

January 8, 2009

VIA ELECTRONIC DELIVERY

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: WC Dkt. Nos. 07-256, 08-8

Dear Ms. Dortch:

tw telecom inc., Cbeyond Inc. and One Communications Corp. (“Joint Commenters”), by their undersigned counsel, hereby file this letter to explain why the FCC must reject Embarq’s petition for forbearance filed in WC Dkt. No. 08-8.¹ In the Petition, Embarq asks the FCC to use its forbearance authority to apply access charges to IP-to-PSTN VoIP traffic (“VoIP traffic”). Specifically, Embarq seeks forbearance from (1) “the ESP exemption, as adopted by Commission Orders;” (2) Section 69.5(a) of the rules; and (3) Section 251(b)(5) as applied to “non-local” voice traffic. *See* Petition at 17.

Embarq’s petition must be denied as procedurally defective. While the Joint Commenters support the application of access charges to VoIP traffic, granting Embarq’s forbearance petition would not achieve this result. As explained in detail below, in order for the FCC to apply access charges to VoIP and to eliminate the ESP exemption, it must adopt rules affirmatively requiring these outcomes. The FCC has already rejected three separate petitions for forbearance where the forbearance requested would not provide the petitioner with the substantive relief sought.² In addition,

¹ *See* Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b) and the Commission Orders on the ESP Exemption, Petition for Forbearance, WC Dkt. No. 08-8 (filed Jan. 11, 2008) (“Petition”).

² *Iowa Telecom Petition for Forbearance Under 47 U.S.C. § 160 (c) from the Universal Service High Cost Loop Support Mechanism, Order*, 22 FCC Rcd 15801, ¶¶ 1, 7 (2007) (“For the reasons set forth below, we find that the requested forbearance would not give Iowa Telecom the relief it seeks[.]...As

the Ninth Circuit Court of Appeals recently upheld that FCC's rejection of a forbearance petition on this basis.³ The FCC should follow these precedents here and reject the Petition.

Moreover, Embarq has failed to meet the legal prerequisites for forbearance set forth in Section 10. *See* 47 U.S.C. § 160(a). Embarq has failed to demonstrate that the regulations and provisions from which it seeks forbearance are unnecessary to ensure reasonable rates (*see id.* at § 160(a)(1)) because granting the petition would in fact reduce LECs' ability to receive adequate compensation for terminating VoIP traffic. Embarq has failed to demonstrate that the regulations and provisions from which it seeks forbearance are unnecessary to protect consumers (*see id.* at § 160(a)(2)) because reduced compensation for terminating VoIP traffic would likely cause LECs to seek to increase rates for services provided directly to consumers or to reduce investments in new facilities or services. Granting Embarq's petition would also be contrary to the public interest (*see id.* at § 160(a)(3)). It is contrary to the public interest to grant a forbearance petition where doing so would not achieve the intended objective. Even if it were possible as a legal matter to ensure application of access charges to VoIP in a forbearance proceeding, granting the Petition would be contrary to the public interest because (1) the FCC could not implement such a rule as a practical matter unless it adopts new rules for distinguishing interstate interexchange VoIP (to which access charges apply) from other VoIP traffic; and (2) applying access charges to VoIP traffic in an adjudicatory proceeding would spawn additional disputes over the proper rating of VoIP traffic and it would increase the risk of retroactive application of access charges to VoIP. The FCC must therefore reject the Petition.

an initial matter, we conclude that forbearance from rules 36.601-36.631, 54.305, 54.309, 54.313 and 54.314 would not give the petitioner the relief that it seeks.”) (“*Iowa Telecom Order*”); *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) or the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118, ¶ 14 (2007) (“Because Section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).”) (“*Core Order*”); *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, 21 FCC Rcd 11125, ¶ 6 (2006) (“As an initial matter, we conclude that forbearance from rule 51.319(d) would not give the Petitioner the relief it seeks, and we therefore deny the Petition as procedurally defective.”) (“*Fones4All Order*”).

³ *Fones4all Corp. v. FCC*, 2008 U.S. App. LEXIS 25277, at **24-25 (9th Cir. 2008) (“The decision was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’...As the FCC said, ‘forbearance from Rule 51.319(d) would not give the Petitioner the relief it seeks.’”).

