

**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 CORRECTED MOTION FOR RECONSIDERATION**

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**FEATUREGROUP IP’S CORRECTED 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 Opinion<sup>1</sup> 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: FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (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.

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<sup>1</sup> 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* 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 to 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* misconstrues and does not address FeatureGroup IP's request for partial but not complete forbearance from § 251(g) and rule 69.5(b).

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 an illegal evidentiary standard limited to the impact on ILECs' access revenues instead of the impact on the overall public's interest, and the *Order* requires proof that is impossible to provide and would be hypothetical, speculative and inadmissible. The result violates the mandates in 47 U.S.C. § 160.

## **II.** **ANALYSIS**

1. As the Petitioner, FeatureGroup IP was a party to the proceeding. *Cf.*, 47 C.F.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. There are two questions. First, under either § 251(b)(5) and rule 51.701(b) or § 251(g) and rule 69.5 when two LECs collaborate to jointly handle a voice-embedded Internet communication can an ILEC impose access charges on the CLEC that directly serves the third party voice-embedded Internet communications provider? Second, if the ILECs have some right to recover access charges from FeatureGroup IP under § 251(g) and rule 69.5(b) has FeatureGroup IP met the § 10 criteria for forbearance from that part of § 251(g) and rule 69.5(b) allow ILECs to impose access charges on FeatureGroup IP – which, even if access applies to voice-embedded Internet communications – is a joint access provider? With regard to the second

question, FeatureGroup IP was not seeking complete forbearance from all application of § 251(g) and rule 69.5(b). Those provisions would still apply to the transaction. The ILECs would merely recover their access entitlement from the voice-embedded Internet communications provider rather than FeatureGroup IP. In this respect, the rules would operate just as they do today for joint access service when two LECs collaborate to handle an IXC's telephone toll call.

3. The Commission plainly erred when it failed to answer the first question. The *Order* suffered from arbitrary and capricious error because it 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.<sup>2</sup> The *Order*, devoid of explanation, denied relief that was not sought and it did not either grant or deny the relief that was actually sought.<sup>3</sup>

**A. Reconsideration Point 1:**

4. 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-embedded Internet communications.

5. 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

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<sup>2</sup> 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.

<sup>3</sup> The Commission's failure to specifically deny the actual relief that was sought means that the relief was "deemed granted" under Section 10(c), 47 U.S.C. § 160(c). Even though it does not have to, FeatureGroup IP is seeking reconsideration to allow the Commission to actually dispose the question.

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).

6. 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.”<sup>4</sup> Although the *Order* recites in note 19 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 pleading<sup>5</sup> in a Texas PUC post interconnection agreement dispute case arguing that the Texas PUC should view the *Order* as the FCC’s conclusion that access charges are due for this traffic type and that they are due from FeatureGroup IP. 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 allow AT&T Texas to cancel the interconnection

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<sup>4</sup> *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.”]

<sup>5</sup> The AT&T Texas pleading is attached hereto as Exhibit “A.”

agreement and take down the interconnection trunks between FeatureGroup IP and AT&T Texas.<sup>6</sup>

7. 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.”

8. 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 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.”

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<sup>6</sup> FeatureGroup IP January 12, 2009 written *ex parte*, Declaration of Lowell Feldman, p. 2.

9. 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).”<sup>7</sup> “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).”<sup>8</sup> 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.

10. While FeatureGroup IP has consistently argued that the ESP is not subject to access charges from either of the two LECs that jointly handle the call, that was not the focus of the petition. Instead the petition sought a ruling on whether one LEC can deem the other LEC an “access customer” because neither of the two LECs is the one providing “telephone toll service” and neither LEC is an “interexchange carrier” for purposes of 47 C.F.R. § 69.5(b).

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<sup>7</sup> 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.*”) [Emphasis added].

<sup>8</sup> *Id.* ¶15, 2008 FCC LEXIS 7792 \*24.

