

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for)	
Local Exchange Carriers)	
)	
High-Cost Universal Service Support)	WC Docket No. 07-135
Developing an Unified Intercarrier)	WC Docket No. 05-337
Compensation Regime)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
Lifeline and Link-Up)	WC Docket No. 03-109

FeatureGroup IP Comments on USE/ICC NPRM FCC-11-13

NOW Comes FeatureGroup IP (“FGIP”) and submits these comments in response to the Notice of Proposed Rulemaking.

1. Comments Regarding the Scope of VoIP in the NPRM

Section XV of the NPRM requests comments on “what” VoIP should be covered by new rules. The Commission’s proposed policy framework focuses solely on Interconnected VoIP. FGIP asserts that a narrow focus on Interconnected VoIP is misguided. Failing to deal with other types of voice-enabled IP-based services and products will leave unattended a significant and growing part of the traffic that does or can interact with PSTN end-points, and will consign LECs like FGIP to more years of uncertainty, disputes and litigation.

The Commission must implement the Act and decide how VoIP other than “Interconnected VoIP” will be classified, and the inter-carrier rules that will apply. Is it § 251(b)(5) as between the carriers and “telephone exchange service” to the VoIP provider? Is the VoIP service/product subject to exchange access? If so, is it jointly provided access as between the two LECs? Who gets the “access” bill? Is either LEC providing Telephone Toll or can one LEC deem the other an IXC and apply their Access Tariff? Is the VoIP provider providing telephone exchange service, exchange access service or telephone toll service, or is the traffic a type not categorized? FGIP has been grinding these issues for 10 years, and it is far past time that the Commission make rules and then enforce them so that a certain outcome is predictable by someone other than a large ILEC.

Delay or failure to act yet again will merely allow the ILECs like AT&T to continue misusing the regulatory uncertainty and conflict as a basis for unilateral anticompetitive action and prevent innovative entry by entrepreneurial firms like FGIP that have valuable and unique capabilities and plans.

Unlike most if not all of the many entities that will likely comment on this NPRM, and unlike all of the entities tapped to participate in the FCC sponsored “workshops,” FGIP focuses exclusively on wholesale products and services. It does not really matter to FGIP whether some of our customers are deemed to be carriers or “carrier-like” and thus are burdened with regulatory obligations (like many interconnected VOIP providers currently are with respect to paying into USF), nor will it matter if some of our customers (like those who support native Internet-based applications that do not need to mime a geographic PSTN end point like Interconnected VOIP does) continue to claim and use the status of an Enhanced Service Provider. What matters to FGIP is establishing its LEC rights and having a regulator rather than an ILEC

prescribe what our “rights” are. FGIP is simply a LEC trying to compete as a wholesale provider, and must finally obtain a result where (1) *all* LEC-LEC traffic is categorized into one of the two categories¹ prescribed by the Act for LEC-handled traffic; and (2) our wholesale competitive attempts to enter the market as a peer are recognized as valid. The anticompetitive doublespeak legal bombs that AT&T has placed in our path must be cleared.

More specifically our wholesale services must be declared as a LEC function and AT&T should not be allowed to abuse its market power to re-label our offering as a type of “telephone toll” product which must pay homage to an AT&T Tariff.

No LEC, like AT&T, has the right under law to deem another competitive LEC its “access customer” rather than a “joint LEC” provider.² No carriers and especially no carriers with sufficient market power to engage in and benefit from anticompetitive activities such as tying or defensive leveraging, should continue to be allowed to block the competitive entry of a wholesale provider like FGIP. To date, FGIP has been effectively blockaded from entry into the market by anti-competitive action on the part of AT&T which has used the festering “lack of clarity” discussed in the NPRM to compose their will on the core issues outlined above. Monopoly desires are expected. Worse is that this “lack of clarity” has been nurtured by the FCC’s continuing inaction to impose the rule of law as is the FCC’s duty.

¹ In 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*, 24 FCC Rcd 1571 (2009) (“*Forbearance Order*”) and Order on Reconsideration, *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*, 25 FCC Rcd 8867 (2010) (“*Forbearance Reconsideration Order*”) the Commission made clear that under current law all LEC-LEC traffic must fall into one of two categories – either § 251(g) or § 251(b)(5). If under these NPRM any new categories are created, such as an “Interconnected VOIP” category – there still must be answer as to what categories the other traffic belongs.

² If FGIP is wrong on this legal position, then conversely, all LECs should have the equal right to deem other LECs their “access customer.”

FGIP is concerned that the FCC apparently only considers Interconnected VoIP to be the “true” VoIP. Providers of Interconnected VoIP, such as Vonage, Time Warner and Comcast, provide an incumbent-like function, and their products are essentially landline replacements. By contrast, Non-Interconnected VoIP applications do not emulate PSTN end points; they do not require geographic numbering assignments in order to function.

