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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of Qwest Communications)	WC Docket No. _____
International, Inc. for Limited Forbearance)	
Under 47 U.S.C. §160(c) from Enforcement)	
of 47 C.F.R. §69.5(a), 47 U.S.C. §251(b), and)	
Commission Orders on the ESP Exemption)	

PETITION FOR FORBEARANCE

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. BACKGROUND.....	4
III. THE COMMISSION SHOULD REMOVE ANY UNCERTAINTY BY FURTHER CLARIFYING THE SCOPE OF FORBEARANCE RELIEF	8
IV. CRITERIA FOR FORBEARANCE UNDER SECTION 10 OF THE ACT.....	10
V. FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE ACT	11
1. The ESP Exemption is not required to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory	11
2. The ESP Exemption is not necessary to protect consumers.....	13
3. Forbearance is consistent with the public interest.....	14
VI. SECTION 10(d) DOES NOT BAR FORBEARANCE BECAUSE SECTIONS 251(e) AND 271 HAVE BEEN FULLY IMOPLEMENTED	15
VII. CONCLUSION	16

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PETITION FOR FORBEARANCE

I. INTRODUCTION AND SUMMARY

Qwest Communications International, Inc. ("Qwest") hereby requests that the Federal Communications Commission ("Commission") exercise its authority under Section 10 of the Communications Act of 1934, as amended, ("Act")¹ and forbear from enforcing the enhanced services provider ("ESP") exemption to voice traffic that originates in Internet Protocol ("IP") and terminates on the Public Switched Telephone Network ("PSTN") (*i.e.*, IP-to-PSTN traffic)² against Qwest. This Petition [hereinafter the "Petition"] requests the same forbearance relief as Embarq and Frontier requested in their earlier petitions.³ Specifically, Qwest requests that the

¹ 47 U.S.C. §160(c). *Also see*, 47 C.F.R. § 1.53.

² In this document, Qwest uses the term "IP-to-PSTN traffic" to refer to IP-enabled voice services and applications (including "interconnected VoIP" as the Commission has used that term) in which all telecommunications and information components originate in IP and terminate on the PSTN.

³ *See* Petition for Forbearance of Embarq Local Operating Companies, WC Docket No. 08-8, filed Jan. 11, 2008. *And see* Public Notice, 23 FCC Rcd 348 (2008). *And see*, Frontier Forbearance Petition, WC Docket No. 08-205, filed Sept. 25, 2008 which requests the same relief as Embarq. Qwest incorporates the factual and legal support preferred by Embarq and Frontier for their forbearance requests and attaches those petitions hereto as Appendices A and B, respectively. Qwest does not agree with every contention contained in the Embarq and Frontier petitions. For example, Qwest does not concur in Frontier's description of the recent activities at the Commission to address potential comprehensive intercarrier compensation

Commission forbear from: 1) allowing any application or enforcement of Section 69.5(a)⁴ where any service provider might claim that IP-to-PSTN traffic qualifies it for treatment as an end user, rather than paying appropriate access charges under Section 69.5(b);⁵ 2) allowing any application or enforcement of Section 251(b)(5) of the Act⁶ where a service provider might claim its non-local IP-to-PSTN traffic is subject to reciprocal compensation; and 3) enforcing or applying any Commission Orders⁷ that address or apply the ESP exemption to the extent the language and/or provisions in these Orders might be interpreted to justify applying the ESP exemption to IP-to-PSTN traffic.

Some companies, such as Feature Group IP West ("FGIP"), mistakenly claim that IP-to-PSTN traffic is exempt from paying access charges as a result of the ESP exemption.⁸ But, this

reform. Appendix B at 6. And, Embarq and Frontier both argue, essentially, that the ESP exemption does not apply to IP-to-PSTN traffic or, in the alternative, that the Commission should forbear from applying the ESP Exemption to such traffic. As explained in the text, at 3-6, Qwest has historically taken the position that the ESP Exemption has a very limited application to such traffic. But, Qwest joins in Embarq's and Frontier's request that the Commission forbear from its application here. There is no factual or policy basis that distinguishes Qwest's situation from Embarq's and Frontier's, and no reason for Qwest's relief to be delayed once the Commission has determined what relief it will or will not grant to Embarq and Frontier.

