

available quantity of services or restricting the entry of potential service providers.”⁶⁴

Forbearing from any application of the ESP exemption to IP-to-PSTN voice traffic will also ensure the marketplace is not skewed in favor of one type of service technology. With some competitors misinterpreting the ESP exemption, failing to forbear would only undermine “the technology-neutral goals of the Act” and frustrate “Congress’ aim to encourage competition.”⁶⁵

Over-extending the ESP exemption would confer an arbitrary and grossly unreasonable competitive advantage upon one class of service provider over others, simply based on the technology used in originating the call. The ESP exemption was adopted and retained, because ESPs used the PSTN differently than carriers – to connect to their own information service subscribers – and warranted exemption to encourage the early growth of the ESP industry. It did not give, and was never intended to extend, any particular provider an artificial regulatory advantage over any other provider. In contrast, extending the exemption to VoIP providers (and their associated carriers) would confer a wholly artificial regulatory advantage to one class of providers over another class competing within the exact same market: voice telephone services. It would be senseless to allow the ESP exemption to be converted, for the first time, into a source of gross competitive inequality.

Forbearance would advance competition by helping ensure more uniform application of, and adherence to, access charge rules among all service providers. It would ensure that access charge rules are not tilted in favor of VoIP providers against other competitors, when

⁶⁴ *Federal-State Joint Bd. Order*, 12 FCC Rcd 8776 at ¶¶ 48, 49.

⁶⁵ *Deployment of Wireline Servs. with Advanced Telecoms. Capability*, Order on Remand, 15 FCC Rcd 385 at ¶ 12 (2000).

they are all using the PSTN in the very same way. The Commission should take this opportunity to eliminate the competitive distortions and technology bias caused by over-extension of the ESP exemption.

2. **Forbearance Would Reduce Regulatory Arbitrage and Disputes.**

For some time, there has been debate about the classification of VoIP as information services.⁶⁶ The Commission does not need to address that issue here. Embarq's petition addresses a different and far narrower issue: ensuring the ESP exemption is not misapplied to IP-to-PSTN voice calls.

The whole point of the Intercarrier Compensation proceeding, the Commission has explained, has been "to move toward a unified compensation regime that eliminates the opportunity for arbitrage due to different regulatory treatment of different types of traffic."⁶⁷ Access charge evasion is one of the specific forms of regulatory arbitrage that the Commission continually has tried to discourage in its access charge regime.⁶⁸ For Embarq, it

⁶⁶ The Commission has already taken some important steps to resolve important issues governing classification of VoIP as information services, generally with a view toward reducing the disparity in social regulations between VoIP and traditional services. Granting this Petition would be consistent with that trend. *See VoIP 911 Order*, 20 FCC Rcd 10245 (applying E911 requirements to interconnected VoIP services); *Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2006), *aff'd*, *American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (applying CALEA compliance requirements); *USF Contribution Order*, 21 FCC Rcd 7518 (applying universal service support obligations).

⁶⁷ *Declaratory Ruling, Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 at ¶ 20 (2002), *pet. for rev. dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. 2003).

⁶⁸ The Commission described examples of access charge avoidance as regulatory arbitrage in its most recent NPRM on Intercarrier Compensation. *See Developing a*

is one of the fastest growing sources of disputes. This IP-to-PSTN access arbitrage has frustrating and damaging consequences. It is not simply that ILECs are forced to divert resources to try to identify terminating traffic that does not qualify for the ESP exemption, or that they may recover only a fraction of the charges actually owed them, even in negotiating interconnection agreements, ILECs are facing battles over the classification of traffic and the appropriate intercarrier compensation for such traffic.

Forbearance would reduce these traffic classification disputes. It would eliminate any presumed regulatory uncertainty about access charges on IP-to-PSTN voice calls. It would minimize disputes, avoid needless lawsuits, complaints, and interconnection battles. It would spare federal and state authorities – and the Commission – the need to hear the growing number of disputes between LECs and carriers of IP-based voice traffic.