I. The FCC Could Only Apply Access Charges To VoIP Traffic By Affirmatively Changing Its Existing Rules.

The FCC could apply access charges to VoIP in two ways: (1) by classifying VoIP traffic as an interstate telecommunications service provided by interexchange carriers (*i.e.*, by classifying VoIP as a telecommunications service and VoIP providers as telecommunications carriers); or (2) by eliminating the ESP exemption with respect to VoIP providers. To implement either approach, the FCC would be obligated to adopt affirmative changes to its existing rules. *See, e.g.*, Global Crossing Comments at 11.⁴ Thus, Embarq's attempt to achieve the second approach via forbearance is insufficient.⁵

A. Access Charges Would Apply To VoIP Traffic If The FCC Were To Classify VoIP As An Interstate Telecommunications Service Provided By Interexchange Carriers.

Under Section 69.5(b) of the FCC's rules, carrier's carrier (*i.e.*, switched access) charges only apply to "interexchange carriers" that use "local exchange switching facilities" to provide an "interstate telecommunications service." 47 C.F.R. Section 69.5(b).⁶ The FCC could therefore apply access charges to VoIP by ruling that VoIP providers are "interexchange carriers" and VoIP service (or at least interexchange VoIP service) is an "interstate telecommunications service." However, forbearance from Section 69.5(a) of the rules, Section 251(b)(5) of the Act and the "ESP exemption," as Embarq proposes in its petition, would not cause access charges to apply to VoIP because these provisions have no bearing on whether VoIP providers are in fact "interexchange carriers" that provide "interstate telecommunications service" under Section 69.5(b). The FCC may not make such a classification determination through ruling on a petition for forbearance.

When determining if a service is an "interstate telecommunications service," the FCC examines (1) the attributes of the end-to-end retail service offered to end users, not the inputs used to

⁴ Unless otherwise noted, all comments referred to herein were filed in WC Dkt. No. 08-8.

⁵ Embarq makes clear that it is not seeking a decision classifying VoIP service. *See* Petition at 26 ("For some time, there has been debate about the classification of VoIP as information services. The Commission does not need to address that issue here.").

⁶ *See Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, n.74 (2004) ("AT&T Order") (noting that the ESP exemption cannot apply to AT&T's IP-In-The-Middle Service once the FCC has classified the service as a telecommunications service). Carriers are eligible for the ESP exemption only to the extent that they are using access services as an input to provide enhanced services. *See Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 18 (1987) ("Northwestern Bell").

provide the service⁷ and (2) whether the telecommunications and information service aspects of the end-to-end service are “sufficiently integrated.”⁸ For example, in its *Calling Card Order*, the FCC found that the ability of end-users to use “menu-driven” calling cards to make phone calls was sufficiently separate from the “enhanced” menu functionality to classify the portion of the service that permits end-users to make calls as an interstate telecommunications service.⁹ Similarly, the FCC examined the nature of the end-to-end service to determine whether AT&T’s IP-in-the-Middle service should be deemed an interstate telecommunications service. The FCC examined, among other things, whether AT&T’s service (1) constituted an “offering of telecommunications for a fee directly to the

⁷ See *Calling Card Order Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶¶ 11-17 (2006) (“*Calling Card Order*”) (discussing the attributes of menu-driven calling card service); *id.* ¶ 20 (discussing how IP-enabled calling cards provided a service similar to the service examined in the AT&T Order); *AT&T Order* ¶ 11 (2004) (“AT&T’s specific service consists of a portion of its interexchange voice traffic routed over AT&T’s Internet backbone. Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls.”).

⁸ In recent classification orders, the FCC’s has built upon its analysis in the *Wireline Broadband Order* and *Cable Modem Declaratory Order* as well as the Supreme Court’s *Brand X* decision. See *Calling Card Order* ¶ 14 (“[I]n its recent *Brand X* decision, the Supreme Court made a similar distinction, stating that the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications transmission capability is ‘sufficiently integrated’ with the information service component ‘to make it reasonable to describe the two as a single, integrated offering.’”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 9 (2005) (“*Wireline Broadband Order*”) (“Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 38-39 (2002) (“*Cable Modem Declaratory Order*”) (“Consistent with the analysis in the *Universal Service Report*, we conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered. We find that cable modem service is an offering of Internet access service....Cable modem service is not itself and does not include an offering of telecommunications service to subscriber.”).

