BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Developing a Unified Intercarrier Compensation Regime	**)** **)**	**CC Docket No. 01-92**
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(b)(1), and Rule 69.5(b)	**)** **)** **)** **)**	**WC Docket No. 07-256**

FEATUREGROUP IP's INTERCARRIER COMPENSATION REPLY COMMENTS IN RESPONSE TO FNPRM IN CC DOCKET 01-92 AND WRITTEN *EX PARTE* IN WC DOCKET 07-256

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FeatureGroup IP

EXECUTIVE SUMMARY

FeatureGroup IP will, once again, explain its status and its contentions. This is necessary because many parties are pretending to be confused or are deliberately mischaracterizing FeatureGroup IP's status and position and its specific and unique need for Forbearance in what is now the likely event that the Commission does not fully and finally resolve all issues in Docket 01-92 by January 21, 2009. The Legacy Providers deliberately mischaracterize FeatureGroup IP's service and technology. They all ignore or summarily dismiss the fact that FeatureGroup IP has spent the last seven years trying to work within the system (through "negotiations," "arbitrations" and "dispute proceedings" with the incumbents and through rulemaking cases) to resolve the naturally occurring technical and legal issues flowing from new and better Internet-based technology and business plans attempting to interact with 30 year old signaling standards and even older network designs and monopolistic business practices. But the incumbents have completely refused to negotiate or even discuss the matter. They will settle for nothing less than total victory. Regulators have let the matter fester for far too long; they have allowed the incumbents to delay, deny, obstruct and deter efficient entry by new technology providers and they absolutely will not allow new or different business plans to survive.

FeatureGroup IP simply wants to compete – ***as a Local Exchange Carrier*** – using its new, advanced technology to serve other new technology entrants, ***none of whom are carriers, and none of whom provide any telecommunications service*** by providing connectivity to the PSTN. FeatureGroup IP is a peer of the ILECs and it should not be – indeed it cannot be – required to purchase "access charge" inputs from the incumbents in order to compete with ILECs in the telephone exchange or exchange access market. FeatureGroup IP does not want to buy signaling elements, traffic capacity or any currently unavailable network elements from the ILECs. We simply want to interconnect as a peer so our customers can communicate with ILEC

customers like the 1996 Amendments expressly contemplated. FeatureGoup IP has invented and deployed technology, and has spent millions of dollars and several years attempting to enter the market. We say "attempting" because everywhere we turn we run into a "bill access to create a huge contingent liability then stall resolution" strategy by the incumbents. The ILECs seek to require FeatureGroup IP to become an "access customer" and buy unneeded legacy products at exorbitant non cost-based prices even though the traffic involved is clearly either telephone exchange and/or exchange access traffic for which FeatureGroup IP has no access liability.

Some CLECs – mostly those that merely want to replicate the ILECs' business model and benefit from umbrella pricing – appear willing to pay this ransom. But FeatureGroup IP will not voluntarily be complicit in an anti-technology, anti-innovation and anti-competitive scheme to deny any chance that the highly-successful "Internet" business model may be applied to the legacy network. The Commission must decide whether the incumbents will be allowed to repeal the interconnection and reciprocal compensation terms in the 1996 Amendments and substitute their anti-competitive and anti-technology compact.

FeatureGroup IP respectfully requests that the Commission not be confused by or accept the incumbents' mischaracterization of what we are, what we believe, what we do or what we seek. For example, FeatureGroup IP's forbearance request in Docket 07-256 <u>is not</u> a reincarnation of Level 3's prior petition, even though some of the language is similar. Level 3 has a different business plan, and its petition did not focus on a discrete and unique service geared to support a particular type of new-technology customer that did not even exist when the Telecommunications Act of 1996 became effective. Unlike all of the other CLECs, FeatureGroup IP has a filed and effective interstate tariff that is precisely geared to meet the needs of Voice-Embedded IP-Based service providers. FeatureGroup IP's federally-tariffed IGI-POP service is a competitive response to AT&T's TIPToP tariff, but in contrast to AT&T's

TIPToP product IGI-POP is not anti-competitive or anti-Net Neutral;[1] it is user empowering rather than user constricting and it was designed to support and facilitate rather than frustrate and hinder efficient intercommunication between the Internet and the PSTN.[2]

For seven years the incumbents, led by AT&T, back-stopped by NECA, and occasionally aided by state commissions, have attempted to "outlaw" FeatureGroup IP's products through raw abuse of their monopoly power. For seven years, we have exhausted every available mechanism to gain regulatory certainty.[3] FeatureGroup IP tried to arbitrate the issue at the state level, but the state commission indefinitely "abated" the case over our objection. FeatureGroup IP sought to litigate the issue in a post interconnection dispute resolution matter but that too was abated for a

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[1] Embarq filed an *ex parte* on December 19, 2008 in Docket 07-256 suggesting on slide 6 that ILECs should be able to use "Deep Packet Inspection" to ferret out IP/PSTN traffic. FeatureGroup IP is glad that Embarq agrees with FeatureGroup IP that the intercarrier compensation debate significantly overlaps with the so-called "Net Neutrality" debate, but even we are a bit surprised at how brazen they are in suggesting that ILECs should be allowed to use DPI as a form of "PSTN network management." The Commission held that DPI is not a reasonable network practice unless it is used to distinguish legal from illegal content. Memorandum Opinion and Order, *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* FCC 08-183, ¶ 46, note 217, File No. EB-08-IH-1518, WC Docket No. 07-52, 23 FCC Rcd 13028. 13055 (rel. Aug. 2008). Embarq and probably all the other ILECs obviously believe that IP/PSTN traffic is "illegal" unless it pays access charges.

IGI-POP service – as contrasted to AT&T's TIPToP service or even ILECs' basic business service and certainly Embarq's desire to "listen in" to the content of its users' communications, and in contrast to the rest of the ILECs, cable companies and their affiliates, and even most of the CLECs – embraces all of the concepts behind Network Neutrality. IGI-POP is the essence of Net Neutrality, because it limits control within the network and gives freedom to the edge. Docket 07-256 will likely be considered to be one of the two seminal early net neutrality decisions by this Commission.

[2] *See* FCC November 24, 2004 Press Release "Chairman Powell Issues Statement on SBC's TIPToP Service" available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254681A1.pdf ["Should we conclude that this tariff is being used to justify the imposition of traditional tariffed access charges on VoIP providers or to discriminate against SBC's competitors, the Commission will take appropriate action including, but not limited to, initiating an investigation of SBC's interstate tariff and any other tariff that proposes similar terms. Nothing in this tariff should be interpreted to force a set of compensation relationships on VoIP providers and their connecting carriers either at this Commission or in other venues."]

[3] In many of these proceedings and in our attempts to engage the "ILECs" in negotiations we have offered interim and more targeted solutions. The ILECs refused to even discuss the matter. The Commission has broad authority under Section 10 to work with FeatureGroup IP and decide vary narrowly and very specifically or very broadly and generally which new technology customer types and uses, and even which geographic areas should receive the competitive benefits of forbearance from the imposition of access charges, if they somehow apply. The agency merely needs to condition relief on FeatureGroup IP amending the IGI-POP tariff and business practices. But FeatureGroup IP can no longer operate under the competitive threat that each dollar in revenue we receive for the service we provide to IGI-POP customers creates five to ten dollars in contingent liabilities to ILECs for fictional and unwanted "access services."

while and although it was ultimately restarted and the case was heard and briefed there is still no decision. FeatureGroup IP has participated in multiple Commission proceedings, but the FCC has not resolved the matter through interpretation of the current rules or promulgation of new rules. From a business perspective, we can wait no longer, nor should we be reasonably expected to do so. The delay and uncertainty and the mounting risk occasioned by their monumental (but totally unwarranted) access billings will drive FeatureGroup IP from the market. More dithering will only support the anti-competitive efforts by AT&T and its incestuous kin, and with every day that passes it becomes more likely they will win by default.

Sadly, the Commission probably will not decide these issues on a global basis in the near future. FeatureGroup IP, however, has presented a unique, specific and time-sensitive need for forbearance from enforcement of any rules that somehow could be read to result in an access charge liability to the ILECs by FeatureGroup IP, and that case has a looming statutory deadline. FeatureGroup IP is forcing this issue for a decision because in our particular case any further delay in decision will result in a complete denial of justice and due process.

FeatureGroup IP's basic contentions are not convoluted or novel and they flow directly from the statute. They should form the basis of any new rules flowing from Docket 01-92. The following bullet points concisely summarize what FeatureGroup IP has been advocating for seven years. The ILECs and their sycophants cannot truly respond to the argument, so they resort to mischaracterization and misrepresentation, and then they play for more delay. FeatureGroup IP, however, cannot suffer further delay because the ILECs are already unilaterally imposing their own view of what the rules <u>are</u> and <u>will be</u>. They are refusing to honor their current obligations and they are sending crushing access charge bills to FeatureGroup IP. The potential, contingent liability and the resulting uncertainty has limited FeatureGroup IP's ability to grow and very well could force us out of the market before the Commission ever gets around to telling

the ILECs that their self-imposed result was wrong and will still be wrong going forward. The lack of any decision at either the state or federal levels is a denial of due process and a denial of justice. The Commission must at least grant FeatureGroup IP's Petition for Forbearance in Docket 07-256.

⇒ The Voice-Embedded IP-Based providers who subscribe to IGI-POP are Enhanced/Information service providers. They are not carriers and they do not provide telephone toll. They therefore cannot be held subject to exchange access charges.
- If an entity is not providing "telephone toll service" it cannot be mandatorily assessed "exchange access" charges under the Act.
- Voice-Embedded IP-Based applications and services inherently involve a change in content and usually offer enhanced functions.[4] No ILEC has contested FeatureGroup IP's demonstration in prior filings in, *inter alia*, CC Docket 01-92 and WC Dockets 07-256, 08-8 and 08-152 that this is so.
- Since IGI-POP customers are not "interexchange carriers" and do not provide "interstate or foreign telecommunications services" they are treated as end users under the Act and the current rules.

