

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
FeatureGroup IP)
)
Petition for Forbearance Pursuant to)
47 U.S.C. § 160(c) from Enforcement)
of 47 U.S.C. § 251(g), Rule 51.701(a)(1),)
and Rule 69.5(b))

WC Docket No. 07-256

**FEATUREGROUP IP'S
MOTION FOR RECONSIDERATION**

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MOTION FOR RECONSIDERATION

Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp. d/b/a FeatureGroup IP, Feature Group IP North LLC, and Feature Group IP Southeast LLC, (collectively “FeatureGroup IP”), through its attorneys, petitions the Commission for reconsideration of its Memorandum Order and Opinion¹ denying FeatureGroup IP’s petition for forbearance (the “Forbearance Petition”). This Motion for Reconsideration is submitted pursuant to 1.106 of the Commission’s rules, 47 C.F.R. § 1.106.

**I.
SUMMARY**

Reconsideration Point 1: Under 47 C.F.R. § 1.106(c)(1), incorporating § 1.106(b)(2)(i) and (ii) and 1.106(c)(2), the Commission should reconsider its *Order* due to subsequent events including the reliance by certain ILECs on the Commission’s *Order* to justify charging access for voice-imbedded Internet communications.

Reconsideration Point 2: Under *AT&T v. FCC*, 452 F. 3d 830, 839 (D.C. Cir. 2006), *citing Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (vacating because challenged orders inconsistent with prior and subsequent agency action), the Commission should reconsider its *Order* because the Commission’s *Order* is inconsistent with prior agency action.

¹ Memorandum Opinion and Order, *In the Matter of FeatureGroup IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)*, WC Docket 07-256, FCC 09-3, ___ FCC Rcd. ___ (rel. Jan. 21, 2009) (“*Order*”).

Reconsideration Point 3: Under 47 C.F.R. 1.106(d)(1) and (2), the Commission should reconsider its *Order* because the *Order* at paragraph 6 incorrectly recites the arguments of the Forbearance Petition and the state of the law.

Reconsideration Point 4: Under 47 C.F.R. 1.106(d)(1) and (2) and *AT&T v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006), the Commission should reconsider its *Order* because the *Order* unjustifiably sidesteps ruling on the Forbearance Petition in preference for a long-overdue proposed rule making and ignores Congress's statutory mandate under 47 U.S.C. § 160 with respect to "non-IP in the middle" access charges.

Reconsideration Point 5: Under 47 C.F.R. 1.106(d)(1) and (2) and *AT&T v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006), the Commission should reconsider its *Order* because the *Order* unjustifiably sidesteps ruling on the Forbearance Petition in preference for a long-overdue proposed rule making and ignores Congress's statutory mandate under 47 U.S.C. § 160 with respect to access charges between two exchange access providers.

Reconsideration Point 6: Under 47 C.F.R. 1.106(d)(1) and (2) and *AT&T v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006), the Commission should reconsider its *Order* because the *Order* imposes unsupported evidentiary standard that economic impact is limited to ILECs access revenues instead of the public interest and that economic impact is capable of proof even in hypothetical, forward-looking forbearance in violation of the mandate contained in 47 U.S.C. § 160.

II. **ANALYSIS**

1. As the Petitioner, FeatureGroup IP was a party to the proceeding. *Cf.*, 47 F.R.R § 1.106(b)(1). FeatureGroup IP was adversely affected by the action taken in the *Order* because the FCC denied relief that directly affects FeatureGroup IP's rights. 47 C.F.R. § 1.106(b)(1).

2. The Forbearance Petition presented two questions. First, do access charges apply to voice-embedded Internet communications? If so, does FeatureGroup IP met the § 10 criteria for forbearance from any rules or statutory provisions that exist that allow ILECs to charge access to *FeatureGroup IP* – a joint access provider?

3. The Commission plainly erred when it failed to answer the first question. It committed arbitrary and capricious error because did not even discuss the second. FeatureGroup IP's petition for forbearance did not ask for forbearance from access on all voice-embedded Internet communications. It sought forbearance from any rules or statutory provisions that

would allow an ILEC to assess access charges against FeatureGroup IP.² The *Order*, devoid of explanation, denied relief that was not sought and it did not either grant or deny the relief that was sought.

A. Reconsideration Point 1:

4. Reconsideration is warranted, and the *Order* should be reconsidered and changed to grant relief, based on facts that arose after the *Order* was issued. These facts were not previously presented to the Commission because they had not yet occurred. Therefore FeatureGroup IP could not have known about or presented these matters through the exercise of ordinary diligence. As will be shown below, the public interest demands that these facts be considered – for if they are not then the issue the Commission has so assiduously tried to preserve but yet not decide will effectively be resolved in the ILECs’ favor. *See* 47 C.F.R. § 1.106(c)(1), incorporating § 1.106(b)(2)(i) and (ii) and 1.106(c)(2).

5. FeatureGroup IP predicted in a filing before the *Order* that the ILECs would interpret a denial of forbearance as confirmation of their position that access charges apply to “voice-embedded Internet communications.”³ Although the *Order* recites that the Commission is not making any “decision on or findings in this Order concerning the current compensation rules for these types of communications, which are the subject of a pending rulemaking in the current *Intercarrier Compensation* proceeding,” a mere six days after the *Order* was issued, AT&T filed a pleading⁴ in a Texas PUC post-interconnection agreement dispute case arguing that the Texas

² *See*, Petition p. 10-11; FeatureGroup IP Reply Comments, pp. 11, 12, 13-16, 29-31, 34. FeatureGroup January 12, 2009 *ex parte* pp. 5, 6.

³ *See* FeatureGroup IP written *ex parte*, Declaration of Lowell Feldman, p. 2 [“FeatureGroup IP deserves a decision on the question. A ‘non’ decision denying relief on “procedural” grounds that attempts to dodge the question may allow the Commission to avoid a hard question, but in the real world a non-decision will be spun (right or wrong) by the ILECs as a decision that they won and access does apply. They are already filling the regulatory void caused by inaction and surely no one could reasonably think they will change their tactics.”]

⁴ The AT&T Texas pleading is attached hereto as Exhibit “A”.

PUC should view the *Order* as the FCC's conclusion that access charges are due. To date, AT&T has billed FeatureGroup IP over \$7.5 million in access charges for voice-embedded Internet communications that came from FeatureGroup IP's ESP customers that were handed off to AT&T Texas for termination. AT&T Texas has asked the Texas Commission to require FeatureGroup IP to escrow this money or to allow AT&T Texas to cancel the interconnection agreement and take down the interconnection trunks between FeatureGroup IP and AT&T Texas.⁵

6. AT&T Texas argued to the Texas Commission on pages 1-3 of its recent pleading that "the FCC's rejection of UTEX's arguments in support of its forbearance petition, illustrates the importance of interpreting the parties' interconnection agreement to require compensation for the services that AT&T Texas provides to UTEX in terminating its traffic. . . . These FCC findings effectively determine that allowing UTEX to avoid liability for switched access charges would be (1) unjust and unreasonably discriminatory, (2) harmful to consumers, and (3) not in the public interest. If the interconnection agreement between UTEX and AT&T Texas were interpreted to permit UTEX to avoid liability for access charges, it would violate essentially these same criteria. For these reasons alone, the Commission should reject UTEX's strained and incorrect interpretation of its interconnection agreement. . . . The FCC's Order of last week indicates that for the UTEX interconnection agreement to be non-discriminatory and in the public interest, it must be interpreted to require UTEX to pay switched access charges for terminating long-distance traffic."