⁹ See *Calling Card Order* ¶ 13 (“Menu-driven calling cards...are marketed to consumers, in large part, as a transmission service....These menu driven prepaid calling cards also may provide the user with an option to access additional information, but the information service features and telecommunications service...are only minimally linked to one another....[T]here is no doubt that these cards are marketed to consumers as a vehicle for making traditional telephone calls.”).

public,” as defined in the Act; (2) involved an offering of net-protocol conversion service to end-users; and (3) was functionally identical to basic telephone service.¹⁰

Once the FCC made the affirmative finding that the calling card services and AT&T’s IP-In-The-Middle service were, in both cases, interstate telecommunications services, access charges applied by operation of Section 69.5(b) of the rules. No additional rule changes or clarifications were necessary.¹¹ As the FCC explained in its *Calling Card Order*: “As a result of our finding that providers of the two types of prepaid calling cards described in the previous section offer telecommunications services, these providers are now subject to all of the applicable requirements of the Communications Act and the Commission’s rules, including requirements...to pay access charges.” *Calling Card Order* ¶ 21.

In the instant case, the FCC could similarly ensure application of access charges to VoIP by classifying interexchange VoIP traffic as “interstate telecommunications service” and VoIP providers as “interexchange carriers” under Section 69.5(b). If it did so, VoIP would automatically become “subject to all of the applicable requirements of the Communications Act, and the Commission’s rules, including requirements...to pay access charges.”

¹⁰ See *AT&T Order* ¶ 12 (“We clarify that AT&T’s specific service is a telecommunications service as defined by the Act. AT&T offers ‘telecommunications’ because it provides ‘transmission, between or among points specified by the *user*, of information of the *user*’s choosing, without change in the form or content of the information as sent and received.’ And its offering constitutes a ‘telecommunications service’ because it offers ‘telecommunications for a fee directly to the public.’ *Users of AT&T’s specific service* obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;’ therefore, its service is not an information service under section 153(20) of the Act. *End-user customers* do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T’s traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T’s specific service take place within its network, they appear to be ‘internetworking’ conversions, which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T’s specific service constitutes a telecommunications service.”) (emphasis added).

¹¹ See *id.* ¶ 15 (“It is reasonable that AT&T pay the same interstate access charges as *other interexchange carriers* for the termination of calls over the PSTN....”) (emphasis added); *id.* ¶ 16. (noting that access charges apply to AT&T’s service on its face by operation of rule 69.5(b) once AT&T’s service was classified as an interstate telecommunications service).

B. Access Charges Would Apply To VoIP Traffic If The FCC Eliminated The ESP Exemption With Respect To VoIP Service.

If the FCC chose not to address whether VoIP is an interstate telecommunications service, the FCC could still ensure that access charges apply to VoIP service by eliminating the ESP exemption (or at least by limiting its application to entities that are not VoIP providers). This is what Embarq attempts to accomplish through its petition. However, the FCC can only eliminate the ESP exemption by adopting affirmative changes to its rules.

In 1987, the FCC tentatively concluded that it should eliminate the ESP exemption completely.¹² In that NPRM, the FCC listed numerous rule changes that are necessary to eliminate the exemption. *See id.* App. A. These rule changes are necessary because the ESP exemption is not really an “exemption” *per se*. Rather, the so-called “exemption” is the result of the FCC’s classification of ESPs as end-users. *See Google Comments at n.6, Global Crossing Comments at 4.* End-users pay only end-user charges pursuant to Section 69.5(a), not carrier’s carrier charges. *See 47 U.S.C. § 69.5(a).*¹³ Accordingly, in order to eliminate the exemption, the FCC deemed it necessary, among other things, to amend the definition of “end user” in Section 69.2(mm) so that “end user” “means any customer of an interstate or foreign telecommunications service that is not a carrier or an enhanced service provider.” *See ESP NPRM*, App. A (underlined text shows proposed revisions). The FCC also deemed it necessary to change Section 69.5(b) of the rules so that carrier’s carrier charges apply to both interexchange carriers and enhanced service providers, not just interexchange carriers.¹⁴ The FCC

¹² *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987) (“*ESP NPRM*”); *see also VON Coalition Comments at 10-12.* The FCC subsequently decided not to eliminate the exemption. *See Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, n.53 (1988) (“*ESP Order*”).

