

Fundamentally, interconnected VoIP is functionally no different from traditional LEC voice service.

Given that interconnected VoIP functionality is no different than traditional services, interconnected VoIP providers cannot fairly claim the ESP exemption entitles them to a regulatory advantage over competitors simply based on their choice of technology in originating a voice call. They "utilize LEC services and facilities in the same way [and] for the same purposes as other customers" subject to access charges.³⁰ Interconnected VoIP traffic imposes the same burden on the PSTN, and uses the same facilities, as more traditional telephone traffic. Consequently, companies sending IP-to-PSTN traffic to LECs should expect to contribute their full share to support the PSTN – support that is critical to maintain and extend the network deployment on which all traffic depends, especially for consumers in rural areas where broadband investment is most difficult to justify.

IP-to-PSTN calling accounts for a large and growing percentage of traffic on the PSTN. The Commission can use its forbearance authority to ensure the ESP exemption is not misapplied by competitors that would ultimately shortchange consumers by hampering investment in the PSTN.

B. Providers Are Over-Extending Claims to the ESP Exemption, Which Is Creating too Many Disputes and Threatening Needed Investment in Local Networks.

It is widely known that IP-originated voice traffic has been growing dramatically. IP-telephony is rapidly becoming the standard in the enterprise market. In the mass market, cable-based voice service providers, which generally use IP technology in their networks, had 12.1

³⁰ *Southwestern Bell Tel. Co.*, 153 F.3d at 542.

million residential customers as of June 2007, up 60% from the year before – and up from 2.1 million in June 2002.³¹ Cable-originated voice traffic will continue to rise sharply, as cable telephony services are now available to more than three quarters of all homes in America. Over-the-top VoIP services have grown rapidly, as well. Vonage alone reported 2.2 million subscribers at year-end 2006, up 75% from 2005.³² Cable and other VoIP competitors together are gaining residential customers at a rate of 4 to 4.5 million annually; cable/VoIP telephony market share is expected to reach 25% by 2010.³³ In addition, a growing percentage of long distance providers (especially in the prepaid card market) are using IP in their services.

Today, most carriers delivering IP-to-PSTN voice traffic have been paying access charges.³⁴ In fact, like many ILECs, Frontier has had signed interconnection agreements with many carriers that provide interconnected VoIP services, and they include commitments to pay access charges on that traffic. Increasingly, however, some carriers are disputing access charges (particularly intrastate charges) for what they claim are VoIP-originated calls, arguing that the ESP exemption may justify failing to pay access charges. Plainly, as VoIP-originated traffic has grown, access evasion and misapplication of the ESP exemption have become a serious problem and a growing risk for LECs and the PSTN. Like other LECs, Frontier is concerned about

³¹ See National Cable & Telecoms. Ass'n, *Residential Telephony Customers 2001-2006*, available at <http://www.ncta.com/ContentView.aspx?contentId=61>.

³² Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2006 Results* at Table 2 (Feb. 15, 2007).

³³ See M. Rollins & E. Schmitz, Citigroup Global Markets – Equity Research, *Telecom Update – Consumer Wireline Focus: Triple-Play Urgency Rising for Telcos as Share Erosion Continues* (Dec. 9, 2007) at 4, 7.

³⁴ In recent years, major cable network operators, and the carriers that work with them, had consistently agreed to apply access charges to IP-to-PSTN calls delivered to Frontier. Similarly, Frontier believes that most enterprise VoIP traffic properly had been handled properly. With the growth in VoIP-originated calling, however, even formerly responsible carriers are now trying to misuse the ESP exemption.

declines in critical access revenues throughout its local service territories – not just attributable to access line loss. Terminating access minutes of use appear to be falling more than access lines.