⁴ 47 C.F.R. § 69.5(a).

⁵ 47 C.F.R. § 69.5(b).

⁶ 47 U.S.C. § 251(b)(5).

⁷ These Orders include the 1983 *Access Charge Order*, the 1988 *ESP Order*, the 1997 *Access Charge Reform Order* and any subsequent Commission Orders that acknowledge or apply the ESP Exemption. See *In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (subsequent history omitted); *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988); *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

⁸ FGIP contends that IP-to-PSTN traffic, be it local or non-local, is completely exempt from switched access charges. FGIP asserts that IP-to-PSTN traffic is an information service and, therefore, that the Commission's ESP Exemption renders this traffic wholly exempt from access charges. FGIP also argues "in the alternative" that, should the Commission disagree with the forgoing contention, it should forbear from various statutory provisions and rules relating to the

interpretation has no basis in the law. The ESP exemption was intended to be an "interim" solution which allowed ESPs to use local exchange facilities (e.g., measured business lines) for interstate access to reach their subscribers. The attempts of FGIP and others to overextend the application of the ESP exemption -- and the resulting costly and disruptive disputes -- lie at the heart of the circumstances giving rise to this Petition. The significance of these issues continues to grow as IP-to-PSTN traffic increases and, along with it, the frequency of these carrier disputes.⁹

Forbearance from applying the ESP exemption to IP-to-PSTN voice traffic will remove any doubt as to the scope of the ESP exemption and ensure that all companies terminating voice calls on the PSTN are treated equally. As Qwest demonstrates in this Petition, forbearance is necessary to ensure that access charges and practices are just and reasonable and not unreasonably discriminatory for the traffic at issue. Furthermore, forbearance would be consistent with the public interest by ensuring that companies providing voice services on the PSTN are treated in a non-discriminatory matter -- thereby enhancing competition. Therefore, the Commission should find that Section 10's forbearance criteria are satisfied and that a grant of Qwest's Petition is justified.

application of tariffed feature group access charges to IP-to-PSTN Voice over Internet Protocol ("VoIP") traffic (*i.e.*, as necessary to render such traffic wholly exempt from such access charges). *See* Petition for Forbearance of Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC, WC Docket No. 07-256, filed Oct. 23, 2007. *And see* Public Notice, DA 07-5029, rel. Dec. 18, 2007, Order, DA 08-93, rel. Jan. 14, 2008, Erratum, rel. Jan. 18, 2008; *and see* Qwest Comments, WC Docket Nos. 07-256 and 08-8, filed Feb. 19, 2008.

⁹ *See* Appendix A at 12-14 describing, among other things, increases in IP-to-PSTN traffic and in frequency of carrier disputes); Appendix B at 11-16 (same).

II. BACKGROUND

A brief discussion of the genesis and role of the ESP exemption in the Commission's access charge structure is necessary prior to addressing Section 10's forbearance criteria.

The Commission has been wrestling with the issue of how providers of "enhanced services" should pay for interstate use of local exchange switching facilities and services since the very beginning of the access charge regime.¹⁰ In what was intended to be an "interim" solution, the Commission created the so-called "ESP exemption" whereby enhanced service providers were entitled to connect their "point of presence" ("POPs") to local exchange switching facilities via local exchange access services (as opposed to the tariffed feature group access services that carriers were required to purchase) even though they used the local exchange facilities for interstate access.¹¹

Thus, the ESP exemption was simply a regulatory decision whereby, for a variety of policy reasons, interstate access by ESPs located within the local calling area of a customer would be treated as local for the purpose of assessing the correct access charge, at least if local service were ordered. The same status was accorded to private networks that accessed local exchanges for interstate origination and termination of interstate calls -- these private networks were likewise treated as end users for access charge purposes based on the location of the PBX or other terminating device (including Centrex) through which the traffic was delivered into a

¹⁰ See *In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 254-55 ¶ 39 and n.15, 320 ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("First Order on Reconsideration"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("Order on Further Reconsideration"), *aff'd in principal part and remanded in part sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

¹¹ See, e.g., *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16131-34 ¶¶ 341-48 (1997); see, also, generally, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

local exchange.¹² In both cases, interstate cost recovery was designed to be achieved through assessment of a particular access surcharge on incumbent local exchange carrier ("ILEC") interstate special access lines used by ESPs or "leaky PBXs."

