

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

In the Matter of

Petition of Feature Group IP 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

**OPPOSITION OF VERIZON<sup>1</sup>  
TO FEATUREGROUP IP'S PETITION FOR RECONSIDERATION**

**INTRODUCTION AND SUMMARY**

FeatureGroup IP sought to use forbearance so that the IP-enabled voice traffic that it routes over its network and delivers to the PSTN would be subject to § 251(b)(5), rather than access charges. The Commission denied that petition, based on the same reasoning as in its *Core 251(g)/254(g) Forbearance Order*<sup>2</sup>: forbearance “would not automatically, and by default, mean that section 251(b)(5) would govern traffic that was previously subject to” access charges. *Order*<sup>3</sup> ¶ 8. Instead, as with Core’s petition, forbearance would mean that “there would be no rate regulation governing the exchange of this traffic”; such a “regulatory void” is contrary to the

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> Memorandum Opinion and Order, *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118 (2007) (“*Core 251(g)/254(g) Forbearance Order*”), petition for review dismissed, *Core Communications, Inc. v. FCC*, 545 F.3d 1 (D.C. Cir. 2008).

<sup>3</sup> Memorandum Opinion and Order, *FeatureGroup 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, FCC 09-3 (Jan. 21, 2009) (“*Order*”), petition for review filed, *FeatureGroup IP Petition West LLC v. FCC*, No. 09-1070 (D.C. Cir. filed Feb. 20, 2009). FeatureGroup IP’s filing of its petition for reconsideration with the Commission renders its petition for review with the court “not only premature but incurably so.” *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002).

public interest. *Id.* ¶¶ 8, 10, 12. The Commission, moreover, expressly rejected FeatureGroup IP’s efforts to differentiate its petition from Core’s, finding that the two “cannot be distinguished.” *Id.* ¶ 10.

Although FeatureGroup IP raises six “points” on reconsideration, it never once mentions the Commission’s *Core 251(g)/254(g) Forbearance Order*, let alone meaningfully disputes the Commission’s determination that the two petitions share a common procedural defect that compelled the denial of FeatureGroup IP’s petition. The points FeatureGroup IP does raise lack merit. The Commission should deny the petition for reconsideration.

1. FeatureGroup IP first seeks reconsideration based on a letter AT&T Texas filed with the Texas Public Utility Commission (“PUC”), in which it discussed the *Order*. *See* Corrected Pet. at 3-7. Even assuming FeatureGroup IP were correct that AT&T Texas’s letter mischaracterized the effect of the *Order* — and AT&T Texas has already explained that FeatureGroup IP has misread that letter<sup>4</sup> — a private party’s description of a Commission ruling provides no basis for reconsideration of the *substance* of that ruling. Put differently, nothing a private party says can change the content of the *Order*, and reconsideration is limited to challenges to that content: to the Commission’s actual “findings of fact and/or conclusions of law.” 47 C.F.R. § 1.106(d)(2).

2. FeatureGroup IP next complains that the Commission did not apply its interpretation of 47 U.S.C. § 251(b)(5) in the *Second ISP Remand Order*.<sup>5</sup> FeatureGroup IP

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<sup>4</sup> *See* Letter from Thomas J. Horn, AT&T Texas, to Judge Liz Kayser, Texas PUC, Docket No. 33323 (Tex. PUC Feb. 10, 2009).

<sup>5</sup> Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, WC Docket Nos. 05-337 *et al.*, FCC 08-262 (rel. Nov. 5, 2008) (“*Second ISP Remand Order*”), *petitions for review pending, Core Communications, Inc. v. FCC*, Nos. 08-1365 *et al.* (D.C. Cir.).

claims further that, as a result of that interpretation, forbearance here would not create a regulatory void. *See* Corrected Pet. at 7-10. FeatureGroup IP never made this argument in any of its filings in this docket following the release of the *Second ISP Remand Order*. Therefore, it is unsurprising that the *Order* makes no mention of that decision.<sup>6</sup>

In any event, there is no merit to FeatureGroup IP's belatedly raised claim. The *Second ISP Remand Order* — no different from the Commission's prior *ISP Declaratory Ruling*<sup>7</sup> and *ISP Remand Order*<sup>8</sup> — addressed only the intercarrier compensation rules for the narrow class of dial-up ISP-bound traffic involving “calls made to internet service providers (‘ISPs’) located within the caller’s local calling area.” *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002); *see Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 74 (1st Cir. 2006) (relying on Commission *amicus curiae* brief stating that, “in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller.”). Therefore, the Commission’s determination about “the scope of section 251(b)(5)” was limited to that class of ISP-bound traffic. *Second ISP Remand Order* ¶ 7.