¹³ *See Northwestern Bell* ¶ 1 (“In this order we clarify that under our current rules, enhanced service providers are treated as end users for access charge purposes.”); *ESP NPRM* n.20 (“Because enhanced services providers are not carriers, they are treated as end users for the purposes of part 69.”); *ESP Order* n.53 (“[T]he current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges[.]”); *Access Charge Reform et al.*, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, ¶ 288 (1997) (“[a]lthough our original decision in 1983 to treat ESPs as end users rather than carriers was explained as a temporary exemption, we tentatively conclude that the current pricing structure should not be changed....”); *Access Charge Reform et al.*, First Report and Order, 12 FCC Rcd 15982, ¶ 348 (1997) (“We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system”).

¹⁴ *See ESP NPRM*, App. A. (“Carrier’s carrier charges shall be computed and assessed upon all interexchange carriers or enhanced service providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services or enhanced services.”).

identified additional necessary changes to Sections 69.2(gg), 69.105(a) and (c), 69.106(a), 69.107(a), 69.108(a), 69.111(a) and 69.112(a) of the rules, and it proposed the addition of a new Section 69.2(nn) defining “enhanced service providers.” *See id.*

In order to limit application of the ESP exemption to ESPs that are not VoIP providers, the FCC would be required to make similar changes to its rules. Among other things, the FCC would need to amend rule 69.5(b) to provide that “Carrier’s carrier charges shall be computed and assessed upon all interexchange carriers and interconnected VoIP providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services or interstate or foreign interconnected VoIP service.” In addition, the FCC would need to change other subsections of Part 69 similar to those the FCC proposed in 1987. Absent such rule changes, the FCC could not eliminate application of the ESP exemption from VoIP.

II. If Granted, The Forbearance Sought By Embarq Would Not Subject VoIP Traffic To Access Charges.

Because application of access charges to VoIP could only be achieved via *adoption* of new rules, the *elimination* of existing rules would be insufficient to achieve this objective. Instead, as several parties, including Joint Commenters, have argued, forbearance from the provisions proposed by Embarq would create a regulatory vacuum and would not have the effect of applying access charges to VoIP.¹⁵

The FCC has repeatedly denied forbearance petitions where the relief sought would, if granted, create a regulatory vacuum.¹⁶ Moreover, the FCC has denied forbearance petitions for the independent reason that the relief sought would not achieve the end result sought by the petitioners. *See supra* note 2. Indeed, the Ninth Circuit recently upheld this “failure to achieve the objective

¹⁵ *See, e.g., Ex Parte* Letter of Brad Mutschelknaus, Counsel, Broadview *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 07-256 & 08-8, at 6 (filed Dec. 19, 2008) (“Broadview Letter”) (“Under Section 69.5(b), only entities defined as interexchange carriers are required to pay switched access charges. Since providers of IP-to-PSTN services are not currently classified as interexchange carriers, such providers’ traffic would not automatically be subject to switched access charges under Section 69.5(b). The commission must affirmatively classify IP-to-PSTN service providers as interexchange carriers; forbearance from enforcement of Section 69.5(a) would not, in itself, achieve that result.”); Time Warner Telecom *et al.* Comments at 3.

¹⁶ *See Core Order* ¶ 14 (“If the Commission were to forbear from the rate regulation preserved by Section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.”); *Iowa Telecom Order* ¶ 8 (“In sum, forbearing from these rules would simply create a vacuum rather than enabling Iowa Telecom to receive support under the non-rural mechanism”); *Fones4All Order* ¶ 9 (where the FCC denied forbearance because “[f]orbearing from the rule...would simply create a vacuum rather than confer any rights upon requesting carriers or obligations upon incumbent LECs.”).

sought” rationale as a fully sufficient basis for rejecting a forbearance petition. *See supra* note 3. The Embarq petition fails on both grounds.