Forbearing from the ESP exemption will reduce the growing regulatory arbitrage that drives these disputes. In the past, the Commission has taken steps to end regulatory arbitrage.⁶⁹ It has issued rulings confirming that IP-in-the-middle is not within the ESP exemption,⁷⁰ and that advertisements inserted into prepaid card announcements do not render calling card voice traffic “enhanced services” for purposes of universal service

Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶ 12 (2001).

⁶⁹ *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at ¶ 3 (2001) (“*CLEC Access Charge Reform Order*”).

⁷⁰ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

contributions.⁷¹ It acted to end regulatory arbitrage in CLEC access rates.⁷² It adopted the “parent trap” rule to discourage carriers from transferring exchanges simply to increase high-cost universal service support.⁷³ The Commission should use forbearance here to continue its stated policy of reducing regulatory arbitrage.

3. **Forbearance Would Protect Investment in the PSTN, Particularly in Rural America.**

In section 706 of the Act, Congress instructed the Commission to use all means at its disposal, “including regulatory forbearance,” “to remove barriers to infrastructure investment” and to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability.”⁷⁴ Embarq’s forbearance petition is an opportunity for the Commission to advance these goals by protecting investment in the PSTN.

The access charge regime was designed to ensure that all companies using the PSTN contribute toward its costs. ILECs are unique, in that they provide the local backbone on which most traffic depends. Even as they lose revenues and market share to competitors (including cable telephony and interconnected VoIP providers), ILECs continue to have carrier-of-last-resort obligations requiring them to maintain and expand

⁷¹ *AT&T Corp. Pet. for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 (2005) (noting also that intrastate access charges apply notwithstanding routing to an out-of-state platform), *pet. for rev. denied*, *AT&T Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

⁷² *CLEC Access Charge Reform Order*, 16 FCC Rcd 9923.

⁷³ *Federal-State Joint Bd. Order*, 12 FCC Rcd at 8942-43.

⁷⁴ 47 U.S.C. § 157 nt.

a network capable of serving virtually any customer. IP-to-PSTN access arbitrage denies ILECs revenue that they need to maintain and upgrade their networks.⁷⁵

Forbearing from the ESP exemption, to the extent it may be claimed to apply to IP-to-PSTN voice traffic, will help protect investment in the PSTN. Ending the artificial access revenue shortfall will free up capital that ILECs could otherwise invest in extending broadband services to low density, rural areas currently under-served or unserved by any broadband provider. Allowing this regulatory arbitrage to continue, and to continue growing, will only contribute to leaving network investment in rural America farther and farther behind.

IV. CONCLUSION

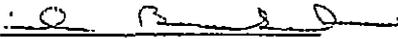
The ESP exemption was meant to be a narrow exception to the obligation of all service providers to contribute an equal share toward the costs of the PSTN. The ESP exemption has never properly applied to IP-to-PSTN voice traffic. The transition of service providers (including Embarq) to IP-based technologies was never meant to bypass the nation's intercarrier compensation system or undermine the PSTN. By exercising its forbearance authority here – by forbearing from any application or enforcement of the ESP exemption for IP-to-PSTN voice traffic – the Commission will help ensure IP-originated calls contribute their fair share of support for the PSTN, and help promote investment in advanced telecommunications capability in rural areas where it otherwise will be increasingly difficult to justify. It will provide a greater measure of

⁷⁵ Because price cap ILECs' ability to raise access rates is constrained, they are unable to fully recover this lost access revenue. Realistically, however, even rate of return ILECs are unable to recover.

stability and certainty for everyone, minimize regulatory arbitrage, and reduce disputes. It will prevent carriers from misapplying the ESP exemption to voice calls – a type of traffic it has never properly applied to. It will promote fair competition between interconnected VoIP and traditional voice services when they use the PSTN in the very same way.

