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December 19, 2008

VIA ECFS

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

Re: *FEATUREGROUP 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), WC Docket No. 07-256; 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 the Commission Orders on the ESP Exemption, WC Docket No. 08-8*

Dear Ms. Dortch:

The purpose of this letter is to address two related petitions seeking forbearance from certain statutory requirements and Commission rules pursuant to Section 10 of the Communications Act, as amended,¹ which will be deemed granted by operation of law if not acted upon by the Commission within the next month.² The Embarq Local Operating Companies ("Embarq") are seeking Commission forbearance from any application or enforcement of the access charge exemption enjoyed by enhanced service providers ("ESP Exemption") "to the extent it may be claimed to apply to IP-to-PSTN voice traffic."³

¹ 47 U.S.C. § 160.

² The full 15-month statutory period for Commission review of the *Feature Group IP Petition* will expire on or about January 21, 2009. The initial 12-month review period for the *Embarq Petition* will expire on or about January 8, 2009. The Commission has the authority to extend the deadline for action on the *Embarq Petition* 90 days but has not done so.

³ *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 the*

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Conversely, Feature Group IP asks that the Commission forbear from applying access charges to voice-embedded Internet communications pursuant to Section 251(g) of the Act “insofar as it applies to the receipt of compensation for switched ‘exchange access, information access, and exchange services for such access to interexchange carriers and information service providers’ ...”⁴ The issue at the heart of each petition is the applicability (or inapplicability) of the ESP Exemption to IP-to-PSTN traffic. Feature Group IP and Embarq disagree as to the state of the law today. Feature Group IP argues that the ESP Exemption currently applies to IP-to-PSTN traffic and seeks forbearance only to the extent the Commission disagrees with its conclusion while Embarq maintains that the ESP Exemption does not apply to IP-to-PSTN traffic today and seeks forbearance only to the extent it is incorrect. As explained below, each petition suffers from numerous procedural shortcomings and, thus, both petitions should be denied by the Commission. Moreover, the petitions should be denied because they do not meet the public interest requirements of Section 10.

I. THE COMMISSION HAS NOT MADE A DEFINITIVE RULING ON THE APPLICABILITY OF THE ESP EXEMPTION TO IP-TO-PSTN TRAFFIC

The opposing positions taken by Feature Group IP and Embarq on the applicability of access charges to IP-to-PSTN voice traffic in the absence of forbearance illustrate the indisputable fact that there is no settled law on this issue. The Commission addressed this issue for the first time ten years ago in a Report to Congress on Universal Service. In that *Report*, the Commission engaged in a tentative and preliminary discussion whether certain types of IP-enabled applications, specifically, IP-voice telephony, could be categorized “telecommunications” or “telecommunications services” under the Communications Act or whether these fell outside those categories.⁵ The *Report to Congress* also tentatively entertained whether any providers of IP telephony should be subject to access charges. The Commission reached no definitive conclusions regarding the regulatory classifications of any type of IP-based telephony (or the applicability of access charges to those services), however, leaving those basic questions unresolved.

Since it issued its *Report to Congress*, the Commission has conducted a comprehensive rulemaking to examine myriad aspects of IP-enabled services, including VoIP.

Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008) (“*Embarq Petition*”), at 5-6 (footnote omitted).

⁴ *FEATUREGROUP 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)*, WC Docket No. 07-256 (“*Feature Group IP Petition*”), at 24.

⁵ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, (1988) (“*Report to Congress*”).

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“[T]he extent to which access charges should apply to VoIP or other IP-enabled services”⁶ was among the subjects specifically outlined in the March 2004 Notice of Proposed Rulemaking (“NPRM”) in that docket, although the Commission specified that in requesting comment on that issue it “[was] not addressing whether access charges apply or do not apply under existing law.”⁷ In the NPRM, the Commission stated its view that “[a]s a policy matter, ... 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.”⁸ To that end, the Commission specifically sought comment on the authority it could rely on to require payment for these services, as well as whether the charges should be the same as the access charges assessed on providers of telecommunications services or should be computed and assessed differently.⁹ That rulemaking is still pending, as is further development of the Commission’s treatment of IP-based services for intercarrier compensation purposes in the context of the Commission’s *Unified Intercarrier Compensation* rulemaking.¹⁰

Interested parties have repeatedly presented the Commission with their views on the compensation obligations that should apply to IP-to-PSTN traffic in the context of those dockets as well as in a host of other proceedings over the past several years.¹¹ Most recently, in the Commission’s consolidated intercarrier compensation/universal service reform proceeding,¹² Chairman Martin proposed that the Commission finally resolve the issue and classify IP-to-PSTN traffic as Information Services subject to the final uniform reciprocal compensation rates

⁶ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 61 (2004) (“*IP-Enabled NPRM*”).