⇒ When two LECs exchange traffic and when the originating LEC is not functioning as a provider of telephone toll then §§ 251(b)(5) and 251(d)(2) directly apply.
- Section 251(b)(5) applies to all traffic exchanged between two LECs when each is acting as an LEC (*e.g.*, providing telephone exchange and/or exchange access) and the originating carrier is not providing telephone toll; the "carve out" in §251(g) does not extend to any traffic exchanged between an ILEC and a CLEC. ILECs cannot recover above-cost charges from CLECs in the name of Universal Service. *See Local Competition Order* ¶713.
- Section 252(d)(2) limits §251(b)(5) charges to the "additional cost" associated with terminating a call.
- The most appropriate price for transport or termination of Voice-Embedded IP-Based services – and the telephone exchange and telephone toll services with which they sometimes compete – is a cost-based rate that is consistent with §252(d)(2).
- The FCC's $0.0007 rate for "ISP-bound" traffic is a "reasonable approximation" of the "additional cost" of terminating any and all calls, without regard to "classification. That price could be used for all "telecommunications" traffic, including "telephone toll service" traffic that is subject to "exchange access." Alternatively, state-specific cost determinations will also adequately serve if they comport with §252(d)(2) and are applied to all calls without regard to classification.
- The Commission should explicitly encourage LECs to voluntarily agree to a "mutual waiver" as allowed by §252(d)(2)(B)(i).

[4] FeatureGroup IP's Petition explains the competitive and societal benefits that flow from efficient and seamless interoperation of Voice-Embedded IP-based services, applications and devices with the PSTN. The benefit to society from the resulting Group Forming Networks can not be denied, but it can only be made available by extending "control" toward the edge.

- Section 252(d)(1) requires that facilities used for §251(c)(2) interconnection follow TELRIC principles, which prohibits recourse to special access rates.
- Cost-causation principles do not allow an ILEC to require a CLEC to cover the facilities costs associated with the ILECs' originating traffic.
- IGI-POP call sessions involve the "transport and termination of telecommunications" as between two LECs, and fall squarely within §251(b)(5). They are not "carved out" by §251(g). The "additional cost" standard in §252(d)(2) applies. One LEC is not the other LEC's "access customer" because the LECs are co-carriers and peers.
- IXC-provided traditional telephone toll is subject to exchange access until the Commission – as contemplated by §254(e) and allowed by §251(g) – finishes the transition to the additional cost standard for that traffic as well. Exchange access charges assessed against providers of traditional telephone toll service may lawfully exceed additional cost, but as a matter of policy they should not.

⇒ The Commission must resolve how multiple LECs signal, route and rate the traffic they jointly handle as co-carriers and peers.

- Interconnection and intercarrier compensation involve far more than just "transport and termination." Significant issues relating to signaling, routing and rating for both the originating and the terminating ends must be addressed and resolved.
- SS7 signaling is not the exclusive or even the preferred method; it is not as capable, robust, interoperable, flexible or modern as IP-Based protocols.
- The ILECs must be reminded that they have the obligation to interconnect in any "technically feasible" manner, and IP interconnection is technically feasible.
- Some ILECs will not agree to SS7 B-Link signaling interconnection unless the CLEC "buys" "SS7 service" from the ILEC as an "access customer." This forced customer relationship is anti-competitive on its face and violates the § 251(c)(2), § 252(d)(1) and rule 51.305(a)(2)(v).
- The ILECs' signaling proposals would impose legacy telephony conventions on IP-Based services and functionally regulate or require changes to well-established Internet standards and protocols.
- The ILECs' signaling proposals are not even consistent with SS7 standards in many ways, particularly when it comes to ISUP and global numbering conventions, and SMS interoperability.
- The ILECs refuse to honor routing preferences of the address holders and they use the LERG for anticompetitive purposes.
- The ILECs reject CLECs' numbering resources and rate center designations and they are refusing to route calls originating on the ILECs' networks and addressed to the CLEC's network on a "non-toll" basis unless the CLEC agrees to become the ILEC's "access customer."

⇒ If and to the extent traffic exchanged between two LECs is subject to exchange access then they are joint providers and one LEC cannot charge the other. Each must look to the "joint access customer" for payment. The ILECs cannot force CLECs to use Single Company Billing and also serve as the billing company.

- If Voice-Embedded IP-Based services provided by third party entities are deemed subject to access charges, then the LECs that jointly handle the call at either end are co-carriers and peers. One LEC is not the other LEC's "access customer."

- To the extent an LEC's customer is deemed to be providing "telephone toll service" or somehow otherwise subject to access charges then both LECs are joint access providers.
- The ILECs are attempting to revive the "Single Company Billing" approach the Commission held was unlawful more than 20 years ago.
- Unless the two LECs voluntarily and contractually agree to the "Single Bill Option" then each LEC separately bills the access customer, and does not look to the other LEC for payment.
- FeatureGroup IP has never agreed to use the "Single Bill Option."

⇒ If the Commission does not render the foregoing matters moot as part of holistic reforms it must grant FeatureGroup IP's petition in WC Docket 07-256.

- FeatureGroup IP's primary position is that exchange access does not apply to Voice-Embedded IP-Based services; that subjecting this traffic to exchange access will cause massive network re-engineering and will only lead to continued delay and litigation over specifics.
- To the extent the Commission disagrees, FeatureGroup IP seeks forbearance from any of the potentially applicable statutes and rules that would allow an ILEC to impose exchange access charges on FeatureGroup IP by reviving "Single Company Billing" when the ILEC transports and terminates Voice-Embedded IP-Based traffic from FeatureGroup IP's ESP end user customers.
- **FeatureGroup IP's forbearance request would not preclude a future holding that some Voice-Embedded IP-Based services are subject to exchange access charges. If the FCC in the future rules that any ESP IGI-POP customers are or should be treated as IXCs, FeatureGroup IP will cease providing IGI-POP service to those customers and begin to treat the ESP like a traditional IXC. In that event FeatureGroup IP and the ILEC will be engaged in jointly provided access with the result that each LEC individually bills access charges to the ESP, unless FeatureGroup IP and the ILEC mutually and voluntarily agree to use the Single Bill Option.**

The final bullet point is important because the opponents to FeatureGroup IP's Petition for Forbearance have never directly responded to the relief FeatureGroup IP is really requesting in Docket 07-256. The actual relief sought is merely that *if* access charges apply to Voice-Embedded IP-Based services and applications and *if* the current rules somehow allow ILECs to unilaterally impose "Single Company Billing" then FeatureGroup IP requests forbearance to any and all rules that can be read to allow the ILEC to "send the bill" to FeatureGroup IP. The result would be that each LEC would send the access bill to the ESP "access customer." There is nothing complicated or unique about the request. It merely seeks to treat any access billing for IP/PSTN traffic just like jointly provided access to IXCs is handled today if and when any IP-

Based service providers are deemed to be subject to access charges. Granting the forbearance will allow FeatureGroup IP's non-carrier, non-IXC IGI-POP customers to have some certainty that they may enter the market and use a carrier other than the incumbent (FeatureGroup IP) to gain interoperation between their new technology and the legacy PSTN without the threat of lawsuits by the ILECs or direct or indirect imposition of ILEC access charges.

But, of course, before the Commission can resolve the question of whether FeatureGroup IP can or should be forced to serve as the billing company as part of Single Company Billing when FeatureGroup IP and an ILEC are joint access providers for IP/PSTN traffic the FCC must first resolve whether access applies to begin with. FeatureGroup IP's petition guarantees, at least for FeatureGroup IP's IGI-POP Service Tariff customers, that this decision cannot be avoided any longer and the market can not be chilled any longer by the uncertainty and endless litigation that presently prevails.

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FEATUREGROUP IP's INTERCARRIER COMPENSATION REPLY COMMENTS IN RESPONSE TO FNPRM IN CC DOCKET 01-92
AND
WRITTEN *EX PARTE* IN WC DOCKET 07-256

INTRODUCTION

UTEX Communications Corp. d/b/a FeatureGroup IP ("FeatureGroup IP") herein provides its Reply Comments in CC Docket 01-92. This document also serves as a written *ex parte* in WC Docket 07-256.

I. FeatureGroup IP is a competitive LEC, and it is not an ESP or an IXC. ILECs cannot unilaterally send access bills to FeatureGroup IP when it provides PSTN connectivity to the class of ESPs identified in the IGI-POP tariff.

Several commentors mentioned FeatureGroup IP's Petition for Forbearance[5] in their initial comments. Almost all of them repeated or cited to their comments in WC Docket 07-256 where they completely misconstrued what FeatureGroup IP is, what it does and the relief it has sought in that case.[6] Therefore, FeatureGroup IP must – once again – set the record straight.

Some of the participants claim that FeatureGroup IP is an ESP or an IXC and is not a CLEC. Some claim that FeatureGroup IP is seeking forbearance from rules that do not apply to FeatureGroup IP but instead apply to other providers.[7] This is simply not true.

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[5] *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(b)(1), and Rule 69.5(b)*, WC Docket 07-256.

[6] Time Warner Telecom, CBeyond and One Communications Comments p. 18, note 25; Embarq Comments, p. 41, note 74; Qwest Comments, p. 15, note 22; AT&T Comments, p. 27, note 33.

[7] For example, Broadview, Cavalier, NuVox and XO claim in a December 19, 2008 *ex parte* that FeatureGroup IP does not provide "access service." They are apparently not aware (or they want the Commission to

FeatureGroup IP is a competitive LEC. FeatureGroup IP interconnects with ILECs pursuant to §§ 251 and 252. FeatureGroup IP does not provide any interexchange telephone toll service at all. FeatureGroup IP is not an ESP. FeatureGroup IP does not directly provide any Voice-Embedded IP-Based service. All that FeatureGroup IP does at present is provide "wholesale" PSTN connectivity to its non-carrier customers via FeatureGroup IP's interstate Internet Gateway Intermediation Point of Presence ("IGI-POP") tariff.[8] The IGI-POP tariff expressly requires the customer to certify that it is an ESP and is not a carrier.[9] FeatureGroup IP's ESP customers (or the ESP's patrons, when FeatureGroup IP customer is a wholesaler) provide the retail service to users.

FeatureGroup IP's position is that Voice-Embedded IP-Based applications, services and devices are enhanced/information services and our tariffed customers are exempt from access charges. IGI-POP customers are entitled to the "ESP Exemption" and therefore cannot be required to pay exchange access charges either directly or indirectly. When an ESP decides to obtain "telecommunications" such as PSTN connectivity from an ILEC it has the unqualified right to obtain service from the ILEC's business service tariff, just like all other business end users.[10] When the ESP decides to instead obtain the telecommunications service from a

forget) that FeatureGroup IP has an interstate access tariff for interstate switched access. FeatureGroup IP, however, agrees that its IGI-POP tariff is not an access service. If the Commission agrees as well, then it needs to go no farther because that necessarily means that ILECs cannot impose access charges on FeatureGroup IP or its IGI-POP customers. If IGI-POP is not an access service, then ILEC access charges clearly do not apply when an ILEC handles a call to or from an IGI-POP customer. Broadview, Cavalier, NuVox and XO may be willing to call this LEC function something other than it is, and they may be happy to engage in umbrella pricing, but FeatureGroup IP chooses to not follow their lead. They are apparently willing to pay access charges to the ILECs, so any relief granted in Docket 07-256 can exclude them.

