

**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
REPLY TO RESPONSES TO
ITS MOTION FOR RECONSIDERATION**

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REPLY TO RESPONSES TO 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, files this reply to various responses to FeatureGroup IP’s motion for reconsideration of the Commission’s Memorandum Order and Opinion¹ denying FeatureGroup IP’s petition for forbearance (the “Forbearance Petition”).

**I.
SUMMARY**

- Reply Point 1: Access charges do not apply to voice-imbedded IP communications.
- Reply Point 2: If there is not a clear answer to the Reply Point 1, then a regulatory vacuum exists currently leaving the ILECs free to make their own rules.
- Reply Point 3: Reply to Response of NECA.
- Reply Point 4: Reply to Response of Embarq.
- Reply Point 5: Reply to Response of Verizon.

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

II. **ANALYSIS**

1. FeatureGroup IP's petition presented the following questions for resolution and sought specific relief depending on the answer. (1) Does § 251(b)(5) apply when two LECs are involved in handling voice-embedded Internet communications, with the effect that the terminating LEC is entitled to cost-based reciprocal compensation from the LEC that is providing PSTN connectivity to the voice-embedded Internet communications provider? (2) If (contrary to FeatureGroup IP's position stated above) the § 251(g) preserved access charge regime does apply to the transaction when two LECs are involved in handling voice-embedded Internet communications is the terminating LEC supposed to get its access revenue from the voice-embedded Internet communications service provider or does the current access regime somehow allow the terminating LEC to treat the LEC that is providing PSTN connectivity to the voice-embedded Internet communications provider as the "access customer?" (3) If (contrary to FeatureGroup IP's position stated above) the terminating LEC is somehow entitled to assess the LEC that provides PSTN connectivity to the voice-embedded Internet communications provider, then should FeatureGroup IP receive forbearance, with the result that the same rules would apply to voice-embedded Internet communications as apply today to traditional telephone toll?

Reply Point 1: Access charges do not apply to voice-imbedded IP communications

2. FeatureGroup IP's position was and is that § 251(b)(5) applies as a matter of law. FeatureGroup IP's position was and is that this traffic was never covered by the access regime and was never carved out of § 251(b)(5) by § 251(g) for two reasons. First, 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).”² The Commission’s Order (the “Order”) and the Respondents each ignore this crucial distinction in arguing that § 251(g) could ever apply between two LECs.

3. Second, ISP-originated traffic should be treated in the same manner as ISP-bound traffic for purposes of regulatory consistency. “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).”³ 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. Traffic to and from an ISP should be treated in a consistent manner because there is no logical reason to discriminate between the two types of traffic.⁴

4. FeatureGroup IP’s position was and is that if this is access traffic then when the LEC that is providing PSTN connectivity to the voice-embedded Internet communications provider is purely acting as an LEC – in other words it is providing only “telephone exchange service” or “exchange access service” and is not also directly providing “telephone toll service”

² 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) (“*Order Answering Mandamus to Issue Order on Remand of ISP Remand Order.*”)

³ *Id.* ¶15, 2008 FCC LEXIS 7792 *24.

⁴ In the same way that jointly provided “ISP-bound” traffic was not “carved out” of § 251(b)(5) by § 251(g), jointly-provided “ISP-originated” traffic is not “carved out of § 251(b)(5) by § 251(g). The Commission’s failure to resolve this inconsistency in application of § 251(b)(5) warrants vacatur. *AT&T v. FCC*, 452 F. 3d 830, 839 (D.C. Cir. 2006), *citing Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (vacating because challenged orders inconsistent with prior and subsequent agency action).

or the voice-embedded Internet communications service – then the two LECs are engaged in jointly provided access under the Commission's rules and their respective tariffs and each of the LECs is required to bill and expect payment from the voice-embedded Internet communications service provider. Neither LEC can treat the other LEC as the responsible access customer because they are both exchange access providers and neither is a consumer or user of the other's access service. The access rules in place in 1996 that were "preserved" by § 251(g) expressly prohibited "Single Company Billing."⁵ Those rules still do so today.

5. In the Order, the Commission refused to answer question 1 and assumed that access applies but it failed to resolve *who pays them*. So the Commission therefore also did not answer question 2. The Commission completely ignored question 3, and the second part of FeatureGroup IP's petition. It did not either grant or deny relief. Even though FeatureGroup IP could assert that this part of the petition was "deemed granted," FeatureGroup IP instead seeks reconsideration.

Reply Point 2: If there is not a clear answer to the Reply Point 1, then a regulatory vacuum exists currently leaving the ILECs free to make their own rules

6. The following chart shows the real regulatory vacuum that exists with respect to the types of traffic exchanged between LECs and ISPs and the folly of the arguments that forbearance creates rather than resolves this issue:

⁵ See, Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176 (1984); Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 86-104, FCC 87-252, 2 FCC Rcd 4518 (rel. Jul. 1987)..

