

Before the  
Federal Communications Commission  
Washington, D.C. 20534

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In the Matter of	)	FCC Mail Room
	)	
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	)	

## ORDER ON RECONSIDERATION

Adopted: June 29, 2010

Released: June 30, 2010

By the Commission:

## I. INTRODUCTION

1. In this order, we decline to reconsider a Commission decision denying Feature Group IP's request for forbearance from the application of access charges (to the extent that they applied) to "voice-embedded Internet communications." The Commission's 2009 forbearance order found that Feature Group IP's petition did not meet any of the statutory forbearance criteria, principally because forbearance would result in a regulatory void, rather than achieving the outcome Feature Group IP sought.<sup>1</sup> Feature Group IP<sup>2</sup> filed a petition for reconsideration,<sup>3</sup> which fails to identify any new facts or

<sup>1</sup> *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, Memorandum Opinion and Order, 24 FCC Red 1571 (2009) (*Feature Group IP Forbearance Order*).

<sup>2</sup> Feature Group IP includes Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC.

<sup>3</sup> See Feature Group IP Motion for Reconsideration, WC Docket No. 07-256 (filed Feb. 20, 2009). On February 23, 2009, Feature Group IP filed a corrected version of its petition and a motion to accept the corrected pleading. See Motion to Accept Corrected Motion for Reconsideration or in the Alternative Motion to Accept Supplement or Addition, WC Docket No. 07-256 (filed Feb. 23, 2009) (Motion) (attaching Corrected Motion for Reconsideration, WC Docket No. 07-256 (filed Feb. 23, 2009) (Petition for Reconsideration)). The Motion states that the wrong version of the petition was "inadvertently selected for print, conversion to portable document format and execution and then upload." Motion at 2. According to the Motion, the document filed on February 20, 2009 contained a number of errors and was not in the format required under the Commission's rules. Motion at 2 and n.2. On March 5, 2009, AT&T, Inc., the Embarq Local Operating Companies, the National Exchange Carrier Association (NECA)/National Telecommunications Cooperative Association (NTCA)/Organization for the Promotion and Advancement of Small Telecommunications Companies (OPATSCO)/Independent Telephone and Telecommunications Alliance (ITTA)/Western Telecommunications Alliance (WTA) (filing jointly), and Verizon filed oppositions to the Petition for Reconsideration. See Opposition of AT&T, Inc. to Feature Group IP Motion for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009) (AT&T Opposition); Opposition of Embarq to Petition for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009); NECA, NTCA, OPATSCO, ITTA, and WTA Opposition to Motion for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009); Opposition of Verizon to Feature Group IP's Petition for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009). Feature (continued . . .)

circumstances, or material error on the part of the Commission that would support reconsideration. Therefore, we deny the petition.

## II BACKGROUND

2. 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>4</sup> Specifically, Feature Group IP requested 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>5</sup> Alternatively, Feature Group IP asked 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>6</sup>

3. On January 21, 2009, the Commission adopted the *Feature Group IP Forbearance Order* denying the Petition for Forbearance because it failed to meet any of the statutory forbearance criteria.<sup>7</sup> The Commission determined that unless it took affirmative action, as required by the statute, to address intercarrier compensation regulation for this type of traffic, the requested forbearance would result in a regulatory void regardless of the types of carriers or traffic at issue.<sup>8</sup> Because forbearance would result in the elimination of any rate regulation, the Commission concluded that enforcement of section 251(g) and related Commission rules remained necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory.<sup>9</sup> The Commission further concluded that it could not, on the record in this proceeding, make the necessary findings that enforcement of these provisions was not necessary for the protection of consumers or that forbearance would be in the public interest.<sup>10</sup>

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Group IP filed its reply on March 13, 2009. See Feature Group IP’s Reply to Responses to Its Motion for Reconsideration, WC Docket No. 07-256 (filed Mar. 13, 2009) (Feature Group IP Reply).

<sup>4</sup> See 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, at 24-31 (filed Oct. 23, 2007) (Petition for Forbearance).

<sup>5</sup> Petition for Forbearance at 3. Although Feature Group IP used a variety of different terms throughout its petition, for the purposes of the decision, the Commission used the term “voice-embedded Internet communications” to describe the services that were subject to the request for forbearance. See *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1573, n.13.

<sup>6</sup> Petition for Forbearance at 3-4; 24-31.

<sup>7</sup> See *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1571, para. 1.

