end user” classification applies when the information service provider communications *to or from* other end users via the PSTN; that traffic does not mystically morph from an “end user” to a “carrier” transmission, depending on whether the two end users have a direct contractual relationship.

The federal courts have likewise found that FCC law does not currently apply the terminating access charges of incumbent LECs to IP voice services. To the contrary, in the recent case *Frontier Tel. v. USA Datanet*, 386 F.Supp. 2d, 144 (D.W.N.Y. 2005), the Court explained to petitioner Frontier that it may not apply its federally tariffed terminating access charges to an interconnected VoIP provider, unless and until such time as the FCC squarely addresses the complex policy and regulatory classification issues. *Id.*, at 144 (Court stays the Frontier collection action until the FCC “resolve[s] the central issue in this case, which is whether and to what extent VoIP voice communication providers such as Datanet are liable to pay access charges to [LECs] such as Frontier”). Another federal district court has found that reciprocal compensation, and not incumbent carrier access charges, is the appropriate compensation mechanism for “information service” IP traffic. *Sw. Bell Tel., L.P. v. Mo. PSC*, 461 F. Supp. 2d 1055 (D. Mo. 2006). Other federal courts have found that IP services do not meet the “telecommunications service” definition of the Communications Act,<sup>5</sup> which would

---

<sup>5</sup> *Vonage v. Nebraska PSC*, Memorandum and Order, Case No. 4:07CV3277 at 11 (D. NB, May 3, 2008); *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) (finding that

render impossible the legal application of “carrier’s-carrier” access charges to non-carrier providers.

Thus, the “declaratory ruling” Frontier requests could not be issued yet because the FCC has not yet determined the rulemaking, technical, and policy matters of what, if any, form of intercarrier compensation IP service providers should pay to incumbent LECs or other last-mile network owners.<sup>6</sup> See, *Frontier Tel.*, 386 F.Supp. at 149-150 (same). The FCC’s pending *IP-Enabled NPRM* contemplates several alternative and prospective-only compensation schemes.<sup>7</sup> The proper outcome turns, at least in part, on another fundamental legal and policy matter still pending before the FCC – the regulatory classification of IP services, including VoIP services, as “telecommunications services,” “information services,” or neither. As the FCC noted in 2004, the *IP-Enabled NPRM* “proceeding will entail an analysis of the regulatory characterization of a variety of IP services, including VoIP, and the applicability of access charges to those services.”<sup>8</sup>

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

Not only does Frontier’s proposal contravene current FCC law, it should also be rejected as bad communications policy. As IP technology and the services it enables evolve, 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 bring

---

Vonage’s “over-the-top” VoIP service is an “information service”), aff’d, 394 F.3d 568 (8th Cir. 2004).

<sup>6</sup> *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Dkt. No. 04-36, 19 FCC Rcd. 4863, ¶¶ 61-62 (2004) (“*IP-Enabled NPRM*”).

<sup>7</sup> *Id.*, ¶ 62.

<sup>8</sup> *AT&T IP-in-the-Middle Order*, ¶ 10. See also, *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd. 9610, ¶ 4 (2001).

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. IP services also reduce distinctions between wireline and wireless networks and applications to allow seamless integration either not possible with, or not offered by, the PSTN.

These IP services allow existing functions to be performed with greater efficiency and lower cost, and they create new opportunities for commerce, socializing and connection. In our increasingly networked, innovation economy, 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>9</sup> In particular, we have learned that technological change is endogenous to the economy, and that new ideas power economic growth,<sup>10</sup> along with innovation spillovers, peer production, and social values like diversity and democracy.<sup>11</sup> Internet-based technologies like IP Voice enable all of this.

Under the guise of “regulatory relief,” Frontier effectively asks the FCC hold back the emerging competitive broadband web-driven environment. 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

---

<sup>9</sup> Eric Beinhocker, *The Origin of Wealth: Evolution, Complexity, and the Radical Remaking of Economics*, Harvard Business School Press (2006).

<sup>10</sup> David Warsh, *Knowledge and the Wealth of Nations: A Story of Economic Discovery*, W. W. Norton (2006).

<sup>11</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).

regulatory regime designed for another era (and one, like the access charge regime, that was designed to be “temporary” at that).

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

Frontier’s forbearance request is baldly inappropriate. Forbearance authority is a valuable tool for the FCC to reign in and 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 Frontier proposes, however, is for the FCC to turn the statute on its head, by *adding regulatory burdens to 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 Frontier’s request to expand the scope of carrier access charge regulations to non-carrier information service providers 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.

Similarly, to the extent Frontier 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>12</sup> in order for Frontier to assess carrier per-minute access charges

---

<sup>12</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

on the latter, the petition makes a patently inadequate showing. The Frontier Petition does not even request for the FCC to eviscerate the statutory “information service” distinctions, nor does Frontier 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.

At bottom, the Frontier Petition 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 is the antithesis of the FCC’s specific forbearance precedent; forbearance is inappropriate where the petitioner has failed to identify a specific service and explain how the particular regulation in question meets the three-pronged statutory scheme.<sup>13</sup> Far from being narrowly-tailored forbearance relief on a specific and well-defined set of carrier services, the Frontier Petition “casts as wide a net” over all IP Voice applications as is conceivable.

---

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. . .”).

<sup>13</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) (declining to exercise forbearance where the FCC “do[es] 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.”) (Internal citations omitted).

Finally, the Frontier Petition would appear to be an effort to employ forbearance inappropriately to obtain regulatory enforcement. Specifically, Frontier complains that an increasing number of *telecommunications carriers* are engaging in “an evasion and misapplication” of the ESP exemption. *See*, Frontier Petition, at 12. Granting forbearance from the “ESP exemption” in its entirety, however, would be an overly broad solution to a narrow set of enforcement claims.<sup>14</sup>

**Conclusion**

For the foregoing reasons, Google urges the Commission to deny the Frontier Petition. 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,



Richard S. Whitt, Esq.  
Washington Telecom and Media Counsel  
GOOGLE INC.  
Public Policy Department  
1101 New York Avenue NW  
Second Floor  
Washington, DC 20005

---

Donna N. Lampert  
Mark J. O'Connor  
LAMPERT, O'CONNOR & JOHNSTON, P.C.  
1776 K Street NW, Suite 700  
Washington, DC 20006  
(202) 887-6230 tel  
(202) 887-6231 fax

*Counsel for Google Inc.*

October 10, 2008

---

<sup>14</sup> The Commission has already addressed such matters in the *AT&T IP-in-the-Middle Order*; Frontier's proper remedy is to pursue a collection action against these unnamed carriers in federal district court. *See, AT&T IP-in-the-Middle Order*, ¶ 23, n.93.