It must be understood, however, that these two categories are not exclusive to a VoIP application. In particular, the future of telephony is what might be called ‘mobile-application’ VoIP. As wireless networks transition from 3G to 4G and beyond, voice will increasingly be an application that runs on top of an IP core, just like Interconnected VOIP has blossomed since fixed broadband has become readily available. The mobile-application VoIP market will share characteristics of both the current Interconnected and Non-Interconnected paradigms. As such it is critical that the FCC expand the scope of its policy framework to include all kinds of new technologies and applications, and not focus solely on Interconnected VoIP technologies that by now are no longer new or novel.

FGIP seeks to be a wholesale competitor in this emerging market, and indeed it has a commonly owned affiliate that owns the same type of 4G LTE spectrum acquired in FCC Auction 73 as AT&T and Verizon. The FCC must protect the interests of competition, as required by the principles of the Act. The FCC must not allow AT&T and the other incumbents to stifle competition in future mobile telephony the way AT&T has been allowed to stifle competition in wireline markets.

2. Comments on State of Competition in Regard to ICC for VoIP

In paragraph 608 of the NRPM, the Commission states:

There is mounting evidence that this lack of clarity has not only led to billing disputes and litigation, but may also be deterring innovation and introduction of new IP services to consumers.

FGIP has suffered, perhaps more than any other entity in the country over the last ten years, as a result of this “lack of clarity”. Unlike all of the entities whose business plans rely on arbitrage, the primary focus of FGIP has never been, and never will be to garner revenues from other carriers, nor, frankly, do we care what the price is so long as it is symmetrical, reciprocal and enforceable by rule of law rather than ILEC *fiat* or “voluntary” agreement.

FGIP has sought for the last ten years to seek implementation the Act so that we may take our place as a LEC performing only LEC functions and enter the market and compete with the incumbent carriers on a wholesale basis.

Because of the “lack of clarity” and non-action by the FCC, the incumbent carriers, and especially AT&T, have been allowed to tie their particular formulation of the proper interpretation and implementation of the Act and rules of ICC. In particular, AT&T has used the lack of clarity to both unlawfully increase costs on FGIP when FGIP passes traffic to AT&T, and to effectively block traffic to FGIP for new services that FGIP has created.

2.1. The Incumbents are Engaging in Illegal Tying

To date, FGIP’s products, particularly to Non-interconnected VoIP providers, have effectively been blockaded by the incumbent carriers when FGIP attempts to provide service both to Non-interconnected VoIP providers, who do not need geographic numbers to provide service (FGIP has labeled this product a “500 service”), and to other new-technology carriers, who wish to leverage FGIP’s investment in legacy SS7 technologies (FGIP offers this as a “Transit Service” to other carriers and especially CMRS providers who wish to focus on broadband and not the voice application). In both cases, the AT&T and other incumbent carriers

have refused for several years to route LERG Active numbers pointed at FGIP. They are blocking. This state of affairs gives the appearance of a 1-way arbitrage by FGIP. In fact, this appearance, which provides a very useful tool for the incumbents to blockade FGIP's entry into the market, is the direct responsibility of the FCC, for its willingness to allow the "lack of clarity" to perpetuate these number blocking schemes by AT&T and their ILEC brethren. These are FCC-approved numbers but through non-action by the FCC and other regulatory bodies, AT&T has become the *de facto* numbering authority. AT&T now chooses whether a number will work because they choose whether to route and on what terms.

In both the case of 500 Service and Transit, AT&T's actions constitute clear cases of illegal tying. The basic requirements for tying are as follows:

- 1) There must be two separate products or services.
- 2) There must be a sale or an agreement to sell one product (or service) on the condition that the buyer purchase another product or service (or the buyer agrees not to purchase the product or service from another supplier).
- 3) The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.
- 4) The tying arrangement must affect a "not insubstantial" amount of commerce.

In the case of FGIP's attempts to enter the market, AT&T is forcing FGIP to buy two "tied" products in order to provide telephone exchange service using 500 numbers to service VOIP. Before FGIP can secure AT&T's § 251 "interconnection" product FGIP must also buy AT&T's "500" (ACIS) Tariff product at non-TELRIC prices. If FGIP refuses then AT&T will not route telephone exchange traffic, in violation of AT&T § 251 "interconnection" obligations.

The Texas PUC in Docket 26381 recently ruled that AT&T's Tariff cannot apply to FGIP's 500 VOIP services insofar as FGIP is providing Telephone Exchange. Nonetheless, AT&T is still saying FGIP still has to "buy" access-based translations for tens of millions of dollars before AT&T will route any "500 Service" telephone exchange traffic. FGIP has been working for years in our attempt to launch "The Internet's Area Code" and in fact we believe that based on the difference between Reed's law and Metcalf's law on how group forming networks operate, this is a substantial market that by itself could be at least as large as the current Interconnected VoIP market.

Additionally, FGIP has a transit service for other carriers who may support use of VOIP technologies. The transit customer puts instructions in the LERG that calls to the customer should be routed to FGIP's tandem. AT&T, however refuses to do so, and simply blocks the call. AT&T requires that the CMRS provider have a direct arrangement even though the CMRS provider prefers indirect interconnection. The excuse is that AT&T wants an agreement for payment for termination before it will originate. Thus, AT&T is unabashedly tying origination of calls through FGIP (for which AT&T cannot charge under FCC rules) to termination (to which they have a right to be paid when there is an agreement). Looking at it another way, AT&T is telling the CMRS provider it cannot use UTEX transit for AT&T originating unless the CMRS has a contract with AT&T for terminating and AT&T transit. This of course means the CMRS will not use UTEX at all.

