

**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)	WC Docket No. 08-205
Enforcement of Rule 69(a), 47 U.S.C.)	
§ 251(b), and Commission Orders on the)	
ESP Exemption)	

REPLY COMMENTS OF EMBARQ

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REPLY COMMENTS OF EMBARQ

I. INTRODUCTION AND SUMMARY

Four parties submitted comments on Frontier’s petition.¹ Each of them noted -- as Frontier itself acknowledged -- that Frontier’s filing is essentially the same as Embarq’s forbearance petition, filed earlier this year.² Embarq’s petition was explicitly supported by manufacturers, integrated carriers, large, mid-sized, and small ILECs, and carrier associations from around the country. Likewise, the overwhelming majority of

¹ 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 (filed Sept. 30, 2008) (“Frontier Petition”). *See* Public Notice, DA 08-2228 (rel. Oct. 3, 2008).

² Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008) (“Embarq Petition”). *See* Public Notice, DA 08-94 (rel. Jan. 14, 2008). Comments on Embarq’s petition and Feature Group IP’s were filed on February 19 and replies on March 14, 2008.

commenters on Feature Group IP's October 2007 forbearance petition -- which seeks the opposite result -- opposed that petition.³ Understandably, Embarq agrees wholeheartedly with Frontier that the Commission should grant Frontier's petition, and its own, and deny Feature Group IP's petition.⁴ Doing so would end needless disputes over some unscrupulous carriers' misapplication of the so-called Enhanced Service Provider Exemption ("ESP Exemption") to non-local voice traffic originated using Internet protocol ("IP") but terminated on the public switched telephone network ("PSTN").

Three of the four commenters on Frontier's petition acknowledge that switched access charges properly apply to IP-to-PSTN calls. NASUCA supported Frontier's petition (and Embarq's), although it suggests a declaratory ruling would be "more efficient."⁵ The New Jersey Division of Rate Counsel agreed that "the Commission should not allow IP-originated voice traffic to evade the obligation of all carriers to pay access charges,"⁶ but it opposed forbearance as the vehicle for relief. Verizon agreed that disputes are a problem, but opposed forbearance, urging the Commission instead to complete its ongoing rulemakings pending on intercarrier compensation and related issues.⁷ Only one commenter, Google, pretended that IP-originated voice calls fall within the ESP Exemption.

³ Petition of the Frontier Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b) (filed Oct. 23, 2007) ("Feature Group IP Petition"). *See* Public Notice, DA 07-5029 (rel. Dec. 18, 2007); Order, DA 08-93 (rel. Jan. 14, 2008).

⁴ Given the similarity of the Embarq and Frontier petitions, Embarq incorporates by reference its comments and reply filed in WC Docket Nos. 07-256 and 08-8 (filed Feb. 19 and Mar. 14, 2008, respectively).

⁵ NASUCA at 2-3. *See also* NASUCA Comments at 2-3, WC Docket Nos. 07-256, 08-8 (Feb. 19, 2008).

⁶ NJDRC at 4.

⁷ Verizon at 2-3. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *IP Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863 (2004).

Embarq agrees with NASUCA that the Commission should bring an end to disputes over the ESP Exemption by granting the all local exchange carriers the relief that Frontier and Embarq have both requested. Frontier's petition readily meets section 10 requirements for forbearance.⁸ Forbearance is certainly in the public interest. Access revenue remains essential to ensure universal service, especially in rural areas. Whether through forbearance or declaratory ruling, however, the Commission should take this opportunity to reduce these disputes and promote investment in the PSTN by ensuring the ESP Exemption is not misapplied to IP-to-PSTN voice calls.

II. THE COMMISSION SHOULD ACT TO ENSURE THE ESP EXEMPTION IS NOT MISAPPLIED.

A. Commenters Did Not Dispute that Disputes Over The ESP Exemption Are A Growing Problem.

None of the commenters challenged Frontier's point that there are a growing number of disputes about the ESP Exemption and purportedly IP-originated calls. NASUCA agreed that the Commission should act on Frontier's request (and Embarq's) to bring an end to these disputes and these abuses by some VoIP providers.⁹ Verizon acknowledged industry concern about "unscrupulous providers" that are "gaming the system."¹⁰ The New Jersey Division of

⁸ 47 U.S.C. § 160(b). See Frontier Petition at 17-27.