The current regulatory landscape with respect to IP-to-PSTN services is such that a modified approach whereby IP-to-PSTN traffic would be treated exactly the same as time division multiplexing ("TDM") calls for access charge recovery is more appropriate.

Qwest has previously argued that IP-to-PSTN should be classified as an information service, and that, accordingly, its access to local exchange switching facilities should be governed by the ESP exemption. In this case, the end-user designation of a VoIP ISP's point of presence ("POP")¹³ allows for reasoned analysis of the rights and obligations of LECs when exchanging VoIP ISP traffic with each other. Based on the location of the VoIP ISP POP, whatever mechanism is used to treat calls between traditional end users (reciprocal compensation, tariffed access, or some other approach) can be applied to this traffic and used by the respective carriers to recover the costs incurred in exchanging IP-to-PSTN traffic.¹⁴ Under this approach, a VoIP ISP POP is not the same thing as an interexchange carrier ("IXC") POP or a competitive local exchange carrier ("CLEC") point of interface ("POI"), because neither an

¹² See *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 7424, 7425 ¶¶ 13-15 (1987).

¹³ In this discussion, Qwest uses the term "VoIP ISP" to refer to information service providers who originate IP-to-PSTN traffic.

¹⁴ This is precisely what Qwest has done when it negotiates interconnection agreements with CLECs to the extent they address IP voice traffic. Qwest also allows VoIP ISPs to include this same approach in retail PRS (Primary Rate Service) contracts. All of this, however, anticipates that the Commission would categorize IP-to-PSTN traffic as an information service and would apply the ESP Exemption in a traditional fashion. As discussed in further detail in the text, Qwest believes the better approach, from a policy standpoint, is to treat IP-to-PSTN traffic identically to other traffic on the PSTN -- *i.e.*, to change this application of the ESP exemption.

IXC POP nor a CLEC POI is treated as an end user for access purposes and neither would be entitled to purchase retail services reserved for end users.

At the same time, Qwest recognizes that the Commission has not yet determined whether IP-to-PSTN service is an information service.¹⁵ Additionally, over the last few years, the Commission has issued a number of rulings in which it has applied numerous regulatory obligations to VoIP traffic. While normally the application of such obligations depends upon the classification of the service at issue, with the regulatory consequences following from that classification, the Commission has taken a different tack here. Without deciding whether VoIP traffic is an information service or a telecommunications service, the Commission has issued orders subjecting such services in one form or another to Universal Service Fund ("USF") obligations, access to numbering resources and numbering obligations, 911 obligations, customer

¹⁵ See, *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, 22 FCC Rcd 11275, 11281, n.50 (2007) ("*TRS Report and Order*"). The intercarrier compensation proposals contained in the Commission's November 5, 2008 Further Notice of Proposed Rulemaking included a proposed conclusion that IP-to-PSTN traffic be deemed an information service. See *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, FCC 08-262, rel. Nov. 5, 2008 ("*FNPRM*"), 73 Fed. Reg. 66821, Nov. 12, 2008. Qwest's comments in that proceeding have been consistent with those reflected in this petition. See Comments of Qwest Communications International Inc., filed in the aforementioned proceedings, Nov. 26, 2008 at 14-20 ("*Qwest Intercarrier Comments*").

proprietary network information ("CPNI") and privacy obligations and obligations with respect to persons with disability.¹⁶

Also, more and more carriers are asserting the clearly incorrect position that IP-to-PSTN traffic is magically exempt from access charges regardless of how it is terminated to the PSTN, where it is terminated from or what ILEC services are used. The present situation, where half of the industry is apparently treating these services as telecommunications services and the other half is treating them as information services, is clearly not an optimal state of affairs. In light of these developments, Qwest agrees that the optimal approach to IP-to-PSTN traffic is to treat these services in the same manner as any other voice calls that touch the public switched network without regard to the ultimate regulatory classification of the service. Granting Embarq's and Frontier's forbearance petitions and this Petition would eliminate any misapplication of the ESP

¹⁶ See, *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*; *IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007); *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007); *TRS Report and Order*, 22 FCC Rcd 11275; *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006); *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005), *aff'd. sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

exemption and put the traffic at issue on equal footing with all other traffic on the PSTN that uses the PSTN in the same manner.