7. AT&T claims that FeatureGroup IP owes AT&T access charges for terminating voice-embedded Internet communications in Texas even though the agreement between the

⁵ FeatureGroup IP written *ex parte*, Declaration of Lowell Feldman, p. 2.

parties expressly says in § 1.4.1 of Attachment 12: Compensation that “No compensation is due or payable to either Party for traffic that is destined for or received from an Enhanced Service Provider (“ESP”) as defined in section 53.7 of the general terms and conditions of this Agreement.”

8. The parties specifically agreed to a mutual waiver of § 251(b)(5) reciprocal compensation as is allowed by § 252(d)(2)(B)(i). It is not possible to have a clearer recognition that traffic *from* the Internet handled by two joint provider LECs is subject to § 251(b)(5) in the same way that traffic *to* the Internet handled by two joint provider LECs is and always was subject to § 251(b)(5). “The transport and termination of *all telecommunications exchanged with LECs* is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”⁶ “Here, however, the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as ‘there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.’ As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).”⁷ There is no logical, technical or legal difference between traffic that originated on the PSTN and goes to an Information service Provider (“ISP”) and traffic that flows from an ISP and goes to a point on the PSTN. The ISP in both instances is providing an enhanced/information service, and the so-called “ESP Exemption” applies. The ESP is not subject to access charges from either of the two LEC that jointly handle the call. And one LEC can deem the other LEC an “access customer” because as between the two LECs there

⁶ Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High Cost Universal Service Reform; 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*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, FCC 08-262, ¶ 16, 2008 FCC LEXIS 7792 *23 (rel. Nov. 5, 2008) (“*Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order.*”)

⁷ *Id.* ¶15, 2008 FCC LEXIS 7792 *24.

is no “telephone toll service” and neither LEC is an “interexchange carrier” for purposes of 47 C.F.R. § 69.5(b).

9. Yet AT&T claims entitlement to access charges. AT&T it has sued FeatureGroup IP for \$7.5 million. And it has asked the Texas PUC to require FeatureGroup IP to escrow the money and to allow AT&T to cut off FeatureGroup IP and all of its customers if this is not done. More importantly, AT&T is now telling the Texas Commission that the FCC’s *Order* justifies a finding that access charges are due. AT&T has – as predicted – spun the non-decision into a decision that the ILECs have won the day. And their goal is to put FeatureGroup IP out of business. The harm is stark and it is real. The Commission has the duty to resolve the issue.

10. The *Order* must be reconsidered. The FCC’s non-decision has been received in the real world as a decision – notwithstanding note 19. If the Commission does not reconsider, the ILECs will make the rules and impose their own regulation – on a matter the Commission has repeatedly says it has not decided but plans to some day. That some day is now.

B. Reconsideration Point 2:

11. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (2). The action taken by the Commission should be changed because it was based on a failure to apply the law. When two LECs jointly provide service to an Information Service Provider, then neither LEC is entitled to recover access charges from the ISP, and the LEC that transports and terminates a call from the ISP’s platform to an end user on the PSTN can most certainly not demand access charges from the other LEC that is jointly handling the call. The Commission’s decision in the *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order* resulting from the DC Circuit’s mandamus order clearly – finally – holds that § 251(b)(5) has always applied to traffic that originates on the PSTN that is addressed *to* an ISP. Section 251(b)(5) does not have any distinction about the direction of the traffic. The

Commission recognized as much in its orders and rules requiring ILECs to pay reciprocal compensation to “paging” carriers even though that traffic is all one way.⁸ There is no rational basis to conclude that calls *from* an ISP that go to end users is also not fully within § 251(b)(5). In the same way that jointly provided “ISP-bound” traffic was not “carved out” of § 251(b)(5) by § 251(g), jointly-provided “ISP-originated” traffic is not “carved out of § 251(b)(5) by § 251(g). The Commission’s failure to resolve this inconsistency in application of § 251(b)(5) warrants vacatur. *AT&T v. FCC*, 452 F. 3d 830, 839 (D.C. Cir. 2006), *citing Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (vacating because challenged orders inconsistent with prior and subsequent agency action).

12. There was “no pre-Act obligation relating to intercarrier compensation for”⁹ ISP-originated traffic.” When one LEC serves an ESP and delivers the ESP’s traffic to another LEC for transport and ultimate termination then that traffic was *never* part of the access (§ 251(g)) regime and it *never* had any pre-Act obligation to pay access. This is most certainly the case when one of the LECs is a CLEC.

13. The Commission’s failure and refusal to recognize this simple proposition of law is as egregious as its handling of the equally simple proposition that bedeviled the industry between 1997 and 2008 – 11 years of fighting over the obvious. The D.C. Circuit ultimately got fed up with the Commission’s refusal to do its job on “ISP-bound” traffic. The Commission

⁸ Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High Cost Universal Service Reform; 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*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, FCC 08-262, ¶ 16, 2008 FCC LEXIS 7792 *23 (rel. Nov. 5, 2008) (“*Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order.*”)

⁹ *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order.* ¶15, 2008 FCC LEXIS 7792 *24.

should not dally on the equally important issue, particularly when the Congressional intent of the statute is clear. If the ESP is not providing a telecommunications service, then § 251(g) cannot even arguably apply.

14. The traffic that FeatureGroup IP described in its petition is clearly “transport and termination of . . . telecommunications exchanged with LECs” and it is “subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”¹⁰ The *Order* demonstrates that the Commission read the comments of the ILEC’s but not the Petition itself, finding hobgoblin of regulatory void.¹¹ The regulatory void is a figment of the ILECs’ fervent and overactive imagination that the Commission accepted whole hog. The regulatory void that exists in fact is the one that allows the ILECs to erect barriers to new entrants and new technology by assessing access charges because the Commission has completely and utterly failed to rule on this important issues.

C. Reconsideration Point 3:

15. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (2). The action taken by the Commission should be changed because it was based on a wholly faulty premise. FeatureGroup IP did not ever assert, argue or agree that access charges apply to voice-embedded Internet communications. Yet the *Order* says that “we assume, *arguendo*, that the foundation of Feature Group IP’s petition is valid. That is, we assume that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) of the Commission’s rules apply to voice-embedded Internet communications, with the effect that at least in some circumstances,

¹⁰ *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*. ¶ 16.

¹¹ *Order* ¶ 10. However, unlike *Core*, relied on by the Commission, FeatureGroup IP is subject to regulation under 97 U.S.C. § 201(b).

LECs may receive access charges.”¹² This was not the “foundation” of FeatureGroup IP’s petition; to the contrary FeatureGroup IP asserted in every pleading and every *ex parte* notice or filing that access charges *do not* apply.

16. FeatureGroup IP explained that it is the ILECs that assert the foundation that access charges apply, and FeatureGroup IP sought forbearance only in the alternative, and only if FeatureGroup IP was wrong, from each and every specific provision in the statute and rules that could possibly give rise to an access obligation *by FeatureGroup IP*.¹³ If the Commission does nothing else it should reconsider and change its decision to present a factually correct statement of what was pled and what was requested. Parties that spend the incredible amount of time and money and effort that is involved in a petition to the FCC – a government agency – for relief from harms imposed by those the agency is *supposed* to regulate deserve to at least have the government correctly describe and characterize the petition when it is disposing the petition.¹⁴

D. Reconsideration Point 4:

17. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (2). The action taken by the Commission should be changed because it wrongly did not resolve the underlying question that gave rise to the petition. The Commission erred by “assuming” away the most important issue facing the industry and the main impediment to investment in the technology and infrastructure to support advanced applications. The Commission should and

¹² Order ¶ 6.