Respectfully submitted,

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January 11, 2008

APPENDIX A

**EMBARQ LOCAL OPERATING COMPANIES
Subsidiaries of Embarq Corporation**

Central Telephone Company d/b/a Embarq
Central Telephone Company of Texas, Inc. d.b.a Embarq
Central Telephone Company of Virginia d/b/a Embarq
Embarq Florida, Inc.
United Telephone Company of Indiana, Inc. d/b/a Embarq
United Telephone Company of Eastern Kansas d/b/a Embarq
United Telephone Company of Kansas d/b/a Embarq
United Telephone Company of Southcentral Kansas d/b/a Embarq
Embarq Minnesota, Inc.
Embarq Missouri, Inc.
Carolina Telephone and Telegraph Company d/b/a Embarq
United Telephone Company of the West d/b/a Embarq
United Telephone Company of New Jersey, Inc. d/b/a Embarq
United Telephone Company of Ohio d/b/a Embarq
United Telephone Company of the Northwest d/b/a Embarq
United Telephone Company of Pennsylvania d/b/a Embarq
United Telephone Company of the Carolinas d/b/a Embarq
United Telephone-Southeast, Inc. d/b/a Embarq
United Telephone Company of Texas, Inc. d/b/a Embarq

APPENDIX B

WC 08-208

Petition of Frontier for Forbearance from the ESP Exemption
WC Docket No. 08-_____

FILED/ACCEPTED

SEP 30 2008

Federal Communications Commission
Office of the Secretary

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

In the Matter of:)
)
Petition of the Frontier Local Operating)
Companies for Limited Forbearance)
Under 47 U.S.C. § 160(c) from)
Enforcement of Rule 69.5(a), 47 U.S.C.)
§ 251(b), and Commission Orders on the)
ESP Exemption)

WC Docket No. 08-_____

PETITION FOR FORBEARANCE

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SUMMARY

The Frontier Local Operating Companies ("Frontier")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 Frontier from recovering ordinary compensation for terminating calls on the PSTN, simply because those calls originated with a service provider that uses IP technology.

By this petition, which mirrors a nearly identical petition filed by Embarq on January 11, 2008 in WC Docket No. 08-08, Frontier asks the Commission to forbear from any application of the ESP exemption to IP-to-PSTN voice traffic. Frontier 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

¹ Frontier is a mid-size incumbent local exchange carrier (ILEC) with subsidiaries in 24 states under the common ownership of Frontier Communications Corporation, formerly named Citizens Communications Company. As an ILEC, Frontier operates in one of the most competitive (both residential and business) urban markets in the country (Rochester, NY), but the balance of its ILEC operations are located in several small, high cost rural markets throughout the United States. In most of its ILEC markets, Frontier operates under federal price cap regulation, but operates under NECA Average Schedules in some of its smallest rural markets; on an intrastate basis, Frontier mostly operates under a mix of traditional rate-base, rate-of-return regulation and alternative forms of regulation.

never applied to telecommunications carriers. Frontier 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 those carriers to Frontier, 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. Frontier, 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 Frontier 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 Frontier 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 Frontier are particularly reliant on access revenues to support their carrier-of-last-resort ("COLR") obligations. In its service areas, Frontier 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. Frontier 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 protect the integrity of the existing regime. Frontier believes it is self-evident that IP-to-PSTN access traffic does not fall

within the narrow scope of the ESP exemption. The Commission can and should reduce regulatory arbitrage, minimize disputes, and protect and promote competition by forbearing from any application of the ESP exemption whenever it is claimed to treat IP-originated voice calls differently from any other calls that terminate on the PSTN.