Type of Traffic	IP in the Middle	Non IP in the Middle (ESP)
From Internet	Subject to access ⁶	Regulatory vacuum
To Internet	Subject to access ⁷	Not subject to access ⁸

7. The real regulatory vacuum is the elephant in the room that the ILECs and the Commission ignore to the point of making wildly inconsistent statements as to their version of clear regulatory treatment “non IP in the Middle”/from Internet traffic. Embarq claims that “under the current intercarrier compensation regime, access charges properly apply to all voice calls that terminate on the PSTN, regardless of the technology used in their origination.”⁹ Embarq, then is completely sure that the ESP exemption of Rule 69.5(b) would never apply to Internet-originated traffic even though every federal court to consider it concludes otherwise.¹⁰ The Commission, contrastingly, must know that there is a regulatory vacuum for this type of traffic because it is the subject of its languorous NPRM: “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.”¹¹

⁶ 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*”).

⁷ *Id.*

⁸ Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, FCC 08-262, ¶ 16, 2008 FCC LEXIS 7792 *23 (rel. Nov. 5, 2008) (“*ISP Remand Order*”).

⁹ Opposition of Embarq to Petition for Reconsideration, p. 2

¹⁰ *Southwestern Bell Tel., L.P. v. Mo. PSC*, 461 F. Supp. 2d 1055, 1081-82 (D. Mo. 2006).

¹¹ Memorandum Opinion and Order, p. 4

8. The Commission's apparent rationale that section 251(g) is the default regulatory scheme, then, ignores the ESP exemption of 47 CFR § 69.5(b) when it declares that "non IP in the Middle"/from Internet traffic may be subject to section 251(g) and that "forbearance would result in no regulation." As explained above, in order for "non IP in the Middle"/from Internet traffic to be subject to 251(g), it had to have been subject to a "pre-Act obligation relating to intercarrier compensation."¹² When one LEC serves an ESP, and thereby delivers the ESP's traffic to another LEC for transport and ultimate termination, then that traffic was *never* part of the access (§ 251(g)) regime and it *never* had any pre-Act obligation to pay access. The Commission also ignores the fact that FeatureGroup IP is a CLEC and not an IXC as explained above and could not be subject to access charges under the *Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*.

9. In sum, in the absence of clear regulatory treatment that logically applies to "non IP in the Middle"/from Internet traffic as the Commission should determine, the ILECs continue to impose their own version of regulation. NECA's Response provides that stark reality. "The Commission should *confirm* that access charges apply to all interexchange voice traffic terminated on the PSTN, regardless of the technology used to originate the call."¹³ NECA, parroting Embarq then, like AT&T in its billing of LECs like FeatureGroup IP, has decided that 47 CFR § 69.5 does not exist and that the Commission's ruling in the *Order Answering Mandamus to Issue Order on Remand of ISP Remand Order* does not apply between LECs.¹⁴ In

¹² *Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*. ¶15, 2008 FCC LEXIS 7792 *24.

¹³ Opposition of NECA to Motion for Reconsideration, p. 9.

¹⁴ Opposition of NECA to Motion for Reconsideration, p. 9. Compare, Opposition of Embarq to Motion for Reconsideration (the Commission should "reconfirm" that "access charges properly apply to all voice calls that terminate on the PSTN, regardless of the technology used in their origination." Opposition of Embarq to Motion for Reconsideration, p. 2.

the absence of a ruling on the Forbearance Petition, the ILECs have made the rules for all of us. Nature abhors a vacuum. The Commission created one and the ILECs are filling it.

10. The ILECs' responses to the reconsideration petition were predictably full of attempts to confuse, mischaracterizations of the issues and requests and more than one flat-out misrepresentation. The page limits necessarily prevent any opportunity to address all of these problems, so FeatureGroup IP can cover only a few. The weight of Commission and judicial authority clearly favors the conclusion that interconnected VoIP services qualify as enhanced services.

Reply Point 3: Reply to Response of NECA

11. NECA's main point is that the decision in *Time Warner*¹⁵ supports the proposition that one LEC can unilaterally send a bill to another LEC. That is not at all what the decision says. Paragraph 17 states that:

...the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. We do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Inter-carrier Compensation* docket.

Time Warner speaks to "§ 251 arrangements" and it cannot be reasonably read to say that an ILEC's access tariff can override an ICA or will apply when there is no ICA. In any event, FeatureGroup IP is not using the "section 251 rights provided herein." FeatureGroup IP is providing telephone exchange service and/or exchange access service to its customers and while the arrangement can fairly be characterized as wholesale it does not remotely resemble the service provided by the petitioners in *Time Warner*.

¹⁵ MO&O, *Time Warner Request for Declaratory Ruling that Competitive Carriers May Obtain Interconnection Under § 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, 22 FCC Rcd 3513 (2007) ("*Time Warner*"). NECA pinpoint cites to ¶¶ 16-17.

12. NECA also makes the patently false claim that FeatureGroup IP failed to demonstrate that its customers' services are enhanced/information services. FeatureGroup IP conclusively showed that there was a net change in form for much of the traffic, that all of FeatureGroup IP's customers change content and offer enhanced functions and that no IGI-POP customers provide any telecommunications service.¹⁶

13. Finally NECA buries another factual misstatement in footnote 23. It asserts that FeatureGroup IP "sends traffic to ILEC networks bearing its own carrier identification code (rather than the codes of other carriers supposedly originating the traffic)" and therefore "shouldn't complain when it is billed the resulting access charges." FeatureGroup IP does not have and has never had a CIC and it therefore does not "send a CIC." FeatureGroup IP has only OCN – which it does publish consistent with LEC industry conventions.