11. Yet AT&T claims entitlement to access charges from FeatureGroup IP. AT&T has sued FeatureGroup IP for \$7.5 million. And it has asked the Texas PUC to require FeatureGroup IP to escrow the money and 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 from FeatureGroup IP. 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; it is real and it is happening right now. The Commission has the duty to resolve the issue.

12. The *Order* must be reconsidered. The non-decision in the *Order* 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 said it has not yet decided but plans to decide some other day. That some day is now. The Commission has no more “days”; any further delay is a complete and illegal violation of FeatureGroup IP's due process rights.

**B. Reconsideration Point 2:**

13. FeatureGroup IP seeks reconsideration under 47 C.F.R. 1.106(d)(1) and (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.

14. The action taken by the Commission should be changed because it was based on a failure to apply the law as declared by recent agency action, and is inconsistent with that action.

Granting FeatureGroup IP's petition would not create a "hole".<sup>9</sup> Under the Act, the transaction is either covered by § 251(b)(5) and rule 51.701(a)(1) or § 251(g) and rule 69.5(b). FeatureGroup IP continues to insist that this is § 251(b)(5) traffic. When two LECs jointly provide service to an Enhanced or Information Service Provider, then neither LEC is entitled to recover access charges from the ESP/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.<sup>10</sup> 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.<sup>11</sup>

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<sup>9</sup> Any fair reading of the Order makes it clear that the Commission was entirely resting its decision on the notion that there would be a "hole" ("no rate regulation") if § 251(g) does apply and forbearance was granted.

<sup>10</sup> Memorandum Opinion and Order, *TSR Wireless, LLC v. US West Communications, Inc.*, File Nos. E-98-13, E-98-15; E-98-16, E-98-17, E-98-18, FCC 00-194, ¶ 21, 15 FCC Rcd 11166, 11177-11178 (2000), *aff'd sub nom. Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

<sup>11</sup> *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).

15. There was “no pre-Act obligation relating to intercarrier compensation for” “ISP-originated traffic” jointly handled by a CLEC and an ILEC.<sup>12</sup> Traffic between a CLEC serving an ESP and that delivers the ESP’s traffic to an ILEC for transport and ultimate termination to an ILEC end user was *never* part of the access (§ 251(g)) regime. There was no pre-Act obligation that CLECs pay access because they did not exist as such until after the 1996 Amendments were passed. There was no such thing as “voice-embedded Internet communications” in 1996, so there was no “pre-Act obligation” for this sub-species of ESP traffic. There was not even a pre-Act obligation for CLECs and ILECs to interconnect to each other for this traffic, much less some intercarrier compensation obligation. This traffic could not possibly have been “carved out” by § 251(g) because it did not exist in 1996.<sup>13</sup>

16. The Commission’s failure and refusal to recognize this simple proposition of law concerning ESP traffic that merely goes the “other direction” from so-called “ISP-bound” traffic is as egregious as its handling of the equally simple proposition that bedeviled the industry between 1997 and 2008 until it was finally resolved in the *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*. The industry dedicated 11 years to fighting over the obvious. Taking 7 years (and counting) to answer the very much related question for voice-embedded Internet communications is an equal embarrassment. The D.C. Circuit ultimately got fed up with the Commission’s refusal to do its job on “ISP-bound” traffic.<sup>14</sup> The Commission cannot also dally on the equally important issue of what the rules are or should be when the ESP traffic goes the other way, particularly when the Congressional intent

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<sup>12</sup> *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*. ¶15, 2008 FCC LEXIS 7792 \*24.

<sup>13</sup> *WorldCom v. FCC*, 288 F.3d 429, 433-434 (D.C. Cir. 2002).