[8] FeatureGroup IP will in relatively short order begin providing tandem transit service to other carriers, but that will be a separate service, and does not involve the issues addressed in these comments.

[9] This additional requirement is an important feature that, along with specific technology FeatureGroup IP has invented, prevents "IP in the Middle" IXC fraud.

[10] Voice-Embedded IP-Based providers can theoretically subscribe to AT&T's TIPToP Tariff. FeatureGroup IP's customers simply prefer IGI-POP to TIPToP. Denial of forbearance would give AT&T a de-facto monopoly over this emerging market and would impose AT&T's set of compensation relationships on VoIP providers and their connecting carriers, contrary to then-Chairman Powell's express reservation when TIPToP went into effect. *See*

competitive provider[11] and a call to or from the ESP involves an end user served by the ILEC, then the ILEC is not entitled to demand access charges from either the competitive carrier or the ESP. This is the case regardless of whether the PSTN user is making a call "to the Internet" or whether the "Internet" is calling the PSTN user.

We will repeat in large font, with bold and italics, the last two sentences since they form the central idea behind FeatureGroup IP's forbearance petition and they have been the focus of the advanced technology FeatureGroup IP has put in place that allows seamless and efficient interoperation between and among technologies:

When the ESP decides to instead obtain the telecommunications service from a competitive provider and a call to or from the ESP involves an end user served by the ILEC, then the ILEC is not entitled to demand access charges from either the competitive carrier or the ESP. This is the case regardless of whether the PSTN user is making a call "to the Internet" or whether the "Internet" is calling the PSTN user.

FeatureGroup IP has been trying to secure new interconnection agreement terms in Texas for over seven years, but the case has been continually delayed and is now "abated" pending this Commission's decisions on "VoIP." FeatureGroup IP has received millions of dollars in intercarrier compensation bills from ILECs who claim that *FeatureGroup IP* rather than the ESP is somehow responsible for access charges the ILECs claim are due when they terminate ESP

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[11] In our case from the IGI-POP Tariff.

traffic handed off to them by FeatureGroup IP. The ILECs also refuse to do the switch translations that are necessary for them to route calls from their users to numbering resources assigned to FeatureGroup IP that will be used by IGI-POP customers. The ILECs insist that FeatureGroup IP must first "agree" to pay ruinous nonrecurring and recurring access charges for the *ILECs'* originating traffic notwithstanding rule 51.703(b). FeatureGroup IP has been trying to secure a regulatory ruling on the validity of the ILEC billings and refusals to route traffic for over four years, to no avail.

FeatureGroup IP therefore filed its Petition for Forbearance in Docket 07-256. FeatureGroup IP asserted its belief that – because of the ESP Exemption and more specifically because of the business practices embodied in the IGI-POP tariff, which applies the current ESP Exemption and is based on sound forward looking competitive policies related to adoption of new technology – the ILECs can not assess access charges on Voice-Embedded IP-Based services provided by FeatureGroup IP's customers, and ILECs can not send an access bill to either the IGI-POP customer or FeatureGroup IP. In the event that access charges are due under any reading or confabulation of current laws and rules, FeatureGroup IP contended that the ILEC had to look to the ESP and not the CLEC because the "access" would be "jointly provided" and Commission rules prohibit unilateral ILEC recourse to "Single Company Billing" absent a voluntary agreement between the two LECs to use the "Single Bill Option." But, if FeatureGroup IP is wrong in these two points, then FeatureGroup IP sought forbearance from whatever rules there were that would purport to allow an ILEC to bill FeatureGroup IP access charges for Voice-Embedded IP-Based traffic of an IGI-POP customer when FeatureGroup IP is merely one of two or more joint providers and is providing a competitive offering to the ILEC's business end-user services.

The result sought by FeatureGroup IP in its forbearance request – *if and to the extent*

access charges apply to Voice-Embedded IP-Based traffic – is that FeatureGroup IP will have the same rights all LECs have today for traditional IXC traffic. Put another way, FeatureGroup IP seeks forbearance from having to purchase goods and services from the ILECs at access prices in order to offer a competing telephone exchange and/or exchange access service to a new class of advanced technology customers. Denial of forbearance, along with the continued denial of our due process rights will require FeatureGroup IP to buy services from the ILECs in order to offer our competing IGI-POP services. It will also functionally repeal the ESP Exemption because there is no basis to distinguish between Voice-Embedded IP-Based services and any other IP-Based service, including traditional dial-up access to the Internet.

Comptel says the Commission should not resolve this matter right now and it should instead "rethink" for some unknown period.[12] This suggestion must be rejected because the classification and compensation questions must finally be resolved, and there is no avoiding them in the near term in any event. Perhaps the competitive provider members of Comptel do not have raging ongoing disputes about what their current interconnection agreements provide with regard to LEC-LEC signaling, routing and rating for new technology traffic. It might be the Comptel members have not suffered several years of millions of dollars in potential liabilities that are 5-10 times the revenue they receive. Maybe none of them have been trying for over seven years to arbitrate the issue of how two LECs will signal, route and rate traffic that comes from or goes to non-carrier new technology customers who offer, provide or support Voice-

[12] Comptel Comments, p. 10. Comptel's position that answering this question will frustrate or impede competitive carriers' right to interconnect under §§ 251 and 252 is also wrong. All the Commission needs to do is hold that when a carrier provides PSTN connectivity to an ESP it is providing either telephone exchange or exchange access service. Comptel is starting to sound a lot like the legacy ILECs. Their position ultimately reduces to the proposition that only carriers can provide IP-Based services, IP providers are subject to both state and federal regulation and all non-carrier ESPs must either submit to traditional regulation as carriers or exit the market. FeatureGroup IP forcefully disagrees. We want to serve ESPs and provide regulated basic, raw lower layer transmission to them so the ESPs can provide higher layer enhanced/information services and applications. And, unlike most of our CLEC brethren we do not merely replicate the ILECs' business model and try to survive by using umbrella pricing. In this respect FeatureGroup IP is unique.

Embedded IP-Based services, only to have the case delayed and then abated over their objection by a state commission that wants to await the FCC's "pending" classification and compensation decisions that never seem to come. FeatureGroup IP has. The time has long passed for this matter to be decided, and the continual delay and uncertainty is harming the industry in general and FeatureGroup IP in particular.

Comptel also seems to forget that FeatureGroup IP has a pending forbearance request that requires a decision on these issues by January 21, 2009. FeatureGroup IP's hope is that the Commission will stick to its preliminary decision that Voice-Embedded IP-Based services are enhanced/information services and are entitled to the ESP Exemption. FeatureGroup IP hopes and trusts it will finally be clear that ILECs cannot send access bills to CLECs for traffic to or from ESPs because Voice-Embedded IP-Based service traffic (like ISP-bound traffic) is covered by § 251(b)(5). If it does so, then the Petition for Forbearance in WC Docket 07-256 will be moot. But Comptel's counterproductive plea for continued uncertainty and more delay cannot be fulfilled. This matter should and must be decided here and now on a global basis. If that does not happen these things must be decided with regard to FeatureGroup IP's IGI-POP service by January 21, 2009 in WC Docket 07-256.

II. Voice-Embedded IP-Based service providers who buy from the IGI-POP tariff offer enhanced/information services.

Several commentors challenge the FNPRM's tentative decision that IP/PSTN services are enhanced/information services. Their comments largely focus on "interconnected VoIP services" but some commentors speak to "VoIP service" without any limitation to only those services that meet the definition in Rule 9.3. The NPRM proposal on this point, however, was properly and correctly much broader – it extends to <u>all</u> IP/PSTN services (*e.g.*, not just those deemed to include something that appears to include human speech). It applies to calls <u>from</u> the PSTN

(including but not limited to calls to "dial up" ISPs) that are designed to access an IP-Based service, and it applies to calls to the PSTN that are part of an IP-Based service.

If somewhere along the way of the communication there is a change in content, then as a matter of law the offering is not "telecommunications" and therefore obviously can not constitute a telecommunications service.[13] To the extent the offering "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide[s] the subscriber additional, different, or restructured information; or involve[s] subscriber interaction with stored information," it is an enhanced service.[14] When the device, application or service offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" it is an information service.[15]

FeatureGroup IP will let others engage in the debate over "change of form."[16] As the Commission acknowledges in note 529 of Appendix A and note 520 of Appendix C, the presence or absence of a "net" protocol change is not the only basis for classifying something as an enhanced and/or information service. The Commission tentatively declined to reach the other bases, but FeatureGroup IP will nonetheless discuss the other bases so it is clear in the record that the Voice-Embedded IP-Based services, applications and devices that flow through IGI-POP service are not telecommunications services because they meet these other criteria as well.

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[13] The definition of "telecommunications" explicitly requires that there be no change in the "content of the information as sent and received." 47 U.S.C. § 153(43). If the offering is not "telecommunications" but merely uses telecommunications as an input, then it is not a "telecommunications service" and is an "information service." 47 U.S.C. § 153(46).

[14] *See* 47 C.F.R. § 64.702(a).

[15] *See* 47 U.S.C. § 153(20).

[16] FeatureGroup IP will, however, demonstrate below that – regardless of whether a change of form is sufficient to classify IP-Based services as enhanced/information – it is the change of form to IP that allows the ESP to provide enhanced functions.

All those who challenge the tentative conclusion are incorrect as a matter of law and they ignore the record in this case. And not a single one of them ever explains how the statute and rules can be read to provide that an application or service riding "on top" of an information service (like broadband) can ever be a telecommunications service. The plain words of the statute simply do not countenance that a "telecommunications service" can be provided "via information service." *Information service* is provided "via telecommunications." But the converse can not ever be true. An application or service that is provided via information service cannot, as a matter of law, ever be deemed to constitute a "telecommunications service."

Whether there is a "change in form" is not the only test for classifying something as an enhanced/information service. One must also consider whether there are "enhanced/information" functions or whether there is a change in content. The "change in content" factor relates to whether something is "*telecommunications*" whereas "enhanced functions" is a shorthand reference to the various criteria set out in the definitions of "*enhanced service*" or the slightly broader "*information service*."

