

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Intercarrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68
)	
IP-Enabled Services)	WC Docket No. 04-36

**COMMENTS OF
SUREWEST TELEPHONE**

SureWest Telephone, by its attorneys, hereby submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceedings, released November 5, 2008 (“*FNPRM*”). In these Comments, SureWest Telephone addresses intercarrier compensation (“*ICC*”) for IP/PSTN (“*VOIP*”)¹ traffic, and urges the Commission to explicitly rule that *VOIP* traffic should, during any “transition” period and beyond, be subject to

¹ As used herein, the term “*VOIP*” means any call initiated by an end user through means of Internet protocol technology. The term covers not just voice calls, but also data transmission, including credit card verifications.

ICC charges. Regulation should not favor a call originated in IP format over one using other competing technologies -- even supposedly “legacy” technologies -- when the same call completion objective is achieved. In addition, in order to resolve pending disputes between carriers and VOIP providers, the Commission should rule that for the period prior to the commencement of comprehensive ICC reform, the same principle applied, i.e., that providers of VOIP were required to pay access charges to terminate VOIP calls onto the PSTN.²

I. Introduction

SureWest Communications is a holding company whose subsidiaries provide incumbent local exchange, competitive local exchange, interexchange, multichannel video, and broadband data services. The SureWest Telephone subsidiary (“SureWest”) is an incumbent local exchange carrier (“ILEC”) operating solely in California, currently serving less than 100,000 access lines, and is regulated as a rate-of-return company by the FCC.

Since 1914, SureWest has taken pride in providing high-quality, dependable and affordable services to its customers. As an ILEC, it is the carrier of last resort (“COLR”) in its local telephone service area, yet it is faced with multiple competitors for the provision of telephone services (e.g. wireless, cable VOIP, non-facilities VOIP, and other wireline providers) that are not the COLR. Part of taking COLR responsibilities seriously is a commitment to provide service to all customers in a service area and maintaining a high quality network. But maintaining a high quality network ready to provide services to all customers in a service area requires resources, and carriers that use the ILEC network to terminate traffic must contribute their proper share of the cost of maintaining that network. Unfortunately, in the last few years, the independent VOIP industry has grown largely on a business plan that sought to use the comparative novelty of IP to avoiding costs properly paid by other carriers. The primary tool

² As used herein, “PSTN” refers to the local network of an ILEC (or other LEC).

for this cost avoidance has been the wide spread practice by numerous VOIP providers of refusing to pay access charges to the ILECs for VOIP interexchange calls that terminate on the PSTN, based on the claim that VOIP traffic constitutes an information service rather than “telecommunications”. For all COLRs, but especially smaller ILECs, these unrecovered costs cannot be allowed to continue without significant degradation of the PSTN. The Commission cannot rationally or fairly ignore this issue in the present proceeding.

II. Going Forward, Providers of VOIP Traffic Must Pay the Same ICC Charges as Providers Using Other, Competing Technologies.

In footnote 555 of the proposed Order in Appendix C to the *FNPRM*, the Commission addresses in a mere two sentences, the ICC payment obligation of providers of IP/PSTN (VOIP) traffic:

Thus, IP/PSTN traffic ultimately will be subject to the final uniform reciprocal compensation rates established pursuant to the methodology adopted in this order. We maintain the status quo for this traffic during the transition, however.³

While it is not certain that the term “IP/PSTN traffic” in the Order is equivalent to or includes VOIP, SureWest will assume that VOIP is included in that term. Accordingly, while SureWest supports the proposal in the first sentence that at the end of the transition to a new ICC regulatory regime, VOIP providers will be subject to the same ICC regime as competing providers using other technologies, the second sentence maintaining the “status quo” during the interim is unsupportable and irrational for numerous reasons.

By merely referencing the “status quo,” but not explaining what that “status quo” is, the Commission would retain as unresolved an issue that has been subject to extensive debate in

³ The same text is used in footnote 564 of Appendix A of the *FNPRM*.

Commission proceedings, as well as litigation in civil courts throughout the country.⁴ Such extensive debate demonstrates that the nature of the “status quo” is both subject to great dispute, and of critical financial importance to VOIP providers and traditional ILECs alike. In a 165 page Order that addresses in great detail the ICC requirements for other providers, failing to explicitly address this critical issue is not only irresponsible, it is arbitrary and capricious.

SureWest believes that the proper interpretation of Commission rules and policies is that the “status quo” means that VOIP providers have always had to, and must continue to, pay the same ICC for this traffic as other providers using competing technologies. SureWest is concerned, however, that the Commission may intend, by reference to the “status quo,” that VOIP providers pay no ICC until the end of the transition to the new ICC regime. Such an approach is irrational and untenable.