Accordingly, Frontier's Petition meets section 10's standards for forbearance.² Section 10(a)(1) is met, because enforcing the ESP exemption, to the extent it may be claimed to apply to IP-originated phone-to-phone voice traffic that terminates on the PSTN, is not necessary to ensure that charges or practices are just and reasonable, and not unjustly or unreasonably discriminatory. On the contrary, forbearance will ensure that *all* phone-to-phone calls are subject to the same access charges – instead of discriminating in favor of one class of service provider or consumer. Section 10(a)(2) is met, because enforcement is not necessary to protect consumers. Instead, forbearance will benefit consumers by ensuring that IP-enabled voice calls contribute their fair share of the costs of the PSTN, and so ensuring that non-VoIP consumers are not forced to pay higher costs. Section 10(a)(3) is satisfied, because forbearance is in the public interest. It will protect and promote competition by ensuring the same rules apply to all service providers, and it will preserve support that is critical for the PSTN and for the deployment of advanced telecommunications infrastructure, particularly in rural America.

² 47 U.S.C. § 160.

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

In the Matter of:)
)
Petition of the Frontier 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

Pursuant to 47 U.S.C. § 160(c) and 47 C.F.R. § 1.53, Frontier respectfully requests that the Commission exercise its statutory authority to forbear from any application or enforcement of the ESP exemption to IP-to-PSTN voice traffic. This petition mirrors a nearly identical petition filed by the Embarq Local Operating Companies on January 11, 2008,³ and seeks the same relief. Frontier respectfully requests that it be granted the same relief at the same time as the Commission may grant forbearance to Embarq.⁴ If the Commission finds this matter inappropriate for forbearance, Frontier requests that the Commission issue a declaratory ruling that the ESP exemption does not apply to IP-to-PSTN voice traffic.

Some companies providing IP-originated voice services or carrying such traffic are wrongly claiming the ESP exemption. They are failing to contribute an equal share toward to the costs of the PSTN, even while interconnected VoIP and traditional voice service use the PSTN in

³ Pleading Cycle Established for Petition of the Embarq Local Operating Companies for Forbearance from Enforcement of Section 69.5(a) of the Commission's rules, Section 251(b) of the Communications Act and Commission Orders on the ISP Exemption, WC Docket No. 08-08, DA 08-94 (Jan. 14, 2008).

⁴ There is no factual or policy basis that distinguishes Embarq's from Frontier's situation, and no reason for Frontier's relief to be delayed once the Commission has determined what relief it will or will not grant to Embarq.

the very same way. This regulatory arbitrage creates serious problems that make forbearance , both appropriate and necessary.

I. INTRODUCTION

The ESP exemption is a regulation created by Commission orders, an outgrowth in the comprehensive access charge plan it adopted in 1983.⁵ The access charge system was designed to allow LECs to recover the costs associated with the origination and termination of calls on their carrier-of-last-resort networks. LECs were then, and still are, required to look to other carriers for compensation to help cover the high costs of fulfilling government mandates to build local networks ubiquitously and provide service at averaged, affordable rates.

When it established this system, the Commission intended "to apply these carrier's carrier charges to interexchange carriers, and to all resellers *and enhanced service providers*."⁶ ESPs, however, were granted a "temporary exemption" from access charges to protect them from the "shock" of access costs during the entire industry's transition to the new access system.⁷ The exemption allowed ESPs to be treated as "end users" for purposes of applying access charges.⁸ In 1987, the Commission issued an NPRM to examine whether ESPs should commence paying access charges.⁹ The following year, it decided to retain the ESP exemption indefinitely, but

⁵ *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (subsequent history omitted) ("*Access Charge Order*").

⁶ *Id.* at ¶ 76 (emphasis added). The meaning of "ESP" is narrower than Internet service provider ("ISP"). For the purposes of Frontier's petition, there no need to distinguish between the two.

⁷ *Id.* at ¶ 83.

⁸ "End user" was defined in the Commission's rules as "any customer of an interstate or foreign telecommunications service that is not a carrier..." 47 C.F.R. § 69.2(m). IP-originated voice calls terminated on the PSTN are routed to a LEC by interconnecting carriers, which are responsible for the charges for their use of the PSTN.