First, as explained, ESPs are currently classified as end users for access charge purposes and Section 69.5(a) of the rules states that end-user charges apply to end users. *See* 47 U.S.C. § 69.5(a). Thus, today, if VoIP providers claim the status of end-users pursuant to Section 69.5(a), they must at least pay end-user charges under that rule. Forbearance from Section 69.5(a) with respect to VoIP providers would eliminate application of end user charges as applied to VoIP providers, but, as explained, it would not result in the affirmative application of carriers’ carrier charges. Accordingly, forbearance from Section 69.5(a) would reduce LECs’ ability to apply *any* Part 69 charges associated with connection to the switched network¹⁷ (i.e., if a VoIP provider refuses to pay carrier’s carrier charges, the LEC would be foreclosed even from charging end-user charges pursuant to Section 69.5(a)). Moreover, limiting LECs’ ability to levy interstate charges of any kind on VoIP providers would undermine the FCC’s goal of ensuring that carriers are sufficiently compensated for providing service.

Second, if the FCC were to grant forbearance from application of Section 69.5(a) of its rules, carrier’s carrier charges would continue to apply *under Section 69.5(b)* only to “interexchange carriers” to the extent that they provide “interstate telecommunications service.” As explained above, the FCC has not yet determined if VoIP providers offer interstate telecommunications service and, in any event, the FCC could only make that determination by adopting a new rule. Accordingly, forbearance from Section 69.5(a) would not achieve the objective Embarq seeks: it would have no effect on whether Section 69.5(b) of the rules (and access charges) apply to VoIP service.¹⁸

Third, forbearance from Section 251(b)(5) with respect to “non-local” VoIP traffic as Embarq proposes would not have the effect of applying access charges to interconnected VoIP traffic.¹⁹

¹⁷ The FCC’s rules might be read to offer LECs the opportunity to apply special access surcharges to VoIP providers’ connections to the LECs’ networks. *See* 47 C.F.R. §§ 69.5(c), 69.115. In practice, however, LECs have not attempted to impose charges in this manner.

¹⁸ *See* VON Coalition Comments at 4 (“[W]hether or not Embarq’s request for forbearance from 69.5(a) with respect to certain ESPs is granted, Rule 69.5(b) will continue in force as written and access charges will continue to apply only to interexchange carriers[.]”).

¹⁹ It should be noted that, as the Joint Commenters, the VON Coalition and Broadview *et al.* have previously argued, forbearance from Section 251(b)(5) with respect to non-local VoIP traffic may substantially complicate the FCC’s efforts to unify all intercarrier rates subject to Section 251(b)(5). The FCC’s recent draft intercarrier compensation orders propose unifying the rates for all traffic subject to Section 251(b)(5). *See High Cost Universal Service Support et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, Appendix A ¶¶ 207-235. (rel. Nov. 5, 2008) (“*Mandamus Order*”). If Embarq’s petition were granted, the FCC would have to justify reversing itself to unify all traffic subject to Section 251(b)(5) or risk leaving non-local VoIP traffic subject to no intercarrier compensation rules at all. *See* Broadview Letter at 6-7; VON Coalition Comments at 4-5; Time Warner Telecom *et al.* Comments at 6-7.

Access service purchased by enhanced/information service providers (*i.e.*, information access) is governed by Section 251(g) under which the FCC regulates all access services. *See* 47 U.S.C. § 251(g). As the FCC has repeatedly found, Section 251(g) serves as a limitation or carve-out of traffic that would otherwise be subject to Section 251(b)(5).²⁰ If the FCC were to forbear from applying Section 251(b)(5) to VoIP, the rules applicable to traffic subject to Section 251(g), traffic that has been “carved out” of the scope of Section 251(b)(5), would still apply. Those rules could only be changed if the FCC affirmatively changed its rules (as explained in Section I above). Accordingly, forbearance from Section 251(b)(5) would not achieve the application of access charges to VoIP traffic sought by Embarq.²¹

III. The FCC Should Reject AT&T’s Argument That VoIP Providers’ Use of Wholesale Telecommunications Service Triggers Application Of Access Charges To VoIP Service.

AT&T argues that the FCC’s holding in the *TWC Order*²² that VoIP providers’ carrier partners are entitled to statutory interconnection rights because they provide wholesale telecommunications services also mandates application of access charges to VoIP. *See* AT&T Comments at 9-11. This argument is flawed for several reasons.

First, AT&T implies that that the FCC *already held* in the *TWC Order* that access charges apply to VoIP because VoIP providers purchase wholesale telecommunications service inputs. That is plainly not the case. The FCC explicitly stated in the *TWC Order* that it was not making any finding

²⁰ *See Mandamus Order* ¶ 16 (“Notwithstanding section 251(b)(5)’s broad scope, we agree with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ‘receipt of compensation.’”); *see also WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002) (holding that Section 251(g) is “worded simply as a transitional device, preserving LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act.”).