<sup>14</sup> *In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008) (directing the Commission to respond to the remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the ISP Remand Order).

of the statute is clear. If the ESP is not providing a telecommunications service, then § 251(g) cannot even arguably apply because it is not telephone toll and therefore no “exchange access” charges can apply and, as noted, there was no pre-Act obligation for CLECs and ILECs to interconnect for this traffic and there was no pre-Act inter-carrier obligation related to this traffic. There is nothing hard about this question: this traffic is and always was covered by § 251(b)(5) and it was never carved out by § 251(g). It did not exist in 1996.

**C. Reconsideration Point 3:**

17. Under 47 C.F.R. 1.106(d)(1) and (2), the Commission should reconsider its *Order* because the *Order* incorrectly recites the arguments of the Forbearance Petition and the state of the law.

18. 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, LECs may receive access charges.”<sup>15</sup> 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.

19. There is no “hole,” and no “absence of regulation.” There is only completely misguided ILEC wishful thinking and conjuring of a hole – bolstered by the Commission’s failure to do its job with the result that the ILECs win. The ILECs have conjured up a hole, from

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<sup>15</sup> *Order* ¶ 6.

“whole” cloth. 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).”<sup>16</sup> The *Order* demonstrates that the Commission read the comments of the ILEC’s but not the Petition itself, finding some hobgoblin of a regulatory void that the Commission accepted whole hog. The only regulatory void that exists is the one created by Commission inaction that allows the ILECs to erect barriers to new entrants and new technology by unilaterally assessing access charges on both voice-embedded Internet communications service provider and the CLECs that serve them because the Commission has completely and utterly failed to rule on these important issues. The regulatory void is a figment of the ILECs’ fervent and overactive imagination. The only absence of regulation that occurs here derives from the Commission’s abdication of its regulatory obligation to enforce the clear terms of § 251(b)(5) and its refusal to recognize that this traffic as a matter of law was not “carved out” by § 251(g).

20. FeatureGroup IP explained that it is the ILECs’ “foundation” that access charges apply to this traffic, and more particularly that they can send the bill to FeatureGroup IP. 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.<sup>17</sup> 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

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<sup>16</sup> *Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*. ¶ 16.

<sup>17</sup> *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.

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. The petitioner has a right to a ruling on the relief that was actually requested, rather than a complete mischaracterization of the requested relief set out by those who oppose the petition.<sup>18</sup>

**D. Reconsideration Point 4:**

21. 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 deference to 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.

22. 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 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.

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<sup>18</sup> 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.

23. The *Order* is a transparent exercise in procedural Doublespeak to – once again – not decide the intercarrier compensation obligations that apply (both with regard to the LECs that handle the call and with regard to the voice embedded Internet communications provider to one or all of the LECs) 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*.<sup>19</sup> FeatureGroup IP’s Petition expressly and clearly stated that the type of traffic involved in that case was not in issue.<sup>20</sup> 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.<sup>21</sup> Further the petition was limited to FeatureGroup IP traffic and ILEC charges against FeatureGroup IP; it did not seek forbearance from access charges that may apply to and be payable by the voice-embedded Internet communications provider.

24. The industry has sought a decision on “non IP in the Middle” in every possible way. SBC/AT&T has asked for a declaratory ruling<sup>22</sup> and then another declaratory ruling

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<sup>19</sup> 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*”). In that case the Commission expressly held that any access obligation was owed by the IXC and not the CLEC that directly serves the IXC and is a joint access provider. See, *id.* note 92.

<sup>20</sup> Forbearance Petition pp. 25-26 and note 38.

<sup>21</sup> *Id.* Therefore, FeatureGroup IP’s customers are as a matter of law enhanced/information service providers and they are not carriers. Indeed, the FeatureGroup IP tariffed service expressly bars carriers from subscribing; only true enhanced/information service providers may use IGI-POP.

<sup>22</sup> *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*

accompanied by a waiver.<sup>23</sup> The issue was squarely teed up in multiple requests for comment going back for more than 7 years in the never-ending *Intercarrier Compensation* rulemaking and the broadly stated but as yet unresolved *IP Services* rulemaking.<sup>24</sup> 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.<sup>25</sup> 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.