III. THE COMMISSION SHOULD REMOVE ANY UNCERTAINTY BY FURTHER CLARIFYING THE SCOPE OF FORBEARANCE RELIEF

In granting Qwest's Petition -- which requests the same relief as Embarq and Frontier -- the Commission should make the following important clarifications. First, the Commission should make it unambiguously clear that geographical endpoints - not telephone numbers - are the proper determinants of whether a call is local such that reciprocal compensation applies versus access (or, for non-local traffic, whether interstate or intrastate access charges apply). Carriers may use telephone numbers as a surrogate for billing purposes provided, however, that, as in other contexts such as nomadic wireless usage, there must be an ability for carriers to ensure that, in the end, billing accurately reflects jurisdiction.

Second, in granting forbearance, the Commission should clarify how interconnection/access will work for IP-to-PSTN traffic after forbearance. As Qwest has stated in past filings, this can be very straight-forward.¹⁷ There are three possible varieties of interconnection/access that must be addressed because VoIP ISPs could conceivably deliver such traffic to the PSTN using services available to end users, IXC services or CLEC services. Post-forbearance, VoIP ISPs would no longer be able to deliver IP-to-PSTN traffic to the PSTN over local facilities purchased as an end user. However, they could still purchase access services for IP-to-PSTN traffic directly and such traffic would, like any other traffic sent over such facilities, be subject to access charges. Alternatively, VoIP ISPs could use the services of IXCs, who, in turn, would deliver their traffic to the PSTN over access facilities and access charges would apply just like any other traffic using the PSTN in the same way. Finally, VoIP ISPs could use

¹⁷ See Qwest Intercarrier Comments at 14-20.

the services of CLECs to deliver their IP-to-PSTN traffic to the PSTN. Of course, consistent with existing law, those CLECs can only have interconnection rights to the PSTN under Section 251 in the first place if they obtain such interconnection for the purpose of offering a telecommunications service.¹⁸ Of course, this traffic should not be terminated over those interconnection facilities if it is not local (or non-IXC intraLATA toll).¹⁹

Finally, it is important that the forbearance sought by Qwest, Embarq, and Frontier not apply solely to these carriers, but instead be granted on an industry-wide basis.

¹⁸ See 47 C.F.R. §§ 51.5 (definition of “Telecommunications service”) and 51.100(b). Classification of IP-to-PSTN traffic as an information service means that the information services themselves continue to be recognized as non-telecommunications services. However, in this interconnection scenario, the transmission service that brings the information service to a local exchange would be common carrier in nature. This position was made crystal clear in Time Warner Cable’s Request for Declaratory Ruling. *In the Matter of 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) (“*Time Warner*”). In *Time Warner*, several ILECs refused to interconnect with Time Warner’s interconnected VoIP service, claiming that, as an information service, a VoIP provider had no interconnection rights and was obligated to purchase local exchange and other services out of the appropriate tariffs. Time Warner countered that it was not interconnecting a VoIP service to the ILEC networks under Section 251. To the contrary, Time Warner stated that it was interconnecting to the ILEC networks through the common carrier services of two CLECs, and that these two carriers were providing a wholesale common carrier service that entitled them to interconnection rights under Section 251. See *Time Warner* Petition for Declaratory Ruling, WC Docket No. 06-55, filed Mar. 1, 2006 at Section I. Ultimately, the Commission held that, because Time Warner interconnected through a CLEC that was providing telecommunications service, the ILECs could not deny the CLEC interconnection rights. Tellingly, the Commission emphasized that “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.” *Time Warner*, 22 FCC Rcd at 3520-21 ¶ 15.