<sup>8</sup> See *id.* at 1575-76, paras. 7-10. For purposes of conducting the required forbearance analysis, the Commission assumed that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) of the Commission’s rules applied to voice-embedded Internet communications, but emphasized that it was making no decisions or findings concerning the current compensation rules for these types of communications. See *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1574, para. 6 and n.19.

<sup>9</sup> See *id.* at 1576, para. 10.

<sup>10</sup> See *id.* at 1577-78, paras. 11-12. The Commission reached this conclusion based on the lack of evidence in the record on the economic impact that grant of the forbearance petition would have on the market or consumers. *Id.* at (continued . . .)

Accordingly, the Commission found that the petition failed to meet the statutory criteria necessary for forbearance.<sup>11</sup>

4. Feature Group IP seeks reconsideration of the *Feature Group IP Forbearance Order*, claiming that the Commission "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."<sup>12</sup> Specifically, Feature Group IP contends that there are several reasons that the Commission should reconsider the *Feature Group IP Forbearance Order*: (1) subsequent events, including reliance by an incumbent local exchange carrier (LEC) on the order to justify charging access for voice-embedded Internet communications, suggest that reconsideration is warranted; (2) the decision is inconsistent with Commission precedent; (3) the order incorrectly interpreted the petition and the state of the law; (4) the order "sidesteps" the issue of "non-IP in the middle" access charges; (5) the decision misconstrues the partial forbearance requested, and; (6) the order imposes an illegal evidentiary standard.<sup>13</sup> Accordingly, Feature Group IP asks that the Commission reconsider and issue a revised decision that:

(1) properly characterizes Feature Group 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 Feature Group IP for voice-embedded Internet communications that Feature Group IP processes for its ESP customers and hands off to an ILEC for transport and termination; or (4) that Feature Group 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 service provider. . . .<sup>14</sup>

### III. DISCUSSION

5. For the reasons discussed below, we deny the Petition for Reconsideration. Feature Group IP fails to identify any new facts or circumstances, or any material error that would support reconsideration of the *Feature Group IP Forbearance Order*. We are not persuaded by claims that the *Feature Group IP Forbearance Order* is inconsistent with Commission precedent, nor do we find any other basis in the Petition for Reconsideration for concluding that the Commission's resolution of the Petition for Forbearance was incorrect. Throughout its Petition for Reconsideration, Feature Group IP restates and re-characterizes many of the arguments presented in its Petition for Forbearance in an attempt

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1577-78, para. 12. Moreover, the Commission reasoned that the regulatory void resulting from the requested forbearance would create uncertainty that could harm network investment. *Id.*

<sup>11</sup> See *id.* at 1578, para. 13.

<sup>12</sup> See Feature Group IP Reply at 10. On February 20, 2009, Feature Group IP also filed a petition for review of the *Feature Group IP Forbearance Order* in the United States Court of Appeals for the District of Columbia Circuit. See *Feature Group IP West, LLC, et al. v. FCC*, No. 09-1070 (D.C. Cir. Feb. 20, 2009). On April 9, 2009, the Commission filed a motion to dismiss Feature Group IP's petition for review in the D.C. Circuit. On June 23, 2009, the D.C. Circuit ordered that the motion to dismiss Feature Group IP's petition for review be held in abeyance pending agency disposition of the request for reconsideration. See *Feature Group IP West, LLC, et al. v. FCC*, No. 09-1070, Order (D.C. Cir. June 23, 2009).

<sup>13</sup> See Petition for Reconsideration at 1-2.

<sup>14</sup> Petition for Reconsideration at 23 (emphasis in original)

to embed its request for a declaratory ruling, i.e., whether and how access charges currently apply to voice-embedded IP communications, into its forbearance request.<sup>15</sup> As discussed below, under section 10 of the Communications Act, the Commission is obligated to consider within the time specified by the statute only whether the forbearance criteria have been met. That statutory obligation was satisfied in the *Feature Group IP Forbearance Order*. Accordingly, the Petition for Reconsideration is denied.