In particular, the Commission’s order did not say that § 251(b)(5) is broad enough to encompass the IP-enabled traffic that travels over FeatureGroup IP’s network, and FeatureGroup

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<sup>6</sup> The Commission does reference the Further Notice of Proposed Rulemaking issued along with the *Second ISP Remand Order*, noting that the question of “compensation rules for [IP-enabled] communications . . . [is] the subject of [that] pending rulemaking.” *Order* ¶ 6 n.19.

<sup>7</sup> Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Ruling*”) (subsequent history omitted).

<sup>8</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) (subsequent history omitted).

IP does not claim that it did. Indeed, FeatureGroup IP claims only that the Commission would have “no rational basis to conclude” otherwise if presented with the question. Corrected Pet. at 8. But the Commission was not presented with that question in responding to the D.C. Circuit’s remand of the *ISP Remand Order*. As a result, the Commission’s *Second ISP Remand Order* does not provide that § 251(b)(5) would automatically apply to such traffic assuming it were currently subject to access charges and the Commission granted FeatureGroup IP’s forbearance petition. Therefore, it remains the case that, following forbearance, the Commission would need to issue a further order to cause FeatureGroup IP’s traffic — assuming it is currently subject to access charges — to become subject to § 251(b)(5).

In fact, FeatureGroup IP’s belated reliance on the *Second ISP Remand Order* only serves to highlight the critical difference between a rulemaking and a forbearance proceeding. In the former, the Commission can modify its regulations and alter, prospectively, its interpretation of statutory terms. In the latter, the Commission is limited to eliminating existing regulatory obligations. The Commission’s affirmative exercise of its rulemaking authority in the *Second ISP Remand Order*, therefore, does not call into question its conclusion — here and in the *Core 251(g)/254(g) Forbearance Order* — that forbearance from § 251(g) and the Commission’s access rules “would not automatically, and by default, mean that section 251(b)(5) would govern” the IP-enabled traffic traveling over FeatureGroup IP’s network. *Order* ¶ 8.

3. FeatureGroup IP then objects that the Commission “assume[d], *arguendo*, that . . . section 251(g) . . . and . . . the Commission’s [access] charge rules apply to” FeatureGroup IP’s traffic. *Order* ¶ 6; *see* Corrected Pet. at 10-12. FeatureGroup IP notes that this was not the “foundation of [its] petition,” because FeatureGroup IP repeatedly asserted that “access charges

*do not apply*” to FeatureGroup IP’s traffic. Corrected Pet. at 10 (internal quotation marks omitted).

But the Commission’s assumption with respect to FeatureGroup IP’s request for forbearance was consistent with the D.C. Circuit and Ninth Circuit decisions that forbearance “obviously comes into play only for requirements that exist.”<sup>9</sup> In ruling on FeatureGroup IP’s forbearance petition, the Commission had no need to decide whether the Commission’s existing rules require payment of access charges for FeatureGroup IP’s traffic. Instead, as the Commission properly found, the question before it was whether forbearance would be appropriate assuming that the existing rules so require. *See Order* ¶¶ 6. The Commission fully explained why forbearance would not be appropriate on that assumption. *See id.* ¶¶ 8, 10, 12.

4. FeatureGroup IP’s next basis for seeking reconsideration is that the Commission did not rule on its request for a declaratory ruling — on the application of the Commission’s existing intercarrier compensation rules to FeatureGroup IP’s traffic — at the same time the Commission ruled on its forbearance petition. *See Corrected Pet.* at 12-17. But FeatureGroup IP ignores that the Commission had no obligation to issue a declaratory ruling within the statutory deadline for ruling on the forbearance petition. Indeed, the Commission has already held that the statutory deadline in 47 U.S.C. § 160(c) applies only to forbearance petitions and not to any request for declaratory ruling embedded in such a petition.<sup>10</sup> In fact, the Commission’s rules seek to prevent such commingling of requests for relief, by requiring that petitions for

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<sup>9</sup> *USTA v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004); *accord New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1114 (9th Cir. 2006).