Finally, and most importantly, FeatureGroup IP's IGI-POP tariff expressly prohibits carriers from subscribing to IGI-POP service. There is absolutely no "IP-in-the-Middle" traffic when it comes to IGI-POP service. In fact, FeatureGroup IP has developed signaling technology that can proactively identify ordinary IXCs who intentionally misroute traffic: FeatureGroup IP designed a technical solution to the so-called "Phantom traffic" problem.[17] FeatureGroup IP attempted to work with the ILECs on this matter, and we have now been waiting for over a year for any legacy ILEC to indicate any interest in doing so. They are not interested, which can only

[17] *See*, March 28, 2007 Letter to Marlene H. Dortch, Secretary, from W. Scott McCollough, General Counsel for FeatureGroup IP in CC Docket No. 01-92, *In the Matter of the Missoula Intercarrier Compensation Reform Plan; Missoula Plan Phantom Interim Process and Call Detail Records Proposal* transmitting Written *Ex Parte* presenting method to uniquely identify, represent and allow callback to an IP endpoint from the Legacy Public Switched Telephone Network.

mean that the "Phantom" is really an anti-competitive straw man invented by the ILECs to prevent new technology providers with new business plans from efficiently intercommunicating with the ILECs' walled gardens and their captive customers.

A. The Voice-Embedded IP-Based services that rely on IGI-POP service to connect to the PSTN offer enhanced functions.

Several commentors incorrectly assert that Voice-Embedded IP-Based services and applications do not offer any different features or functions than those traditionally or potentially offered by carriers using legacy circuit-switched technology.[18] They simply refuse to accept the plain facts that are evident from the record in this case and in the real world.

Voice-Embedded IP-Based services, both IP-IP and IP-PSTN, allow a provider, *inter alia:*

- to uniquely identify users and user groups without the need for "phone numbers" thus extending the positive economic effect of Group Forming Networks to the users of the legacy PSTN;[19]
- to integrate voice transmission with much more powerful data processing capabilities that then facilitate the offering of additional enhanced functionality;
- to integrate voice, data and video applications;
- to detect a user's "presence" on a network;
- to route communications according to sophisticated user-specified preferences, including variations by time of day, calling party number, and any other parameter that can be defined through a computerized database; and
- to protect the privacy and safety of individuals by means of customized call screening and routing.
- to host "one to many" communications sessions, including the ability to "ring" several

[18] NARUC Comments, p. 16 [incorrectly asserting no subscriber interaction with stored information]; NECA Comments, p. 31 [incorrectly asserting Voice-Embedded IP-Based services "do not have characteristics that are distinct, in any meaningful way, from ordinary voice telephony services using circuit switched technology." *But see*, NECA Comments, p. 32 acknowledging there are "a few bells and whistles" and the strange admission on p. 35, note 88 flatly admitting that "some IP/PSTN services" ***are*** enhanced/information.]; twtelecom, One Communications and CBeyond Comments, p. 12 and note 14; Neb. Rural ILECs Comments, p. 18 [asserting that "much" (apparently conceding that not all) of the enhanced functionality provided by VoIP services can also be accomplished through Class 5 and circuit-switched technologies.] Some of the ILECs were forthright and did acknowledge the offer of enhanced functions, even though they oppose the classification decision for other reasons. *See e.g.*, TSTCI Comments, p. 21.

[19] The CMRS market is at least somewhat more open to innovation, and as a result, GFNs are driving new demand and facilitating new services in the mobile area. *See, e.g.*, "Social networks lead the way as mobile Web ramps up," available at http://www.rcrwireless.com/article/20081222/WIRELESS/812229983/-1/newsletter30.

simultaneous edge devices using only one called party address, or to intelligently route call session requests to the appropriate edge device depending on user-supplied instructions.

- to host "many to one" communications sessions.
- to host "any to any" sessions (*e.g.*, bridging various platforms and edge devices, including traditional telephones, such as a traditional land-line telephone engaging in a call session with a user of an instant messaging application like Skype or GoogleTalk).
- to host communication sessions that mix voice, video, text, or other data communication applications, voice call session interruption and an invocation of different network resources, such as retrieving real-time or stored information (stock quotes, driving directions) from the Internet. The user can initiate such a response by sending a SIP INFO request from a soft client, IP phone, or a key combination from a mobile or POTS phone (which is interpreted and translated into a SIP INFO request).
- to provide real-time language translation.[20]
- to support talking email or text voice mail, using speech-to-text conversion or text-to-speech conversion.[21]

These enhancements are available at the user's election or triggered by predetermined events. They can work with any kind of equipment or edge device the user happens to be employing. The new technology provider's computing platform decides the appropriate application(s) to which the user is directed. The use of IP in this environment is not incidental; it is essential to making enhanced features available to users – including those users who connect to the new technology provider's network from legacy equipment. Many of these functions can be accessed and used simultaneously or sequentially, but they are all part of a complete integrated package of capabilities that are part of the new technology provider's finished service.

IGI-POP customers' Voice-Embedded IP-Based applications, services and devices, for example, can support access to real-time information via both the 12 button POTS interface and

[20] *See* http://arstechnica.com/news.ars/post/20071219-new-google-talk-bots-bring-real-time-translation-to-im.html.

[21] The potential list of enhanced functions is limitless. The ILECs want to pretend it is not true, but each of these enhanced functions can be offered to users on the PSTN unfortunate enough to still be tied to a traditional phone. The incumbents just do not have a vision on how to innovate or rapidly develop and deploy novel offerings that are driven by user – rather than network provider – control and choice. They therefore believe it does not exist. And they strive to kill any chance of it ever existing, unless and until they are the ones to decide to when, where and on what terms. You can bet it will involve billing by the minute and at an exorbitant price far above incremental cost.

voice recognition. Users on IP networks and POTS customers can obtain stock quotes and driving directions and even the ability to communicate with instant messaging services such as Skype and GoogleTalk. Some providers offer the ability to send a command to "record" the conversation in digital format and deliver the recording to the requesting party by email or make it available by other means. Even what looks like a "PSTN-PSTN" session can use these resources – as well as bring in (conference with) an IP-Based user, including users of Voice-Embedded instant messaging applications. PSTN users access this information by "dialing" a key combination at any point during a "call" invoking the other user or "leg" to be placed in conference or on hold. When the user is done accessing this feature, the call is rejoined or the original two-person communication is reinstated after the conference is dropped. All of these enhanced functions are made possible by the IGI-POP service offering that is the subject of FeatureGroup IP's forbearance request since the new technology provider is able to connect to the PSTN using IGI-POP.

B. Voice-Embedded IP-Based services that rely on IGI-POP service to connect to the PSTN change content.

An important requirement in the definition of "telecommunications" is that there is no "change in the … content of the information as sent and received." IGI-POP customers' Voice-Embedded IP-Based applications, service and devices clearly, obviously and indisputably change the content of the information "sent" by the user; the information "content" that is "received" is not the information "content" that was sent.

Some commentors nonetheless assert that Voice-Embedded IP-Based services do not involve any change of content,[22] so they are "telecommunications." Others assert that "some" or "most" Voice-Embedded IP-Based services or applications do not involve the offer or provision

[22] NECA Comments, p. 30, RICA Comments, p. 10

of "additional, different or restructured information" and/or do not "generate, acquire, store, transform, process, retrieve, utilize or make available information."[23] This is merely a variation of the claim that there is no change in content.

Because of the way the technology works, IGI-POP customers' Voice-Embedded IP-Based applications, services and devices quite often change the information content "sent" by the user before it is then delivered to the receiving party. The information "as sent" by one end is different than the information "as received" at the other end.

Let us first make clear what is "the content of the information" that is "sent" by the user, and what is the "content of the information" that is "received." Telephone handsets have a speaker and a mouthpiece. The sounds that impact the diaphragm on a legacy handset cause the mouthpiece to vibrate, thus generating the electrical impulses that are transmitted across a legacy network.[24] Those sounds are not just "words" or "voice." All other sounds – like a door squeaking or a vacuum cleaner running in the background – vibrate the diaphragm too and form part of "the content of the information" that is "sent." Indeed, even "silence" can be content. Silence can most certainly have "substance, purport or meaning"[25] in many contexts. Therefore, the information "content" "as sent" for purposes of §153(43) is <u>not</u> merely the "words"; it is the <u>electrical representation</u> of all <u>the sounds impacting (or not impacting) the diaphragm</u>, including background noise and other aural information as well as spoken words. The entire "substance, purport or meaning" – including all the background noise and even the silence – is what must be considered when applying the "change in content" test.

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[23] NARUC Comments, pp. 15-16.

[24] *See* http://www.sciencetech.technomuses.ca/english/schoolzone/Info_Sound.cfm#handset "How does the telephone handset work?"

[25] There is not a statutory definition of "content" in the Act, although § 705(a) comes close. The Electronic Communications Privacy Act does define content in 18 U.S.C. § 2510(8).

In a legacy PSTN-PSTN call there is no change in content. The "information" sent from one handset is the same "information" received by the other handset. Silence and background noise are faithfully transmitted across the network and reproduced at the other end, so long as they fit within the voice band.[26] IP-Based offerings, on the other hand, often employ Voice Activity Detection,[27] and Comfort Noise Insertion.[28] These have multiple uses. VAD is used to conserve bandwidth among other things but it also helps to bring out the "voice" by distinguishing or enhancing it in relation to other background noise and it reduces the jarring effect of "sound" that suddenly starts after a silent period. Comfort Noise prevents the conversing parties from wrongly thinking the call has been disconnected. It is typically injected by the egress media gateway. Users are often able to turn it off if they prefer. The content changes are desirable and avoidable–each can be "turned off" or "tuned" by the provider (and often the user as well) and the services/application will still work. These functionalities and attributes are therefore "intended to be a service rendered to a customer."[29] If the difference was

[26] "In order to eliminate unwanted signals (noise) that can disturb conversations or cause errors in control signals, the circuits that carry the telephone signals are designed to pass only certain frequencies. The ranges of frequencies that are passed are said to be in the pass band. Zero to 4000 hertz is the pass band of a telephone system voice channel-a VF channel. (Sometimes this band is called a message channel.) Bandwidth is the difference between the upper limit and lower limit of the pass band. Therefore, the bandwidth of the VF channel is 4000 hertz. However, the transmission of speech does not require the entire VF channel. The voice pass band is restricted to 300 through 3300 hertz. Hence, any signal carried on the telephone circuit that is within the range of 300 to 3300 hertz is called an in-band signal. Any signal that is not within the 300 to 3300 hertz bands, but is within the VF channel, is called an out-of-band signal. All speech signals are in-band signals. Some signaling transmissions are in-band and some are out-of-band." *Gateway Protocols, Defining Analog Voice*, Document ID: 8628, © 1992-2008 Cisco Systems, Inc. (Feb. 12, 2007), available at http://www.cisco.com/en/US/tech/tk1077/technologies_tech_note09186a00800a70bf.shtml.