⁹ NASUCA at 2-3. NASUCA reiterated its support for Embarq's similar petition in WC Docket No. 08-8 and its opposition to the Feature Group IP petition in WC Docket No. 07-256. NASUCA also noted that granting Frontier's and Embarq's petitions "would also address the key issues raised by a subsequent AT&T petition" asking the Commission to reconfirm that access charges apply to IP-to-PSTN calls. *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption,"* WC Docket No. 08-152 (filed July 23, 2008). See Comments of Embarq, WC Docket No. 08-152 (filed Aug. 21, 2008) at 10-12.

¹⁰ Verizon at 2. Verizon professed worry that granting Frontier's petition outside the intercarrier compensation reform rulemaking could somehow inadvertently create new "arbitrage opportunities." *Id.* Verizon did not explain how any new arbitrage could arise from an order that would preclude misuse of the ESP Exemption.

Rate Counsel, which is congenitally opposed to any deregulatory forbearance, recognized the problem, but deemed it less “urgent” than other issues before the Commission.¹¹ Google likewise did not deny that these disputes are a growing problem within the industry.

Moreover, none of the commenters denied that the large majority of interconnecting carriers have been paying access charges on IP-to-PSTN calls, as Frontier explained in its petition.¹² This long-standing industry practice makes sense, because the ESP Exemption has never properly been applied to IP-to-PSTN voice calls. The fact that carriers historically have been paying access on these calls shows that parties know the ESP Exemption does not truly apply. In fact, only Google tried to claim that the ESP Exemption even applies to IP-to-PSTN traffic.

B. Access Revenues Remain Critical To Support Universal Service And Investment In The PSTN, Especially in Rural America.

NASUCA echoed most commenters on Embarq’s petition, reiterating that “carriers using the networks of other carriers to terminate calls must compensate the carriers who own those networks.”¹³ That is a “fundamental principle” of telecommunications law and policy. That principle reflects the critical importance of switched access revenue to support telecommunications infrastructure investment and universal service.

Local exchange carriers operate, maintain, and upgrade the PSTN throughout the nation. They rely on switched access charges to help fund that investment, especially in more rural areas where investment otherwise is most difficult to justify. As Frontier’s petition explained,

¹¹ NJDRC at 4.

¹² Frontier Petition at 12.

¹³ NASUCA at 2.

misapplication of the ESP Exemption could have very serious consequences.¹⁴ Access charges account for almost \$9 billion annually in investment.¹⁵ IP-originated voice services are growing rapidly. In 2008, they are projected to be 20% of all voice calls, rising to 33% in 2010, and to 40% in 2011.¹⁶ ILECs are already facing line loss and the accompanying decline in revenues, even while they -- unlike all other competitors -- are obligated to serve as carrier of last resort (“COLR”) even in uneconomic areas. If ILECs are to invest in the PSTN, and if they are to extend broadband networks in rural and high cost areas, it is critical that the ESP Exemption not be misapplied. “VoIP providers need to pay their fair share” of the cost of that network to support that investment.¹⁷

Absent vast increases in explicit universal service support, ILECs must rely on access revenue to provide the PSTN and to ensure universal service in high cost areas. If those revenues are eroded by misapplication of the ESP Exemption, ILECs cannot invest in network upgrades and broadband capable plant, and eventually will be unable to maintain existing quality of service, in rural America. Already, ILECs are under acute pressure to curtail investment -- especially in high cost areas.

¹⁴ Frontier Petition at iv-v, 7-8.

¹⁵ See Fed. And State for the Fed.-State Joint Board on Universal Service, “Universal Service Monitoring Report (Dec. 2007) at Table 1.5; Industry Analysis and Tech. Div., “Trends in Telephone Service,” (Feb. 2007) at Table 1.4.

¹⁶ See eMarketer subscribership projections, available at www.emarketer.com/Article.aspx?id=1004829; www.imnewswatch.com/archives/2007/04/number_of_us_vo.html?visitFrom=1.