<sup>10</sup> *See Memorandum Opinion and Order, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000, ¶ 31 (2002) (“This request [for a declaratory ruling], unlike SBC’s forbearance request, is not subject to a statutory timetable.”).

forbearance be “filed as a separate pleading.” 47 C.F.R. § 1.53. Therefore, the Commission’s conclusion that it was not bound to rule on both of FeatureGroup IP’s requests within a statutory deadline applicable to only one of them was plainly reasonable.<sup>11</sup>

5. FeatureGroup IP also asserts that the Commission ignored its actual request for relief. *See* Corrected Pet. at 17-19. But the Commission fully understood that FeatureGroup IP requested a ruling — whether through a declaratory ruling or a grant of forbearance — that “access charges do not apply to [its] voice-embedded Internet communications.” *Order* ¶ 4.

FeatureGroup IP’s fifth reconsideration point is, in reality, that the Commission did not find that forbearance would automatically cause FeatureGroup IP’s *customers* — rather than FeatureGroup IP itself — to be obligated to pay access charges. *See* Corrected Pet. at 18. But that was not FeatureGroup IP’s claim in its petition. It instead argued that reciprocal compensation, under § 251(b)(5), would apply to its traffic following forbearance. *See, e.g.*, FeatureGroup IP Pet. at v, 17; FeatureGroup IP Reply at 29.

In any event, FeatureGroup IP’s current claim again ignores the rule that forbearance “obviously comes into play only for requirements that exist.”<sup>12</sup> Therefore, the Commission properly addressed FeatureGroup IP’s forbearance petition as a request for forbearance from § 251(g) and the Commission’s existing rules to the extent (and on the assumption) that those rules require FeatureGroup IP to pay access charges for the IP-enabled traffic it delivers to the

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<sup>11</sup> Contrary to FeatureGroup IP’s claim (Corrected Pet. at 15-16), this case is nothing like *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006), where the D.C. Circuit found that the Commission had erred in denying a *forbearance* petition on the ground that the Commission “had yet to determine” whether the rules in question applied to AT&T’s services. *Id.* at 834. The Commission here denied forbearance on the assumption that the rules in question did apply to FeatureGroup IP’s services. *See Order* ¶ 6. The D.C. Circuit did not require the Commission to issue a declaratory ruling whenever a party seeks forbearance while at the same time disputing that the rules in question apply to the services at issue.

<sup>12</sup> *USTA*, 359 F.3d at 579.

PSTN. FeatureGroup IP offers no explanation for how forbearance would cause FeatureGroup IP's presumed access charge obligations to shift "automatically, and by default" to its customers. *Order* ¶ 8.<sup>13</sup> Instead, as the Commission found in the *Order*, forbearance would "result in a regulatory void," which is not in the public interest. *Order* ¶ 12.

6. Finally, FeatureGroup IP takes issue with the Commission's finding that FeatureGroup IP had provided "no economic analysis of the impact of granting its petition." *Order* ¶ 12; *accord id.* ¶ 10 (noting the "absence of any economic evidence or analysis"). See Corrected Pet. at 19-21. As the Commission noted in the *Order*, it has denied numerous forbearance petitions "for lack of sufficient evidence." *Order* ¶ 10 n.29. Most recently, the Commission denied an analogous petition by Fones4All in part on that ground, *see id.* ¶ 12 n.34,<sup>14</sup> and the Ninth Circuit rejected Fones4All's challenges to that decision, *see Fones4All v. FCC*, 550 F.3d 811, 820-21 (9th Cir. 2008).

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<sup>13</sup> In fact, when FeatureGroup IP suggested in ex partes that its customers might become obligated to pay access charges, FeatureGroup IP never claimed that this would occur automatically. Instead, it stated that additional Commission action — "a future holding" — would be required to bring about that result. *E.g.*, Letter from W. Scott McCullough, UTEX Communications Corp. d/b/a FeatureGroup IP, to Marlene H. Dortch, FCC, WC Docket No. 07-256, Attach. at 6, 8 (Jan. 12, 2009).