But something like a dog whistle, which typically operates within the range of 16,000 Hz to 22,000 Hz (*See* http://wiki.answers.com/Q/How_many_hertz_high_is_a_dog_whistle, Copyright © 2008 Answers Corporation) would therefore not be transmitted across the traditional analog network even though it would wobble the heck out of that diaphragm in the handset.

[27] For an explanation and analysis of VAD see M.Y. Appiah, M. Sasikath, R. Makrickaite, M. Gusaite, "Robust Voice Activity Detection and Noise Reduction Mechanism" (PDF), Institute of Electronics Systems, Aalborg University (2005), available at http://kom.aau.dk/~myap04/pjts/final_report_8th.pdf.

[28] http://en.wikipedia.org/wiki/Comfort_noise. Wikipedia® Text available under GNU Free Documentation License.

[29] *See* Supplemental Notice of Proposed Rulemaking, *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for*

not "evident" or "perceptible" then options for turning these functions on and off or for tuning them would not be necessary.[30]

Most Voice-Embedded IP-Based applications, service and devices involve use of codecs within the platform, at a gateway or at the IP edge, such as in a PC. It may be that "telecom" old-timers do not know what a "codec" is, which would explain their incredulity when one tries to explain that Voice-Embedded IP-Based applications, services and devices are enhanced/information service because they change content. *See*, http://en.wikipedia.org/wiki/Codec and http://en.wikipedia.org/wiki/Audio_codec.[31] Read the description. Then try to conclude that a standard audio codec is not a computer program that "generates, acquires, stores, transforms, processes, retrieves, utilizes and makes available information" and/or "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; and provide[s] the subscriber additional, different, or restructured information" and even allows "subscriber interaction with stored information." IGI-POP customers' Voice-Embedded IP-Based applications, services and devices clearly do change content.

IGI POP customers provide IP-Based processing and enhanced services to their patrons, which can be other providers or ultimate consumers. These offerings can – depending on how they are configured – support communication sessions comprised of voice, video, text, or other data communication applications. The session can originate on any type of device and it can connect to and be completed via any type of device. In other words, these services enable "any-

Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, FCC 86-253, ¶¶ 21-23, n. 30-31, CC Docket No. 85-229, Phase II, 1986 FCC LEXIS 3236 *21-*24 (rel. Jun. 1986).

[30] The ILEC may not "see" it, but users clearly do perceive the enhancements. The users obviously know, for example, they are receiving language translation, speech-to-text, text-to-speech or that the system is reading an email or a web page to them.

[31] Wikipedia® Text available under GNU Free Documentation License.

to-any" connectivity, meaning that they transmit communications between any possible mix of IP and/or PSTN endpoints and make processing and communications enhancement capabilities available to every possible configuration, including but not limited to communications where one or more legs of the communication are on the PSTN during all or part of the session. These offerings fall neatly into the "information service" category.[32]

[32] *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10 and WC Docket Nos. 04-242 and 05-271, FCC 05-150 ¶ 15, 20 FCC Rcd 14853, 14864 (rel. Sept. 2005) (notes omitted, emphasis added):

> 15. The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, "between or among points selected by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as "information services." The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service. Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability "which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server." The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.

The Enforcement Bureau used the same analysis in the Memorandum Opinion and Order, *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014, DA 07-486, 22 FCC Rcd 3392 (rel. Feb. 2007)(Emphasis added):

> 25. NPTC is correct that the Commission has classified as "information service" an integrated service that combines transmission with the data storage, manipulation, processing, and retrieval portion, *i.e.*, the Internet service provider ("ISP") portion of an Internet access service. The ISP portion of an Internet access service typically provides end users with a comprehensive capability for manipulating information using the Internet, including applications such as web browsing, file transfers, e-mail access, Usenet newsgroups, and Domain Name System access. The Commission has also recognized that the "telecommunications" component of an Internet access service can be "part and parcel" of an integrated Internet access service offering, or it can be offered separately from the ISP portion of the service and consist solely of a transparent transmission path, with no changes to the form or content of the transmitted information. Carriers can choose to offer this transmission component as a telecommunications service on a stand-alone, wholesale, common carrier basis to ISPs, who then use that service as an input for the wireline broadband Internet access that the ISPs, in turn, offer to their own end user customers. Given the foregoing, the Commission has held that whether a service is a "telecommunications service" or

IGI POP customers convert from TDM to IP when the communication session does not enter the IGI POP customer's platform in an IP format. They then process the IP packets so that the enhanced features and functions can be accessed and used. After processing, they then route the communication toward the desired endpoint. The conversion from TDM to IP is a necessary prerequisite to being able to offer and provide enhanced features and functions. Each of these services intrinsically involve interaction with and changes to customer-supplied information ("content") with every session or "call." Because they offer "Any-to-Any" capability, a communication session may enter and leave the IGI POP customer's platform in any number of different signaling protocols and codecs.

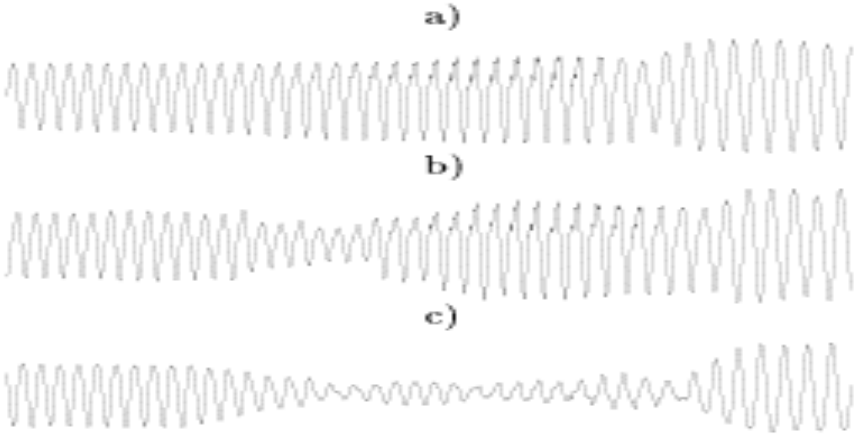
Since IP networks generally use best-effort datagram-based network protocols to transmit media, a small but still significant fraction of the media packets are often lost in transmission. Engineering and information-theoretic techniques attempt to correct this issue. But by doing so, the system is providing the subscriber "additional, different or restructured information." This necessarily results in a change to the content "as sent and received" as explained below:

- PCM (Pulse Code Modulation) takes a digital signal such as voice or modulated modem tones and creates a digital recreation.
- T.38, an ITU standard, represents facsimile/modem modulated tones as data, which are recreated on the other side as modulated tones. Missing or lost data is retransmitted where possible or the gaps are interpreted where not.
- PLC (Packet Loss Concealment) is a method for dealing with packet loss in IP networks, whereby missing content is "concealed" through analysis of preceding parts of the bitstream and replacement of the missing packets with alternative content.
- CELP (Code-Excited Linear Prediction) is a hybrid of source and waveform coding, achieving the data rate of source coding and speech quality of waveform coding.
- LPC (Linear Predictive Coding) analyzes the speech signal by estimating the formants, removing their effects from the speech signal, and estimating the intensity and frequency of the remaining buzz. LPC provides human-recognizable quality

an "information service" turns on the nature of the functions the purchaser is offered. The determinative question, briefly put, is: does the service offering involve only a transparent transmission path, with no changes to the form or content of the transmitted information; or does it involve data storage, manipulation, processing, and retrieval?

improvements, and it actually interprets and predicts human speech and creates lost or missing data. This can be seen in the testing results[33] reproduced below comparing resulting waveforms from both CELP- and LPC-based encoders. The original waveform in a) is obviously different than that presented by b) and c). The latter two are quite clearly providing the listener with different and restructured information, because they are predicting and/or inserting substituted data that is different from that supplied by the user. It is, however, all based on other user supplied information.

Figure: Robustness of the Frame-Independent Long-Term Prediction compared to a standard CELP method. ITU-T Standard G.729A: a) original signal segment; b) decoded signal resulting from iLBC after a single IP Packet was lost in the transmission; c) same as b) but for G.729A.



Look closely at the picture above. "a)" is the original content "as sent" while "b)" and "c)" represent the content "as received" after processing by various "VoIP" platforms. They are not the same. There is an undeniable change of content.

While many parties want to argue whether the "change in form" alone is sufficient to classify IP/PSTN services as "enhanced/information" the more significant point is that the conversion to IP enables the IGI POP customer to offer mid-call processing capabilities that support novel features and services to PSTN users as well as IP-Based end-points. The conversion is not done merely for the convenience of the network, to correct network issues, to preserve the content of subscriber content or to make new technologies interwork with the old.[34] It is a technical prerequisite to the offer of enhanced features and there is a change in content.

[33] Fig.2 from ILBC – A Linear Predictive Coder With Robustness to Packet Losses http://www.ilbcfreeware.org/documentation/iLBCpaper_andersen.pdf.

[34] *See, e.g.,* Memorandum Opinion and Order, *In the Matter of Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, DA 95-2190, 10 FCC Rcd 13717 (rel. Oct. 1995)

FeatureGroup IP has said all of this before in its prior submissions in this and other cases, but the ILECs have chosen to ignore the showing since they cannot rebut it. At some point the Commission will have no choice but to make a ruling, but that ruling must be based on the record. The record, however, is clear and FeatureGroup IP's showing stands wholly unrebutted: IGI-POP customers' Voice-Embedded-IP-Based services change content and offer enhanced functions. ILECs and their sycophants that say anything different simply will not accept the unrebutted facts in the record and their only hope is that the FCC will ignore the facts and the law to rule their way.

C. The enhanced functions offered by and the change in content involved with the Voice-Embedded IP-Based services that rely on IGI-POP service to connect to the PSTN are not "ancillary" to any telecommunications service.