¹⁷ See Reply Comments of NASUCA on Petitions for Forbearance, WC Docket Nos. 07-256, 08-8 (filed Mar. 14, 2008) at 4.

III. THE ESP EXEMPTION DOES NOT APPLY TO IP-TO-PSTN VOICE CALLS.

A. IP-to-PSTN Voice Calls Are Subject to Access Charges Under Existing Law.

NASUCA agreed with Frontier that, under existing law, non-local “IP-to-PSTN voice calls are not exempt from access charges.”¹⁸ The New Jersey Division of Rate Counsel agreed, emphasizing that “the Commission should not allow IP-originated voice traffic to evade the obligation of all carriers to pay access charges.”¹⁹ Verizon made clear that access charges apply to IP-to-PSTN calls, even though it opposed for other reasons “a narrow ruling on Frontier’s petition.”²⁰ Like most parties commenting on Embarq’s petition, they all realize that the Commission’s access rules govern all voice traffic connected to the PSTN, including IP-originated voice traffic.

The ESP Exemption was adopted as a narrow *exception* to the Commission’s deliberately broad access charge regime. It applies only in instances where an enhanced information service provider allows its subscribers to obtain access to the ISP’s own information services. It does not apply when an ISP uses the PSTN to place a voice long distance call between end users -- as is the case with respect to IP-to-PSTN traffic. It was never intended to exempt any service provider from paying its fair share, much less to give one class of provider a regulatory advantage simply because of the technology it uses in originating a call. Even Verizon, despite opposing Embarq’s request for forbearance, did not argue that the ESP Exemption properly can be applied to IP-to-PSTN voice calls.

¹⁸ See Comments of NASUCA on Petitions for Forbearance, WC Docket Nos. 07-256, 08-8 (filed Feb. 19, 2008) at 11.

¹⁹ NJDRC at 6.

²⁰ Verizon at 3. Verizon repeated its advocacy for federal preemption of any state regulation of any IP-originated services, arguing that federal switched access rates should apply to these calls.

Echoing its comments on Embarq's petition, Google voiced concern about protecting "innovation" in Internet-based applications²¹ It offered no explanation how or why innovation would be hampered by having IP-to-PSTN voice services compete on a level playing field, remaining subject to the same access rules as all other voice calls. Instead, it simply argued that any ostensibly "Internet-based technologies like IP voice" are exempt from the access charge regime, because having "IP service pioneers" contribute their fair share to support the PSTN would "saddle" them "with the vestiges of a regulatory regime designed for another era."²²

Google contended that granting Frontier's petition would "eviscerate the statutory 'information service' distinctions" and "reverse" the 1996 Act.²³ That is obviously wrong. True information services and Internet services are not assessed access charges today, and there is no dispute within the industry on that subject. In creating the ESP Exemption as a limited, deliberately narrow exception to the access rules, the Commission explained that ESPs use the PSTN in an entirely different way from carriers providing telephony.²⁴ The Eighth Circuit affirmed the Commission's retention of the limited ESP Exemption, pointing out that the exemption was based on the realization that enhanced services "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."²⁵ True ESPs use the PSTN as a means for their subscribers to interact with the ESPs information services, not to make telephone calls to *nonsubscriber* third parties on the PSTN.

²¹ Google at 7.

²² *Id.* at 8-9.

²³ *Id.* at 10.

²⁴ See, e.g., *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at ¶¶ 343, 345 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("*Access Charge Reform Order*").

²⁵ *Southwestern Bell*, 153 F.3d at 542.

The Commission has found that interconnected VoIP services are substitutes for ordinary voice telephone services.²⁶ It has found they must be subject to the same E911 and CALEA requirements and must contribute to the universal service funds. It has found such obligations must apply, because interconnected VoIP providers share the benefits of the PSTN and because competitive neutrality requires they be subject to the same obligations.²⁷

B. Carriers Sending Interconnected VoIP Calls For Termination On The PSTN Cannot Claim the ESP Exemption.

Google was also wrong in assuming that interconnected VoIP service providers are not “telecommunications carriers” and do not provide “telecommunications services.”²⁸ Google ignores that ESPs do not interconnect with ILECs. Only *carriers* have any rights or obligations to interconnect under section 251.²⁹ ESPs, by definition, are not carriers. Interconnecting carriers cannot properly claim the ESP Exemption for voice calls they route to ILECs for termination on the PSTN, whether or not they may have received the calls in IP from a non-carrier.