⁹ *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987) ("*ESP NPRM*").

declined to make it "permanent."¹⁰ While the Commission noted its "concern that the charges currently paid by enhanced service providers may not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public," it nevertheless found extraordinary "regulatory and judicial events" justified giving the nascent "enhanced service industry" temporary financial favor and protection from BOCs competition, even if at the expense of "other users of exchange access."¹¹

A decade later, the Commission decided to retain the exemption for enhanced service providers. It explained that the exemption was based on the recognition that ESPs do not use the PSTN the same way as other carriers, even though they rely on the "incumbent LEC networks to receive calls from their customers."¹² The Commission thus declined to treat ESPs like carriers, because they do not use the PSTN like carriers. Early ESPs included Westlaw dedicated research terminals and automated teller machines, later followed by dial-up Internet service providers. The Commission recognized that their traffic is more like that of end-user business customers.¹³ That makes sense, because the ESP exemption covered only the connection between the ESP and its subscribers, not between the ESP and its non-subscribers.

Those justifications have never applied to IP-to-PSTN traffic, however. It would entirely inconsistent with the history of the exemption for it to apply to such calls. Indeed, when the Commission fashioned the exemption, it never intended it to cover any voice calls. Moreover,

¹⁰ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 at ¶¶ 2, 18 n.51 (1988) ("ESP Order").

¹¹ *Id.* at ¶ 1. Open Network Architecture Plans required in the *Computer III* proceeding had not yet been implemented, and the District Court overseeing the Bell System divestiture had modified the Modification of Final Judgment to allow the Bell Operating Companies ("BOCs") to enter the information service provider market.

¹² *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at ¶ 343 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("*Access Charge Reform Order*").

¹³ *Id.* at ¶ 345.

most of the entities that seek to avoid access charges through this misapplication of the ESP exemption are not ESPs. They are *telecommunications carriers* that serve as the connection between VoIP providers and terminating LECs. The ESP exemption plainly has never applied to *them*. Moreover, when those interconnecting carriers route an IP-originated call to Frontier for termination on the PSTN, it is no longer in IP technology. It has already been converted into TDM format, the transmission form used by all other voice calls on the PSTN.

Nevertheless, a growing number of interconnected VoIP providers, and interconnecting carriers, are stretching the ESP exemption to cover traditional voice traffic. This phone-to-phone traffic consists of real-time voice calls originating on IP-based systems and terminating on the PSTN. To end users, the interconnected VoIP services from which this traffic originates are direct substitutes for traditional voice service. Moreover, the IP-to-PSTN traffic uses local telecommunications networks in the same way as traditional voice traffic, and it is largely indistinguishable from traditional voice traffic.

Admittedly, there has been and continues to be much debate and litigation about the regulatory status of VoIP traffic generally, with some claiming that interconnected VoIP qualifies as an "information service,"¹⁴ and that this is true for all applications of VoIP technology. Frontier's petition here is not part of that debate. It does not prejudice or limit Commission action in the *IP Enabled Services* proceeding.¹⁵ In determining whether to grant this petition, the Commission need not address or determine whether VoIP services are

¹⁴ In light of the growth of local telecommunications competition, Frontier has advocated a lighter regulatory touch on new services and deregulating traditional ILEC services wherever possible.

¹⁵ See *IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP Enabled Services NPRM*").

information services. Nor does Frontier's petition impact any debate about the relative merits of IP-based technologies.

As explained below, however, use of IP technology does not render IP-to-PSTN voice calls "enhanced services." Even if one assumed they were, such calls still would not fall within the ESP exemption.¹⁶ Calls originating as interconnected VoIP use the PSTN no differently than any other voice traffic terminated on the PSTN.¹⁷ Carriers routing interconnected non-local VoIP calls to LECs for termination on the PSTN have always been subject to access charges. For the same reason, non-local IP-to-PSTN traffic cannot lawfully be routed through local interconnection trunks for purposes of reciprocal compensation under section 251(b)(5) of the Act.¹⁸ Nonetheless, some interconnected VoIP providers and their carrier partners are doing so in an attempt to justify refusing or threatening to refuse to pay access charges. Such regulatory arbitrage is harming competition and undermining the public interest.