²¹ Given that the Embarq seeks forbearance relief that cannot achieve the regulatory outcome it seeks (application of carriers’ carrier access charges to VoIP), the D.C. Circuit’s admonition that the FCC may not reject a petition for forbearance “just because it requests forbearance from uncertain regulatory obligations” is irrelevant. *AT&T Inc. v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006).

²² *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (“*TWC Order*”).

as to either the classification of VoIP²³ or whether VoIP traffic transmitted via carrier partners is subject to access charges or reciprocal compensation.²⁴

Second, AT&T's argument assumes that the ESP exemption does not apply to VoIP. But classification of VoIP and application of the ESP exemption to VoIP is not a settled question. If VoIP is an information service and VoIP traffic is subject to the ESP exemption, then VoIP providers need not pay access charges.

Third, as explained in Section I.A above, the FCC examines the attributes of the end-to-end service offered to retail end users when determining whether the service is an interstate telecommunications service to which access charges apply. The FCC does not examine the inputs used to provide that service in classifying the end-to-end service. The fact that a VoIP provider might use a wholesale telecommunications service input to provide VoIP has no bearing on whether the end-to-end VoIP service qualifies as an interstate telecommunications service that is subject to access charges.

IV. Embarq Has Failed To Meet The Section 10 Forbearance Test.

Embarq has failed to demonstrate compliance with the three prongs of the test for determining whether forbearance is appropriate under Section 10. That test requires that the FCC grant forbearance where the enforcement of the regulation or requirement is unnecessary to ensure that the applicable rates, practices, classification and regulations are just and reasonable (Section 10(a)(1)); enforcement of the regulation or provision is unnecessary for the protection of consumers (Section 10(a)(2)); and forbearance is in the public interest (Section 10(a)(3)). Embarq's Petition fails all three prongs of this test.

²³ See *TWTC Order* ¶ 15 (“The regulatory classification of the service provided to the ultimate end-user has no bearing on the wholesale provider’s rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider’s VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b)”).

²⁴ See *TWC Order* ¶ 17 (“In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. *We do not, however, prejudge the Commission’s determination of what compensation is appropriate, or any other issues pending in the Inter-carrier Compensation docket.*”) (emphasis added).

A. Embarq Has Failed To Demonstrate That The Requirements And Provisions From Which It Seeks Forbearance Are Unnecessary To Ensure Reasonable Rates And To Protect Consumers.

The legal consequences of granting Embarq's petition discussed in Section II above demonstrate that the requirements and provisions from which Embarq seeks forbearance are necessary to ensure reasonable rates and to protect consumers. Granting Embarq's petition would have the practical effect of preventing LECs from charging VoIP providers end user charges under Section 69.5(a), and it would prevent LECs from charging VoIP providers reciprocal compensation for terminating "non-local" VoIP traffic. Although LECs would be deprived of these revenue sources, they would still not have the right to charge VoIP providers interstate switched access charges. Accordingly, although Embarq's goal is to *increase* the revenues it receives for terminating VoIP traffic, it is more likely that granting the forbearance petition would *diminish* the revenues LECs receive for terminating VoIP traffic.

This result is inconsistent with the requirements of Sections 10(a)(1) and 10(a)(2). A reduction in compensation for terminating VoIP traffic would increase the risk that LEC rates for terminating VoIP would be unreasonably low. Embarq cannot therefore satisfy the Section 10(a)(1) requirement that the regulations and provisions from which it seeks forbearance are unnecessary to ensure reasonable rates. In addition, if LECs' compensation for terminating VoIP traffic declines, LECs will likely seek to recover the shortfall from customers of its other services or they might choose to reduce investments in upgrading their facilities and services. Both outcomes show that Embarq cannot satisfy the Section 10(a)(2) requirement that the regulations and provisions from which it seeks forbearance are unnecessary to protect consumers.