The Commission allowed ESPs a limited exemption from the access charge regime, precisely because they are *not* carriers and do not use the PSTN in the way carriers do.

Interconnected VoIP services, in contrast, are just IP-originated versions of more traditional

²⁶ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at ¶¶ 35, 43 (2006), *aff'd in rel. part, Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) (“*USF Contribution Order*”). See also *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 at ¶ 23 (2005) (emphasizing that consumers expect interconnected VoIP services to work much “like a ‘regular telephone’”); *Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2006), *aff'd, American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (applying CALEA compliance requirements).

²⁷ *USF Contribution Order* at ¶ 43.

²⁸ Google at 9.

²⁹ 47 U.S.C. § 251.

voice services. Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any traditional voice provider. When carriers route their calls to ILECs for termination, they are not acting as ESPs, and they cannot claim the ESP Exemption. Granting Frontier's petition would not, as Google pretends, be imposing "a new regulatory cost model" on interconnected VoIP providers.³⁰ Those calls have always been subject to the same "obligation of all carriers to pay access charges."³¹

Google was likewise mistaken to assume that IP-to-PSTN voice calls qualify as "enhanced services."³² Enhanced service requires "computer processing" on the subscriber's "transmitted information," or "provid[ing] the subscriber additional, different, or restructured information," or "subscriber interaction with stored information."³³ That is consistent with true ESPs, such as the early examples noted in Frontier's petition.³⁴ The definition does not describe an interconnected VoIP subscriber using a telephone to make an interstate or intrastate voice call to another telephone that is on the PSTN. The Commission has noted that interconnected VoIP is marketed as a substitute for traditional telephone service, and few of the 20 million or more interconnected VoIP subscribers nationwide have no reason to believe that the service is fundamentally different from that offered by traditional telephone companies.³⁵

Indeed, when an IP-to-PSTN call first touches the PSTN, it is already in TDM. It is indistinguishable from any other call on the PSTN. Today's networks cannot even distinguish

³⁰ Google at 2.

³¹ NJDRC at 4.

³² Google at 4-5.

³³ See 47 C.F.R. § 64.702(a).

³⁴ These included dedicated legal research terminals, early automated teller machines, and dial-up Internet service providers. See Frontier Petition at 3.

³⁵ See National Cable & Telecoms. Ass'n, *Residential Telephony Customers 2001-2006*, available at <http://www.ncta.com/ContentView.aspx?contentId=61>; Craig Moffett, *et al.*, Bernstein Research, *VoIP: The End of the Beginning*, at Ex. 8 (Apr. 3, 2007).

between an IP-originated voice call and any other long distance call. The use of IP technology, and the conversion to TDM necessary to terminate the IP-originated voice call, is simply use of a new basic network technology. It does not change the nature of a service from a telecommunications service to an information service.³⁶ The Commission is well aware that the entire industry is moving from circuit-switched to IP-based networks, and consequently there will be conversion when the two technologies interact -- just as there were as the industry transitioned from analogue to digital technology. The Commission recognized then that the change in technology, and the need for conversion to complete a call, had no impact on the classification of the traffic.³⁷ Interconnected VoIP calls that terminate on the PSTN impose the same burdens on the ILEC and have the same obligation to support the PSTN.

IV. FRONTIER'S PETITION SHOULD BE GRANTED.

A. Frontier's Petition Meets Section 10 Standards.

Frontier's critics offered little analysis of the petition under section 10's standards.

Commenting on Embarq's very similar petition earlier this year, a wide range of industry parties

³⁶ See, e.g., Frontier Petition at 10-11.