25. 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;<sup>26</sup> those that do provide service conducive to new technology are sued for immense amounts of money by ILECs

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*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.

<sup>23</sup> *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers*, WC Docket No. 08-152 (filed July 17, 2008).

<sup>24</sup> *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.

<sup>25</sup> *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).

<sup>26</sup> Indeed this non-decision creates the illusion of new "traffic pumping opportunities" for some CLECs to charge 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 that AT&T has complained about in its recent Declaratory Ruling and "Limited Waiver" petition in WC Docket 08-152

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 therefore discouraged. The Commission is abandoning its duty to regulate and this is causing 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.

26. 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 requests would “complicate and hinder the Commission’s decision-making process enormously, as we would be forced to delay ongoing rulemaking efforts in order to address one forbearance petition after another.”<sup>27</sup> 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 –

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<sup>27</sup> 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).

remanded forbearance requests, declaratory rulings that have been sought but not answered, and rulemakings that have been repeatedly noticed followed by comments from all corners of the industry – without any resolution in sight.

27. 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 forbearance denial, the court said “section 10(a)(3)’s very purpose is to force the Commission to act within the statutory deadline.”<sup>28</sup> The court also reaffirmed that forbearance relief could not be denied merely because alternative routes for seeking regulatory relief were available.<sup>29</sup> As noted, the D.C. Circuit was also clearly frustrated with the Commission’s failure and refusal to answer the remand of the *ISP Remand Order*, and issued the mandamus requiring the Commission to act.<sup>30</sup> 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.

28. 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 long running and far-overdue rulemaking of uncertain status and at some undetermined time – is simple regulatory failure. Indeed, as set forth in Reconsideration Point 1 above, the denial in the

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<sup>28</sup> *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006).

<sup>29</sup> 452 F.3d at 836, citing *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001).

<sup>30</sup> *In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008).

*Order* has only farther emboldened the ILECs. This is not regulation. The failure to decide is regulatory abdication. 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 that is able to constrain the ILECs from being able to accomplish their natural inclination to crush new business plans and new forms of competitive entry that will lead to revenue decline and lost dominance in all things communicative.

**E. Reconsideration Point 5:**

29. 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* misconstrues and does not address FeatureGroup IP's request for partial but not complete forbearance from § 251(g) and rule 69.5(b).

30. 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.

31. 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.

32. 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.

33. This part of the forbearance petition was not a request to completely forbear from § 251(g) and rule 69.5(b) if they apply (which as noted FeatureGroup IP continues to deny). But if they do apply, then FeatureGroup IP sought forbearance from the part of § 251(g) and rule 69.5(b) that allows ILECs to send access bills to FeatureGroup IP. The result would be that the ILECs would send their § 251(g)/rule 69.5(b) access bills to the voice-embedded communications service provider. 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*. But § 251(g) and rule 69.5(b) would still apply. There would be no "hole," no "regulatory void" and no "absence of rate regulation."

34. The *Order* completely ignored the actual relief that was sought. The Commission should reconsider and (1) decide the question of whether – under § 251(b)(5) and rule 51.701(b) or § 251(g) and rule 69.5(b) 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 forbearance from the operation of those provisions with the result that the ILECs would still get their access payments from the voice-embedded Internet communications provider, just like they get their § 251(g)/rule 69.5(b) access payments directly from IXCs in a joint access situation today. 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:**

35. 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 an illegal evidentiary standard limited to the impact on ILECs’ access revenues instead of the impact on the overall public’s interest, and the *Order* requires proof that is impossible to provide and would be hypothetical, speculative and inadmissible. The result violates the mandates in 47 U.S.C. § 160.

36. 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.