B. Embarq Has Failed To Show That Granting Its Forbearance Petition Is In The Public Interest.

Granting forbearance from the ESP exemption, Section 69.5(a), and Section 251(b)(5) would be contrary to the public interest for numerous reasons. To begin with, the FCC has found that a change of law that fails to yield the outcome sought is not consistent with the public interest prong of the Section 10 analysis.²⁵ Moreover, it is likely that granting forbearance would merely increase the uncertainty and transaction costs associated with LEC attempts to obtain compensation for terminating VoIP traffic. Today, when VoIP providers refuse to pay carriers' carrier access charges, there is at least a well-defined alternative compensation system applicable under Section 69.5(a) and Section 251(b)(5). If Embarq's petition were granted, LECs would be deprived of that default framework. LECs and VoIP providers who refuse to pay carriers' carrier access charges would therefore have no choice but to devise a new default framework, a process that would impose more uncertainty and greater transaction costs than exist today.

²⁵ See *Core Order* ¶ 14 ("We also conclude that granting forbearance in this instance would not be 'consistent with the public interest' as required by the Act. Because, as discussed, forbearance from rule 51.319(d) would not provide Petitioner the unbundling relief it seeks, Petitioner has not offered any basis to show that granting forbearance is in the public interest.").

Even if granting Embarq's petition were to result in application of access charges to VoIP, that outcome would be contrary to the public interest and therefore inconsistent with Section 10(a)(3). This is so for two basic reasons. *First*, Application of access charges as a matter of law would not, by itself, cause access charges to apply in practice. As Qwest has explained, access charges can only be applied to interstate interexchange VoIP in practice if the FCC establishes a methodology for distinguishing between VoIP traffic that qualifies as interstate long distance (subject to interstate access charges), as opposed to intrastate long distance traffic (subject to intrastate access charges) or local traffic (subject to reciprocal compensation). *See* Qwest Comments at 18. Adoption of such regulations is necessary because existing FCC regulations that address this issue apply only to telecommunications carriers. For example, the requirement to pass the calling party number ("CPN") only applies to common carriers (*i.e.*, telecommunications carriers). *See* 47 C.F.R. § 64.1601. Moreover, past FCC rulings permitting the use of percentage of interstate use (PIU) studies applied only to interexchange carriers.²⁶ Embarq has not sought classification of VoIP providers as telecommunications carriers generally or interexchange carriers specifically (*see* Petition at 26), and, as discussed below, the FCC would not have the authority to make such affirmative decisions in response to the Petition. In the absence of new rules governing the identification of interstate, interexchange VoIP traffic, disputes over the appropriate charge (intrastate access, interstate access or reciprocal compensation) to apply to VoIP traffic will continue as before. The FCC would have little ability to enforce its newly adopted requirement that access charges apply to interstate interexchange VoIP traffic.

The FCC confronted a similar problem with respect to determining the proper intercarrier rate to impose on prepaid calling card calls. When it decided to apply access charges to IP calling card providers in the *Calling Card Order*, the FCC implemented robust reporting and certification requirements to ensure that interstate access charges would apply to interstate interexchange calling card traffic. The FCC found that "the assessment of interstate or intrastate access charges based on the location of the called and calling party can be complicated." *Calling Card Order* ¶ 29. As a result, the FCC determined that the "certification and reporting requirements are necessary to ensure compliance with our existing access charge rules...[A]bsent such requirements, calling card providers and their underlying carriers would have the incentive and ability to avoid intrastate access charges." *Id.* ¶ 31. Among other things, the FCC found that calling card traffic should be subject to the same PIU studies as other telecommunications traffic and calling card providers should be required to pass CPN information. *Id.* ¶ 32.

The FCC could not follow a similar approach in a forbearance proceeding. It could only adopt new rules governing the proper labeling of VoIP traffic in a rulemaking proceeding (as it did, for example, with respect to calling cards in the *Calling Card Order*²⁷), not in an adjudicatory order such

²⁶ *See Expanded Interconnection with Local Telephone Company Facilities; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, ¶ 137 (1993).

²⁷ *See Calling Card Order* ¶¶ 5, 41 (discussing the scope of the NPRM in the docket and the adoption of prospective traffic labeling rules for calling cards).

as an order responding to a forbearance petition.²⁸ Moreover, it is not even clear that the FCC has sufficient information to establish new traffic labeling rules on VoIP traffic at this time. Unlike in the *Calling Card Order* proceeding, in which AT&T submitted a detailed traffic proposal which the FCC drew upon in adopting new rules (*see Calling Card Order* ¶ 29), no similar proposal has been submitted in this proceeding and subjected to comment and scrutiny.