As can be seen from the foregoing, the enhanced functions offered by IGI POP customers are all part of an integrated offering, and they are usually engaged and used simultaneously with the underlying telecommunications input the IGI-POP customer obtains from its supplying carrier vendor, *e.g.*, FeatureGroup IP.[35] Yet an ILEC looking at the PSTN end-points would be

[35] Some commentors assert that the offer of enhanced functions does not suffice to classify IP-Based services as enhanced/information because there is also "telecommunications." TSTCI Comments, pp. 21-27. IGI-POP customers do not themselves supply the "telecommunications" input. They instead obtain it from FeatureGroup IP and then "add" the enhanced/information functions to create the service that forms the offered "output." When this is the case, the ultimate product is not "telecommunications service" and the provider is an unregulated ESP. *IDCMA Frame Relay*, 10 FCC Rcd. at 13720 (1995); *NTCA v. Brand X*, 545 U.S. 967, 993 (2005) (*Computer Inquiry* precedent does "not subject to common-carrier regulation those service providers that offer[] enhanced services over telecommunications facilities, but that d[o] not themselves own the underlying facilities – so called 'non-facilities-based' providers."); See also, Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) ("*Computer Inquiry II*"). IGI-POP customers resemble the Value-Added Network Service providers (VANs) that "are not facilities-based carriers, but rather purchase transmission facilities (i.e. the transmission lines linking switches together) from facilities-owning carriers." *See*, *IDCMA Frame Relay* 10 FCC Rcd at 13718, ¶ 5, n. 6. The VAN would purchase common carrier transmission facilities and then "add" enhanced functions. VANs were one of the primary beneficiaries of the ESP Exemption, and were specifically mentioned as such in the NPRM that proposed to eliminate the ESP Exemption. *See*, NPRM, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 87-208, ¶ 1, n. 3, 2 FCC Rcd 4305 (rel. July 17, 1987) ["We concluded in our Computer III proceeding that protocol processing would continue to be treated as an enhanced service. *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, CC Docket No. 85-229, FCC 87-102 (released May 22, 1987) (hereinafter *Phase II Order*). That decision had the effect of continuing to exempt from access charges a major class of service providers -- the VANs (value added network providers), which offer protocol processing combined with packet-switched data services. See *Amendment of Sections 64.702 of the Commission's*

unable to determine that the feature was available and/or ever used. Nonetheless, this is clearly the offer of enhanced features and services, and it is therefore not a telecommunications service but is instead an enhanced/information service as a matter of law.

If the Commission wishes to further delve into what makes IGI-POP customers' specific applications exempt from access charges, it is free to do so. FeatureGroup IP has already banned IXCs from subscribing to IGI-POP service, but if the FCC decides for some policy reason that rural Americans should be denied the benefits of new technology, or that certain specific applications should not, as a matter of the public interest, receive the exemption, then the Commission can so rule or condition the grant of forbearance and FeatureGroup IP will amend the IGI-POP tariff to implement this new policy. Any change or restriction, however, must come from the Commission rather than a result of ILEC unilateral action.

FeatureGroup IP can no longer have the fox – in this case the ILECs and those CLECs that are ILEC "wannabes" – guard the hen house and monopolize this new and emerging market by unilaterally imposing legacy subsidies on enhanced/information services. The law requires a decision – by January 21, 2008 – that access charges do not apply to FeatureGroup IP's IGI-POP traffic.

D. The arguments of those challenging the classification decision would equally apply to all IP/PSTN services, including basic dial-up calls for Internet access.

The NPRM correctly speaks to all "IP/PSTN" traffic – both calls "to" and calls "from" an ESP platform – and it properly did not attempt to distinguish IP-Based applications and services that support "voice" from any other IP-Based application or service. The ILECs claim that a certain "type" of enhanced/information service should not be entitled to the "ESP Exemption"

Rules and Regulations (Third Computer Inquiry), Supplemental Notice of Proposed Rule Making, CC Docket No. 85-229, FCC 86-253 (released June 16, 1986), para. 46, n. 56."] Even though VANs procured and to some extent resold the underlying basic service, their ultimate finished product was not subject to regulation or access charges because of the "contamination theory" – which expressly applies only to "nonfacilities-based service providers. *Id.* ¶¶ 42-46. Every IGI-POP customer is a "nonfacilities-based provider."

merely because it has "voice."[36] The Commission has never distinguished between "types" of enhanced/information service offerings. The applicable definitions and rules simply do not allow for such discrimination and it would be unreasonable to even try.

More important, these parties conveniently do not recognize that every call on the PSTN is a "voice" call because that is what the PSTN is engineered to handle. Every ESP communication that touches the PSTN in any way looks like a "voice" communication and every ESP communication looks like it is coming from and/or going to an "ordinary handset" when observed from the "PSTN." The PSTN is optimized for audio, and more specifically the voice band.[37] In order to "work" on the PSTN, an enhanced/information service feature or application must operate within those confines. To the PSTN, a Class 2 FAX, a TTY/TTD and a party interacting with IVR or using keypad entry to gain access to information are each making an ordinary "voice call." To the PSTN, a modem and a cell phone are "ordinary" handsets." Everything "walks like a duck" on the PSTN since the PSTN only works for those who waddle in proper fashion. Every single call on the PSTN is and must be "a voice call between two telephones"[38] because that is the only way any call will work. This is particularly so for IGI-POP.

When an ILEC and a competing carrier collaborate to originate a call "to the Internet" – as is often done with "ISP-bound traffic" but is increasingly occurring when PSTN users "dial

[36] *See*, *e.g.*, USTA Comments, p. 8 ["the VoIP provider should be treated no differently than any other provider interconnecting with the PSTN" – an argument that would apply to providers that interconnect with the PSTN to provide "dial-up" access to the Internet.]; twtelecom, One Communications and CBeyond Comments, p. 13 ["classification of IP/PSTN service as an information service would also put important carrier rights at risk" – even though no one in this or any other case has ever asserted that requesting carriers cannot use interconnection to provide service to dial-up Internet access providers.].

[37] The PSTN is designed to carry audible sounds between 300 hertz to 3000 hertz, which resembles the frequency band of normal "voice" conversations. Any application or device that traverses the PSTN must therefore operate on an audio basis within those confines. And the terminal device must appear to the network to be an "ordinary phone" even if it is in fact a modem or FAX machine.

[38] *Cf.*, Embarq Comments 36.

up" to reach a Voice-Embedded IP-Based service[39] – the call is subject to § 251(b)(5). When a competing carrier and an ILEC collaborate to complete a call "from the Internet" – as has been done for years with many different ESP services like Net2Phone and PC FAX and is increasingly done with a huge variety of other Voice-Embedded IP-Based services supported by IGI-POP – the call is subject to § 251(b)(5). Voice-Embedded IP-Based services and applications that "call" the PSTN are merely the flip side of "ISP-bound" traffic. The Commission was absolutely correct in continuing to equate all IP-Based services for both jurisdictional and intercarrier compensation purposes. All are equally subject to § 251(b)(5) and none are or can be subject to exchange access charges. This is particularly so for IGI-POP.

With all due respect to NASUCA[40] and others[41] the fact is that while they in many instances are trying to single out IP-Based "voice" applications or the sub-set of them that are "interconnected VoIP service," their arguments also justify imposing access charges on consumers' dial-up calls to an Internet access provider using a modem to access the Internet. These putative consumer advocates should reconsider their position. NASUCA in particular probably did not realize that the plain terms of its initial comments essentially ask the Commission to impose originating switched access on dial-up Internet calls that consumers without broadband make to access the Internet. Regardless, these commentors are flatly wrong when it comes to IGI-POP users.

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[39] Vonage, for example, has two different features ("Virtual Number" and "Vonage Access") that allow PSTN users to call a "local" phone number to reach Vonage customers, wherever they may be. See http://www.vonage.com/features.php?feature=virtual_phone_number&refer_id=WEBFE070501001W1 and http://www.vonage.com/features.php?feature=v_access&refer_id=WEBFE070501001W1. Each of these features can also be used by the Vonage customer to access his or her voice mail or other applications.

[40] NASUCA Comments, pp. 8-9.

[41] RICA Comments, pp. 10-11; Neb Rural ILECs Comments, pp. 16-20; USTA Comments, p. 8; CenturyTel Comments, pp. 26-28; Frontier Comments, pp. 7-8.

E. Voice-Embedded IP-Based service providers who buy from the IGI-POP tariff offer enhanced/information services.

Since Voice-Embedded IP-Based applications, devices and services that rely on IGI-POP to intercommunicate with the PSTN are either "enhanced service" or "information service" and they are not "adjunct-to-basic" then they cannot be telecommunications service since the categories are mutually exclusive. The Commission long ago defined what are known as "enhanced services." The definition has not been changed in many years, and it still appears at 47 C.F.R. § 64.702(a):

> Sec. 64.702 Furnishing of enhanced services and customer-premises equipment.
> (a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which ***employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information***. Enhanced services are not regulated under title II of the Act. (emphasis added)

IGI-POP customers do all of the above. They offer, support, provide or employ "computer processing applications." Their applications, services and devices "act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." They "provide the subscriber additional, different, or restructured information." And they "involve subscriber interaction with stored information." The offer is integrated, and goes over telecommunications service (*e.g.*, "common carrier") facilities obtained from FeatureGroup IP that are used in interstate commerce. Because of the application of the IGI-POP tariff, 100% of the time the IGI-POP customer does not itself provide the telecommunications or common carrier input, but only adds the enhancement capability.[42] The finished output is an enhanced service.

[42] Some comments assert or imply that "many" or "most" "VoIP" providers are "carriers" and that "most" "Interconnected VoIP service" comes from "cable companies." These parties clearly have no idea what is happening in the real world. While cable companies may provide the preponderance of "Interconnected VoIP service" that is

IGI-POP customers are also "Information Service Providers" because they provide "information service" as defined in the Act:

> (20) INFORMATION SERVICE.--The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[43]

The offer is to provide "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." The offer is integrated, and it goes over telecommunications obtained from FeatureGroup IP. The IGI-POP customer does not itself provide the telecommunications input, and does nothing other than add the enhancement capability. This functionality and capability is not used to manage, control or operate a telecommunications system or manage a telecommunications service. IGI-POP customers have no telecommunications system to manage and they do not offer "telecommunications service" so there is nothing to "manage" there either. The finished output is an information service and these are information service providers.

As we already demonstrated above, IGI-POP customers are not providing "telecommunications" as a stand-alone or segregable product. IGI-POP customers do not provide any telecommunications service. The service therefore cannot be "telephone toll" – which is by definition a telecommunications service. The IGI-POP customer is accordingly not subject to

absolutely not the entire universe – or even the greatest portion – of traffic related to Voice-Embedded IP-Based services and applications that touch the PSTN in one way or another. FeatureGroup IP, for example, does handle traffic from cable companies' offerings and the traffic from several "over the top" providers. But this is less than one half of our total traffic volume and their share is dropping, not rising. The rest (and most of our growth) comes from all the other kinds of non-carrier and non-facilities based Voice-Embedded IP-Based services and applications that the telephone companies simply refuse to admit are out there.

[43] 47 U.S.C. § 153(20).

exchange access charges under the Act or Part 69.[44] Access charges do not apply to the IGI-POP customer or to FeatureGroup IP.