¹³ See, e.g. Order ¶ 15, citing to FeatureGroup IP Petition at 3-4. The Commission’s decision to deny the petition on the ground that relief could be granted under some other procedural mechanism (e.g., Declaratory Ruling) is addressed below.

¹⁴ The government agency should also at least have the courtesy to read the petition. It is plain that this was not done in this case. FeatureGroup IP did present an economic analysis – but the Commission chose to ignore that presentation since it was more interested in protecting the ILECs than advancing the public’s interest. This too is addressed below. And, more fundamentally, the Commission did not even address the relief that was actually sought: ILEC imposition of access charges against FeatureGroup IP – a co-carrier and peer LEC.

must answer the question whether access charges do apply to voice-embedded Internet communications. This question cannot be ducked any longer if there is to be any remaining competition by LECs that envision a business plan other than that dictated by the ILECs.

18. The *Order* is a transparent exercise in procedural Doublespeak to – once again – not decide the intercarrier compensation that applies to voice-embedded Internet communications. This issue has hounded the industry and the Commission for over 7 years. In all of this time there has been only one decision on the issue: the *AT&T Declaratory Ruling*.¹⁵ FeatureGroup IP’s Petition expressly and clearly stated that the type of traffic involved in that case was not in issue.¹⁶ Indeed, FeatureGroup IP’s petition expressly limited the traffic to only that which is clearly, unambiguously and without a doubt not “telephone toll” in any respect because the petition expressly addressed only traffic that was “more than mere IP transmission” and had a change in content and/or an offer of enhanced services.¹⁷ Further the petition was limited to FeatureGroup IP traffic and ILEC charges against *FeatureGroup IP*.

19. The industry has sought a decision on “non IP in the Middle” in every possible way. SBC/AT&T has asked for a declaratory ruling¹⁸ and then another declaratory ruling accompanied by a waiver.¹⁹ The issue was squarely teed up in multiple requests for comment

¹⁵ Order, In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) (“*AT&T Declaratory Ruling*”) (a/k/a “*IP-in the Middle Order*”).

¹⁶ Forbearance Petition pp. 25-26 and note 38.

¹⁷ *Id.* Therefore, FeatureGroup IP’s customer was without a doubt an enhanced/information service provider and was not a carrier. Indeed, the FeatureGroup IP tariffed service expressly bars carriers from subscribing; only true enhanced/information service providers may use IGI-POP.

¹⁸ *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 05-276 (filed Sept. 21, 2005) (SBC Petition). This filing corrected and replaced an earlier petition that SBC had filed on September 19, 2005.

¹⁹ *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers*, WC Docket No. 08-152 (filed July 17, 2008).

going back for more than 6 years in the never-ending *Intercarrier Compensation* rulemaking and the broadly stated but as yet unresolved *IP Services* rulemaking.²⁰ Embarq sought forbearance from any rules that might *preclude* it from being the troll under the bridge, but recently withdrew the petition because it clearly knew that the FCC was about to give Embarq the same disrespect and non-decision that was bestowed on FeatureGroup IP.²¹ FeatureGroup IP, of course, opposed the ILEC attempts to impose access charges on access-exempt traffic, but all sides of this issue really need a decision. FeatureGroup IP insists the ILECs are overreaching and acting in an anticompetitive fashion but the Commission's inability to issue a decision is now simply letting the ILECs continue on their anticompetitive rampage, imposing regulations of their own.

20. In the market place, CLECs are no longer willing to provide PSTN connectivity to ESPs that provide voice-embedded Internet communications unless those communications register to 10 digit geographic numbers and submit to the access charge regime,²² those that do provide service conducive to new technology are sued for immense amounts of money by ILECs and then state-level petitions for judgments or permission to disconnect. Some – like FeatureGroup IP – are accused of fraud. If this matter is not resolved in the very short term then the ILECs will win by default. In effect the FCC is allowing the incumbents to regulate competition. Not only does FeatureGroup IP lose, but innovation loses as innovative voice enabled products that do not have a natural geographic location are competitively taxed and

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; IP-Enabled Services*, CC Docket Nos. 96-45, 96-98, 01-92, 99-68, WC Docket Nos. 04-36.

²¹ *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 ESP Exemption*, WC Docket No. 08-8, Notice of Withdrawal (Feb. 11, 2009).

²² Indeed this non-decision creates the illusion of new "traffic pumping opportunities" for some CLECs to charge for access for traffic to such ESPs based upon the false belief that they will receive 251(g) access charges for calls to such numbers – a business practice we are sure to see complained about by the ILECs. More important is the ILEC

therefore discouraged. The Commission is abandoning its duty to regulate and it has a tangible and negative consequence on society. Refusing to forbear in this case on such insubstantial and insupportable grounds was arbitrary and capricious and an abuse of discretion.

21. The FCC tried to get away with not deciding hard questions in an earlier forbearance case. When AT&T asked for forbearance from Title II regulation on “IP Platform” services, the Commission denied the petition on procedural grounds because it was not yet ready to “rule on the appropriate regulatory treatment of IP-enabled services.” The Commission balked because the petition would require the Commission to “prejudge important issues pending in broader rulemakings and “would require us to decide whether a requirement applies in the first place, and, if so, decide whether to forbear from such requirement.” The Commission said handling these tough issues in forbearance request would “complicate and hinder the Commission’s decisionmaking process enormously, as we would be forced to delay ongoing rulemaking efforts in order to address one forbearance petition after another.”²³ AT&T successfully obtained a remand, and – just like the remand of the *ISP Remand Order* – the case came back to the Commission only to gather dust. But here we are several years later, with the issues still festering, and the Commission has not decided the question in all those other cases – declaratory rulings that have been sought, and rulemakings that have been repeatedly noticed followed by comments from all corners of the industry – but for naught.

22. The D.C. Circuit put it quite succinctly – twice – that the FCC’s job is to decide these thorny issues and never-ending stalling and indecision is an abrogation of the Commission’s duties under the Communications Act. In the appeal of the AT&T IP Platform

²³ Memorandum Opinion and Order, *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, FCC 05-95, ¶¶ 6, 9, 10, 20 FCC Rcd 9361, 9363, 9364, 9365 (rel. May 2005).

forbearance denial, the court said “section 10(a)(3)’s very purpose is to force the Commission to act within the statutory deadline.”²⁴ The court also reaffirmed that forbearance relief could not be denied merely because alternative routes for seeking regulatory relief were available.²⁵ The Commission’s denial here is all the more egregious because FeatureGroup IP has exhausted each and every one of these alternative means, in the courts, at the state level, and at this Commission, but after 7 years there has been no resolution at all. The state commission defers to the Commission, and the courts abate or dismiss because of primary jurisdiction. And the FCC has simply refused to answer the question. This endless loop must end.