Accordingly, a decision to apply interstate access charges to VoIP, by itself, would not be consistent with the public interest. Such a decision would be largely unenforceable absent rules governing the identification and classification of VoIP traffic. But the FCC may not and cannot adopt such rules in this proceeding.

Second, although Embarq argues that application of access charges through a petition for forbearance would “reduce disputes,” (Petition at 30), it would more likely increase intercarrier disputes over whether access charges apply *retroactively*.²⁹ If the FCC determines that access charges apply to VoIP in an adjudicatory proceeding, such as a proceeding responding to a petition for forbearance, it would not be able to establish a blanket prohibition on the retroactive application of access charges to VoIP. It would instead be required to make the determination on a case-by-case basis.³⁰ Moreover, even if the FCC decided in an adjudicatory order that access charges *should not*

²⁸ *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (holding that (1) “the only entities that could properly be subject to” an adjudicatory order are the parties in the case and (2) adjudicatory orders “may and do, serve as vehicles for the formulation of agency policies...They may generally provide a guide to action that the agency may be expected to take in future cases...But this is far from saying...that commands, decisions, or policies announced in adjudications are ‘rules’ in the sense that they must, without more, be obeyed by the affected public.”); *Subsidiaries of Cable Systems Corporation et al.*, Memorandum Opinion and Order, 23 FCC Rcd 17012, ¶ 6 (2008) (noting that it would not “be proper, in these adjudicatory proceedings, to amend a rule of general applicability.”).

²⁹ *See Verizon Comments* at 12 (“Granting Embarq’s narrow forbearance petition would not settle underlying disputes among carriers regarding the intercarrier compensation rules applicable to VoIP originated calls. To the contrary, the controversy in the industry as to the nature of this traffic and the compensation treatment that applies, would continue, and there would likely be further uncertainty and disputes over granting forbearance.”).

³⁰ *See AT&T Order* ¶ 23 (“While we recognize the strong interest in providing certainty...we are unable to make a blanket determination regarding the equities of permitting retroactive liability. We believe that the equitable inquiry is inherently fact specific. For example, the nature of a particular...service offering, when the service was introduced, the purported basis for detrimental reliance on Commission pronouncements, and the course of dealings between the parties in a dispute all may provide relevant to the analysis. Accordingly, if disputes arise, the question whether access charges can be collected for past periods may be addressed on a case-by-case basis.”).

apply retroactively, there is a serious risk that such a ruling would be overturned.³¹ Indeed, the FCC has candidly acknowledged that if it determines that access charges apply to VoIP traffic, parties will dispute the retroactive application of such charges “in state or federal courts, as appropriate.” *AT&T Order* n.93. In light of the substantial disputes that would result, determining whether access charges apply in an adjudicatory proceeding is clearly not in the public interest.

By contrast, as the Joint Commenters have explained, the FCC is more likely to be able to prevent retroactive application of access charges to VoIP if it decides to apply access charges to VoIP in a rulemaking order.³² For this reason, the Joint Commenters have urged that the FCC act to apply access charges to VoIP in its pending IP-Enabled Services or Intercarrier Compensation rulemakings. *See id.* Doing so would avoid a litigation nightmare over years-old traffic, much of which can no longer be traced.

It is reasonable for the FCC to take into account the problems associated with applying access charges to VoIP in an adjudicatory proceeding (*e.g.*, retroactive application of access charges, lack of appropriate conditions or additional rules) in weighing whether Embarq’s petition meets the public interest prong of the statutory forbearance analysis. The fact that the FCC can largely avoid these harms by acting through a rulemaking order does not mean that the FCC cannot consider the harms that would result from a grant of Embarq’s petition.³³ Rather, it merely highlights that granting Embarq’s petition is not in the public interest.

Pursuant to Section 1.1206(b) of the Commission’s rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

³¹ *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (remanding the *Calling Card Order* and noting that the D.C. Circuit has not given the FCC deference when reviewing an FCC determination to bar retroactive effect).

³² *See Comments of tw telecom et al.*, CC Dkt. Nos. 01-92 *et al.*, WC Dkt. Nos. 04-36 *et al.*, at 16-18 (filed Nov. 26, 2008).

³³ *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir 2001) (“Congress has established § 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different regulatory mechanism”).

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Respectfully submitted,

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