³⁷ See *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584 at ¶ 16 (1983) (emphasis in original):

[T]here is currently a trend towards the use of digital loops which will interface with customer premises equipment using a digital protocol interface. A potential problem might arise if a call were placed between a user of equipment which employs such a digital interface and a user using the more traditional analog interface ... : there would be a net protocol conversion within the network for such a call to proceed, *i.e.*, from a digital to an analog protocol between the ends of that call. This could be thought of as invoking the definition of enhanced service, *although the service itself would remain a switched message service otherwise unchanged except for the characteristics of the electrical interface.*

See also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 at ¶ 106 (1996).

agreed that the petition should be granted. They include integrated carriers like AT&T and Qwest, a wide range of mid-sized and smaller ILECs, industry associations, and a manufacturers group. They agreed that, to the extent anyone seeks to extend it to IP-to-PSTN voice calls, the ESP Exemption is not necessary to ensure just and reasonable and nondiscriminatory charges.³⁸ They agreed the ESP Exemption is not necessary to protect consumers.³⁹ They agreed that forbearance from the exemption on any IP-to-PSTN voice traffic is in the public interest. They agreed the ESP Exemption was not necessary to ensure rates, terms, and conditions were not unreasonable or discriminatory, and that failing to grant forbearance would only perpetuate some carriers' misapplication of the ESP Exemption, which itself was unreasonable, unjust, and discriminatory. They agreed that forbearance from the ESP Exemption would benefit consumers and promote competition and broadband investment.⁴⁰

Of the three critics of Frontier's petition, only Google tried to argue that the ESP Exemption actually applies to this traffic. It claimed that Frontier's petition would turn section 10 "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."⁴¹ What Google ignores, however, is that interconnected VoIP calls are routed to local exchange carriers by other carriers -- not by "unregulated non-carrier businesses." IP innovators and application providers are not necessarily affected by Frontier's petition. Again, only *carriers* have any right to interconnect with the PSTN. The ESP Exemption has never properly

³⁸ 47 U.S.C. § 160(a)(1).

³⁹ 47 U.S.C. § 160(a)(2).

⁴⁰ 47 U.S.C. §§ 160(a)(3), 160(b). Section 706 of the 1996 Act directs the Commission to take steps, including regulatory forbearance, to promote the availability of advanced telecommunications capability to Americans. *See* 47 U.S.C. § 157 nt.

⁴¹ Google at 9 (emphasis removed).

applied to voice calls routed to the PSTN. The ESP Exemption allows a limited exception from access charges to enable the ESP's own subscribers to access the ESP for its information services. It has never applied to telephone calls made over the PSTN. Far from asking the Commission to "eviscerate" or "blur" the regulatory distinction between "information services" and "telecommunications,"⁴² Frontier's petition seeks only to ensure that the distinction is not misapplied.

And again, these calls are not information services. As Frontier's petition explained, IP-to-PSTN voice calls are indistinguishable from any other calls sent by interconnecting carriers to the PSTN.⁴³ They are marketed as substitutes for traditional phone service. They use the PSTN in the very same way, and for the very same purpose. They receive the same benefits from the PSTN and impose the same burdens on it as any other carriers' voice call. The Commission has said the "costs of the PSTN should be borne equitably among those who use it in similar ways."⁴⁴

Frontier's petition would not, as Google claimed, "expand the scope of carrier access charge regulations to non-carrier information service providers."⁴⁵ Frontier's petition reflects existing law and existing industry practice and understanding. It does not change existing rules or regulatory requirements, but seeks to ensure they are not misapplied.⁴⁶ In fact, the large majority of IP-to-PSTN traffic has been paying access as it should, although disputes have been

⁴² *Id.* at 10.

⁴³ *E.g.*, Frontier Petition at 10-11.

⁴⁴ *IP Enabled Services NPRM* at ¶ 61.

⁴⁵ Google at 9.

⁴⁶ Frontier's petition also has no impact on the *CALLS Order*, contrary to the New Jersey Division of Rate Counsel's claim. NJDRC at 6, citing *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000). Granting Frontier's request does not modify the *CALLS* regime and does not require a rulemaking.

rising. If some other service providers must incur some costs to bring their networks and traffic routing into compliance with existing law, then so be it.