F. Technology should not matter as a matter of policy, but the Act's distinctions are technology based.

Several commentors take issue with the NPRM's focus on the technology that is used to provide IP/PSTN services, and particularly Voice-Embedded IP-Based communications. They assert that the underlying technology should not matter and other things (substitutability, user perception, functionality, predominant use) should control when a service is classified for regulatory purposes. But their argument is not with the NPRM because it is faithful to the Act. They simply cannot accept the fact that at present the Act and the rules very much incorporate and apply technological considerations to determine the various parties' rights, duties and obligations. The definitions of "enhanced service" and "information service" both completely rest on ***technological*** considerations. Does the *technology* "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information?"[45] Does the *technology* "offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"?[46] If it does, then as a matter of law it is not a telecommunications service, and is an enhanced/information service. And the neither the

[44] 47 C.F.R. § 69.5(b) provides that "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." Interexchange carriers cannot subscribe to IGI-POP. IGI-POP customers do not use local exchange switching facilities "for the provision of "telecommunications service." They clearly are not subject to assessment of "carrier's carrier charges" under this rule. Similarly FeatureGroup IP is providing either telephone exchange or exchange access service, each of which is exclusively an LEC function. FeatureGroup IP is not acting as an "interexchange carrier." Therefore the ILEC also cannot "send the access bill" to FeatureGroup IP under the rule.

[45] *See*, 47 C.F.R. §67.702(a) (definition of "Enhanced service").

[46] *See*, 47 USC §153(20) (definition of "Information service").

IGI-POP customer nor FeatureGroup IP is subject to access charges under Rule 69.5 because that rule imposes access charges only on "interexchange carriers" that provide "telecommunications service."

While "technological neutrality" in terms of intercarrier compensation is a fine aspirational goal – since as we all know "a minute is a minute" – the statute and rules do not at present incorporate that approach.[47] And, what the ILECs advocate is not in fact "neutral" because it is SS7/TDM/Legacy-centric and handicaps new technology so as to favor the ILECs' legacy technology laden incumbent status and it preponderates their business model and pricing arrangements over all others.

The law is that enhanced/information services are not subject to access charges. The applicable definitions are technology specific. The Act codified the ESP exemption and the Commission cannot lawfully impose exchange access charges on an entity that does not provide telephone toll. Try as they might, the ILECs simply cannot overcome this simple proposition.

FeatureGroup IP agrees that as a matter of policy all "uses" of the PSTN should ultimately be subject to the same price for origination and termination. That will happen when all other traffic, including "access" traffic, pays the uniform rate at the end of the transition period under the NPRM. There is, however, no policy basis for and the law does not allow imposition of access to IP/PSTN traffic during the transition.

G. The Commission must reject the AT&T and Qwest arguments that even though IP/PSTN services are enhanced/information services access charges do or should still apply to traffic handled by FeatureGroup IP through the IGI-POP tariff.

Several parties, led by AT&T and Qwest, forcefully argue that even though IP/PSTN services are enhanced/information some (or maybe all) should nonetheless be subject to access

[47] The FCC described the technology-driven distinctions that exist in ¶¶5-7 of the NPRM, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, 16 FCC Rcd 9610, 9613-14 (rel. Apr. 2001). The tentative decision to eliminate these distinctions for intercarrier compensation purposes at the end of the transition period is wholly reasonable and is the only lawful result.

charges. AT&T says that access charges apply to "interexchange" enhanced/information service traffic. Qwest posits that the "physical location" of the "ESP POP" should determine whether a call is subject to reciprocal compensation or access. Both are wrong.

1. AT&T's "interexchange" argument completely ignores that all ESP services are largely interstate and interexchange but have always been exempt.

AT&T argues that "interexchange" IP/PSTN traffic should be subject to access charges, but "local" IP/PSTN traffic should be subject to reciprocal compensation. They persist in this claim even though the Commission has now twice observed that "local" is not a statutorily defined term and does not appear in § 251(b)(5). Section 251(b)(5) refers to "telecommunications" and that term is not limited geographically or to particular services.[48] There is no credible basis to assert that something must be "local" before it is subject to § 251(b)(5), or conversely that anything "not local" is necessarily subject to access charges.

AT&T's theory suffers a more fundamental problem. *ISP-bound traffic is inherently "interexchange" but it has never been subject to access charges.* Indeed, it is the interexchange, interstate nature of so-called "ISP-bound" traffic that justifies the Commission's assertion of comprehensive and exclusive jurisdiction to maintain the ESP Exemption from access charges and to establish the intercarrier compensation terms that apply to it. AT&T is asking the Commission to impose access charges on ISP-bound traffic, because as the Commission notes in ¶ 209 of Appendix A and ¶ 204 of Appendix C "IP/PSTN" traffic is not just "VoIP" or "interconnected VoIP." It is all of the many manifestations of a non-carrier provider of enhanced/information service that has a connection to the PSTN and uses that connection as one of the inputs to its service. FAX service is enhanced/information. Credit card validation is enhanced/information. Voice mail is enhanced/information. Voice-Embedded IP-Based

[48] *Order on Remand*, ¶¶ 7-16, and cases cited therein.

applications, services and devices are enhanced/information. Most of these are now IP-Based. Some are mostly PSTN-originated. Some are mostly IP-originated. Some are bi-directional. And there is absolutely no basis in policy or law to distinguish between one or any other for any purpose.

AT&T's disingenuous attempt to parse and game the system to its maximum advantage by twisting words and mangling precedent is probably best illustrated by its citation to *Northwestern Bell*[49] for the proposition that an ILEC can assess access charges against another LEC that is providing service to an end user ESP and hands off traffic to the ILEC for termination.[50] The discussion cited by AT&T involved a claim that access charges should not apply when an ESP purchases a telephone toll service from an IXC. The Commission correctly ruled that access charges were due under rule 69.5. No party to this proceeding or any related proceeding has asserted that any IXC should be relieved of any access burden merely because the IXC's telephone toll customer happens to be an ESP. What FeatureGroup IP does say is that one LEC cannot impose originating or terminating access charges on another LEC when there is traffic that is in fact eligible for the ESP Exemption because the LEC product being purchased is not telephone toll but is instead telephone exchange or exchange access. In the *Northwestern Bell* case if two LECs collaborated to handle the originating side of the 800 service traffic, each LEC would individually bill the IXC. Neither LEC would bill the other LEC for any part of the access service they were jointly providing.

Returning to AT&T's main point, however, FeatureGroup IP hopes that the Commission reads the rest of the *Northwestern Bell* decision cited by AT&T. The enhanced service that Teleconnect offered in that case involved communications between callers in Omaha, Nebraska

[49] Memorandum Opinion and Order, *In the Matter of Northwestern Bell Telephone Company for Declaratory Ruling*, FCC 87-290, 2 FCC Rcd 5986 (rel. Oct. 1987). AT&T pinpoint cites to ¶21.

[50] AT&T Comments, p. 30 and note 40.

and a platform in Cedar Rapids, Iowa. These were "interexchange" calls. Yet, the Commission held that Teleconnect was not required to subscribe to exchange access service to collect calls in Omaha. AT&T's attempt to change the rules and limit the ESP Exemption to only "local" calls must be rejected. The whole notion is nonsensical. Access charges only apply to "interexchange" services. "Local" services are already "exempt." The ESP Exemption is only necessary for "interexchange" traffic to begin with. Now AT&T wants to impose access on "interexchange" ESP traffic. That would necessarily mean that consumers' dial up calls to access the Internet would pay access charges, because much of the information in the session travels interexchange and interstate. AT&T, like NASUCA, wants the Commission to completely eliminate the ESP Exemption. The Commission should decline that invitation.

2. Qwest uses the "local/non-local" dichotomy the Commission has twice rejected for ESP traffic.

Qwest asserts that under the current rules ESP traffic is "local" (and subject to § 251(b)(5)) or "non-local" (and subject to access charges) based on the physical location of the ESP's POP in the LATA.[51] This is just another attempt to insert some concept of "local" into § 251(b)(5) and as noted above the Commission has already rejected that approach as a matter of law.

In any event, the incumbents' positions are irretrievably inconsistent and jumbled. When the issue was whether reciprocal compensation was due for "ISP-bound" traffic the ILECs insisted that the physical location of the ESP was irrelevant, because the "actual" end points were determinative and Internet traffic has multiple and ultimately unknown end points. In other words they claimed there is no such thing as a "local" call to an ESP because the ESP was merely an intermediate switch. The Commission agreed with them. The ILECs then turned

[51] Qwest Initial Comments, pp. 14-15,

around and began to assert that the physical location of the ESP actually is relevant, and the Commission's holdings only applied to "local" ISP-bound calls. They argue that unless the ESP has a physical location in the same local calling area the *ISP Remand* rate does not apply. These folks need to pick a story and then the Commission must make them stick to it.

Similarly, the ILECs originally insisted that the end points could not be determined and traffic should not be rated for intercarrier compensation purposes based on the rate center associations of the calling and called numbers when an ISP is involved. The Commission agreed in part. Now they insist that the end points should be determined and traffic should be rated based on the rate center associations of the calling and called numbers even when an ESP is involved. Their arguments on how "ISP-bound traffic" should be rated for intercarrier compensation purposes are wholly inconsistent with their position on how "VoIP" traffic should be rated for intercarrier compensation purposes. The only consistency is that they never want to pay any compensation and they always want to be paid switched access, regardless of direction.

The Commission must end this gamesmanship. Indeed, it already did. This was all put to bed in the *Remand Order*. While end points matter if one is determining whether a communication is state or interstate, they are completely irrelevant for intercarrier compensation purposes. The physical location of the calling or called parties does not matter. The physical location of the ESP does not matter. If it is "telecommunications" it is covered by § 251(b)(5) unless it is carved out by § 251(g). The only thing carved out by § 251(g) is "telephone toll service" traffic because it is subject to "exchange access service" charges until the Commission decides to make that single exception go away – as it tentatively proposed to do over a 10 year period in the FNPRM.

3. Qwest wants the Commission to revive "Single Company Billing" and have it be mandatory for IP/PSTN traffic.

Qwest suggests that "the most logical approach to interconnection would be for terminating ILECs who receive IP/PSTN traffic from a CLEC from a CLEC to bill CLECs (rather than treating the VoIP ESP as an IXC) at the tariffed rate for access traffic."[52] Qwest has admitted that the ILECs do not in fact want to simply bring ESP traffic into the access regime. They do want to recover access for this traffic, but they expect the CLEC to pay access to the ILEC and then recover both the ILECs' charges and the CLEC's charges from the ESP. In other words they want to revive "Single Company Billing" and have it be mandatory – but only for IP/PSTN traffic, because that is not how legacy telephone toll is presently handled between joint access provider LECs, just like Qwest admits.