#### A. Corrected Petition

6. As an initial matter, we grant Feature Group IP's Motion to accept the corrected Petition for Reconsideration. Feature Group IP maintains that the original filing was made "through inadvertent error" and that the corrected version contained no new substantive arguments.<sup>16</sup> Although procedural irregularities with the initial Motion for Reconsideration were alleged,<sup>17</sup> we find that the initial Motion for Reconsideration was timely filed, parties were able to prepare and file their oppositions within the time prescribed by the Commission's rules,<sup>18</sup> and the corrected version of the Petition for Reconsideration was not materially different in substance than the initial Motion for Reconsideration. For these reasons, we exercise our discretion to grant Feature Group IP's Motion to accept its corrected Petition for Reconsideration.<sup>19</sup>

#### B. Reconsideration Based on Subsequent Developments

7. Reconsideration of a Commission's decision is appropriate when the petitioner demonstrates that the original Order contains a material error or omission.<sup>20</sup> Moreover, to the extent the petitioner relies on additional facts in making his or her case, the petitioner must demonstrate that such facts were not known or did not exist until after the petitioner's last opportunity to present such matters (although the Commission remains free to consider additional facts as the public interest requires).<sup>21</sup> To the extent a petition simply repeats arguments that were previously considered and rejected in the proceeding, the Commission may deny them for the reasons already provided.<sup>22</sup> Feature Group IP first argues that reconsideration is appropriate because some incumbent LECs are relying on the *Feature Group IP Forbearance Order* to justify imposing access charges for voice-embedded Internet

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<sup>15</sup> See *supra* para. 10.

<sup>16</sup> Motion at 2.

<sup>17</sup> Specifically, AT&T questions whether the initial motion was timely filed and served under the Commission's rules and whether the second filing should be considered a "correction" or "supplement." See AT&T Opposition at 3, n.8.

<sup>18</sup> See 47 C.F.R. § 1.106(g).

<sup>19</sup> See 47 U.S.C. § 4(j) ("The Commission may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.").

<sup>20</sup> *Toll Free Service Access Codes, Order on Reconsideration*, 22 FCC Rcd 22188, 22192-22193 at para. 13 (2007).

<sup>21</sup> 47 C.F.R. § 1.106(c).

<sup>22</sup> See, e.g., *Federal-State Joint Board on Universal Service Business Service Center, Inc., Mobile Phone of Texas, Inc., and 3 Rivers PCS, Inc. Petition for Reconsideration of Small Wireless Carrier Group, Order*, 19 FCC Rcd 22305, 22306 at para. 4 (2004).

communications.<sup>23</sup> Feature Group IP specifically references a filing made by AT&T to the Texas Public Utility Commission (Texas Commission) notifying it of the *Feature Group IP Forbearance Order*.<sup>24</sup> However, AT&T does not contend in that filing that the *Feature Group IP Forbearance Order* determines the issues involved in the parties' dispute before the Texas Commission over the proper interpretation of an interconnection agreement.<sup>25</sup> Even if the AT&T filing at issue could be construed as Feature Group IP contends, a party's self-interested construction of a Commission order is irrelevant to the Commission's charge to determine whether a forbearance petition meets the criteria set forth in Section 10.<sup>26</sup> Accordingly, we find that the alleged interpretation of the *Feature Group IP Forbearance Order* complained of by Feature Group IP does not provide a sufficient basis for reconsideration.

### C. Reconsideration Based on Alleged Inconsistency with Precedent

8. Next, Feature Group IP argues that the *Feature Group IP Forbearance Order* is inconsistent with prior agency precedent.<sup>27</sup> In the *Feature Group IP Forbearance Order*, the Commission found that, "[a]bsent 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."<sup>28</sup> Feature Group IP argues that this conclusion is inconsistent with the finding in the *2008 ISP Remand Order* with respect to dial-up ISP traffic that "251(b)(5) has always applied to traffic that originates on the PSTN that is addressed to an ISF."<sup>29</sup>

<sup>23</sup> See Petition for Reconsideration at 3-7.

<sup>24</sup> See Petition for Reconsideration at 4-5 and Ex. A.

<sup>25</sup> *Id.*, Ex. A at 1 ("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."); see also AT&T Opposition at 5. In addition, we decline to address any arguments raised concerning the interconnection dispute between Feature Group IP and AT&T that is currently before the Texas Commission as such matters are not properly before the Commission. See Petition for Reconsideration at 5-7. Feature Group IP filed a petition asking the Commission to preempt the Public Utilities Commission of Texas' consideration of a dispute between UTEX Communications Corporation and AT&T Texas over a new interconnection agreement. See Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134 (filed July 13, 2009). On October 9, 2009, the Wireline Competition Bureau denied that request. See Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134, Memorandum Opinion and Order, 24 FCC Red 12573 (2009).