Google's high-flying rhetoric about "adaptive agents," "evolutionary processes," "positive emergent economic and non-economic phenomena," and the purported glories of "innovation spillovers, peer production, and social values like diversity and democracy"⁴⁷ just seeks to hide the fact that IP is just a basic network technology. It is, in fact, a technology already increasingly used even by the "telecommunications providers" Google appears to deride as unwilling to "adapt."⁴⁸ Google simply wants interconnected VoIP providers to enjoy a free ride on the PSTN. ILECs maintain, operate, extend, and upgrade the PSTN. They are obligated to serve as COLRs, investing in uneconomic areas and providing services at low, geographically averaged rates. Rural carriers have particularly heavy COLR burdens, and larger rural carriers, like Embarq, receive little universal service support. Given these realities, it is intolerable that some competitors pretend that carriers routing their traffic to the PSTN are exempt from terminating access charges that make the PSTN possible.

Forbearance would benefit consumers, especially in rural America, and would also benefit the public interest by ensuring better compliance with the Commission rules and avoiding costly and unnecessary disputes caused by some unscrupulous carriers' misuse of the ESP Exemption. Granting Frontier's petition would also promote competitive market conditions by ensuring all carriers comply with the same rules and by preventing some carriers from wrongly insisting on discriminatory preferences for IP-to-PSTN calls. The Commission has said its rules should be competitively neutral. The ESP Exemption may have provided preferential regulatory treatment to all ESPs as a class, but it was never intended to allow any service provider an

⁴⁷ Google at 8.

⁴⁸ *Id.* at 3.

artificial advantage over its competitors. Granting Frontier’s petition, and Embarq’s, ensures that will not happen.

The New Jersey Division of Rate Counsel complained lamely that Frontier “fails to provide the data necessary to enable meaningful analysis of and comment on its Petition,” and that it should therefore be “dismissed” as “incomplete.”⁴⁹ On the contrary, Frontier’s petition provides more than sufficient evidence for forbearance. The Division’s argument is implausible, anyway, given that more than thirty parties filed comments and/or replies on Embarq’s and Feature Group IP’s petitions. Most parties supported Embarq’s petition, but even among those opposed to forbearance, no one suggested the petition was incomplete or lacking sufficient data. Regardless, specific data is not required to meet section 10 standards. The D.C. Circuit made clear that forbearance petitions are not to be dismissed or denied even when raising “hypothetical” or “theoretical” issues.⁵⁰

B. Forbearance Is An Appropriate Vehicle For Preventing Misapplication Of The ESP Exemption.

All commenters recognized that the number of disputes about the ESP Exemption is growing. Verizon, the New Jersey Division of Rate Counsel, and Google nevertheless argued that forbearance is not the right way to resolve the issue. Embarq disagrees.

Verizon argued that Frontier’s petition “is not the correct vehicle” for addressing the problem, because “the forbearance process” has “inherent limitations” that “make comprehensive action impossible.”⁵¹ In effect, Verizon acknowledges that Frontier is right, but it does not want the Commission to resolve the issue so long as there would remain “further

⁴⁹ NJDRC at 6.

⁵⁰ *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

⁵¹ Verizon at 2.

uncertainty and disputes” -- particularly about Verizon’s efforts to evade intrastate access rates on VoIP.⁵²

Verizon has advocated that the Commission should rule all VoIP traffic is jurisdictionally interstate, preempting any state regulatory authority.⁵³ Embarq disagrees with Verizon, but that is a separate issue, and a separate argument, for another day. It is not raised by Frontier’s petition. It does not need to be addressed to grant the limited relief Frontier requests. And it cannot justify ignoring the public interest in reducing disputes, ensuring the ESP Exemption is not misapplied, and promoting investment in the PSTN. The Commission has a statutory obligation to address Frontier’s petition, and cannot deny it simply because Verizon thinks the public interest would be better served by addressing a wider range of issues.

The New Jersey Division of Rate Counsel suggested forbearance cannot be granted because Frontier has not “exhausted other remedies,” by bringing section 208 complaints at the Commission.⁵⁴ The New Jersey Division of Rate Counsel is wrong to presume that anyone must pursue other “administrative remedies” before being eligible for forbearance. The Commission, in fact, has a statutory obligation to address any forbearance petition, and Frontier’s petition meets the statutory standards. Google similarly contended that access evasion is an “enforcement matter,” and suggested “federal collections actions” would be more appropriate,

⁵² *Id.* at 3. Verizon’s long distance affiliates have short-paid switched access charges to local exchange carriers, including Frontier. This is matter of dispute between Verizon and many local exchange carriers nationwide, but it is a separate issue from Frontier’s petition.