¹⁹ Qwest has previously advocated that, in the context of the Commission’s recent proposal for a new uniform rate intercarrier compensation regime where there would no longer be a rate disparity between local and access traffic, the most logical approach to interconnection would be for terminating ILECs who receive IP-to-PSTN traffic from a CLEC to bill CLECs (rather than treating the VoIP ISPs as an IXC) at the tariffed access rate for access traffic and at reciprocal compensation rates for local traffic. Of course, once rates for all traffic become uniform under such a plan, these terminating ILECs would bill CLECs at the new uniform rate for all traffic.

IV. CRITERIA FOR FORBEARANCE UNDER SECTION 10 OF THE ACT

Section 10 of the Act directs the Commission to remove needless regulation and creates a strong presumption in favor of less regulation. Section 10 requires that the Commission “shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” if the Commission finds that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just, reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.²⁰

In making its public interest determination, Section 10 requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.²¹

In determining whether a regulation (or statutory provision) “is unnecessary for the protection of consumers” (*i.e.*, Section 10’s second criterion above), the Commission has found that a regulation is “necessary” if there is “strong connection” between the regulation and the goal of consumer protection.²²

²⁰ 47 U.S.C. § 160(a).

²¹ 47 U.S.C. § 160(b).

²² *In the Matter of Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order 18 FCC Rcd 24648, 24654 ¶ 14. Also see, *In the Matter of Verizon Wireless’s Petition for Partial*

V. FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE ACT

Forbearance from enforcing the ESP exemption against Qwest under Section 10 is not “discretionary” -- it is “mandatory” once the Commission determines that Section 10’s criteria have been met.²³ Section 10 envisions that the Commission will forbear from the enforcement of unnecessary rules that currently are being applied to carriers and rules that are harmful to competition. This Petition addresses any interpretation, application or enforcement of Section 69.5(a) of the Commission’s rules, Section 251(b)(5) of the Act or Commission Orders to the extent the language in these sections and Orders might be interpreted to justify applying the ESP exemption to non-local IP-to-PSTN traffic.²⁴

1. The ESP Exemption is not required to ensure that Qwest’s rates and practices are just, reasonable and not unreasonably discriminatory

The first statutory criterion for forbearance requires that the Commission determine whether the application of the ESP exemption is necessary to ensure that Qwest’s access rates and practices are just, reasonable and not unreasonably discriminatory. Clearly, the ESP exemption -- to the extent this exemption is interpreted to justify exempting non-local IP-to-PSTN traffic from terminating access charges under any circumstances -- is not necessary to

Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability, Memorandum Opinion and Order, 17 FCC Red 14972, 14978-79 ¶ 16 (2002). The court upheld the Commission’s interpretation of the term “necessary” as a permissible interpretation under *Chevron* deference. See *Cellular Telecoms. & Internet Ass’n v. FCC*, 330 F 3rd 502, 512 (D.C. Cir. 2003).

²³ Forbearance is not limited to specific provisions of the Act but also includes Commission regulations, such as the ESP exemption, that is the subject of this Petition. The only restriction on the Commission’s forbearance authority is contained in Section 10(d) which limits the Commission from forbearing from applying Sections 251(c) and 271 until those requirements have been fully implemented. 47 U.S.C. § 160(d).

²⁴ The Commission could alleviate any need for forbearance by issuing a Declaratory Ruling (which would also be a change of law ruling) that neither the Commission’s Orders addressing the ESP exemption nor Sections 69.5(a) and 251(b)(5) exempt a service provider from paying access charges on non-local IP-to-PSTN traffic.

ensure that Qwest's access rates and practices are just, reasonable and not unreasonably discriminatory. In fact, forbearance would eliminate unjust and unreasonable discrimination in the application of terminating access charges to voice traffic on the public switched network. Not only would forbearance eliminate unreasonable discrimination, it would eliminate a source of regulatory arbitrage in the Commission's access charge regime. The Commission has always intended "that the cost of the PSTN should be borne equitably among those that use it in similar ways."²⁵

Again, without the requested forbearance ruling, Qwest believes that the traffic at issue here is subject to the treatment afforded to other information services as described above. That is, if carriers elect to use access services for termination of IP-to-PSTN traffic, then tariffed access rates would continue to apply. If, however, the VoIP ISP elects to purchase retail services from an ILEC or CLEC (as an end user subject to the ESP exemption from access charges), then the status of IP-to-PSTN traffic would be evaluated based on the location of the VoIP ISP POP (not the location of the IP voice subscriber), and the call would be subject to reciprocal compensation or access charges depending on the relative locations of the VoIP ISP POP and the PSTN called party.