Reciprocal compensation arrangements are not a substitute for proper access treatment of non-local voice calls. In fact, beyond leading to shortfalls in access charge payments, misapplication of the ESP exemption even threatens to distort reciprocal compensation payments against ILECs. The Commission established a presumption that traffic that exceeds a three-to-one, originating-to-terminating ratio is ISP-bound and eligible for lower intercarrier compensation rates (e.g., \$0.0007/minute).³⁵ Consequently, when CLECs wrongly claim the ESP exemption and terminate non-local IP-originated voice access traffic over local interconnection arrangements, they benefit from regulatory arbitrage. Mischaracterizing access traffic as originating local traffic also reduces the ratio of ILEC-originated minutes to CLEC-originated minutes. This triggers higher reciprocal compensation rates and thus inflates the reciprocal compensation payments owed by the ILEC to the interconnecting CLEC.³⁶

Inevitably, Frontier and other LECs have been involved in a growing number of disputes with other carriers about applicability and enforcement of access charges.³⁷ For Frontier and LECs nationwide, widespread access evasion is causing a decline in terminating access revenues. Self-serving over-extension of the ESP exemption by interconnected VoIP providers and their carriers is at the center of that problem.

³⁵ *Implementation of the Local Competition Provisions in the Telecoms. Act of 1996; Intercarrier Compensation for ISP Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Remand Order").*

³⁶ *Id.* at ¶ 79.

³⁷ In a recent dispute, for example, a carrier that provides interconnected VoIP services wrongly asserts that where voice calls are "VoIP transmissions rather than circuit-switched telephone calls, your company is not entitled to collect access charges on these calls."

C. The Commission Should Use its Forbearance Authority to Ensure the ESP Exemption Is Not Misapplied to the Detriment of Consumers and Competition.

In recent years, several disputes have been brought to the Commission about voice calls on the PSTN that were transmitted in IP at some prior point. For example, in 2002, AT&T Corp. sought a declaratory ruling that its self-styled "phone-to-phone IP telephony services" were within the ESP exemption.³⁸ In 2004, after unilaterally withholding access charges, VarTec Telecom petitioned for a declaratory ruling that it had no duty to pay access charges on calls routed from "ESPs" or IP-based carriers.³⁹ In 2005, after a federal court deferred the issue to the Commission,⁴⁰ SBC filed a related petition seeking confirmation that the ESP exemption does not apply to traffic that merely transits an IP network somewhere in the call path.⁴¹ In 2005, Frontier filed for a declaratory ruling that USA DataNet was obligated to pay originating access charges on Feature Group A services provided for the origination of interLATA voice calls.⁴² Also in 2005, Grande Communications petitioned for a declaratory ruling seeking to confirm its

³⁸ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002). The Commission denied the petition. *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).

³⁹ *Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination*, WC Docket No. 05-276 (filed Aug. 20, 2004); *withdrawal granted by Order*, 22 FCC Rcd 5603 (Mar. 29, 2007).

⁴⁰ The court dismissed without prejudice SBC's claims for access charges due on long distance calls transported using IP technology. *Southwestern Bell Tel. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, 2005 U.S. Dist. Lexis 26166 (E.D. Mo. Aug. 23, 2005). The defendants included VarTec, UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., UniPoint Holdings, Inc., Transcom Communications, Inc., and Transcom Holdings, LLC.

⁴¹ *Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Sept. 21, 2005).

⁴² *Petition for Declaratory Ruling that USA DataNet Corp. is Liable for Originating Access Charges when it Uses Feature Group A Dialing to Originate Long Distance Calls*, WC Docket No. 05-276 (filed Nov. 23, 2005; *withdrawal granted Mar. 28, 2007*).

view that interconnecting carriers may simply “self-certify” whether the traffic they carry is subject to access charges, assuming (wrongly) that IP-originated voice telephony is subject to the ESP exemption.⁴³

The Commission has also received forbearance petitions seeking to expand the ESP exemption. In 2003, Level 3 Communications asked the Commission to “forbear from enforcing its governing statute and rules to the extent that they could be interpreted to permit [LECs] to impose interstate or intrastate access charges on [IP-to-PSTN] traffic.”⁴⁴ Level 3 withdrew the petition when it became clear it would be denied, and the Commission lost an opportunity to affirm that the ESP exemption does not apply to IP-to-PSTN voice calls.