⁵³ By this argument, Verizon is seeking a change in existing law and policy on the jurisdictional classification of VoIP. The Feature Group IP Petition argued that all VoIP is already jurisdictionally interstate, which also misstates current law. The Commission, however, does not necessarily need to address that issue in granting Frontier’s petition -- nor in denying Feature Group IP’s.

⁵⁴ NJDRC at 6.

even if admittedly tedious and expensive.⁵⁵ Granting Frontier’s petition, however, is in the public interest to reduce disputes and thereby conserve Commission and judicial resources through regulatory forbearance. Multiplying litigation would only make matters worse for everyone, while shortchanging investment in the PSTN on which the vast majority of consumers depend. Requiring additional litigation would also reward unlawful behavior and encourage more competitors to defy the Commission’s rules. Furthermore, it is needless. The Commission can and should resolve the matter quickly and simply in one narrow order.

Verizon and the New Jersey Division of Rate Counsel also claim addressing Frontier’s forbearance petition (or Embarq’s earlier petition) would be “piecemeal” decision-making, when they believe the Commission should address all intercarrier compensation issues in a rulemaking.⁵⁶ A rulemaking is neither required nor appropriate. Frontier’s petition actually seeks no change in policy or rules; it seeks limited forbearance from rules to prevent them from being misapplied. It is parties like Google that seek a dramatic change in rules, by pretending that ESP Exemption applies to carriers and traffic to which it has never properly applied. There is nothing about section 10 that precludes a carrier or class of carriers from seeking limited forbearance from particular regulatory requirements (whether or not they are codified) to ensure a rule is not misapplied.

NASUCA has never been enthusiastic about forbearance. Even so, reiterating its comments supporting Embarq’s petition and opposing Feature Group IP’s, NASUCA agreed with Frontier that the ESP Exemption has never properly applied to IP-to-PSTN voice calls, that it has never applied to voice calls to nonsubscriber third parties on the PSTN, and that it has

⁵⁵ Google at 4.

⁵⁶ Verizon at 2; NJDRC at 3.

never applied to telecommunications carriers.⁵⁷ For the sake of “efficiency,” NASUCA encouraged the Commission simply to issue a declaratory ruling, while denying Feature Group IP’s petition, thereby reconfirming that the ESP Exemption does not apply and has never applied to IP-to-PSTN voice calls.⁵⁸ Frontier’s petition makes clear that, if the Commission prefers, the Commission can resolve its request by issuing a declaratory ruling reiterating that the ESP exemption is inapplicable to IP-to-PSTN voice traffic.

IV. CONCLUSION

The four parties commenting on Frontier’s petition all acknowledged that the industry is facing disputes about this issue. Three of them effectively acknowledged that Frontier is right, even though only one actively supported the petition. Frontier’s petition, with Embarq’s, provides the Commission a ready opportunity to assist the industry on this issue, without constraining its ability to decide issues in important, pending proceedings on intercarrier compensation, universal service, or other issues.

The Commission should grant Frontier’s petition and thereby ensure the ESP Exemption is not misapplied, which would serve only to distort competition, undermine investment in the PSTN, and short-change rural America. Frontier’s petition meets the requirements for forbearance. It ensures the application of rates, terms, and classifications are not unjust and discriminatory, it benefits consumers, and it promotes the public interest in investment and competition. If, as NASUCA suggested, the Commission were to issue a declaratory ruling that the ESP Exemption has never applied to IP-to-PSTN voice calls, both Frontier’s and Embarq’s petitions could be rendered unnecessary, and could be withdrawn or denied as moot.

⁵⁷ NASUCA at 2-3.

⁵⁸ *Id.* at 3. *See also* Comments of NASUCA on Petitions for Forbearance, WC Docket Nos. 07-256, 08-8 (filed Feb. 19, 2008) at 2-3, 10-11.

Respectfully submitted,

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