However, a number of VoIP providers have taken some very strange and legally inconsistent positions to avoid paying for services purchased from LECs.²⁶ And, as a result, disputes about the proper treatment of this traffic abounds and at great cost.

²⁵ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 ¶ 61 (2004). "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, or an IP network, or on a cable network." *Id.*

²⁶ These carriers suggest, essentially, the "magic wand" theory of regulation for IP-to-PSTN traffic -- *i.e.*, that such traffic is automatically local in all circumstances regardless of

Forbearance would end these problems and place all providers terminating voice traffic on the PSTN on equal footing, thereby enhancing competition. Forbearance would also ensure that ILECs are fairly compensated for use of the PSTN. As Embarq and Frontier correctly observed, in their Petitions, the Commission already determined appropriate access charges in the *CALLS Order* proceeding.²⁷ And, in the process, it found them to be a "reasonable approach for moving toward the Commission's goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service." Embarq and Frontier also correctly observe that "overextending the ESP exemption under-compensates ILECs for use of the PSTN by overstating traffic subject to reciprocal compensation."²⁸

For all these reasons, the Commission should find that Section 10(a)'s first criterion is satisfied.²⁹

2. The ESP Exemption is not necessary to protect consumers

The second statutory criterion for forbearance requires that the Commission determine whether the ESP exemption -- to the extent this exemption is interpreted to justify exempting non-local IP-to-PSTN traffic from terminating access charges under any circumstances -- is necessary for protection of consumers. As shown above and in Embarq's and Frontier's petitions, the ESP exemption is not necessary to ensure that Qwest's rates and practices for terminating non-local IP-to-PSTN traffic are just, reasonable and not unreasonably discriminatory. Indeed, for all intents and purposes, application of the ESP exemption to this traffic is anticompetitive. It encourages regulatory arbitrage and unreasonably discriminates

"inconvenient" details like the location of the calling and called parties, how the VoIP ISP uses interconnection or access services on the PSTN, etc.

²⁷ Appendix B at 18. *See also*, Appendix A at 6-8.

²⁸ Appendix B, 18-19; Appendix A at 13-14.

²⁹ *See also generally*, Appendix A at 18-21; Appendix B at 17-19.

against other carriers terminating voice traffic on the PSTN.³⁰ While application of the ESP exemption may benefit a small number of consumers in the short run, “their benefit is possible only by forcing other carriers and their customers to subsidize VoIP calls terminating on the PSTN...”³¹ In determining whether the second criterion is satisfied, the Commission must look at consumers as a whole rather than whether a small subset of consumers loses an unfair competitive advantage. Forbearance will promote competitive market conditions among service providers by creating a more level playing field. There should be no question that enhanced competition serves the interests of consumers and is an important factor for the Commission to consider in its determination.³² As such, the Commission should find that Section 10(a)’s second criterion is satisfied.³³

3. Forbearance is consistent with the public interest

The third statutory criterion for forbearance requires that the Commission determine whether forbearance from applying the ESP exemption -- to the extent this exemption is interpreted to justify exempting non-local IP-to-PSTN traffic from terminating access charges under any circumstances -- is consistent with the public interest. In making this public interest determination, the Commission considers whether forbearance “will promote competitive market

³⁰ As Embarq points out, “[a]llowing IP-to-PSTN voice calls to evade access charges might benefit, at best, a fraction of consumers - those who might enjoy artificially low retail rates for their interconnected VoIP services thanks to what is effectively regulatory arbitrage.” Appendix A at 21.

³¹ *Id.*

³² See also, Appendix B at 20-21 (discussing, generally, harms to consumers and undermining of network investment); Appendix A at 23-26 (same).