<sup>26</sup> See AT&T Opposition at 5 (stating that Feature Group IP "does not even mention the statutory forbearance test, much less explain the purported connection between that test and AT&T Texas' letter"); Embarq Opposition at 6 (noting that the Motion for Reconsideration fails to address the statutory forbearance requirements).

<sup>27</sup> See Petition for Reconsideration at 7-10.

<sup>28</sup> *Feature Group IP Forbearance Order*, 24 FCC Red at 1576, para. 10.

<sup>29</sup> Petition for Reconsideration at 8 (citing *High-Cost Universal Service Support; 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. 01-92, 99-200, 99-68, 96-98, 96-45, WC Docket Nos. 06-122, 05-337, 04-36, 03-109, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Red 6475, (continued . . . )

Feature Group IP then restates numerous arguments made in the record previously concerning its contention that voice-embedded Internet communications are subject to section 251(b)(5).<sup>30</sup>

9. We disagree with Feature Group IP's assertion that the *Feature Group IP Forbearance Order* is inconsistent with the *2008 ISP Remand Order*. As we explain more fully in the next section, the Commission declined in the *Feature Group IP Forbearance Order* to determine whether voice-embedded Internet communications are subject to section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b). Rather, in performing the forbearance analysis under section 10, the Commission assumed *arguendo* that voice-embedded Internet communications were subject to those statutory and regulatory provisions.<sup>31</sup> The Commission then concluded that granting Feature Group IP's forbearance request would not automatically subject voice-embedded Internet communications to section 251(b)(5), but would instead create a regulatory void.<sup>32</sup> Given this reasonable analytical assumption and the explicit disclaimer that accompanied it,<sup>33</sup> we find nothing in the *2008 ISP Remand Order*, and Feature Group IP points to nothing, that is inconsistent with the Commission's conclusion.<sup>34</sup> Feature Group IP alternatively asserts that the Commission should have declared that voice-embedded Internet communications fall within section 251(b)(5), but as we explain below, section 10's requirement that the Commission act on forbearance petitions within the statutory deadline does not apply to any associated declaratory ruling requests.

#### D. Reconsideration Based on Alleged Deficiencies in Carrying Out Section 10

10. As indicated above, Feature Group IP makes numerous arguments seeking reconsideration on the ground that the Commission declined to address the request for declaratory ruling underlying the Petition for Forbearance, i.e., whether and how access charges apply to voice-embedded Internet communications.<sup>35</sup> First, Feature Group IP asserts that the Commission mischaracterized the Petition for Forbearance and the relief sought by Feature Group IP when it assumed for purposes of its analysis that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) apply to this

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6476-89, paras. 1-29 (2008) (*2008 ISP Remand Order*), *aff'd sub nom. Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) (*Core Communications*) (emphasis in original).

<sup>30</sup> See Petition for Reconsideration at 9-10.

<sup>31</sup> *Feature Group IP Forbearance Order*, 24 FCC Red at 1574, para. 6.

<sup>32</sup> *Id.* at 1575, para. 8.

<sup>33</sup> See *id.* at 1574 n.19 ("Though we make this assumption for purposes of the section 10(a) analysis below, we make no decisions or findings in this Order concerning the current compensation rules for these types of communications, which are the subject of a pending rulemaking in the current *Inter-carrier Compensation* proceeding.").

<sup>34</sup> Dial-up ISP-bound traffic, which the Commission has determined falls within the scope of section 251(b)(5), is not subject to section 251(g). *2008 ISP Remand Order*, 24 FCC Red at 6483, para. 16; see also *Core Communications*, Nos. 08-1365, 09-1046, 08-1393, 09-1044, 2010 WL 86672 (D.C. Cir. Jan. 12, 2010), citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002). Thus, if the voice-embedded Internet communications at issue in this proceeding are similarly situated to dial-up ISP-bound traffic, forbearance would be unnecessary to achieve the result Feature Group IP seeks. See Petition for Reconsideration at 9-10 (contending that all voice-embedded Internet communications are subject to section 251(b)(5)).