The Commission can resolve these problems by forbearing from any application or enforcement of the ESP exemption to the extent it may be claimed to apply to IP-to-PSTN voice traffic.¹⁹ Forbearance would resolve the growing problem of access evasion by carriers of IP-to-PSTN voice traffic, and would reduce the disputes and problems that regulatory arbitrage engenders. It would maintain support for the PSTN on which IP and traditional traffic all depends. And it would promote critical investment in existing and new facilities, helping bring

¹⁶ Enhanced services are a subset of information services. *E.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Comms. Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 11230 at ¶ 103 (1996).

¹⁷ Access charges are assessed on interexchange carriers and competitive local exchange carriers under 47 C.F.R. § 69.5(b).

¹⁸ 47 U.S.C. § 251(b)(5).

¹⁹ Frontier files this petition pursuant to section 10 of the Telecommunications Act of 1996 and section 1.53 of the Commission's rules. 47 U.S.C. § 160(c); 47 C.F.R. § 1.53.

voice and broadband services to all Americans, particularly in rural areas that are most in need of infrastructure investment.

The Commission should take action on this matter now. A number of carriers are proposing sweeping changes in intercarrier compensation that would, like the flawed Missoula Plan and the more recent filings suggesting a rate of \$0.0007 for all terminating traffic¹⁰, create an enormous windfall for interexchange carriers by drastically lowering access charges. The windfall would be funded by equally enormous increases to the monthly rates and surcharges paid by end users, and in particular rural end users. Instead of using a meat-axe on access charges, the Commission should focus on the issues that are actually causing the problems in intercarrier compensation. One of the most significant problems is the claim by carriers terminating VoIP traffic to the PSTN that they are only obligated to pay interstate access charges for intrastate calls, or that they are not obligated to pay any access charges at all. By focusing on the roots of the intercarrier compensation issue, the Commission will be able to shrink the size of the problem.

¹⁰ *E.g.*, Ex Parte filings by AT&T (Sept. 11, 2008) and Verizon (Sept. 12, 2008) in CC Docket No. 01-92, which propose a reduction of access charges to \$.0007 per minute. The Verizon plan would fund the reduction by increases in end user monthly rates, Subscriber Line Charges and Universal Service Surcharges.

**II. THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE
ESP EXEMPTION FOR IP-ENABLED VOICE CALLS TERMINATED
TO THE PSTN.**

**A. Under Existing Law, IP-to-PSTN Voice Calls Are Subject
to Access Charges.**

**1. The Commission's Access Charge Rules Govern All Voice
Traffic Connected to the PSTN.**

The Commission created the access charge system so that LECs could "recover the costs" associated with originating and terminating non-local telecommunications traffic for other service providers.²¹ LECs were then, and still are, required to look to other carriers for compensation to help cover the high costs of fulfilling government mandates to build local networks ubiquitously and provide service at averaged, affordable rates. Under Commission regulations, LECs collect access charges whenever non-local traffic uses the PSTN. As a general matter, access charges apply to *all* non-local traffic. The ESP exemption is a narrow *exception* to the access rule.

Access charges were always meant to be broadly applied, and for good reason. They are critical for ILECs to recover the full costs of providing ubiquitous local networks as required by carrier-of-last-resort mandates – rules that make ILECs the only telecommunications carriers that must build network where it is uneconomical to do so. Carriers serving rural areas, like Frontier, are particularly dependent on access charges for revenue critical to maintain and invest in their networks. Without such networks, and without continued investment in them, services and capabilities for consumers would progressively degrade. Congress has reiterated its continued commitment to voice service nationwide, and it has directed the Commission to promote network

²¹ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Red 12962 at ¶ 130 (2000) ("CALLS Order").

investment to further deploy broadband services in low density, high-cost service territories where consumer need is most acute.²¹

The Commission disfavors rules that would discriminate in favor of one technology over another, when both use the PSTN the same way. In the long-pending *IP Enabled Services* proceeding, the Commission reiterated that “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”²² It is entirely appropriate, the Commission explained, that the “cost of the PSTN should be borne equitably among those that use it in similar ways.”²⁴ The Commission should forbear from any extension of the ESP exemption to IP-to-PSTN traffic, because such an extension would violate the principle of competitive neutrality.