³³ See also generally, Appendix A at 21-23; Appendix B at 20-21.

conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”³⁴

Clearly, if the Commission forbears from applying the ESP exemption to IP-to-PSTN traffic it will promote competition by: 1) ensuring a level playing field among service providers; 2) reducing regulatory arbitrage and access charge disputes; and 3) encouraging continued ILEC investment in the PSTN. It will also promote investment in advanced telecommunications capability. These same factors lead to the conclusion that forbearance serves the public interest. As such, the Commission should find that forbearance serves the public interest and that Section 10(a)(3) has been satisfied.³⁵

VI. SECTION 10(d) DOES NOT BAR FORBEARANCE BECAUSE SECTIONS 251(c) AND 271 HAVE BEEN FULLY IMPLEMENTED

Section 10(d) does not allow the Commission to “forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.”³⁶ These provisions of the Act do not prevent the Commission from granting Qwest’s forbearance petition services from the ESP exemption because neither Section 251(c) nor 271 are affected by this request. Furthermore, the Commission has already determined that the requirements of these two sections of the Act have been “fully implemented.”³⁷

³⁴ 47 U.S.C. § 160(b).

³⁵ See also generally, Appendix A at 23-29; Appendix B at 22-27, for additional discussion of why forbearance will promote competition and is otherwise in the public interest.

³⁶ 47 U.S.C. § 160(d).

³⁷ See *In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21503 ¶ 15 (2005). Also see, Qwest Petition for Forbearance of the Circuit Conversion Rules, WC Docket No. 05-294, filed Oct. 4, 2005 at 40 nn.108-110.

VII. CONCLUSION

As demonstrated in the foregoing sections of this Petition, the Commission should find that the three statutory criteria that Congress established for forbearance in Section 10 of the Act have been satisfied and that it is not necessary to apply the ESP exemption to non-local IP-to-PSTN traffic against Qwest. Accordingly, Qwest requests that the Commission grant this Petition at the earliest possible date.

Respectfully submitted,

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December 10, 2008

APPENDIX A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
)
Petition of the Embarq Local Operating)
Companies for Limited Forbearance) **WC Docket No. 08-_____**
Under 47 U.S.C. § 160(c) from)
Enforcement of Rule 69.5(a), 47 U.S.C.)
§ 251(b), and Commission Orders on the)
ESP Exemption)

PETITION FOR FORBEARANCE

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January 11, 2008

TABLE OF CONTENTS

SUMMARY	iii
I. INTRODUCTION	1
II. THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE ESP EXEMPTION FOR IP-ENABLED VOICE CALLS TERMINATED TO THE PSTN.	6
A. Under Existing Law, IP-to-PSTN Voice Calls Are Subject to Access Charges.	6
1. The Commission's Access Charge Rules Govern All Voice Traffic Connected to the PSTN.	6
2. The ESP Exemption Does Not Extend to IP-to-PSTN Voice Traffic.	8
3. Interconnected VoIP Is Functionally No Different Than More Traditional Voice Services Supported by the PSTN.	10
B. Providers Are Over-Extending Claims to the ESP Exemption, Which is Creating Too Many Disputes and Threatening Needed Investment in Local Networks.	12
C. The Commission Should Use its Forbearance Authority to Ensure the ESP Exemption Is Not Misapplied to the Detriment of Consumers and Competition.	14
D. Limited Forbearance Should Extend to Commission Orders Creating and Acknowledging the ESP Exemption, to 47 C.F.R. § 69.5(a), and to 47 U.S.C. § 251(b)(5).	17
III. FORBEARANCE STANDARDS ARE MET.	18
A. The ESP Exemption Is Not Necessary to Ensure Just and Reasonable and Nondiscriminatory Charges on IP-to-PSTN Voice Traffic.	18
B. The ESP Exemption Is Not Necessary to Protect Consumers.	21

C.	Forbearance from the ESP Exemption on any IP-to-PSTN Voice Traffic Is in the Public Interest.	23
1.	Forbearance Would Promote and Enhance Competition.	23
2.	Forbearance Would Reduce Regulatory Arbitrage and Disputes.	26
3.	Forbearance Would Protect Investment in the PSTN, Particularly in Rural America.	28
IV.	CONCLUSION	29
APPENDIX A:	Embarq Local Operating Companies	31

SUMMARY

The Embarq Local Operating Companies (“Embarq”)¹ face a growing number of disputes about the appropriate compensation for terminating non-local calls routed to the public switched telephone network (“PSTN”) that originated in Internet Protocol (“IP”). Increasingly, some carriers are claiming that their IP-to-PSTN voice calls are exempt from access charges because of a regulation that the Commission created in the 1980s for enhanced service providers (“ESPs”). These carriers are claiming preferential treatment for IP-to-PSTN traffic by pretending that the ESP exemption prohibits local exchange carriers (“LECs”) like Embarq from recovery ordinary compensation for terminating calls on the PSTN, simply because those calls originated with a service provider that uses IP technology.