⁷ *Id.*, at ¶ 32.

⁸ *Id.* (emphasis supplied).

⁹ *Id.*

¹⁰ *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

¹¹ See, e.g., *AT&T Corp., Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, 20 FCC Rcd. 4826 (2005); *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, DA 06-1510 (rel. Jul. 25, 2006).

¹² *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, WC Docket Nos. 05-337, et al. (“*Comprehensive USF/ICC Reform Proceeding*”).

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established pursuant to the methodology adopted by the Commission in that proceeding.¹³ At the same time, the Chairman proposed to “maintain the status quo for this traffic,” without defining the status quo, until final uniform compensation rates are implemented.¹⁴ Numerous commenters, some taking the position that the ESP Exemption applies to IP-to-PSTN traffic today and others taking the opposite position, responded to the Chairman’s proposal and presented their views to the Commission. To date, the Commission has not been able to render a decision on this issue or any of the numerous other intercarrier compensation-related issues in the consolidated docket.

II. THE MYRIAD PROCEDURAL SHORTCOMINGS OF THE FEATURE GROUP IP AND EMBARQ FORBEARANCE REQUESTS REQUIRE THEIR DENIAL

A. The Feature Group IP And Embarq Petitions Constitute Procedurally-Defective Petitions For Declaratory Ruling

As noted above, Feature Group IP argues that the ESP Exemption currently applies to IP-to-PSTN traffic and Embarq argues that the ESP Exemption does not apply. In reality, as shown above, the Commission has yet to definitively rule on the applicability of the ESP Exemption to IP-to-PSTN traffic. That fact notwithstanding, to the extent Feature Group IP seeks a Commission ruling that the ESP Exemption continues to apply to IP-to-PSTN traffic, Feature Group IP is asking for a declaratory ruling. Similarly, to the extent Embarq seeks a Commission ruling that the ESP Exemption does not currently apply, Embarq also is seeking a declaratory ruling. Such requests must, however, be filed separately from a petition for forbearance.¹⁵ In addition, such requests are not subject to the statutory time limits that apply to a petition for forbearance. Thus, because both Feature Group IP and Embarq have combined a request for forbearance with a request for Commission action to confirm what those entities believe is an existing rule, their petitions do not meet the procedural requirements of Section 1.53 of the Commission’s rules and must be rejected.¹⁶

¹³ *Comprehensive USF/ICC Reform Proceeding*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (rel. Nov. 5, 2008), Appendix A, ¶¶ 208-220.

¹⁴ *Id.*, at n. 564.

¹⁵ See 47 C.F.R. § 153.

¹⁶ Section 1.53 states that “[i]n order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. 160(c), any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. Section 160(c). Any request which is not in compliance

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B. The Embarq And Feature Group IP Petitions Are Procedurally Defective Because The Terms Of Section 10 Do Not Permit The Relief Each Petitioner Seeks

The express terms of Section 10(c) permit “[a] telecommunications carrier, or class of telecommunications carriers [to] submit a petition to the Commission requesting that the Commission exercise the authority granted under this section *with respect to that carrier or those carriers, or any service offered by that carrier or carriers.*”¹⁷ Thus, Feature Group IP and Embarq may only seek forbearance from statutory provisions or rules that apply to them. Since neither of the petitions at issue meet this requirement, they each must be rejected.