2. The ESP Exemption Does Not and Should Not Extend to IP-to-PSTN Voice Traffic.

The Commission has explained that the ESP exemption was created because ESPs do not use the PSTN the same way as other carriers. ESPs should not be treated the same as carriers “solely because [they] use incumbent LEC networks to receive calls from their customers.”²³ In the late 1990s, after fifteen years of dramatic “evolution in ISP technologies and markets since we first established access charges,” the Commission again decided to retain the exemption. It declined to treat ESPs like carriers, because, in the Commission’s words, they do not “use the public switched network in a manner analogous to IXCs.” Instead, “characteristics of ISP traffic

²¹ 47 U.S.C. 157 nt.

²² *IP Enabled Services NPRM* at ¶ 61.

²⁴ *Id.*

²⁵ *Access Charge Reform Order*, 12 FCC Rcd 15982 at ¶ 343.

(such as large numbers of incoming calls to Internet service providers)” make them more like “other classes of business customers.”²⁶

In upholding the Commission’s order, the Eighth Circuit highlighted the cornerstone of the exemption. ESPs “do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.”²⁷ While two types of service providers “use the LEC network services and facilities that might be ‘technologically identical,’” the exemption was not unreasonably discriminatory. “[T]he services and facilities provided by the LEC are ‘distinct’ if the carriers are making different uses of them.”²⁸

This distinction in use was also evident when the Commission decided that Pulver.com’s Free World Dialup (“FWD”) was an information service.²⁹ The Commission recognized that FWD and similar peer-to-peer services do not use LEC facilities in the same way as IP-to-PSTN or traditional voice services. FWD does not provide any “transmission” service. Moreover, because it requires a broadband connection at both ends, it technically does not contact the PSTN on either end of the call. Notably, FWD users cannot make calls to telephones on the PSTN.

IP-to-PSTN voice services are altogether different from services to which the ESP exemption legitimately has been applied. The Commission has never intended the ESP exemption to apply to IP-to-PSTN voice services. Indeed, it would be wholly inconsistent with the full history of the ESP exemption to stretch it to encompass such voice services.

²⁶ *Id.* at ¶ 345.

²⁷ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

²⁸ *Id.* at 542. *See also id.* at 544 (noting the exemption applies to “ISPs that ... utilize the local networks differently” than carriers).

²⁹ *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

Interconnected VoIP services are purely substitutes for more traditional LEC services.

Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any network provider. For such traffic, the ESP exemption should not apply, and the Commission should remove confusion and opportunities for regulatory arbitrage by forbearing from any application of the ESP exemption to such traffic.

3. Interconnected VoIP Is Functionally No Different Than More Traditional Voice Services Supported by the PSTN.

Interconnected VoIP service is functionally the same as traditional LEC voice service.

The vast majority of such VoIP services today are indistinguishable to consumers from traditional telephone services. Whether the provider markets its services as "VoIP" – or as digital phone, Internet calling, or any other label – the service is intended and is understood as a substitute for traditional voice services provided by LECs.

It makes no difference whether an interconnected VoIP provider may offer other "integrated" services, such as call forwarding, networking, voice mail, or unified messaging. LECs offer or are developing many of the same features. The inherent nature of an IP-to-PSTN service is not altered simply because it is offered with additional features. The core functionality of interconnected VoIP service is the ability of a customer to have a real-time voice conversation with a customer of another service provider on the PSTN.

Indeed, when a LEC receives an IP-to-PSTN call, that call is no different than a call that originates on any traditional LEC-served telephone connected to the PSTN. It makes no difference whether or not an interconnected VoIP provider tracks the point where its IP-to-PSTN call originated. It makes no difference whether the IP-originated caller is fixed or nomadic.