The Commission affirmatively prohibited the "Single Company Billing" long ago at the request of many of the same parties that now want to bring it back. It is not logical or reasonable to bring it back and apply it only to IP/PSTN traffic. If IP/PSTN traffic is subject to exchange access charges, then it must be handled like all other exchange access traffic. As FeatureGroup IP demonstrates below, when two LECs collaborate to handle access traffic at either the originating or terminating end the two LECs each individually bill the access customer, and neither LEC bills the other LEC – <u>unless **both** LECs mutually and voluntarily agree by separate contract to use the "Single Bill Option</u>." The ILECs have absolutely no right to unilaterally decide to send the access bill to the other LEC and expect the other LEC to recover both LECs' charges from the joint access customer.

FeatureGroup IP has sought to eliminate, end and prevent the precise result sought by Qwest as to FeatureGroup IP in its forbearance petition in Docket 07-256. All FeatureGroup IP

[52] Qwest Initial Comments, p. 19.

seeks is a holding that – *if access applies to any kind of Voice-Embedded IP-Based services that traverse IGI-POP* – FeatureGroup IP does not have to buy unneeded and overpriced "access service" from Qwest to compete against Qwest in the telephone exchange service market or the exchange access market and FeatureGroup IP cannot be forced against its will to use Single Company Billing and be the billing carrier under that illegal and unreasonable arrangement.

III. Even if access charges do apply to some IP/PSTN services, the ILECs have no right to "send the access bill" to a nonconsenting CLEC joint access provider.

Even if – contrary to all the argument above – one or more of the LECs involved in call origination or termination is somehow entitled to recover exchange access charges, the ILEC's portion of the access charges can only be collected from the offending ESP that has somehow been deemed to be an IXC. One LEC cannot force any of the other collaborating LECs to be an access customer and responsible for payment. The Commission's current rules and the Act itself directly prevent any other result.

In the same way that the ILECs never expressly say that they want to end the ESP Exemption they (except for Qwest) also never admit that they are also trying to reinstate "Single Company Billing" for IP/PSTN traffic. The ILECs want to collect access charges from the CLEC that is providing PSTN connectivity to the ESP. They then expect the CLEC to recover both the ILEC charges and the CLEC's charges from the ESP. The bottom line is that the ILECs want a co-carrier LEC to be magically transformed into an "access customer."

If you carefully read what the ILECs say they want, it becomes apparent they are asking the Commission to require that when ESPs order service from the CLEC the CLEC must arrange to provide the services and perform the billing for the complete service provided, including the ILEC's portion. They assert that the CLEC must be required to purchase access from the ILEC

that provides the termination to the ultimate end user.[53] The ILECs are asking the Commission to require the CLEC to charge the ESP rates that are – at least in part – based on the tariff of a LEC other than the one providing service to the ESP customer. They are absolutely and unequivocally advocating a return to the "Single Company Billing" that the Commission ruled was unreasonable and illegal more than 20 years ago.[54]

Note 92 of the *AT&T Declaratory Ruling* recognized that with regard to "access" traffic all the LECs involved are engaged in providing exchange access service and one LEC is not the customer of the other LEC.[55] The *Local Competition Order*[56] also correctly noted that when two

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53 Qwest makes this absolutely clear in its Initial Comments on page 19.

54 *See*, Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 86-104, FCC 87-252, 2 FCC Rcd 4518 (rel. Jul. 1987). The Commission held that "single company billing" violated the Act and the Commission's rules because it would "result[] in the LECs' charging rates based on the tariff of a LEC other than the one providing service to the customer":

> 1. The initial access tariffs filed by local exchange carriers (LECs) in 1983 originally contained two optional provisions for the ordering, rating and billing of access services provided by more than one carrier. The first option essentially required interexchange carriers (ICs) to order service from the LEC in whose territory the end user serving office associated with the IC's point of presence (POP) was located. That carrier would then determine the charges, arrange to provide the services and perform the billing from its own tariff for the complete service provided, and would settle accounts with the other LEC(s) involved in providing that service. We shall refer to this option as single company billing.
>
> . . .
>
> 3. In our review of the initial access tariffs, <u>this Commission required carriers to delete single company billing because it would have resulted in the LECs' charging rates based on the tariff of a LEC other than the one providing service to the customer</u>. [note 1 set out below] (Emphasis added).
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> [note 1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176 (1984).

55 *AT&T Declaratory Ruling*, 19 FCC Rcd at 7471, note 92 ["We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise."]

56 First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC 96-325 ¶ 553, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 15780-15781 (rel. Sept. 1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *further aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 525 U.S. 366 (1999).

LECs are interconnecting under § 251(c)(2) they are co-carriers and each LEC individually looks to the "joint access customer" for payment.

If and to the extent, now or in the future, any or some IP/PSTN traffic is deemed subject to access then all the involved LECs are engaged in providing access service to the third party "access customer." The Commission requires LECs to follow MECAB.[57] Under MECAB the variation now known as the "Single Bill Method" or "Single Bill Option" can be used only of both LECs voluntarily agree by separate contract to use that arrangement. This could not be any clearer from the discussion in ¶ 34 and note 25 in the *Joint Access Billing Waiver Order*.[58] When there is no such voluntary agreement one LEC does not buy access from or in any way owe access to the other LEC: they each individually and separately look to the access customer for payment.

The Commission's current rules require ***mutual agreement*** through some form of voluntary contract between the joint-provider LECs before the Single Bill Method can be used. But now the ILECs want the Commission to ***require*** use of the Single Company Billing that it found to be unlawful in the access regime long ago, but they also want to use it for only for a subset of "access traffic." That would not be logical, reasonable or fair.

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[57] *See, e.g.*, Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, DA 87-1858 ¶¶ 29-31, 3 FCC Rcd 13 (rel. Dec. 1987) ("*Joint Access Billing Waiver Order*").

[58] 34. The guidelines further specify that for all single bill options, the tariff should define single billing as it is defined in the MECAB: a single bill consists of all rate elements applicable to access services billed on one statement of charges under one billing account.[n25 set out below] For the single bill/multiple tariff option, the tariff should state that interpretation and application of tariffs for non-billing companies must be communicated to the billing company. For the single bill/pass-through option, the tariff should state that each non-billing LEC is responsible for preparing its own bill for its portion of access service, and for forwarding the bill to the billing carrier. The case of the single bill/single tariff option presents questions of cost support and timing that will require further consideration.

[n25] While the single bill/single tariff resembles the single company arrangement rejected by the Commission in its March 28 Order, the significant distinction is that in the former, the relationship between the billing carrier and the other joint LEC provider(s) is a tariff relationship, ***while in the latter, the relationship is strictly contractual***.

FeatureGroup IP strongly disagrees with the notion that ESPs of any ilk are subject to exchange access, or that a CLEC that provides telephone exchange or exchange access service becomes the access customer of any ILEC that handles part of the call session. FeatureGroup IP's forbearance petition seeks to protect both FeatureGroup IP and its customers because the ILECs are busily sending access bills to both FeatureGroup IP and FeatureGroup IP's customers and then suing both FeatureGroup IP and its IGI-POP customers when payment does not arrive. If the ILEC cartel finally does succeed in imposing a modem tax, they must collect that tax on their own and they cannot force FeatureGroup IP to be their tax collectors. We respectfully decline to be the billing company in a Single Company Billing arrangement just so the ILECs' can indirectly obtain some ill-gotten and undeserved access charge "entitlement."

The ILECs have unilaterally implemented Single Company Billing against FeatureGroup IP. They have sent millions of dollars' worth of disputed billings, and despite FeatureGroup IP's attempts over 7 years in multiple proceedings to secure a ruling whether this is allowed under the rules, neither the states nor this Commission has seen fit to address the question. Therefore FeatureGroup IP filed its Petition for Forbearance in Docket 07-256. The Commission must now decide by January 21, 2009 whether FeatureGroup IP must be involved in the access regime for its traffic and whether the ILECs can unilaterally impose Single Company Billing on FeatureGroup IP and then force FeatureGroup IP to be the billing company for the ILECs' access entitlement. If the Commission holds that any theoretical confabulation of the current rules allows this practice, then it must decide whether to grant forbearance from the rules so that FeatureGroup IP does not have to buy access services from its direct competitors merely to offer telephone exchange service and/or exchange access service.

FeatureGroup IP strongly opposes any attempt to put IP/PSTN traffic resulting from IGI-POP services in the access regime, but if that is the decision then so be it. Nonetheless, as a result

of FeatureGroup IP's Petition for Forbearance the Commission must decide whether and why any Voice-Embedded IP-Based services using IGI-POP are subject to access charges. If the Commission holds access charges apply, it must then decide whether this traffic is also subject to the ILECs' preferred access charge collection method (Single Company Billing) – which is different than that which presently applies to traditional telephone toll, and which the Commission held was unlawful and unreasonable more than 20 years ago – is proper. Only if the answer to both of these questions is yes can the Commission deny FeatureGroup IP's Petition for Forbearance.

CONCLUSION

Intercarrier compensation – ***all of it*** – must reflect only the "additional cost" of terminating a call. All subsidies must be moved over to universal service support, which has to be explicit, nondiscriminatory and competitively neutral. Anything less will make the FCC complicit in unfairly favoring owners of incumbent networks over developers of new technologies and innovators. The rule of law must be applied or it is not a rule at all.

IGI-POP customers are enhanced/information service providers, are not carriers and do not provide telephone toll, so they cannot be held subject to exchange access charges. When FeatureGroup IP exchanges IGI-POP traffic with an ILEC, neither LEC is functioning as a provider of telephone toll, so §§ 251(b)(5) and 251(d)(2) directly apply. If and to the extent traffic exchanged between FeatureGroup IP and an ILEC is subject to exchange access then both LECs are joint providers and one LEC cannot charge the other because they each look to the entity providing telephone toll service for payment. The ILECs cannot force CLECs to buy ILEC access services to compete in the telephone exchange service or exchange access service market. The Commission must deny the ILECs' strategic drive to bring "Single Company Billing" back

from the dead and their desire to force FeatureGroup IP to serve as the billing company. The ILECs should at least be required to directly bill and collect their monopoly rents.

The ILECs' unrelenting campaign to eliminate the ESP Exemption for all uses and turn co-carriers and peers into "access customers" must be rejected. If the Commission does not resolve these matters in Docket 01-92 then it must grant FeatureGroup IP's petition in WC Docket 07-256 so that the ILECs will have to honor the ESP Exemption for FeatureGroup IP's IGI-POP offerings. The FCC should at least allow FeatureGroup IP to decline the ILECs' demand that FeatureGroup IP serve as the collection agent for the ILECs' modem tax for IP/PSTN traffic that originates on the PSTN and goes to an IP-Based platform or originates on an IP-Based platform and terminates on the PSTN.

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Respectfully Submitted,

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