<sup>35</sup> See Petition for Reconsideration at 11-17.

traffic.<sup>36</sup> After sifting through Feature Group IP's challenges to the Commission's findings and pleadings by interested parties, we find that Feature Group IP's assertions about the Commission's execution of its obligations under the section 10 forbearance standard are incorrect. Despite Feature Group IP's inclusion in the Petition for Forbearance of legal arguments that access charges should not apply to voice-embedded Internet communications and a request that the Commission agree with this interpretation,<sup>37</sup> section 10 limits the Commission's obligation to addressing the petition for forbearance within the specified period of time.<sup>38</sup> It does not require Commission action on what was effectively, in this case, a request for declaratory ruling. We find that the Commission met its statutory obligation in the *Feature Group IP Forbearance Order*, and thus reject Feature Group IP's assertion that the Commission erred by not granting a declaratory ruling in the same proceeding.<sup>39</sup> We also note that the Commission has discretion as to whether and when to address requests for declaratory ruling.<sup>40</sup>

11. The Commission first assumed *arguendo* that the requirement to pay access charges for voice-embedded Internet communications existed because the requested relief necessarily presumes the existence of a requirement that the Commission should forbear from applying.<sup>41</sup> Then the Commission

<sup>36</sup> See *id.* at 10 (citing *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1574, para. 6 (describing the assumptions necessary to conduct the required forbearance analysis)); see also Petition for Reconsideration at 11-12, n.18 and 17-18.

<sup>37</sup> See Petition for Forbearance at 49-56. Feature Group IP also requested that, if the Commission did not agree with Feature Group IP's analysis, the Commission forbear from the requirements of certain statutes and rules. See Petition for Forbearance at 3 (requesting forbearance only "if the Commission holds that Voice Embedded Internet-based communications, services and applications that do involve a net change in form, a change in content and/or an offer of non-adjunct to basic enhanced functionality are not exempt from access charges, or the ESP Exemption is not carried forward into intercarrier compensation pursuant to § 251(b)(5) or § 201"); *id.* at 19 (stating that "[i]f these provisions can be read to result in application of access charges, the Commission must forbear from enforcing them") (emphasis added).

<sup>38</sup> Section 10(c) of the Act states that a petition for forbearance shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under section 10(a) within one year after the Commission receives it, unless the Commission extends the one-year period. See 47 U.S.C. § 160(c). The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of section 10(a). See 47 U.S.C. § 160(a); see also *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

<sup>39</sup> We note that the question of whether access charges apply to voice-enabled Internet communications is a significantly contested area of the law, which is currently under consideration in other, industry-wide, proceedings. See, e.g., *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004); *2008 ISP Remand Order*.

<sup>40</sup> 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); see also *Tennessee Valley Municipal Gas Assoc. v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it."); *Niagra Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions").

<sup>41</sup> See *United States Telecom. Assoc. v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) (explaining that forbearance "comes into play only for requirements that exist").

properly considered whether the forbearance criteria were met under such circumstances.<sup>42</sup> The Commission was well within its discretion to do so. Accordingly, we find that Feature Group IP's allegations that the Commission incorrectly recited the arguments in the Petition for Forbearance do not provide a sufficient basis for reconsideration.

12. Second, Feature Group IP argues that the Commission "unjustifiably sidesteps ruling on the Petition for Forbearance," "wrongly did not resolve the underlying question that gave rise to the petition," and that it "must answer the question [of] whether access charges do apply to voice-embedded Internet Communication."<sup>43</sup> We find these arguments similar to arguments made by Feature Group IP in its Petition for Forbearance and irrelevant to the Commission's analysis of whether the forbearance criteria were met.<sup>44</sup> The Commission addressed the request for forbearance fully in the *Feature Group IP Forbearance Order*. All of the arguments that Feature Group IP asserts were not addressed are, as discussed above, more appropriately characterized as arguments in support of a request for a declaratory ruling. As explained in the *Feature Group IP Forbearance Order* and reiterated here, the Commission has broad discretion whether to respond to a request for declaratory ruling, and it declined to address that portion of Feature Group IP's request in the *Feature Group IP Forbearance Order*.<sup>45</sup> Accordingly, we decline to reconsider the Commission's decision not to address arguments beyond the scope of what was required to resolve the Petition for Forbearance.

#### **E. Reconsideration Based on Alleged Misinterpretation of the Forbearance Request**

13. Feature Group IP further alleges that the Commission "misconstrued" and failed to address its request for partial forbearance rather than complete forbearance.<sup>46</sup> Specifically, Feature Group IP contends that the Commission did not address a request for forbearance relief that was "squarely presented in the pleadings,"<sup>47</sup> which it described as follows:

[E]ven if access charges apply to voice-embedded Internet communications

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<sup>42</sup> The Petition for Forbearance required that the Commission decide whether forbearance was appropriate assuming that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) apply to this traffic, and the Commission conducted this analysis in its *Feature Group IP Forbearance Order*. See *Feature Group IP Forbearance Order*, 24 FCC Rod at 1573-78, paras. 5-13.