23. This can is all kicked out. It is no longer round or oblong, and it will not go any farther down the road. The refusal to so decide in the *Order* preferring to resolve the issue in a proposed rulemaking at some undetermined time is simply regulatory failure. Indeed, as set forth in Reconsideration Point 1 above, the denial in the *Order* has only farther emboldened them. The ILECs are now back in control but they are immunized because the courts still think there is (or should be) a well-greased regulatory machine.

E. Reconsideration Point 5:

24. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (2). The action taken by the Commission did not consider or resolve a clear question and request for relief that was squarely presented in the pleadings. Specifically, even if access charges apply to voice-embedded Internet communications when two LECs are involved in the termination of voice-embedded Internet communications neither LEC has the right to bill the other LEC for access charges. Both LECs are exchange access providers, and under the Commission’s rules each must individually bill the voice-embedded Internet communications service provider.

²⁴ AT&T v. FCC, 452 F.3d 830, 836 (D.C. Cir. 2006).

²⁵ 452 F.3d at 836, citing AT&T v. FCC, 236 F.3d 729, 738 (D.C. Cir. 2001).

25. The Commission completely ignored and did not at all address or dispose the actual request for relief. FeatureGroup IP is an LEC. It is not an IXC and it does not provide any telephone toll or voice-embedded Internet communications service. FeatureGroup IP provides only telephone exchange and/or exchange access service. FeatureGroup IP's customer is the one that provides voice-embedded Internet communications. Even if FeatureGroup IP is wrong and access charges do apply to voice-embedded Internet communications, then under the Commission's current access rules FeatureGroup IP is not and cannot be the "access customer." The ILECs that demand access cannot under any theory of law send the bill to FeatureGroup IP.

26. FeatureGroup IP's petition asked for forbearance from each of the statutory provisions and the rules that the ILECs have identified as a legal justification for billing FeatureGroup IP – the joint provider LEC. But the Commission did not address this question. The *Order* was worded in the abstract – whether forbearance was appropriate for voice-embedded Internet communications – and it did not distinguish between charges assessed against FeatureGroup IP (one of the two LEC joint access providers) or the ESP that is the actual voice-embedded Internet communications service provider. The FCC did not rule on the relief that was actually sought.

27. In this scenario, presumably, the ILECs would get their access tithe. It would just come from the ESP and not FeatureGroup IP. When two LECs collaborate to provide standard exchange access to an IXC each LEC separately bills the IXC, and neither LEC bills the other, or has recourse against the other. FeatureGroup IP is therefore seeking relief that would treat voice-embedded Internet communications *just like telephone toll provided by IXCs*.

28. The *Order* completely ignored the actual relief that was sought. The Commission should reconsider and (1) decide the question of whether an ILEC can send an access bill to a

CLEC joint access provider, and if so (2) whether FeatureGroup IP has met the section 10 criteria for that question. The failure and refusal to even answer this simple and obvious question – and then address the forbearance criteria if necessary – violated the Commission’s charge under § 10.

F. Reconsideration Point 6:

29. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (2). The action taken by the Commission should be altered because it is based on a wholly incorrect statement of the evidence. FeatureGroup IP did present overwhelming evidence of the economic impact of granting its petition.

30. The *Order* asserts as a fallback position to the “hole” theory that FeatureGroup IP did not present an “economic analysis of the impact of granting its petition.”²⁶ With all due respect, that is simply not true. The petition was replete with numbers and it contained an extensive economic analysis of how granting the petition would facilitate the expansion and use of the PSTN to support Group Forming Networks.²⁷

31. Apparently the Commission is so captured by the ILECs – and more particularly the rural ILECs – that it is convinced the only relevant economic impact is the money the ILECs would not receive should forbearance be granted. This is a patently erroneous construct because all the statutory criteria look at the *public’s* interest, not the *utilities’* narrow interest. Further, the Commission ignores FeatureGroup IP’s position that § 251(b)(5) applies. Under FeatureGroup IP’s proposal, the ILECs would be paid the “additional cost” of transporting and terminating this “telecommunications traffic exchanged with LECs.” The amount in issue is therefore easily identifiable: it is the difference between terminating access (which is not cost-based as defined

²⁶ *Order* ¶ 12. *See also*, Commission McDowell Statement (no economic analysis).

²⁷ *See* Forbearance Petition, App. B.

by § 252(d)(2(A)) and reciprocal compensation (which is governed by Congress' statement of the appropriate amount to recover calls for "the transport and termination of all telecommunications exchanged with LECs").

32. Second, the traffic in issue is not traffic for which the ILECs are now recovering access. The petition precisely identified the traffic, notwithstanding the Commission's feigned confusion in ¶ 12 and note 35.²⁸ And, the petition was limited to FeatureGroup IP. FeatureGroup IP has not paid a penny in access charges to any ILEC. Bills have come in, and they have been disputed but not paid. AT&T Texas wants \$7.5 million, but it has yet to see a dime. So the economic impact to all of the ILECs is zero. They will not be precluded from receiving any money that they presently receive, or should receive.

33. Third, the Commission demanded "impact" evidence based on a "foundation." This impact evidence required by the *Order* would be deemed completely speculative and inadmissible in any real court of law (and, probably the Commission) as part of a damages phase. The requirement that FeatureGroup IP quantify how much money the ILECs would get absent forbearance (after a decision on whether access truly applies and whether one LEC can recover this access from another CLEC) is hypothetical, speculative and impossible to determine. And denying relief based on a failure to perform an impossible task is the height of arbitrary and capricious decision making.

²⁸ Note 13 of the *Order* is a rare gem of Commission comprehension. The traffic in issue is "a particular subset of [voice over Internet Protocol (VoIP)] communications that do not merely use the Internet Protocol [(IP)] to transmit voice signals undifferentiated from [public switched telephone network (PSTN)] traffic, but actually uses Internet Protocol to provide voice applications as part of a large Internet communications experience." As noted above, the requested relief was also limited to only traffic handled by FeatureGroup IP, and was directed to access charges imposed by ILECs against FeatureGroup IP.

CONCLUSION

34. The Commission's job is to decide the issues and answer the hard questions. The FCC has ducked the issues for over seven years. The states have deferred to the Commission; the courts have deferred to the Commission. Companies that invested millions are going out of business. FeatureGroup IP faces a \$7.5 million contingent liability under the current Texas agreement and a threat of disconnection. Texas has abated and deferred our primary jurisdiction grounds, an arbitration proceeding between FeatureGroup IP and AT&T for a new agreement because of this very issue. Section 10 of the Telecommunications Act of 1996 mandates that the Commission consider a forbearance petition and grant such petition if it is in the public interest. The Commission has failed in its statutory duty to consider the Forbearance Petition, the precise relief sought and its impact on the overriding purpose of the Act: fostering competition. No amount of sidestepping or Doublespeak can allay the conclusion that the Commission is an impediment to competition and captured protectors of the incumbent monopolists.

PRAYER

WHEREFORE, PREMISES CONSIDERED, FeatureGroup IP requests that the Commission reconsider the *Order* for the six reasons state above, and after such reconsideration issue a revised Order on Reconsideration that (1) properly characterized FeatureGroup IP's position and requests; (2) addresses, rules on and disposes the relief that was actually requested; and, (3) holds that access charges are not due (but § 251(b)(5) reciprocal compensation is due) from FeatureGroup IP for voice-embedded Internet communications that FeatureGroup IP processes for its ESP customers and hands off to an ILEC for transport and termination; *or* (4) that FeatureGroup IP has met each of the criteria in section 10 for forbearance from any access charge obligation that does exist, with the result that ILECs must recover their access

charge “entitlement” from the voice-embedded Internet communications service provider – just like they directly recover access charges from IXCs today.

