

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)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Board on Universal Service)	CC Docket No. 96-45

REPLY COMMENTS OF UTEX COMMUNICATIONS CORP. d/b/a FEATUREGROUP IP

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NOW COMES UTEX COMMUNICATIONS CORP. d/b/a FeatureGroup IP

(“FeatureGroup IP”) and respectfully submits these Reply Comments on Part XV.

The FCC must use this rule-making to resolve the “lack of clarity” and resulting uncertainty that attends the rules relating to interconnection and Intercarrier Compensation for VoIP Traffic. The FCC must recognize that VoIP traffic – like all other traffic – can fall under only one or the other of the two exclusive categories of traffic that LECs handle under the Act. It is either § 251(b)(5) – and must be treated as such by all concerned – or it is exchange access traffic carved out of § 251(b)(5) by § 251(g) because it is associated with “telephone toll service.” Then, the FCC must classify every “kind” of traffic as between one of these two exclusive categories. Otherwise, the FCC will perpetuate the current void in regulatory treatment precisely when and where innovation needs certainty and protection of regulation from

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monopoly power. Furthermore, the FCC may no longer rely on its past circular and self-perpetuating excuse that the “lack of clarity” cannot be resolved because resolving the issues would create a “regulatory void.”¹ All telecommunications handled by an LEC is either “telephone exchange service” or “exchange access.”² Those two functions “occupy the [LEC] field.”³

All telecommunications handled by an LEC and touched by any other telecommunications provider is initially comprehended within § 251(b)(5). Some “exchange access” traffic is carved out of § 251(b)(5) on a transitional basis by § 251(g).⁴ When two LECs collaborate to handle a call that is carved out by § 251(g) it is not the case that one of the LECs magically transforms into an IXC and becomes the other LEC’s access customer. Both LECs retain their LEC status and each is providing exchange access to a third party exchange access service customer. Under the Commission’s jointly provided access rules MECAB applies, and neither LEC can lawfully send an access bill to the other LEC.⁵

Finally, applications and services that do not constitute telecommunications service cannot be deemed to be or treated as if they are “telephone toll service” that is subject to “exchange access” treatment. Under the Act, only “telephone toll service” – and only the kind

¹ See 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) (“*FeatureGroup IP Forbearance Order*”); 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) (“*FeatureGroup IP Forbearance Reconsideration Order*”).

² See § 153(26) [definition of “local exchange carrier”].

³ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8-9 (D.C.Cir. 2000).

⁴ Order on Remand and R&O and Order and FNPRM, *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*, 24 FCC Rcd 6475 (2008) (subsequent history omitted).

⁵ Order Designating Issues for Investigation, *In the Matter of Access Billing Requirements for Joint Service Provision*, 3 FCC Rcd 3568 (1988); Order, *In the Matter of Access Billing Requirements for Joint Service Provision*, 65 Rad. Reg. 2d (P & F) 650, 1988 FCC LEXIS 2006 (1988).

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that existed in 1996 – is subject to “exchange access.” The Commission cannot expand by rule the traffic types that are subjected to “exchange access.” Congress *codified* the so-called “ESP exemption” from access charges by subjecting *only* telephone toll service to exchange access. Congress also created a dichotomy whereby all traffic is either and solely subject to § 251(b)(5) or § 251(g). Thus, whether or not a call is exempt under the ESP exemption is merely the first test as to whether it can be subjected to § 251(g) treatment. Under the Act as interpreted by *Worldcom*⁶ and then *Core Mandamus*, if the traffic type did not exist at the time of the Act it must be covered under § 251(b)(5); *all* telecommunications between LECs is absolutely subject to § 251(b)(5) and is not carved out by § 251(g).

Non-common carrier provided enhanced/information services and all other non-common carrier and common carrier services that did not exist at the time of the Act consume telephone exchange service as a matter of law when they connect to the PSTN, unless the ESP/ISP or other new entity has voluntarily chosen to purchase a telephone toll service from an IXC. When that happens the IXC – not the ESP/ISP, and not any collaborating LECs – is the exchange access customer. The LECs all send the access bill to the IXC – not to any of the other LECs.

All of this is prescribed by the Act, and the Commission does not have the power or discretion to change any of it by rule. It is far past time for the Commission to enforce the Act, and finally advise ILECs that they must interconnect, must route traffic, must honor the rules and cannot any longer forcibly recover exchange access charges from a CLEC that is providing only telephone exchange service and/or jointly provided exchange access for traffic to or from a non-carrier enhanced/information service provider. The Commission must act to ensure that intercarrier compensation is cost-based, mutual and reciprocal.

⁶ *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

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FeatureGroup IP identified its target market long before innovators such as Skype, Google Voice, MagicJack, Vonage, Sun Rocket, T-Mobile@home, and Line-2 existed, and before most other CLECs even thought about supporting anything other than “ISP-bound” traffic to dial-up Internet access providers. FeatureGroup IP desired to use its regulatory expertise and technical know-how to solve, on a wholesale basis, the intermediation and mutual exchange of traffic between new technology providers and the PSTN.⁷ FeatureGroup IP was one of the very first CLECs to raise and attempt to litigate how signaling, routing, rating and billing should “work” as between a CLEC and an ILEC when the CLEC provides wholesale telecommunications service that serves as an input to new technology voice applications and services. FeatureGroup IP’s entire business plan revolved around implementation of the Act and rules regarding how legacy technologies that existed at the time of the Act would interwork with new IP-based technologies, services and applications. Ten years later we are still litigating the same issues.

