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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*.<sup>1</sup> The FCC's Order of last week indicates

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<sup>1</sup> 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.<sup>1</sup> For the reasons set forth below, we deny the petition because it fails to meet the statutory forbearance criteria.<sup>2</sup>

**II. BACKGROUND**

2. In the 1996 Act,<sup>3</sup> 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.<sup>4</sup> 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

<sup>1</sup> 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).

<sup>2</sup> See 47 U.S.C. § 160(a).

<sup>3</sup> 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).

<sup>4</sup> 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.”<sup>5</sup> To ensure the continued enforcement of certain pre-1996 Act access obligations and restrictions, Congress also enacted a transitional mechanism in section 251(g).<sup>6</sup> 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.<sup>7</sup> 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].”<sup>8</sup>

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.<sup>9</sup> The Commission found that section 251(g) “explicitly contemplates

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<sup>5</sup> 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).

<sup>6</sup> *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).

<sup>7</sup> *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.

<sup>8</sup> *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).

<sup>9</sup> *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).”<sup>10</sup> 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.<sup>11</sup>

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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

### 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

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

<sup>11</sup> *Id.* at 14126-28, paras. 14-16.

<sup>12</sup> *See* Feature Group IP Forbearance Petition at 24-31.

<sup>13</sup> 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.”).

<sup>14</sup> Feature Group IP Forbearance Petition at 3-4.

forbearance under section 10(a) of the Act.<sup>15</sup> The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied.<sup>16</sup> Thus, the Commission “could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”<sup>17</sup> 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.<sup>18</sup> 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>19</sup>

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<sup>15</sup> 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”).

<sup>16</sup> 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).

<sup>17</sup> *Id.*

<sup>18</sup> 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.”).

<sup>19</sup> 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.”<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup> 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).”<sup>23</sup>

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.”<sup>24</sup> 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).<sup>25</sup> 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.<sup>26</sup>

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<sup>20</sup> 47 U.S.C. § 160(a)(1).

<sup>21</sup> 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).

<sup>22</sup> Feature Group IP Forbearance Petition at 59.

<sup>23</sup> *Id.* at 60.

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

<sup>25</sup> 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.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

(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.

<sup>27</sup> Feature Group IP Reply at 28-29.

<sup>28</sup> *Id.* at 29.

<sup>29</sup> 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”<sup>30</sup> and if “forbearance from applying such provision or regulation is consistent with the public interest.”<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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).

<sup>30</sup> 47 U.S.C. § 160(a)(2).

<sup>31</sup> 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).

<sup>32</sup> *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.

<sup>33</sup> *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.

<sup>34</sup> *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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

#### 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.<sup>39</sup> The time for appeal shall run from the release date of this Order.<sup>40</sup>

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<sup>35</sup> 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").

<sup>36</sup> 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

<sup>37</sup> *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.

<sup>38</sup> 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).

<sup>39</sup> 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).

<sup>40</sup> 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.