Respectfully submitted,

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January 27, 2009

Judge Liz Kayser
Public Utility Commission of Texas
1701 N. Congress Ave.
Austin, TX 78711-3326

RE: Docket No. 33323; *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*

Dear Judge Kayser:

Attached is an order issued by the FCC last week *In the Matter of Feature Group IP Petition for Forbearance*, WC Docket No. 07-256, Memorandum Opinion and Order (January 21, 2009).

This petition for forbearance proceeding was initiated at the FCC by UTEX in an effort to avoid liability for the switched access charges at issue in this docket. In its testimony and evidence in this case, UTEX described this petition for forbearance as "spell[ing] out the harm" of this Docket No. 33323. See UTEX Exh. H (Feldman Rebuttal) at 24, ll. 1-4 (discussing "the recent Forbearance Petition filed by UTEX and its nascent CLEC affiliates"); UTEX Exh. 811 (UTEX's forbearance petition filed under the name Feature Group IP).

The FCC order does not determine the issues before the Texas Commission in Docket No. 33323, which concerns the proper interpretation of the interconnection agreement between UTEX and AT&T Texas. However, the FCC's rejection of UTEX's arguments in support of its forbearance petition, illustrates the importance of interpreting the parties' interconnection agreement to require compensation for the services that AT&T Texas provides to UTEX in terminating its traffic. Contrary to Mr. Feldman's testimony, UTEX's forbearance petition has spelled out that the potential harm in Docket No. 33323 lies in UTEX's position, not AT&T Texas'.

The FCC denied UTEX's forbearance petition because it failed to meet all three prongs of the statutory forbearance criteria. Thus, the FCC ruled:

- A. Enforcement Remains Necessary to Ensure that Charges and Practices Are Just and Reasonable, and Not Unjustly or Unreasonably Discriminatory [first prong].
- B. Enforcement Remains Necessary for the Protection of Consumers [second prong] and Forbearance Would Not Be in the Public Interest [third prong].

Order at 5, 7. The FCC observed that, if it were to forbear application of these switched access charges, there was no default rate that could be applied, leaving "no rate regulation governing the exchange of this traffic." Order at 5. The FCC determined that "the uncertainty of a regulatory void may harm network investment, including in rural areas." Order at 8.

The FCC also expressly rejected UTEX's argument – similar to arguments made to this Commission – that forbearance "would promote innovation, competition, or U.S. preeminence in the high-tech communications field." Order at 8.

Finally, the FCC rejected UTEX's argument that forbearance would "create greater efficiencies," reasoning that a regulatory void was not efficient or consistent with the public interest. Order at 8.

These FCC findings effectively determine that allowing UTEX to avoid liability for switched access charges would be (1) unjust and unreasonably discriminatory, (2) harmful to consumers, and (3) not in the public interest. If the interconnection agreement between UTEX and AT&T Texas were interpreted to permit UTEX to avoid liability for access charges, it would violate essentially these same criteria. For these reasons alone, the Commission should reject UTEX's strained and incorrect interpretation of its interconnection agreement.

It is important to note that the UTEX interconnection agreement is a negotiated agreement. Pursuant to 47 U.S.C. § 252(e)(2), the Texas Commission was required to reject this agreement if it found that (1) the agreement discriminated against a telecommunications carrier not a party to the agreement or (2) implementation of the agreement was not consistent with the public interest, convenience, and necessity. As the Texas Commission approved this agreement, it found that the agreement was *not discriminatory and was in the public interest*.¹ The FCC's Order of last week indicates

¹ See, Order No. 2 Approving Interconnection Agreement dated September 27, 2000 in Docket No. 22949, *Joint Application of Southwestern Bell Telephone Company and UTEX Communications Corporation for Approval of Interconnection Agreement under PURA and the Telecommunications Act of 1996*.

that for the UTEX interconnection agreement to be non-discriminatory and in the public interest, it must be interpreted to require UTEX to pay switched access charges for terminating long-distance traffic.

Sincerely,

Handwritten signature of Thomas J. Horn in black ink, consisting of the name 'Thomas J. Horn' written in a cursive style.

Thomas J. Horn
General Attorney

Attachment

cc: Kell Mercer
Patricia Tomasco
Scott McCollough
Mary Keeney
Dennis Friedman

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Feature Group IP Petition for Forbearance From)	WC Docket No. 07-256
Section 251(g) of the Communications Act and)	
Sections 51.701(b)(1) and 69.5(b))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 2009

Released: January 21, 2009

By the Commission: Commissioner McDowell issuing a statement.

I. INTRODUCTION

1. In this Order, we deny a petition filed by Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC (Feature Group IP) requesting that the Commission forbear from section 251(g) of the Communications Act of 1934, as amended (Act), and sections 51.701(b)(1) and 69.5(b) of the Commission's rules.¹ For the reasons set forth below, we deny the petition because it fails to meet the statutory forbearance criteria.²

II. BACKGROUND

2. In the 1996 Act,³ Congress sought to foster competition in the local telephone market, while at the same time ensuring the continued provision of affordable service to all Americans.⁴ As part of the 1996 Act, Congress adopted section 251(b)(5), which requires that all local exchange carriers (LECs) "establish reciprocal compensation arrangements for the transport and termination of

¹ 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(b)(1), and Rule 69.5(b), WC Docket No. 07-256 (filed Oct. 23, 2007) (Feature Group IP Forbearance Petition). On December 18, 2007, the Commission released a Public Notice establishing a pleading cycle for comments on the Feature Group IP Forbearance Petition. *Pleading Cycle Established for Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, Public Notice, 22 FCC Rcd 21615 (2007). On January 14, 2008, the Wireline Competition Bureau extended the pleading cycle for comments on the Feature Group IP Forbearance Petition. *Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, Order, 23 FCC Rcd 346 (WCB 2008).

² See 47 U.S.C. § 160(a).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (1996 Act).

⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499-507, paras. 1-7 (1996) (subsequent history omitted) (*Local Competition First Report and Order*).

telecommunications.”⁵ To ensure the continued enforcement of certain pre-1996 Act access obligations and restrictions, Congress also enacted a transitional mechanism in section 251(g).⁶ In the *Local Competition First Report and Order*, the Commission, interpreting section 251(g), concluded that the reciprocal compensation provisions of section 251(b)(5) “do not apply to the transport or termination of interstate or intrastate interexchange traffic” and it required LECs to continue to offer interstate and intrastate access services just as they did prior to the 1996 Act.⁷ The Commission later characterized section 251(g) as a “carve-out provision” that “is properly viewed as a limitation on the scope of section 251(b)(5) [of the Act].”⁸

3. On July 26, 2007, the Commission denied a petition filed by Core Communications, Inc. (Core) seeking forbearance from rate regulation preserved by section 251(g) of the Act, the rate averaging and rate integration required by section 254(g) of the Act, and all related implementing rules with respect to all telecommunications carriers.⁹ The Commission found that section 251(g) “explicitly contemplates

⁵ 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701(c)-(d) (defining transport and termination); *see also Local Competition First Report and Order*, 11 FCC Rcd at 16008-58, paras. 1027-118 (discussing reciprocal compensation obligations for the transport and termination of telecommunications under section 251(b)(5) of the Act).