37. 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.”<sup>31</sup> With all due respect, that is simply not true. The petition was replete with numbers and it contained an

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<sup>31</sup> *Order* ¶ 12. *See also*, Commission McDowell Statement (no economic analysis).

extensive economic analysis of how granting the petition would facilitate the expansion and use of the PSTN to support Group Forming Networks.<sup>32</sup>

38. 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. FeatureGroup IP insists that this is a patently erroneous construct because the statutory criteria look at the *public's* interest, not the *utilities'* narrow interest. Nonetheless, there is such evidence. First, the *Order* ignores FeatureGroup IP's position that § 251(b)(5) applies. 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 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”).

39. Second, the traffic in issue is not traffic for which the ILECs are now recovering access. So we are not discussing revenues they presently recover and will no longer receive. The petition precisely identified the traffic, notwithstanding the Commission's feigned confusion in ¶ 12 and note 35.<sup>33</sup> 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

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<sup>32</sup> See petition pp. 32-36, 40-41, 53-56 and petition Appendix B.

<sup>33</sup> 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.

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. Indeed, they would finally begin to receive money in the form of § 251(b)(5) reciprocal compensation, so they will accrue additional, not fewer revenues.

40. Third, the “impact” evidence demanded in the *Order* based on a “foundation” FeatureGroup IP has consistently rejected is simply impossible to fulfill. The 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 beyond crystal ball gazing and is hypothetical, speculative and impossible to determine. Denying relief based on a failure to perform an impossible task is the height of arbitrary and capricious decision making.

### **CONCLUSION**

41. 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 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. This necessarily means that the Commission should rule on the actual request, not some bastardized construct concocted by those who oppose the petition. The Commission has failed in its statutory duty to consider the Forbearance

Petition, the precise relief sought and whether the petitioner has met the criteria in section 10. 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. FeatureGroup IP seeks reconsideration so that the Commission can rule on the real merits and address the requests that were actually made rather than the perverted mischaracterization of the request that the *Order* described and then pretended to dispose.

42. There are two questions. First, under either § 251(b)(5) and rule 51.701(b) or § 251(g) and rule 69.5 when two LECs collaborate to jointly handle a voice-embedded Internet communication can an ILEC impose access charges on the CLEC that directly serves the third party voice-embedded Internet communications provider? Second, if the ILECs have some right to recover access charges from FeatureGroup IP under § 251(g) and rule 69.5(b) has FeatureGroup IP met the § 10 criteria for forbearance from that part of § 251(g) and rule 69.5(b) allow ILECs to impose access charges on FeatureGroup IP – which, even if access applies to voice-embedded Internet communications – is a joint access provider? With regard to the second question, FeatureGroup IP was not seeking **complete forbearance from all application of § 251(g) and rule 69.5(b)**. Those provisions would still apply to the transaction. The ILECs would merely recover their access entitlement from the voice-embedded Internet communications provider rather than FeatureGroup IP. In this respect, the rules would operate just as they do today for joint access service when two LECs collaborate to handle an IXC's telephone toll call.

43. The Commission erred when it failed to answer the first question. It committed egregious error when it completely and absolutely did not even discuss the second. FeatureGroup IP's petition for forbearance did not ask for forbearance from access on 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. The *Order* did not rule on the relief that was actually sought.

When the commission looks at the real question, and the actual evidence, it will have no choice but to hold that forbearance is required because access charges are not due, or that even if they are due they should not be assessed against FeatureGroup IP. The ILECs can send their own § 251(g)/rule 69.5(g) “modem tax” bills directly to the voice-embedded Internet communications service provider, just like they now send § 251(g)/rule 69.5(b) access bills directly to IXCs.

#### **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 characterizes 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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Dated: February 20, 2009 (as corrected by February 23, 2009 filing)

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day served a copy 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's Motion for Reconsideration in the above-captioned matter on each party admitted to participate in the agency proceeding and on the Respondents herein, via United States Postal Service, first-class mail, in envelopes addressed as indicated below, and I properly cause same to be deposited in a receptacle of the United States Postal Service.

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