A. In Order to Maintain the PSTN, ILECs Must Recover Their Costs.

Maintaining the PSTN cannot be done without incurring significant costs. ILECs don’t just want to recover such costs, they must recover such costs, in order to maintain a network capable of serving all customers in their service area and to continue to provide the high quality service that their customers expect, and indeed, that they are required to provide by state commissions and the FCC. The PSTN that all users rely on, including the customers of VOIP providers, cannot be maintained over time if the carriers that are required to maintain it are prohibited from recovering their costs. VOIP traffic is a rapidly growing portion of the traffic that ILECs are terminating on the PSTN, and ILECs cannot be denied the ability to recover the just and reasonable costs of handling that traffic, without impact to the PSTN. VOIP providers

⁴ See, e.g., 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 08-8 (filed January 11, 2008) at pages 15-16 and citations therein; see also 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(b)(1), and Rule 69.5(b), WC Docket No. 07-256 (filed Oct. 23, 2007).

should pay their share of these costs.

B. Allowing Providers to Avoid Paying ICC for VOIP Traffic Is Inconsistent With the Principle of Competitive Neutrality, and Will Promote the Arbitrage the Commission Seeks to Avoid.

In a previous Further Notice of Proposed Rulemaking in this proceeding, the Commission stated:

We also agree that any new intercarrier compensation approach must be competitively and technologically neutral. Given the rapid changes in telecommunications technology, it is imperative that new rules accommodate continuing change in the marketplace and do not distort the opportunity for carriers using different and novel technologies to compete for customers. In addition, we favor an approach that provides regulatory certainty where possible and limits both the need for regulatory intervention and arbitrage concerns arising from regulatory distinctions unrelated to cost differences. Similar types of traffic should be subject to similar rules. Similar types of functions should be subject to similar cost recovery mechanisms. We are interested in not only similar rates for similar functions, but also in a regime that would apply these rates in a uniform manner for all traffic. To the extent a proposed regime would preserve distinctions between types of carrier or types of traffic, such distinctions should be based on legitimate economic or technical differences, not artificial regulatory distinctions.⁵

If the Commission is proposing in the *FNPRM* that VOIP providers not pay ICC during the transition, while providers using competing technologies make such payments, such an approach would inexplicably and improperly contradict the Commission's longstanding goals of competitive neutrality and prevention of arbitrage.

There is no rational basis for allowing providers to avoid making ICC payments for VOIP traffic during the transition. There is no evidence in the record that the cost of terminating VOIP traffic is any less than the cost of terminating TDM traffic. Indeed, when VOIP providers hand

⁵ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005) at para. 33.

off their traffic to LECs, the exchange format is typically already converted to TDM, and is not in IP format. To a LEC, therefore, the call has no significant differences from one that was transported in a traditional circuit-switched format. Furthermore, there is no need to allow VOIP providers to avoid making ICC payments in order to declare VOIP to be an information service rather than a telecommunications service: the Commission has stated that “[t]he applicability of interstate carrier charges does not depend on whether the entity taking service is a common carrier.” *HAP Services, Inc. v. Southwestern Bell Telephone Company*, 2 FCC Rcd 2948 (1987) at para. 15. The Commission has already required VOIP providers to take on many of the other obligations of telecommunications providers⁶; indeed, the *FNPRM* re-affirms the obligation of VOIP providers to make contributions to the federal Universal Service Fund.⁷ Payment of ICC by providers of VOIP traffic is fairly and properly just another one of those obligations.

If the Commission chooses not to require VOIP providers to pay ICC for termination of VOIP traffic on the PSTN during the transition, the result will be very predictable: an increasing number of providers will classify their traffic as VOIP and unilaterally elect to stop paying ICC for that traffic, resulting in disruption to the financial underpinnings of the ICC transition. It would be particularly arbitrary for the Commission to make such a policy choice for VOIP, in light of the fact that reducing regulatory arbitrage has been a major goal of the Commission’s ICC reform, in this proceeding as well as others.⁸

In sum, in regards to payment of ICC, it is irrational and untenable for the Commission to merely state that the “status quo” will be maintained for VOIP providers during the transition to

⁶ See, e.g., *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order, 20 FCC Rcd 10245 (2005); *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, 22 FCC Rcd 19531 (2007).

⁷ *FNPRM* Appendix C at paras. 99 and 104; Appendix B at paras. 50 and 55; Appendix A at paras. 101-103 and 108.

⁸ See, e.g., *FNPRM* Appendix A at paras. 178 and 184-86, and citations therein.

a new ICC regime. While the status quo as a matter of Commission law is that VOIP providers must pay ICC (currently, access charges), the status quo as a matter of fact is massive regulatory arbitrage and improper non-payment by VOIP providers. This undercuts the ability of ILECs to recover their costs, and harms the financial underpinnings of the PSTN on which all users rely. Rather than perpetuating this pernicious status quo, the Commission should explicitly require that all users of the PSTN pay their fair share of the cost of maintaining the PSTN. In an earlier related proceeding, the Commission stated that:

[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.⁹

SureWest urges the Commission to act in a manner consistent with its earlier policy statement, and clearly delineate that VOIP providers are to follow the same rules as other competitors and make the same ICC payments during the transition period that other providers are required to make for the termination of calls on the PSTN.