⁶ *See* 47 U.S.C. § 251(g) (providing that “[o]n and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment”); *see also WorldCom v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002) (finding that section 251(g) is a transitional provision designed to keep in place certain restrictions and obligations, including the existing access charge regime, until such provisions are superseded by Commission regulations).

⁷ *See Local Competition First Report and Order*, 11 FCC Rcd at 16013, para. 1034. In a subsequent order, the Commission interpreted this provision as a “continuation of the equal access and nondiscrimination provisions of the [AT&T] Consent Decree until superseded by subsequent regulations of the Commission.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, 15 FCC Rcd 385, 407, para. 47 (1999). The Court of Appeals later held, however, that the pre-existing restrictions and obligations referenced in section 251(g) are not limited to Consent Decree obligations. *See WorldCom v. FCC*, 288 F.3d at 433.

⁸ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers – Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9167, para. 35 (2001) (*ISP Remand Order*), remanded on other grounds, *WorldCom v. FCC*, 288 F.3d at 429. Indeed, in defining the scope of the reciprocal compensation pricing rules, section 51.701(b)(1) specifically excludes “interstate or intrastate exchange access, information access, or exchange services for such access.” 47 C.F.R. § 51.701(b)(1). Specifically, the Commission found that Congress “did not intend to interfere” with the Commission’s pre-1996 Act authority with respect to the access charge regime and that Congress “exempted the services enumerated in section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the Commission.” *ISP Remand Order*, 16 FCC Rcd at 9167, para. 36 (footnotes omitted).

⁹ *See Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007) (*Core Section 251(g)/254(g) Forbearance Order*), *pet. for review dismissed*, *Core Communications, Inc. v. FCC*, 545 F.3d 1 (D.C. Cir. 2008).

affirmative Commission action in the form of new regulation” before the access regulation preserved by section 251(g) could be eliminated or replaced and, as a result, “the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).”¹⁰ The Commission concluded therefore that forbearance from section 251(g) would result in no regulation and that the petition failed to meet the statutory forbearance criteria.¹¹

4. On October 23, 2007, Feature Group IP filed a petition asking the Commission to forbear from applying access charges to “voice-embedded Internet communications.”¹² Feature Group IP requests that the Commission “hold that Voice Embedded Internet-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality are enhanced services and, therefore, that the so-called ‘ESP Exemption’ from access charges still applies.”¹³ Alternatively, Feature Group IP requests that “the Commission . . . forbear from application of certain express and implied provisions of Section 251(g) of the Communications Act . . . Rule 51.701(b)(1), and, where applicable, Rule 69.5(b)” so that access charges do not apply to voice-embedded Internet communications.¹⁴

III. DISCUSSION

5. Consistent with the Commission’s *Core Section 251(g)/254(g) Forbearance Order*, we find that the Feature Group IP Forbearance Petition does not meet the statutory criteria necessary for

¹⁰ *Core Section 251(g)/254(g) Forbearance Order*, 22 FCC Rcd at 14126, para. 14.

¹¹ *Id.* at 14126-28, paras. 14-16.

¹² *See* Feature Group IP Forbearance Petition at 24-31.

¹³ Feature Group IP Forbearance Petition at 3. Feature Group IP defines “Voice-embedded Internet communications” as “a particular subset of [voice over Internet Protocol (VoIP)] communications that do not merely use the Internet Protocol [(IP)] to transmit voice signals undifferentiated from [public switched telephone network (PSTN)] traffic, but actually uses Internet Protocol to provide voice applications as part of a large Internet communications experience. . . . We think it is important for policymakers to recognize a qualitative difference between services that merely use IP technology to provide PSTN-equivalent offerings and services that embed IP-based voice applications as part of a larger, next-generation Internet communications experience.” *Id.* at 2 n.3. *But see infra* note 35 (citing other definitions Feature Group IP suggests for the services covered by its request). Although Feature Group IP uses a variety of different terms throughout its petition, for the purposes of this Order, we use the term “voice-embedded Internet communications” to describe the services that are subject to the instant request for forbearance. Under the Commission’s access charge regime, the so-called “ESP exemption” permits enhanced service providers (ESPs) to purchase local business access lines from intrastate tariffs as end users, or to purchase special access connections, and thus avoid paying carrier-to-carrier access charges. *See Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988) (*ESP Exemption Order*); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 16133-35, paras. 344-48 (1997) (*Access Charge Reform Order*), *aff’d*, *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *see also MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 715, para. 83 (1983) (explaining that ESPs had been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); *ESP Exemption Order*, 3 FCC Rcd at 2633, para. 17 (“[T]he imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.”); *Access Charge Reform Order*, 12 FCC Rcd at 16133-35, paras. 344-48 (“Maintaining the existing pricing structure . . . avoids disrupting the still-evolving information services industry.”).

¹⁴ Feature Group IP Forbearance Petition at 3-4.

forbearance under section 10(a) of the Act.¹⁵ The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied.¹⁶ Thus, the Commission “could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”¹⁷ As discussed below, we find that the Feature Group IP Forbearance Petition does not meet any of the statutory forbearance criteria and, accordingly, we deny the petition.

6. For the purposes of conducting our analysis of this petition, we assume, *arguendo*, that the foundation of Feature Group IP’s petition is valid.¹⁸ That is, we assume that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) of the Commission’s rules apply to voice-embedded Internet communications, with the effect that at least in some circumstances, LECs may receive access charges.¹⁹

¹⁵ See 47 U.S.C. § 160(a). We note that Feature Group IP seems to be seeking forbearance only if the Commission determines that voice-embedded Internet communications are not exempt from access charges or that the ESP exemption is not maintained. See Feature Group IP Forbearance Petition at 3-4. Thus, Feature Group IP essentially requests a declaratory ruling from the Commission as a preliminary matter. See Time Warner Telecom *et al.* Comments at 3-4 (arguing that Feature Group IP’s request is essentially a petition for declaratory ruling). The Commission has broad discretion in determining whether to respond to a request for declaratory ruling and, accordingly, because we find that Feature Group IP’s petition fails to meet the statutory requirements for forbearance, we need not address whether such communications are exempt from access charges or whether the ESP exemption is maintained. See 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; see also 47 U.S.C. § 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (“An administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion.”), *cert denied*, 414 U.S. 914 (1973). For similar reasons, we decline to address in the context of this forbearance petition whether the Commission has exclusive jurisdiction to determine the compensation regime for IP-PSTN and incidental PSTN-PSTN traffic. See Feature Group IP Forbearance Petition at 65 (asking the Commission to “reaffirm” that this is an “exclusively interstate matter”).

¹⁶ See *Cellular Telecommunications & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

¹⁷ *Id.*

¹⁸ See *AT&T v. FCC*, 452 F.3d 830, 836-37 (D.C. Cir. 2006) (“We hold only that the Commission may not refuse to consider a petition’s merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations.”).