One of the CMRS providers that AT&T is currently blocking is Worldcall Interconnect, Inc. ("WCX"). WCX wishes to be a FGIP transit customer, and is one. WCX is attempting to leverage the investment in both SIP and SS7 technologies that FGIP has already made. By not having to invest in expensive and antiquated 2G and 3G "SS7 Voice" centric technologies, WCX

can focus its investments on deploying true 4G broadband capability. To date giants like AT&T have insisted that they have no obligation to route CMRS numbers pointed to FGIP's tandems.

FGIP would like to point out and comment on a related USF proposed change in this NPRM. The FCC has planned to phase out Local Switching Support("LSS"), which is the type of support used to specifically help ETCs buy core voice network switches. For all new providers the FCC proposes to eliminate the subsidy all together by 2014. Think how violent the FCC's rule changes will be to competition if at the same time the FCC (1) removes the ability for rural CMRS providers to get subsidy support for switching; (2) the FCC blesses by continued non-action against AT&T, AT&T's right to require millions of dollars of investment by each and every new CMRS entrant for already obsolete SS7 based switching technologies.

2.2. AT&T is Engaging in Defensive Leveraging

AT&T's actions can be seen to be ultimately an attempt to control the transition from the PSTN to the NGN networks. AT&T's actions can be understood to be a clear case of "defensive leveraging", to stop us from "splintering" and going for next generation substitution. Below is a paraphrased example of defensive leveraging given by Robin Cooper Feldman.³

Defensive leveraging also can be used to prevent next-generation substitution, particularly in industries that exhibit network externalities.... A new entrant may try to avoid this barrier by producing the next generation of a product. In other words, if the name of the game is "who has the most customers," a new entrant will automatically lose in the current market. It can avoid the problem, however, by developing a new product market in which no one has any customers. In theory, the new market has a level playing field, and all entrants have the same chance of success.

Defensive leveraging can block this strategy. A monopolist can leverage the power of its existing customer base into the new market thereby dominating the new technology and crushing challengers. The monopolist is not trying to reap additional monopoly profit by projecting its power into the second market. It is trying to prevent extinction of its primary monopoly. Once a monopolist has

³"Defensive Leveraging in Antitrust," Geo.L.J. 2079, 2093-95 (1999)

blocked an attempt at next-generation substitution, the strategy has a deterrent effect. Potential entrants are less likely to search for new technologies and enter the fray for fear that their efforts will be blocked. As a result, in the next-generation scenario, defensive leveraging damages competition in two ways: First, it prevents the natural erosion of a monopoly; second, it inhibits innovation. For example, imagine a telephone system in which customers could only talk to people who subscribe to the same phone system. In this market, one firm has emerged as the overwhelming monopolist because the largest number of subscribers have joined its system. New customers are reluctant to choose another system, even a better one, because they would be unable to connect to many people. Suppose further that a new firm develops cellular phones. Users could travel anywhere with the new phones. In addition, cellular customers could talk to users on any other cellular system.

The new phones would threaten to erode the basic phone monopoly. Having a large customer base is not important in the cellular market because cellular callers can talk to callers from any other cellular system. If users like the convenience of cellular phones, they conceivably could switch more and more calls to the cellular system, a market in which the monopolist has no advantage. Over time, the primary phone market, which the monopolist dominates, could become smaller and smaller, replaced by a market in which open competition prevails.

Defensive leveraging can block this strategy. When the cellular market is in its infancy, the monopolist could develop a cellular phone and bundle it with the basic phone. The monopolist could thereby ensure a large customer base in the new market. In addition, if enough customers receive cellular phones from the monopolist, the new entrant might be unable to generate enough sales to survive. Thus, the monopolist could enter the cellular market unchallenged. It has used leverage to transform its old monopoly into a new generation monopoly.

Now that AT&T has teamed with Verizon and have successfully leveraged control over the existing cellular business in the United States, FGIP wishes to prevent such defensive leveraging from occurring to newer VOIP technologies. FGIP and has identified the next market as untethered mobile “VOIP” applications that are both network and service provider agnostic. FGIP has developed all the “wholesale” abilities to support this application and are now simply being “blocked” from launching this service by AT&T through their refusal to accept FGIP as a transit equal.

3. Using the FGIP Technology to eliminate “Phantom” traffic

FGIP looks forward to reading the industry’s thoughts on the new technology FGIP proposed to eliminate “Phantom” traffic. FGIP wishes to note, that notwithstanding the NPRM’s desire to leave unchanged the current SS7 protocol standards which FGIP showed could be used to help eliminate some “Phantom Traffic” that FGIP’s mapping of its Universal Global Title of unique IP users to the allocated 5YY NPA NXXs assigned to FGIP will functionally eliminate the “Phantom” issue for all customers of FGIP’s “500 Services.”

Respectfully Submitted,

/s/_____

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