More recently, Feature Group IP filed essentially the same request as Level 3.⁴⁵ Citing its long-running state arbitration dispute with AT&T in Texas, Feature Group IP asked the Commission to forbear from enforcing access charges on IP-to-PSTN voice traffic, plus “incidental” PSTN-to-PSTN traffic (which may or may not have been converted to “IP-in-the-middle” traffic). It cites to what it calls “current legal uncertainty” over the applicability of access charges to IP-to-PSTN traffic. The Act and the Commission’s rules, Feature Group IP contends, “make[] clear that [IP-to-PSTN] traffic is *not* to be subjected to access charges.”⁴⁶

Needless to say, Frontier absolutely disagrees with Feature Group IP’s legal and policy arguments. Clearly, such false assumptions about the ESP exemption are a real and growing

⁴³ *Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated Traffic*, WC Docket No. 05-283 (filed Oct. 3, 2005).

⁴⁴ *Level 3 Communications LLC’s Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission’s Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (filed Dec. 23, 2003).

⁴⁵ *Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)*, WC Docket No. 07-256 (filed Oct. 23, 2007) (“*Feature Group IP Petition*”). Public Notice, DA No. 07-5029 (rel. Dec. 18, 2007).

⁴⁶ *Id.* at iv (emphasis in original).

problem. The disputes that have prompted these and other filings underscore the need to grant Frontier's petition.

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).

Forbearance here involves three parts. The Commission should (1) forbear from enforcing the ESP exemption, as adopted by Commission orders, and (2) section 69.5(a) of its rules to IP-originated voice traffic that terminates to the PSTN. Finally, the Commission should (3) forbear from enforcing 47 U.S.C. section 251(b)(5) to provision to non-local traffic terminated as voice traffic on the PSTN.

The ESP exemption is not codified. It is a creation of Commission policy, adopted, continued, and acknowledged in Commission orders. Accordingly, the Commission should expressly forbear from the 1983 *Access Charge Order*, the 1988 *ESP Order*, the 1997 *Access Charge Reform Order*,⁴⁷ and any subsequent orders that acknowledge or apply the exemption, to the extent language in those orders might be interpreted to justify applying the ESP exemption to IP-to-PSTN voice traffic.

Section 69.5(a) of the Commission's rules creates a separate class of access charges for "end users," as distinct from carriers governed by section 69.5(b). The Commission should forbear from allowing any application or enforcement of section 69.5(a) 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).

⁴⁷ *Access Charge Reform Order*, 12 FCC Red 15982 at ¶ 345.

Section 251(b)(5) establishes carriers' duty to establish reciprocal compensation arrangements. The Commission should forbear from application or enforcement of section 251(b)(5) where any service provider might claim its non-local IP-to-PSTN traffic is subject to reciprocal compensation.

III. FORBEARANCE STANDARDS ARE MET.

Section 10 of the Act provides:⁴⁸

[T]he Commission shall forbear from applying any regulation or any provision of the Act ... if the Commission determines that (1) enforcement ... is not necessary to ensure that the charges ... are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement ... is not necessary for the protection of consumers; and (3) forbearance ... is consistent with the public interest.

When the three statutory elements of section 10 are satisfied, the Act requires the Commission to forbear from applying or enforcing the regulation. Frontier's petition readily meets those standards.

A. The ESP Exemption Is Not Necessary to Ensure Just and Reasonable and Nondiscriminatory Charges.

The ESP exemption is not necessary to ensure that imposition of terminating access charges "are just and reasonable and are not unjustly or unreasonably discriminatory."⁴⁹ First, the Commission itself created the current access charge regime. It concluded that the access charge system is fair and reasonable. The system includes a limited exemption for ESPs, but it was never extended to IP-to-PSTN voice calls. The Commission has always intended that "cost

⁴⁸ 47 U.S.C. § 160(a).