By this petition, Embarq asks the Commission to forbear from any application of the ESP exemption to IP-to-PSTN voice traffic. Embarq believes it should be clear that the ESP exemption has never properly applied to IP-to-PSTN voice calls. The regulation was created to exempt the links between ESPs and their subscribers – for example, links between Westlaw and its early subscriber terminals and dial-up connections from a subscriber to an Internet service provider (“ISP”). It has never applied, and cannot be fairly extended to apply, to voice calls to *nonsubscriber* third parties on the PSTN. The exemption, moreover, applies only to ESPs. It has never applied to telecommunications carriers. Embarq does not receive these voice calls from ESPs, but from carriers that deliver ordinary voice calls for termination on the PSTN. When they are delivered by

¹ The Embarq Local Operating Companies are listed in Appendix A.

those carriers to Embarq, they have already been converted into ordinary voice calls, using the same technology format as any traditional voice calls.

Nevertheless, IP-based voice service providers and their associated carriers have become very aggressive in attempting to stretch the ESP exemption. These attempts to use regulatory arbitrage to avoid the access charge rules for non-local calls create needless disputes and pose serious problems for the nation. The Commission should use its forbearance authority to stop such misapplication of the ESP exemption, for several reasons.

First, forbearance will ensure that the ESP exemption is not to be used to give an artificial competitive advantage to one group of service provider. The ESP exemption was intended to promote the growth of the early ESP industry, but it never gave any particular provider a regulatory advantage. In contrast, extending the ESP exemption to IP-originated voice calls would give a grossly unfair advantage to one class of voice service providers, just because they use IP-technology in originating voice calls.

The communications industry is rapidly moving from circuit-switched to IP-based technologies. Embarq also is increasingly embracing IP technology in its own network and services. Many have argued that traditional telecommunications rules should not apply to the Internet, and Embarq generally agrees with this proposition. There is, however, no reason to grant regulatory advantages to the use of IP that terminates on the PSTN. Artificial distinctions based on technology always should be avoided, and IP-based providers can and do compete quite effectively without their IP-to-PSTN calls free-riding on the PSTN. Forbearance will ensure a level competitive playing field between

interconnected voice over Internet protocol (“VoIP”) and traditional voice services when they use the PSTN in the very same way.

Second, forbearance will maintain needed support for the PSTN. The PSTN provided by LECs like Embarq is the network on which the vast majority of the nation’s traffic will long depend. Regardless of technology, the Commission’s intercarrier compensation system remains vital to the health of the PSTN. It helps ensure that all users of the PSTN provide support for the very real costs of maintaining and upgrading that expensive network.

Without that support, investment in the PSTN will only be short-changed, especially in rural, high-cost environments that most need infrastructure and broadband investment. Rural ILECs like Embarq are particularly reliant on access revenues to support their carrier-of-last-resort (“COLR”) obligations. In its service areas, Embarq is the only entity that is obligated to provide service to virtually anyone on request, and at averaged rates often far below actual costs. The access charges applied to non-local calls are part a critical part of COLR support. Forbearance will protect investment in the PSTN and promote the extension of advanced telecommunications capability to rural areas where such investment otherwise will become increasingly difficult to justify.

Third, the Commission has open proceedings on intercarrier compensation and universal service reform. Embarq supports those efforts. Reform, however, must be done comprehensively. It would be arbitrary and unreasonable to allow some carriers to claim a regulatory exemption based on just one aspect (access charges) of the complex and interrelated rules governing how the PSTN is supported. Until the Commission completes intercarrier compensation and universal service reform, it should take steps to