¹⁹ Though we make this assumption for purposes of the section 10(a) analysis below, we make no decisions or findings in this Order concerning the current compensation rules for these types of communications, which are the subject of a pending rulemaking in the current *Intercarrier Compensation* proceeding. On November 5, 2008, the Commission released a Further Notice of Proposed Rulemaking seeking comment on several intercarrier compensation reform proposals, including proposals that would address the regulatory classification of calls exchanged between IP-based and circuit-switched networks. See generally *High Cost Universal Service Reform; 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*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

A. Enforcement Remains Necessary to Ensure that Charges and Practices Are Just and Reasonable, and Not Unjustly or Unreasonably Discriminatory

7. The first prong of section 10(a) states that the Commission shall forbear if it determines that “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 and reasonable, and are not unjustly or unreasonably discriminatory.”²⁰ Feature Group IP asserts that enforcement of section 251(g), the exception clause in section 51.701(b)(1) and, where applicable, section 69.5(b) of the Commission’s rules “is not necessary to ensure that the charges and practices for the exchange of IP-PSTN and incidental PSTN-PSTN voice-embedded Internet communications are just, reasonable, and not unjustly or unreasonably discriminatory” because, in the absence of these provisions, section 251(b)(5) and its implementing rules will govern the intercarrier compensation for this traffic.²¹ Feature Group IP further contends that forbearance would not result in unreasonably discriminatory charges, practices or classifications because the Commission would be taking a class of traffic that “today generally is not subject to access charges” and treating it “in a uniform manner consistent with making a transition to a uniform intercarrier compensation regime.”²² Finally, Feature Group IP maintains that the difficulties associated with determining the geographic endpoints of voice-embedded Internet communications support application of “the statutory default of [s]ection 251(b)(5).”²³

8. As the Commission explained in the *Core Section 251(g)/254(g) Forbearance Order*, section 251(g) preserves pre-1996 Act compensation obligations and restrictions for “exchange access, information access, and exchange services for such access . . . until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.”²⁴ Because section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not automatically, and by default, mean that section 251(b)(5) would govern traffic that was previously subject to section 251(g).²⁵ If the Commission were to forbear from the rate regulation preserved by section 251(g) and the related rules, there would be no rate regulation governing the exchange of this traffic.²⁶

²⁰ 47 U.S.C. § 160(a)(1).

²¹ See Feature Group IP Forbearance Petition at 56-57. More specifically, Feature Group IP contends that the section 252(d)(2) pricing standards governing the reciprocal compensation regime will ensure that the charges and practices for the exchange of this traffic will be just and reasonable. *Id.* at 57; see 47 U.S.C. § 252(d)(2).

²² Feature Group IP Forbearance Petition at 59.

²³ *Id.* at 60.

²⁴ 47 U.S.C. § 251(g) (emphasis added); see *Core Section 251(g)/254(g) Forbearance Order*, 22 FCC Rcd at 14126, para. 14.

²⁵ See *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997) (finding that section 251(g) preserves certain rate regimes “until such restrictions and obligations are explicitly superseded by regulations prescribed by the [Commission]” and “leaves the door open for the promulgation of new rates at some future date” but that any new rates would not (necessarily) be subject to the standards set forth in section 251 and 252); see also *Core Section 251(g)/254(g) Forbearance Order*, 22 FCC Rcd at 14126, para. 14.

²⁶ See *Core Section 251(g)/254(g) Forbearance Order*, 22 FCC Rcd at 14126, para. 14. Several parties agree that, consistent with the Commission’s findings in the *Core Section 251(g)/254(g) Forbearance Order*, forbearance from section 251(g) would not result in the application of section 251(b)(5) by default. See, e.g., AT&T Comments at 17-18; CenturyTel Comments at 4-5; NECA *et al.* Comments at 8; Time Warner Telecom *et al.* Comments at 4-6; Verizon Comments at 7; Embarq Reply at 20-21; Letter from Cammie Hughes, Authorized Representative, Texas (continued....)

9. Feature Group IP's claim that forbearance from section 251(g) would result in a different intercarrier compensation regime by default is the same flawed claim made by Core and denied by the Commission in the *Core Section 251(g)/254(g) Forbearance Order*. Feature Group IP attempts to distinguish that Commission decision from how it believes its request should be resolved. Feature Group IP maintains that its request is different from Core's because the Feature Group IP Forbearance Petition involves two LECs exchanging traffic between an ESP (Feature Group IP's customer) and a local exchange end user.²⁷ Essentially, Feature Group IP attempts to distinguish the *Core Section 251(g)/254(g) Forbearance Order* based on the type of providers and the traffic subject to forbearance.²⁸

10. We find that Feature Group IP's request to forbear from section 251(g) cannot be distinguished from the *Core Section 251(g)/254(g) Forbearance Order*. Absent affirmative action by the Commission, forbearance from section 251(g) would result in a regulatory void based on the plain language of that statutory provision, regardless of what types of carriers or traffic were involved. Due to the absence of any such rate regulation if forbearance were granted, and the absence of any economic evidence or analysis in the record by Feature Group IP or any other commenters, we cannot conclude that enforcement of the rate regulation preserved by section 251(g) and related implementing rules is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory.²⁹

(Continued from previous page) _____
Statewide Telephone Cooperative, Inc., WC Docket No. 07-256, at 1 (filed Jan. 12, 2009); Letter from Mary Albert, General Counsel, COMPTTEL *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket No.01-92, WC Docket Nos. 04-36, 07-256, 08-8, at 3-4 (filed Jan. 8, 2009). Further, forbearance from the exception clause in rule 51.701(b)(1) would not change this result as that language merely implements the requirements of section 251(g). *Compare* 47 U.S.C. § 251(g) (preserving pre-1996 Act compensation obligations and restrictions for "exchange access, information access, and exchange services for such access"), *with* 47 C.F.R. § 51.701(b)(1) (excluding "interstate or intrastate exchange access, information access, or exchange services for such access" from the reciprocal compensation regime). This is not the first time the Commission has denied forbearance when a grant would not have brought the petitioner the relief it sought. *See Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125 (2006) (*Fones4All Forbearance Order*) (concluding that forbearance as requested would not give the petitioner the relief it sought and therefore denying the petition), *pet. for review denied, Fones4All Corp. v. FCC*, 2008 WL 5220266 (9th Cir. 2008); *Iowa Telecom Petition for Forbearance Under 47 U.S.C. § 160(c) from the Universal Service High-Cost Loop Support Mechanism*, WC Docket No. 05-337, Order, 22 FCC Rcd 15801 (2007) (finding that the requested relief would not give Iowa Telecom the relief it seeks); *see also* AT&T Comments at 18.

²⁷ Feature Group IP Reply at 28-29.

²⁸ *Id.* at 29.

²⁹ The Commission previously has denied section 10 forbearance petitions for lack of sufficient evidence. *See Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules*, WC Docket No. 08-162, 23 FCC Rcd 13187 (2008) (denying a forbearance petition for "fail[ure] to address in any manner the statutory criteria for a grant of forbearance or to provide any showing that those criteria are met by its request"); *see also AT&T Corp. v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001) (affirming the Commission's decision to reject market share data submitted in support of a forbearance petition because the carrier failed to provide the underlying raw data on which its conclusions were based, making its findings unverifiable, but remanding the Commission's decision for failure to consider other evidence in record); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19438, para. 50 (2005) (summarily denying request for forbearance from dominant carrier regulation of enterprise services due to a lack of serving area-wide information in the relevant geographic market), *aff'd on other grounds, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Petitions of Qwest Corporation for Forbearance* (continued....)