⁴⁹ 47 U.S.C. § 160(a)(1).

of the PSTN should be borne equitably among those that use it in similar ways.”⁵⁰ It would be unjust and unreasonable, and most certainly discriminatory, if IP-originated voice traffic did not contribute the same per-minute support to the PSTN that traditional voice services do. This is particularly true given that they compete directly against one another. Granting Frontier’s petition would reinforce a system the Commission found just and reasonable. It would not subject any providers to unjust or unreasonable, or discriminatory charges.

Second, the Commission determined appropriate access charges. In the *CALLS Order*, it concluded that those charges were “just and reasonable.” It cited the “long-standing policy to require, to the extent possible, rate structures to reflect the manner in which carriers incur cost.”⁵¹ The *CALLS plan*, it concluded, “reduces, and in most instances eliminates implicit subsidies among end-user classes; makes implicit universal service funding in access charges explicit and portable, [and] provides significant benefits to consumers who make few or no long distance calls.”⁵² It found that today’s access charge system “is 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.”⁵³ Granting Frontier’s request for forbearance, therefore, would simply restore compliance with the long-standing, reasonable intercarrier compensation system, at least until such time as the Commission completes comprehensive intercarrier compensation and universal service reform.

Third, over-extension of the ESP exemption under-compensates ILECs for use of the PSTN by overstating traffic subject to reciprocal compensation. Non-local IP-to-PSTN voice

⁵⁰ *IP Enabled Services NPRM* at ¶ 61 (emphasis added).

⁵¹ *CALLS Order*, 15 FCC Red 12962 at ¶ 129.

⁵² *Id.* at ¶ 29.

⁵³ *Id.* at ¶ 129.

traffic is increasingly being routed over local interconnection trunks to avoid terminating access. As a result of this regulatory arbitrage, ILECs are improperly denied access revenues for terminating competitors' non-local voice calls. At the same time, ILECs that opted into the *ISP Remand Order*,⁵⁴ like Frontier, are forced to over-pay reciprocal compensation to those same competitors, because the arbitrage inflates ILEC-originated minutes below the three-to-one ratio presumed for ISP-bound traffic. Granting Frontier's petition would minimize this abuse, end this discriminatory treatment toward IP-originating voice traffic, and improve compliance with just and reasonable rates and terms necessary to support the PSTN.

Finally, forbearance actually will promote just and reasonable and nondiscriminatory charges, because regulatory arbitrage discriminates against customers of non-IP based providers. Forbearance would reduce the unfair discrimination currently directed toward carriers with non-IP originated voice calls. "[O]ne of the FCC's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications."⁵⁵ It is unreasonable to discriminate against traditional carriers, by making them contribute terminating access charges on non-local traffic, when interconnected VoIP providers claim exemption for their non-local calls terminated on the PSTN. Forbearance would reduce discrimination, by reiterating that all service providers are subject to the same rules.

⁵⁴ *ISP Remand Order*, 16 FCC Rcd 9151 at ¶¶ 8, 79.

⁵⁵ *Id.* at ¶ 36 n.63, citing *NARUC v. FCC*, 737 F.2d 1095, 1101-1108, 1130-43 (D.C. Cir. 1984).

B. The ESP Exemption Is Not Necessary to Protect Consumers.

Misapplying the ESP exemption to IP-to-PSTN traffic certainly is not necessary to protect consumers.⁵⁶ Allowing 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. Ultimately, their benefit is possible only by forcing other carriers and their consumers to subsidize VoIP calls terminating on the PSTN, a situation that the Commission has never suggested it intended and which would be arbitrary and unreasonable given the competitive environment and declining ILEC access lines.