Our founder’s experience creating a previous wholesale transport business that deployed new wave division multiplexing technology in the heart of the SBC ILEC territory taught us early on that the natural tendency of a an ILEC with monopoly power is to use that power to limit the usefulness of a technology that is disruptive to the monopoly’s revenue stream. With respect to intermediation of VoIP and the PSTN, FeatureGroup IP relied on the proposition that the policy and purpose of the Act is to promote innovation, competition, and symmetry in rights between the ILECs and the new entrant CLECs. Thus, regardless of whether any or all new

⁷ FeatureGroup IP used its technical knowledge of both legacy and IP-based technologies to create a method, process and procedure to identify the origin of any traffic, including IP-originated traffic, so that carriers could use whatever rating rules apply to determine the responsible party and the billed amounts. The Commission specifically called for comment on FeatureGroup IP’s “Universal Tele-traffic Exchange” specification in ¶ 634, note 980. To date not a single ILEC has identified any shortcoming of this method. They prefer to ignore it altogether, since it inconveniently happens to solve the “phantom traffic” problem in ways they do not like. Instead, they continue their efforts to wrongly require that new technology applications and services mimic legacy technology, operations and business plans.

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technology traffic is ultimately classified as § 251(b)(5), or whether it is subject to § 251(g) (with FeatureGroup IP *not an ILEC access customer* but instead a joint exchange access provider), FeatureGroup IP should have been allowed to act as a peer with the now-reagglomerated AT&T and Verizon and offer a competing product to new innovators entering the market using new technology. This should have been welcomed, since AT&T in particular has consciously chosen to avoid investing in and deploying new technology to modernize the PSTN through its ILEC operations, with the result that all interconnecting carriers must be backwards-compatible, and waste capital and expense on outdated, legacy circuit-switched technology merely so as to maintain ubiquitous communications capability.

This started in 2001. Over the last 10 years AT&T has managed to leverage its market and political power in multiple ways, and has used the “lack of clarity” regarding appropriate interconnection and intercarrier compensation rules to delay, deter and slow advancement and implementation of any business plan it does not like – particularly those that threaten its hegemony over a captive legacy customer base and the associated legacy revenue streams. We still see it today: AT&T, for example, asserts that the Commission does not have to classify the traffic and should just impose switched access on CLECs that serve VoIP providers without substantive analysis.⁸ This Commission’s inability and purposeful indecision with respect to interconnection rights has resulted in a void that has been amply filled by the ILECs in a litigious scorched earth policy. As a result, innovation through full use of new technology and employment of alternative business plans has only occurred when, where and at a pace suffered by the ILECs.

⁸ See AT&T Initial Comments, *In the Matter of Connect America Fund*, WC Docket No. 10-90 at pp. 25-30 (filed Apr. 1, 2011).

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Why is it somehow “accepted” as a “given” that VoIP must have an actual or deemed geographic end point, have and use legacy telephone numbers many applications do not need or want, be rated using ill-fitting pre-Act regulatory concepts and can be hosted only on a fixed broadband network – usually one controlled by an incumbent or another duopolist that is more than willing to maintain the *status quo*? Why can an iPhone be hosted only on Verizon and AT&T’s networks? Why is untethered VoIP over LTE and “VoIP” on most cellular networks still “unavailable” in the market? Just how is it that ILECs can still get away with the assertion that a voice application in an Xbox, PlayStation or Xoom that comes from the Internet and then touches the PSTN is “fraudulent access-avoidance” and hated “Phantom traffic”?

The answer is that the Commission has let the monopolies shape and deter innovation by a wholesale abdication of its duty to apply the rule of law and to regulate in the public interest rather than the “public utilities” interest. The rule of law is designed to create certainty and clarity so that, as in our case, investment can be made and innovation will be left to the full market, not just those currently dominating the market and are doing everything they can to ensure that their dominance and their monopoly rents – to the detriment of society and our country’s technological edge *vis-à-vis* the rest of the world – continue for as long as possible.

A perfect example of how this Commission and state regulators have allowed the incumbents to win on both sides of the equation through a refusal to apply the rule of law occurred in two decisions in 2011: this Commission’s “magicJack/YMax”⁹ Order and a state arbitration in Texas involving FeatureGroup IP – which also involves magicJack traffic. On April 8th (a week after the initial comments were filed), the Commission released its ruling on a formal § 208 complaint filed by AT&T Long Distance against YMax, a CLEC that exists solely

⁹ Memorandum Opinion and Order, *AT&T Corp. v. YMax Communications Corp.*, File No. EB-10-MD-005, FCC 11-59 (April 8, 2011).