Embarq makes a conditional request for forbearance from the ESP Exemption should the Commission conclude that the ESP Exemption currently applies to IP-to-PSTN traffic. Embarq does not, however, characterize the ESP Exemption as a constraint on *its* actions. Indeed, Embarq seeks forbearance from Section 69.5(a) of the Commission’s rules, which applies to “public end users, and [] providers of public telephones,” categories that do not include Embarq.¹⁸

Similarly, Feature Group IP is not subject to the rules from which it seeks forbearance. Feature Group IP requests forbearance from “Section 251(g) of the Act, insofar as it applies to the receipt of compensation for switched “exchange access, information access, or exchange services for such access to interexchange carriers and information service providers,” pursuant to state and federal access charge rules.”¹⁹ Section 251(g) preserves the pre-Act access charge rules applicable to carriers that provide access services, not customers of access services. Feature Group IP does not provide access services and, as such, is not subject to Section 251(g). Consequently, Feature Group IP is not authorized to seek forbearance from that statutory provision.

C. The Embarq And Feature Group IP Petitions Should Be Denied Because Neither Petition Would Provide The Petitioner With The Outcome It Seeks

Embarq maintains that the ESP Exemption does not currently apply to IP-to-PSTN traffic but nevertheless asks the Commission to eliminate any uncertainty on this point by forbearing from enforcement of certain rules and statutory provisions.²⁰ Embarq argues that

with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c), and is not subject to the deadline set forth therein.” 47 C.F.R. § 153.

¹⁷ 47 U.S.C. § 160(c) (emphasis supplied).

¹⁸ 47 C.F.R. § 69.5(a).

¹⁹ *Feature Group IP Petition*, at 24.

²⁰ *Embarq Petition*, at 14-17.

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forbearance from enforcing the ESP Exemption, Section 69.5(a) of the Commission's rules, and Section 251(b)(5) of the Act would ensure that all IP-enabled voice calls terminated to the PSTN are subject to terminating switched access charges.²¹ Embarq is incorrect.

Embarq's request that the Commission refrain from enforcement of Section 69.5(a) of the Commission's rules with respect to IP-to-PSTN traffic would not subject such traffic to terminating switched access charges. In reality, IP-to-PSTN traffic would likely be subject to no intercarrier compensation obligation at all.²² Under Section 69.5(b), only entities defined as interexchange carriers are required to pay switched access charges.²³ Since providers of IP-to-PSTN services are not currently classified as interexchange carriers, such providers' traffic would not automatically become subject to switched access charges under Section 69.5(b). The Commission must affirmatively classify IP-to-PSTN service providers as interexchange carriers; forbearance from enforcement of Section 69.5(a) would not, in itself, achieve that result.

Embarq also seeks forbearance from Section 251(b)(5) of the Act for IP-to-PSTN traffic but forbearance from this statutory provision would not automatically subject IP-to-PSTN traffic to switched access charges. Forbearance from Section 251(b)(5) would not affect the applicability of Section 251(g) to IP-to-PSTN traffic, as the Commission regards Sections 251(b)(5) and 251(g) as mutually exclusive.²⁴ Moreover, if the Commission were to adopt Chairman Martin's proposal to treat all classes of traffic as subject to Section 251(b)(5), the forbearance being sought by Embarq would result in IP-to-PSTN traffic being subject to no rate regulation. Section 251(g), by its terms, remains in effect until superseded by the Commission.²⁵ Subjecting all traffic to Section 251(b)(5) would constitute such an act. That said, if, as urged by Embarq, IP-to-PSTN traffic were subject to a forbearance order prohibiting the application of Section 251(b)(5), IP-to-PSTN traffic would not be subject to end user charges under Section

²¹ *Id.*, at 17.

²² Section 69.5(a) states: "End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in Subpart B of this part." 47 C.F.R. § 69.5(a).

²³ 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.").

²⁴ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 34 (2001) ("We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5).").

²⁵ 47 U.S.C. § 251(g).

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69.5(a), reciprocal compensation under Section 251(b)(5), or access charges under Section 251(g). This certainly is not the outcome desired by Embarq nor is it in the public interest.

Similarly, although it maintains that the ESP Exemption currently applies to IP-to-PSTN traffic, Feature Group IP seeks forbearance from Section 251(g) and related rules.²⁶ Feature Group IP states that if the requested forbearance is granted, “traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission’s implementing rules, and state-approved, and in some cases, arbitrated, interconnection agreements or, if two LECs agree, under the *ISP Remand* regime.”²⁷ Feature Group IP is incorrect. Forbearance from Section 251(g) would not automatically subject IP-to-PSTN traffic to Section 251(b)(5).