Frontier recognizes that intercarrier compensation reform is needed. For that reason, Frontier is part of the Missoula reform coalition.⁵⁷ Intercarrier reform, however, must proceed holistically and comprehensively. Extending the ESP exemption to IP-to-PSTN voice calls, as some VoIP service providers and carriers seek to do, is a self-evidently piecemeal approach, and one the Commission never intended in the first place. It would be wholly unreasonable – indeed, arbitrary and capricious – to alter one component (access charges for IP-originated calls) of an inextricably interrelated web of intercarrier compensation and universal service funding issues.

Ultimately, consumers would be harmed if forbearance is not granted and carriers continue to stretch the ESP exemption to IP-to-PSTN calls. Until the Commission completes and implements comprehensive intercarrier compensation and universal service reform, access charges remain necessary so that ILECs can operate and maintain their carrier-of-last-resort

⁵⁶ 47 U.S.C. § 160(a)(2).

⁵⁷ See *Missoula Intercarrier Compensation Reform Plan*, attached to Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Jul. 24, 2006).

networks – networks over which *all* applications flow. With the decline in access revenues caused by over-extension of the ESP exemption, inevitably ILECs will be compelled to raise their charges, where possible, to recover those lost revenues. Price caps⁵⁸ limit Frontier's ability to recover those lost access revenues from other customers, but LECs necessarily will have to shift these legitimate costs to carriers that do pay terminating access and to customers of other services. That harms most consumers and undermines investment in the PSTN.

Indeed, the impact of such IP-to-PSTN access avoidance would be most acute in high cost, rural areas, where the costs of maintaining and upgrading the network are highest and where ILECs are most dependent on access charge revenues to compensate for carrier-of-last-resort mandates.⁵⁹ To the extent rural carriers do not recover these lost revenues, the burden on the universal service high cost fund may have to increase – which increases the burden on all consumers. Further, any access evasion based on interconnected VoIP's supposed eligibility for the ESP exemption forces LECs to reduce investment in their networks, frustrating deployment of advanced services and to the particular detriment of rural consumers.⁶⁰

Granting forbearance would avoid all these consumer harms. It will help ensure IP-enabled voice calls contribute their fair share of the cost of the PSTN, for the benefit of all the nation's consumers.

⁵⁸ *Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786 (1990); Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd. 2637 (1991).*

⁵⁹ Some service providers had used the same rationale to justify failure to contribute to universal service, which undermined the viability of the fund. The Commission resolved that issue by extending support obligations to Internet service providers.

⁶⁰ It would be ironic if over-extension of the ESP exemption by some VoIP providers were allowed to prevent the high speed data deployment in rural areas. Rural consumers lacking access to broadband services would be obliged to subsidize VoIP providers and consumers.

**C. Forbearance from the ESP Exemption on IP-to-PSTN
Voice Traffic Is in the Public Interest.**

Forbearance from any application of the ESP exemption to IP-to-PSTN voice traffic is in the public interest. It would promote and enhance competition by ensuring a level playing field among service providers. It would reduce regulatory arbitrage and disputes. It would help maintain investment in the PSTN, especially in rural areas, by helping ensure that some providers cannot free-ride on the PSTN and leave LECs undercompensated for use of their networks.

1. Forbearance Would Promote and Enhance Competition.

Section 10 provides that the Commission, in making its public interest review, "shall consider whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services..."⁴¹

The public interest, the Commission has found, requires "competitively neutral" rules.⁴² This was true when the Commission mandated equal support for universal service, and for disability support, and for E911 capabilities. The same is true for support of the PSTN through uniform application of access charges. "VoIP services increasingly substitute for traditional phone service," and "much of the appeal of [interconnected VoIP] services to consumers derives

⁴¹ 47 U.S.C. § 160(b).