<sup>14</sup> Fones4All had sought forbearance from Commission regulations that made clear that incumbent LECs have no obligation to provide competitors with the combination of unbundled elements known as the UNE Platform. *See Memorandum Opinion and Order, 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*, 21 FCC Rcd 11125, ¶¶ 2-3 (2006), *petition for review denied, Fones4All Corp. v. FCC*, 550 F.3d 811 (9th Cir. 2008). Fones4All claimed that forbearance would automatically "expand incumbent LECs' unbundling obligation," so that incumbents would have to sell Fones4All the UNE Platform. *Id.* ¶ 8. The Commission rejected that claim, finding that only "an affirmative Commission decision to require unbundling" could impose on incumbents the duty to provide the UNE Platform. *Id.* As it did here, the Commission "den[ie]d the petition as procedurally defective" because it "would not give [Fones4All] the relief it seeks." *Id.* ¶ 7.

FeatureGroup IP disputes the Commission’s finding here, asserting that its petition “was replete with numbers.” Corrected Pet. at 19. But it fails to cite a single one. Instead, FeatureGroup IP merely cites a broad range of pages from its petition, where it claims it showed how forbearance “would facilitate the expansion and use of the PSTN to support Group Forming Networks.” *Id.* at 20 & n.32.<sup>15</sup> Even that limited claim fails. Those pages contain no economic evidence or analysis showing a relationship between forbearance and the promotion of so-called “Group Forming Networks.” To the extent FeatureGroup IP offered any analysis at all, it simply asserted that, “[i]f the cost of regulatory uncertainty is eliminated [by forbearance], investment [in Group Forming Networks] would increase.” FeatureGroup IP Pet. at 54; *see Order* ¶ 11 n.33 (noting this argument). Yet the Commission correctly rejected the premise of that claim, finding that forbearance would “not create any regulatory certainty” and, instead, would lead to a “regulatory void” and “additional uncertainty.” *Order* ¶ 12.

Nor is there any merit to FeatureGroup IP’s claim that it would be “simply impossible” to provide the kind of economic analysis and evidence the Commission found to be lacking in the record. Corrected Pet. at 21. Even assuming that were the case — and FeatureGroup IP says nothing about any efforts it undertook to perform such analysis or to amass such evidence — any impossibility would derive from the fact that granting forbearance would result in a “regulatory void” and “additional uncertainty.” *Order* ¶ 12. Indeed, even FeatureGroup IP cannot decide what rules would apply “automatically, and by default,” to its traffic following forbearance, *id.* ¶ 8 — suggesting within the space of a few pages that forbearance would mean that its customers

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<sup>15</sup> FeatureGroup IP also cites Appendix B to its petition, which is more than 160 pages of pre-filed direct testimony submitted to the Texas PUC. Unsurprisingly, that testimony contains no economic analysis of the effect of forbearance, because that issue was not before the Texas PUC, which instead is considering a dispute between FeatureGroup IP and AT&T Texas about the meaning of their interconnection agreement.

would pay access charges to AT&T Texas and that forbearance would instead mean that FeatureGroup IP would pay reciprocal compensation to AT&T Texas.<sup>16</sup>

In the face of such fundamental uncertainty, FeatureGroup IP's inability to offer meaningful economic analysis or evidence is unsurprising. But, as the Commission found, in the absence of such evidence, FeatureGroup IP's petition must be denied: forbearance would not grant FeatureGroup IP the relief it seeks, but instead — as FeatureGroup IP's own uncertainty confirms — would leave a regulatory void. *See Order* ¶¶ 10, 12.

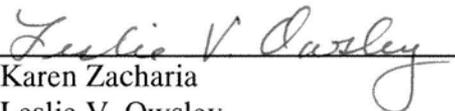
### CONCLUSION

For the foregoing reasons, the Commission should deny FeatureGroup IP's petition for reconsideration.

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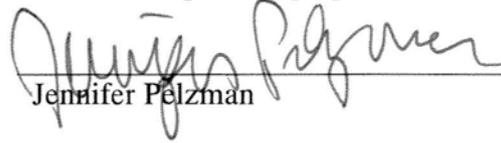
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<sup>16</sup> *Compare* Corrected Pet. at 18 (claiming that AT&T Texas “would get [its] access” charges, but “from the ESP [*i.e.*, FeatureGroup IP’s customer] and not FeatureGroup IP”) *with id.* at 21 (claiming AT&T Texas “would finally begin to *receive* money [from FeatureGroup IP] in the form of § 251(b)(5) reciprocal compensation”).

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of March 2009, I caused copies of the foregoing Opposition of Verizon to FeatureGroup IP's Motion for Reconsideration to be served upon each of the parties listed below by first-class mail, postage prepaid.

  
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