B. Enforcement Remains Necessary for the Protection of Consumers and Forbearance Would Not Be in the Public Interest

11. The second and third prongs of section 10(a) state that the Commission shall forbear if “enforcement of such regulation or provision is not necessary for the protection of consumers”³⁰ and if “forbearance from applying such provision or regulation is consistent with the public interest.”³¹ Feature Group IP contends that enforcement of section 251(g), the exception clause in section 51.701(b)(1) and, where applicable, section 69.5(b) of the Commission’s rules is not necessary to protect consumers because the record fails to show that exclusion of these communications from the access charge regime would adversely affect consumers via end-user rate increases or rate discrepancies between urban and rural areas.³² Feature Group IP also argues that forbearance from application of switched access charges to “IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications,” and “making a clear statement that the exchange of such traffic will be governed by [s]ection 251(b)(5),” would serve the public interest for a number of reasons.³³

12. We are unable, on this record, to conclude that enforcement of section 251(g), the exception clause in section 51.701(b)(1) and, where applicable, section 69.5(b) of the Commission’s rules is not necessary to protect consumers and that forbearance from these provisions is consistent with the public interest. Significantly, Feature Group IP provides no evidence to support its claims, and no economic analysis of the impact of granting its petition is in the record.³⁴ Moreover, the Commission is unable to determine with reasonable precision the potential impact the requested forbearance would have on

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Pursuant to 47 U.S.C. § 160(c) in the *Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008), *pet. for review pending*, No. 08-1257 (D.C. Cir. filed July 29, 2008). Indeed, the Commission’s duty to support its decisions with reasoned explanation generally requires that its factual determinations be based on evidence. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 nn.10-11 (2d Cir. 2007).

³⁰ 47 U.S.C. § 160(a)(2).

³¹ 47 U.S.C. § 160(a)(3). In making its public interest determination, the Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. § 160(b).

³² *See* Feature Group IP Forbearance Petition at 61. Feature Group IP asserts that, although there has been some migration away from PSTN communications, such migration is “unlikely to have a significant impact on PSTN revenues in the near term.” *Id.* at 62. Further, Feature Group IP maintains that any arguments that forbearance would disrupt implicit support flows must fail because the Commission already subjects some IP-based services to universal service obligations and because the 1996 Act requires that any implicit subsidies be made explicit. *Id.* at 62-63 (citing 47 U.S.C. § 254(e)). Although not directly relevant to satisfying the second prong of the statutory criteria, Feature Group IP also argues that forbearance would benefit consumers through increased deployment of voice-embedded Internet communications. *Id.* at 61-62.

³³ *See* Feature Group IP Forbearance Petition at 49. Specifically, Feature Group IP contends that forbearance would reduce regulatory uncertainty and associated costs. *Id.* at 50-53. Similarly, Feature Group IP contends that lack of forbearance will result in legal and market uncertainty. *See id.* at 41-45, 47. Feature Group IP further argues that forbearance would provide the regulatory certainty necessary to spur investment in advanced services and promote innovation. *Id.* at 49-50, 53-55. Moreover, Feature Group IP asserts that forbearance would create greater efficiencies through a uniform reciprocal compensation regime. *Id.* at 49, 55. Finally, Feature Group IP states that forbearance would “reestablish U.S. preeminence” in the high-tech communications industry. *Id.* at 49-50, 55-56.

³⁴ *See supra* note 29; *see also Fones4All Forbearance Order*, 21 FCC Rcd at 11132, para. 14 (denying forbearance when “Petitioner has not offered any basis to show that granting forbearance is in the public interest”).

consumers because the petition is unclear as to what traffic would be covered by any decision here.³⁵ Even if the Commission could determine the exact scope of the forbearance requested, however, the additional uncertainty created by the regulatory void that would result from forbearance here would be detrimental to consumers. Feature Group IP's arguments that forbearance would be in the public interest are all premised on the assumption that forbearance from section 251(g) would result in this traffic being governed by the section 251(b)(5) reciprocal compensation regime.³⁶ As discussed above, the requested forbearance would not have this result. Rather, contrary to Feature Group IP's assumption, forbearance would result in a regulatory void.³⁷ Thus, forbearance would not create any regulatory certainty, nor would it reduce the costs associated with disputes over the appropriate regulatory treatment of this traffic. Moreover, the uncertainty of a regulatory void may harm network investment, including in rural areas. Because forbearance would not provide the regulatory certainty described by Feature Group IP, we also reject arguments that grant of the petition would promote innovation, competition, or U.S. preeminence in the high-tech communications field. Forbearance also would not create greater efficiencies because it would not result in a uniform reciprocal compensation regime, as Feature Group IP contends. Accordingly, we cannot find that the requested forbearance is consistent with the public interest.

13. For these reasons, we find that the Feature Group IP Forbearance Petition fails to meet the statutory criteria necessary for forbearance.³⁸

IV. EFFECTIVE DATE

14. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on January 21, 2009.³⁹ The time for appeal shall run from the release date of this Order.⁴⁰

³⁵ Compare Feature Group IP Forbearance Petition at 2 n.3 (comparing "Voice embedded Internet communications" with "IP-based communications"), with *id.* at 10-11 (attempting to describe the category of traffic for which it seeks forbearance), with *id.* at 25-27 (providing an expanded description of the traffic covered by the petition), with *id.* at 65 (referring to both "Voice-embedded IP communications" and "voice-embedded IP applications").

³⁶ First, Feature Group IP contends that forbearance would reduce regulatory uncertainty and associated costs. *Id.* at 50-53. Similarly, Feature Group IP contends that lack of forbearance will result in legal and market uncertainty. *See id.* at 41-45, 47. Second, Feature Group IP argues that forbearance would provide the regulatory certainty necessary to spur investment in advanced services and promote innovation. *Id.* at 49-50, 53-55. Third, Feature Group IP asserts that forbearance would create greater efficiencies through a uniform reciprocal compensation regime. *Id.* at 49, 55. Finally, Feature Group IP states that forbearance would "reestablish U.S. preeminence" in the high-tech communications industry. *Id.* at 49-50, 55-56

³⁷ *See supra* paras. 8-10. For this reason, forbearance would not provide answers to the numerous questions and disputes listed by Feature Group IP. *See* Feature Group IP Forbearance Petition at 51-52.

³⁸ Because we conclude that the Feature Group IP Forbearance Petition fails to meet the statutory criteria necessary for forbearance, we need not address additional matters raised by Feature Group IP unrelated to the forbearance requested including interconnection disputes, policies, and principles. *See* Feature Group IP Reply at 41-52; Feature Group IP's Intercarrier Compensation Reply Comments in Response to FNPRM in CC Docket No. 01-92 and Written *Ex Parte* in WC Docket No. 07-256, CC Docket No. 01-92, WC Docket No. 07-256, at ii-iii, 3-4 (filed Dec. 22, 2008).

³⁹ 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

⁴⁰ 47 C.F.R. §§ 1.4, 1.13.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the 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 IS DENIED as set forth herein.

16. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on January 21, 2009. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4, 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

RE: Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, WC Docket 07-256.

It is clear that granting the forbearance petitioners have requested would not give petitioners the relief sought, but instead would create a regulatory void and significant uncertainty. In the absence of any evidence or economic analysis in the record that would allow us to determine that enforcement of our regulations is unnecessary, I find that the petition fails to meet the statutory criteria required for forbearance under Section 10. The petition must, therefore, be denied.