In the *Core Forbearance Order* decided just last year, the Commission determined that forbearance from Section 251(g) would not automatically cause Section 251(b)(5) to apply to the subject traffic.²⁸ Core sought forbearance from Section 251(g) and related implementation rules for its access traffic, asserting that forbearance would subject that traffic to the reciprocal compensation provisions of Section 251(b)(5). The Commission rejected Core’s logic, holding that in the absence of an affirmative ruling – which cannot be established in a forbearance proceeding – forbearance from Section 251(g) for Core’s traffic would result in the absence of a regulated rate for that traffic. The Commission stated:

Because Section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from Section 251(g) would not give Core the relief it seeks, because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).²⁹

The Commission went on to explain that if it “were to forbear from the rate regulation preserved by Section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.”³⁰ The Commission concluded that it would not be in the

²⁶ *Feature Group IP Petition*, at 3-4.

²⁷ *Id.*, at 17.

²⁸ *See Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007) (“*Core Forbearance Order*”).

²⁹ *Core Forbearance Order*, at ¶ 14.

³⁰ *Id.*

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public interest to exempt this traffic from any rate regulation, and it denied Core's petition on that basis.³¹ The same reasoning applies here and dictates denial of Feature Group IP's petition.

III. THE PUBLIC INTEREST REQUIRES DENIAL OF THE FEATURE GROUP IP AND EMBARQ FORBEARANCE PETITIONS

It is unquestionably in the public interest for the Commission to resolve the decade-long confusion and controversy surrounding the question of whether the ESP Exemption currently applies to IP-to-PSTN traffic and for the Commission to determine a rational compensation mechanism for this traffic going-forward. That said, it is not in the public interest for the Commission to use "dueling" – and inappropriately framed – forbearance requests as the vehicle to decide these important matters.³²

The applicability of switched access charges to IP-to-PSTN traffic is of critical industry-wide significance. At the same time, this issue represents a single facet of a far broader issue – *i.e.*, the proper intercarrier compensation system for all types of traffic – that is under active consideration by the Commission.³³ Resolution of the IP-to-PSTN compensation question in the context of a forbearance petition would leave unresolved all of the other important compensation issues to which it is inextricably tied and would make resolution of those issues more difficult. At a minimum, resolution of the IP-to-PSTN compensation issue through the instant petitions would complicate the Commission's broader deliberations and could well

³¹ *Id.*

³² The decision by the D.C. Circuit in *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) ("*AT&T*"), is not inconsistent with the approach urged herein. In *AT&T*, SBC Communications Inc. ("SBC") had sought forbearance from applying Title II regulation to IP Platform Services. The Commission denied the petition based, in part, on the finding that the petition was procedurally defective because the Commission had yet to determine whether common carrier regulations even applied to IP Platform services. In remanding the case to the agency, the D.C. Circuit found that "the Commission lacks section 10 authority to reject a petition as procedurally improper just because it requests forbearance from uncertain regulatory obligations ..." *Id.*, at 832. This letter does not recommend or suggest that the Commission deny the Embarq or Feature Group IP petition merely because the applicability of access charges to IP-to-PSTN traffic is not settled law. Moreover, the D.C. Circuit in *AT&T* held that "in assessing the merits of a forbearance petition, the Commission may take into account its conditional nature." *Id.*, at 836-37 (emphasis omitted). This letter suggests that the Commission engage in that analysis in considering whether the public interest requirements of Section 10(a)(3) have been met by Embarq or Feature Group IP.

³³ See *Comprehensive USF/ICC Reform Proceeding*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (rel. Nov. 5, 2008).

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stymie more comprehensive reform. Such an outcome would not meet the Section 10(a)(3) requirement that the Commission find forbearance "is consistent with the public interest."³⁴

IV. CONCLUSION

For all of the foregoing reasons, the Feature Group IP and Embarq forbearance petitions should be denied.

Respectfully submitted,



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47 U.S.C. § 160(a)(3). Embarq and Feature Group IP have also failed to prove that they meet the other substantive requirements of Section 10(a). Neither petitioner has produced record evidence that enforcement of the rules and statutory provisions from which it seeks forbearance is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory or that enforcement is not necessary for the protection of consumers. *See* 47 U.S.C. § 160(a)(1)-(2).