⁴² In the context of universal service support, the Commission has said competitive neutrality means "neither unfairly advantag[ing] nor disadvantag[ing] particular service providers or ... technologies" in the application of Commission rules. *Federal-State Joint Bd. on Universal Service*, Report and Order, 12 FCC Rcd 8776 at ¶ 47 (1997), *Errata*, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000) ("*Federal-State Joint Bd. Order*").

from the ability to place calls to and receive calls from the PSTN.”⁶³ Interconnected VoIP providers, “like telecommunications carriers, have built their business, or a part of their business, on access to the PSTN,”⁶⁴ and they “are dependent on the widespread telecommunications network for the maintenance and expansion of their business” and “directly benefit[] from a larger and larger network.”⁶⁵

It is essential that “disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.”⁶⁶ 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.”⁶⁷

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

⁶³ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Red 7518 at ¶ 43 (2006), *aff’d in rel. part, Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) (“*USF Contribution Order*”). See also *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Red 10245 at ¶ 23 (2005) (“*VoIP 911 Order*”) (emphasizing that consumers expect interconnected VoIP services to work much “like a ‘regular telephone’”).

⁶⁴ *USF Contribution Order*, 21 FCC Red 7518 at ¶¶ 43, 35.

⁶⁵ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000).

⁶⁶ *Federal-State Joint Bd. Order*, 12 FCC Red 8776 at ¶¶ 48, 49.

⁶⁷ *Deployment of Wireline Servs. with Advanced Telecoms. Capability*, Order on Remand, 15 FCC Red 385 at ¶ 12 (2000).

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 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.⁴⁸ The Commission does not need to address that issue here. Frontier's petition addresses a different and far narrower issue: ensuring the ESP exemption is not misapplied to IP-to-PSTN voice calls.

⁴⁸ 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).

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."⁶⁹ 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.⁷⁰ For Frontier, it 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.⁷¹

⁶⁹ *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).

⁷⁰ The Commission described examples of access charge avoidance as regulatory arbitrage in its most recent NPRM on Intercarrier Compensation. *See Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 at ¶ 12 (2001).

⁷¹ *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*").

It has issued rulings confirming that IP-in-the-middle is not within the ESP exemption,⁷² and that advertisements inserted into prepaid card announcements do not render calling card voice traffic “enhanced services” for purposes of universal service contributions.⁷³ It acted to end regulatory arbitrage in CLEC access rates.⁷⁴ It adopted the “parent trap” rule to discourage carriers from transferring exchanges simply to increase high-cost universal service support.⁷⁵ 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.”⁷⁶ Frontier’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 a network capable of serving virtually

⁷² *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).

⁷³ *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).

⁷⁴ *CLEC Access Charge Reform Order*, 16 FCC Rcd 9923.

⁷⁵ *Federal-State Joint Bd. Order*, 12 FCC Rcd at 8942-43.

⁷⁶ 47 U.S.C. § 157 nt.

any customer. IP-to-PSTN access arbitrage denies ILECs revenue that they need to maintain and upgrade their networks.⁷⁷

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 Frontier) 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 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

⁷⁷ 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.

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

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.

Frontier therefore respectfully requests that the Commission grant Frontier the same relief requested by the Embarq Local Operating Companies in WC Docket No. 08-08, and that Frontier receive relief at the same time as the Commission may grant forbearance to Embarq. 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.

Respectfully submitted,

Kenneth F. Mason
VP – Government and Regulatory Affairs

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Date: September 25, 2008

VIA UPS OVERNIGHT DELIVERY

September 25, 2008

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

**Re: 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-_____**

Dear Ms. Dortch:

Enclosed find an original and four (4) copies of the Frontier Local Operating Companies' Petition for Forbearance in the above matter.

Please indicate your receipt of the above filing by date-stamping the enclosed photocopy of the cover letter and returning it in the post-paid return envelope I have provided.

Respectfully submitted,

Gregg C. Sayre
Associate General Counsel –
Eastern Region

GCS/hmj
Encl. (original + 4)

cc: Best Copy and Printing, Inc. (via overnight delivery)

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **PETITION FOR FORBEARANCE** to be: 1) filed in hard copy with the Office of the Secretary of the FCC; and 2) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/Ross Dino _____

December 10, 2008