<sup>43</sup> Petition for Reconsideration at 12. See also *id.* at 12-17 (restating many of the arguments initially contained in the Petition for Forbearance concerning the need to resolve the question of whether and how access charges apply to voice-embedded Internet communications). Feature Group IP also suggests that the Commission's failure to resolve the underlying issue cannot be squared with the court's findings in *AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006). We disagree. In *AT&T v. FCC*, the Court of Appeals for the District of Columbia Circuit faulted the Commission for failing to conduct the statutory analysis required by section 10 of the Act. *Id.* Here, by contrast, the Commission conducted the requisite analysis and concluded that the statutory forbearance criteria were not met. Thus, any suggestion that the Commission's findings in the *Feature Group IP Forbearance Order* are inconsistent with *AT&T v. FCC* is misplaced.

<sup>44</sup> Much of Feature Group IP's reply is devoted to arguments concerning the appropriate regulatory treatment of voice-embedded Internet communications, which is outside the scope of the forbearance analysis considered here. See *Feature Group IP Reply* at 2-9.

<sup>45</sup> See *Feature Group IP Forbearance Order*, 24 FCC Rod at 1574, para. 5, n.15.

<sup>46</sup> See Petition for Reconsideration at 17-18.

<sup>47</sup> *Id.* at 17.

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.<sup>48</sup>

14. First, we disagree that the request for forbearance described in the Petition for Reconsideration (and quoted above) was clearly, or otherwise, raised in the Petition for Forbearance. The section of the Motion for Reconsideration discussing this issue does not contain a single citation or otherwise identify where in the Petition for Forbearance this claim was raised. The Petition for Forbearance included a Table of Contents and clearly identified a section as "Specific Forbearance Requested." The request Feature Group IP asserts the Commission "ignored" was not identified as a forbearance request in this section. Throughout the eight pages discussing the specific forbearance relief sought, the petitioner repeatedly argued for forbearance from the application of access charges to voice-embedded Internet communications.<sup>49</sup> That section contains no reference to or discussion of the legality of, or forbearance from requiring, certain billing practices where two LECs jointly terminate an interstate access call using voice-embedded Internet communications.<sup>50</sup>

15. More fundamentally, this too is more appropriately characterized as a request for declaratory ruling or clarification of the rules applicable to billing for jointly provided access. According to Feature Group IP, the Commission's refusal to answer this question violated its duties under section 10 of the Act.<sup>51</sup> As the Commission explained in the *Feature Group IP Forbearance Order* and in section III.D. above, the question of whether and how access charges may apply to voice-embedded Internet communications need not be resolved to address the question of whether the forbearance requested by Feature Group IP meets the statutory forbearance criteria. Likewise, questions about billing practices for jointly provided access, if access charges apply, are, like the majority of the questions presented by Feature Group IP, more appropriately characterized as requests for declaratory ruling and are not integral to the forbearance analysis subject to reconsideration here.

16. Finally, even if the Commission were to assume for purposes of the forbearance analysis that the Commission's rules currently allow LECs to bill Feature Group IP and similarly situated carriers access charges for voice-embedded Internet communications delivered to the billing LECs, Feature Group IP has failed again to provide the evidence and analysis necessary to support the forbearance requested.<sup>52</sup>

<sup>48</sup> *Id.*

<sup>49</sup> Petition for Forbearance at 27 ("This petition extends only to forbearance from the application of switched access charges."); *id.* at 29 ("By eliminating the statutory and regulatory bases for imposing circuit-switched access charges on IP-PSTN and incidental PSTN-PSTN traffic, this Petition seeks to end the lengthy litigation . . . and attendant regulatory uncertainty . . ."); *id.* at 30 ("[W]e seek either confirmation that the [ISP Reciprocal Compensation] regime already applies to Voice-embedded Internet communications or forbearance so that the same treatment will result.") (emphasis in original).

<sup>50</sup> See Petition for Forbearance at 24-31.

<sup>51</sup> See *id.* at 19.