III. The Commission Should Rule That for the Period Prior to the Commencement of Comprehensive ICC Reform, Providers of VOIP Were Required to Pay Access Charges to Terminate Calls on the PSTN.

As the Commission well knows, there are numerous pending disputes between VOIP providers and LECs regarding unpaid access charges for LEC termination of VOIP traffic on LEC networks. These proceedings will remain unresolved until the Commission rules on the underlying issue as to whether, prior to any new ICC reform enacted in this proceeding, VOIP providers were required to pay access charges for the termination of their traffic on the PSTN. Thus, regardless of any changes that the Commission may enact going forward, it must rule as to

⁹ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 (2004).

the status of VOIP traffic in the present and past.

SureWest believes that it is clear under current Commission policies and rules, VOIP providers are required to pay access charges to carriers that terminate the VOIP traffic on the PSTN. Part 69 of the FCC's rules does not condition the obligation of a provider to pay access charges on the technology used by that provider. Part 69 rules are not limited to TDM traffic, and do not provide an exclusion for IP-formatted traffic.

Some VOIP providers claim that in situations where the traffic originated in IP format, and is converted to and terminated in TDM format, this constitutes a "net protocol conversion" that transforms the carrier into an "enhanced service provider" (or under the 1996 Act, an "information service provider" or ISP), and thus the traffic is exempt from access charges. This argument is fatally flawed for at least two reasons. First, the Commission created an exemption from access charges in 1983 for enhanced service providers, due to their role in an emerging industry that promised to offer considerable public interest benefits.¹⁰ Under this "ESP Exemption," the FCC permitted ESPs (now ISPs) to obtain originating access services needed to receive traffic from their end-user customers by ordering "end user" lines from local exchange carriers' local business tariffs. Accordingly, the ESP Exemption is properly limited to circumstances where the access service is used to connect an ISP with its own subscribers so that the ISP may provide an information service to that subscriber. The Commission recognized this limited nature of the ESP exemption in the *Access Charge Reform Order*, noting that ISPs are exempted from the access charge obligation only when they "use incumbent LEC networks to receive calls from their customers."¹¹ The ESP exemption does not anticipate that a VOIP

¹⁰ *In re MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 at ¶¶ 77-83 (1983).

¹¹ *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997), at ¶ 343.

provider would simply carry the call to an unrelated third party via the PSTN without paying the applicable access charges to terminate that VOIP call on the PSTN.¹²

Second, when the Commission created the “ESP Exemption,” those ESPs added something to the essential nature of the information transmitted - their “enhancement” - so that what came out at the other end was not identical to what had been originated. In the present case, the form and content of VOIP at termination is identical to the form and content of a voice call using any other transmission technology, convention or standard. Accordingly, for the purposes of payment of ICC, the analogy of a VOIP provider to an ESP fails.¹³

In sum, under current applicable Commission rules, it is proper for a carrier to assess terminating access charges on traffic originated by VOIP providers, even if that traffic originated in IP format. Regardless of any policies that the Commission enacts on a going-forward basis, it should state this explicitly, for the purposes of resolving disputes regarding termination of VOIP traffic on the PSTN under the current rules.

IV. Conclusion

The record in this and related proceedings demonstrates that the Commission should explicitly rule that providers of VOIP traffic must pay the same ICC charges as providers using other, competing technologies, to terminate traffic on the PSTN. In addition, in order to resolve

¹² *Id. at* ¶ 345 (finding persuasive that ISPs do not appear to “use the public switched network in a manner analogous to IXCs.” In contrast, however, interconnected VOIP providers use the PSTN to terminate traffic in the exact same manner as IXCs.)

¹³ SureWest recognizes that some VOIP providers have claimed that certain features of their service, such as the ability of a subscriber to access his messages by e-mail, constitute an enhancement that distinguishes their service from basic telecommunications. Such additional features are irrelevant, however, to the issue of the VOIP provider’s use of the PSTN to terminate traffic, and thus are irrelevant to the recovery of PSTN costs through ICC charges. Accordingly, regardless of whether or not such additional service features result in VOIP being categorized as telecommunications or information services, the termination of VOIP traffic on the PSTN should trigger an obligation on VOIP providers to pay ICC charges.

pending disputes between carriers and VOIP providers, the Commission should rule that for the period prior to the commencement of comprehensive ICC reform, providers of VOIP were required to pay access charges to terminate VOIP calls onto the PSTN.

Respectfully submitted,

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November 26, 2008