Reply Point 4: Reply to Response of Embarq

14. Embarq insists on pages 8-10 that the ESP Exemption has never applied to "VoIP" and "interconnected VoIP" must "support the PSTN through access charges." FeatureGroup IP disagrees but must note that if both of these propositions are true then "interconnected VoIP" providers are subject to access under rule 69.5 and Embarq should do what it does when traditional telephone toll is involved: follow its own tariff and the access rules and bill the IXC rather than a joint access providing LEC. Why Embarq wants to look to another LEC rather than the provider of the service Embarq insists is already subject to access is a

¹⁶ The Petition expressly limited all relief to only those services for which there is a net change in form, change in the content or an offer of enhanced functions. Petition, pp. 3, 11, 22, 25, 26 and note 38. FeatureGroup IP exhaustively presented completely un rebutted facts showing that the services in issue often involve a net change in form and always involve a change in content and/or an offer of enhanced functions. Reply to Comments, pp. 17-18, 25; August 28, 2008 Comments pp. 19-31; October 6, 2008 *ex parte* attachment p. 6; December 22, 2008 written *ex parte*, pp. vi, 11-19, January 12, 2009 *ex parte* attachment p. 7. NECA is simply in denial of what the record shows.

complete mystery. Maybe that is because VoIP is exempt and the ILECs want to get access anyway by treating it different from legacy telephone toll.

15. Embarq challenges FeatureGroup IP's point about the economic impact of granting the petition on pages 14-15. Like the similar comments by the other ILECs, they completely misconstrue. First, with regard to the second part of FeatureGroup IP's forbearance request there would be no impact and there would be no "absence of regulation" and the ILECs would not suffer any financial impact. If the Commission grants this alternative relief, then § 251(g) would still apply: it would merely treat voice-embedded Internet communications like it treats traditional telephone toll. The ILECs insist that has always been the rule but the issue they keep dodging is that they are not following that rule. They are treating voice-embedded Internet communications differently because they are billing access to a joint access provider rather than the provider of the service they insist is subject to access.

16. Under the alternative relief, the ILECs would follow their tariff and bill the voice-embedded Internet providers for their share of the service they provide. Then, FeatureGroup IP would follow its access tariff and bill the voice-embedded Internet provider for the part FeatureGroup IP provides. That is precisely how IXCs are handled today with traditional telephone toll. The "access regime" would be enforced, so there would be no absence of regulation. The ILECs would get their access tithes. They would not be out any money. There would be no financial impact.

17. With regard to FeatureGroup IP's first forbearance relief the ILECs would be paid reciprocal compensation by FeatureGroup IP pursuant to § 251(b)(5). They are not getting any money now. Therefore, the ILECs would accrue additional and new funds. Where is the harm?

Reply Point 5: Reply to Response of Verizon

18. On page 3, Verizon asserts that FeatureGroup IP did not present any argument on the similarity between so called "ISP-bound" traffic and voice-embedded Internet traffic after the Commission's *Second ISP Remand Order*. That is not correct. FeatureGroup IP presented this argument in two separate filings.¹⁷

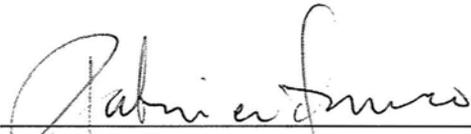
19. Various ILECs and ILEC-controlled organizations filed responses to the Motion for Reconsideration making arguments both contrary to Commission rulings and demonstrative of the regulatory vacuum that exists with respect to voice-imbedded IP communications.

**III.
CONCLUSION**

The Commission has failed in its statutory duty to consider the Forbearance Petition, the precise relief sought and its impact on the overriding purpose of the Act: fostering competition. FeatureGroup IP offers a new competitive service (IGI-POP) that directly competes with AT&T's TIPToP but does not impose access or access-like charges. Without forbearance the Commission's promise to the industry when TIPToP was allowed to go into effect will have been broken. Denial of the Petition allows the ILECs in general and AT&T in particular to dictate the market for advanced communications. 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.

¹⁷ See, FeatureGroup IP January 15, 2009 written *ex parte*, p. 6, note 6; FeatureGroup IP's Intercarrier Compensation Reply Comments in Response to FNPRM in CC Docket 01-92 and Written Ex Parte in WC Docket 07-256, pp. 6-7, 20-21 ("Voice-Embedded IP-Based services and applications that 'call' the PSTN are merely the flip side of 'ISP-bound' traffic. The Commission was absolutely correct in continuing to equate all IP-Based services for both jurisdictional and intercarrier compensation purposes. All are equally subject to § 251(b)(5) and none are or can be subject to exchange access charges. This is particularly so for IGI-POP.")

Respectfully submitted,

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Dated: March 13, 2009
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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 Reply to Responses to Its 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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