<sup>52</sup> As in the *Feature Group IP Forbearance Order*, our assumption here that a rule exists for purposes of considering a request for forbearance from such rule is not a misunderstanding of petitioner's arguments. We make this assumption solely because we can only consider forbearance from a requirement that exists. See *United States Telecom. Assoc.*, 359 P.3d at 579.

Feature Group IP asserts that it sought forbearance from the statutory provisions and rules that the incumbent LECs have identified as a legal justification for billing Feature Group IP as the “joint provider LEC,”<sup>53</sup> but provided no discussion or analysis of this request in its Petition for Forbearance.<sup>54</sup> The forbearance petition contained no discussion of the theory now advanced by Feature Group IP in its Petition for Reconsideration.<sup>55</sup> Thus, there was (and is) simply no evidence in the record or analysis adequate to support the forbearance request now described by Feature Group IP, and the Commission is not required to address these new, unsupported arguments on reconsideration.<sup>56</sup>

#### F. Reconsideration Based on Alleged Errors in the Public Interest Analysis

17. Lastly, Feature Group IP asserts that the Commission erred in its public interest analysis by considering only the potential harms of forbearance rather than the overall economic benefits described in the Petition for Forbearance.<sup>57</sup> Feature Group IP further challenges the Commission’s findings regarding a lack of evidence in the record and argues that the Commission held it to an impossible evidentiary standard concerning the potential impact of the forbearance requested.<sup>58</sup>

18. Although Feature Group IP’s Petition for Forbearance contained some general statements concerning the potential benefits that might result from its requested forbearance,<sup>59</sup> all the public interest arguments made by Feature Group IP in its Petition for Forbearance are based on the premise that section 251(b)(5) would necessarily apply if forbearance were granted, which the Commission rejected.<sup>60</sup> We find insufficient evidence in the record to reverse the Commission’s finding in this regard, and instead find that the Commission was justified in rejecting the public interest arguments presented. Moreover, the Commission’s stated concerns regarding the potential impact of forbearance did not place an

<sup>53</sup> Petition for Forbearance at 18. We emphasize that we make no findings as to whether we agree with Feature Group IP’s description of its role as a “joint provider LEC.”

<sup>54</sup> The argument made by Feature Group IP that this is jointly provided access was raised in its reply comments on the Petition for Forbearance in an attempt to distinguish its forbearance request from that considered in the *Core Section 251(g)/254(g) Forbearance Order*. See Feature Group IP Petition for Forbearance Reply at 28-29; *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1576, para. 9 (discussing the holding in *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). The discussion found in the reply comments, however, does not contain any request for forbearance or any analysis of the forbearance criteria.

<sup>55</sup> The only discussion of “billing” contained in the Petition for Forbearance is found in a few footnotes concerning signaling and interconnection matters. See Petition for Forbearance at n.11, n.20, n.22.

<sup>56</sup> See *General Motors Corp.*, 23 FCC Rcd at 3135, para. 11 (stating that the Commission previously has rejected arguments on reconsideration where the petitioner presented no new evidence that would cause it to reconsider prior determinations).

<sup>57</sup> See Petition for Reconsideration at 19.

<sup>58</sup> See *id.* at 21.

<sup>59</sup> See *id.* at 19-20 and n.32 (citing to general discussions in the Petition for Forbearance of “Group Forming Networks”); see also Verizon Opposition at 8 (challenging Feature Group IP’s assertion that it presented evidence concerning the economic impact of the forbearance requested).

<sup>60</sup> See *Feature Group IP Forbearance Order*, 24 FCC Rcd at 1577-78, para. 12.

unreasonable burden on Feature Group IP; to the contrary, Feature Group IP faced the same burden as other petitioners seeking forbearance under the statute. The Commission reasonably concluded that the numerous deficiencies in the evidentiary record precluded the Commission from finding the requested forbearance consistent with the public interest.<sup>61</sup>

#### IV. CONCLUSION

19. For all of the reasons discussed above, we find that Feature Group IP has failed to demonstrate that reconsideration of the *Feature Group IP Forbearance Order* is warranted.

#### V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the Motion to Accept Corrected Motion for Reconsideration Or In The Alternative Motion to Accept Supplement or Addition 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 GRANTED** to the extent set forth herein.

21. **IT IS FURTHER ORDERED**, pursuant to authority contained in sections 1-5 and 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-55, 160(c), and section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Corrected Motion for Reconsideration 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.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

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<sup>61</sup> See *id.*