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to support PSTN connectivity for magicJack. AT&T Long Distance complained, and the Commission found, that the YMax's network and its "LEC" exchange access functions do not mirror ILEC § 251(g) exchange access functions, primarily because after it collects inbound calls from the PSTN over interconnection with an ILEC access tandem YMax uses new Internet-based technology to then send the call to magicJack, which then in turn sends the call to its VoIP customers over the Internet using "over the top" broadband delivery to the plug-in device.

Although the Commission order does not directly so state (indeed the drafter of the Order may not have even realized), the magicJack Order has necessarily subjected all traffic where one end is on the Internet (and thus not on the PSTN) to the § 251(b)(5) reciprocal compensation regime.¹⁰ If the traffic is not "exchange access" then it *must* be § 251(b)(5) for there is no alternative. Recall that in *FeatureGroup IP Forbearance*¹¹ the Commission expressly held that traffic must be in one category or the other, and cannot be moved in the absence of a rule making. Thus, if traffic from the PSTN to YMax (and then magicJack) is not exchange access and YMax cannot recover access revenues from AT&T Long Distance, then it must be that YMax can recover § 251(b)(5)(b) *reciprocal compensation* from either AT&T Long Distance or AT&T ILEC.¹²

Compare the Commission's magicJack ruling relating to telephone toll service traffic from the PSTN to an Internet end-point with how the Texas Public Utility Commission ("Texas PUC") recently resolved issues concerning *magicJack traffic* from the Internet to the PSTN, and

¹⁰ Since the Internet is jurisdictionally interstate, the traffic is also subject to § 201. The result should be payment to YMax of the *ISP Remand* \$0.0007 rate by either AT&T the IXC or AT&T the ILEC.

¹¹ *FeatureGroup IP Forbearance Orders, supra.*

¹² The only alternative conclusion – that CLECs must continue to deploy legacy technology and exactly mimic legacy ILEC circuit-switched networks or else they cannot be paid *either* access or reciprocal compensation – would be wholly arbitrary and would kill all incentive for CLECs to invest in new IP-based technology. Unless and until the entire industry and all traffic is moved to bill and keep it would also be discriminatory. On the other hand, YMax should be more than adequately compensated through the reciprocal compensation regime, using something like the *ISP Remand* \$0.0007 rate.

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traffic from the PSTN to similar Internet-based services and applications.¹³ This state-level arbitration applied the same federal laws to the same magicJack traffic. Under the Texas PUC Award, when magicJack traffic comes to FeatureGroup IP and is then routed to AT&T ILEC for termination the rating as between § 251(b)(5) and § 251(g) depends on whether there is a “dual POP” arrangement in the same AT&T local calling area as the AT&T ILEC user. If there is no “dual POP,” FeatureGroup IP is deemed to be an IXC *and must pay AT&T the ILEC switched access*. Similarly, if an AT&T ILEC user dials a number used by a magicJack-like application/service and there is not a dual POP in the same local calling area then *sometimes* UTEX is deemed to be access-responsible to AT&T ILEC. The same (or similar)¹⁴ functional use of the Internet that AT&T Long Distance employed to not pay YMAX § 251(g) based access also “makes” FeatureGroup IP an IXC and requires FeatureGroup IP to pay § 251(g) based access to AT&T ILEC. AT&T wins both ways: it never pays access, but always receives it. How can this be?

¹³ Texas PUC Docket 26381, *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Award and Contract Matrix (January 27, 2011), available at http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNT_R_NO=26381&TXT_ITEM_NO=258. The Commission refused to preempt the Texas PUC under § 252(e)(5) despite a multi-year abatement of the case by the Texas PUC, and exhorted the Texas PUC to finish the arbitration by applying “current law.” Memorandum Opinion and Order, *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(4) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, 24 FCC Rcd 12573 (2009); Renewed Petition denied Memorandum Opinion and Order, *In the Matter of UTEX Communications Corporation Petition for Preemption*, WC Docket 09-134, DA 10-1920, 25 FCC Rcd 14168, (2010), Motion for Reconsideration Pending.

¹⁴ FeatureGroup IP’s network arrangement is not like YMax’s in several respects. FeatureGroup IP has a real switch, and requires its ESP customers to establish a physical or virtual POP in each LATA. FeatureGroup IP’s interstate access tariff is also different, for it recognizes and implements the fact that most of FeatureGroup IP’s customers are ESPs and they are treated as end users. Further (and apparently in contrast to YMax and magicJack, FeatureGroup IP firmly believes that traffic with an IP endpoint should be treated the same regardless of whether it originates on the PSTN and goes to the Internet, or originates on the Internet and goes to the PSTN.

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This is not a theoretical question. FeatureGroup IP has handled millions of minutes of traffic from magicJack (YMax) phone numbers over the years and FeatureGroup IP has been charged access by AT&T ILEC for every single minute.

To its credit the Texas PUC was at least consistent. Under the Texas Award AT&T Long Distance will have to pay § 251(g) exchange access charges to FeatureGroup IP on a meet-point billed basis when and if telephone toll calls originate on the PSTN and are routed to FeatureGroup IP for delivery to an interconnected or non-interconnected VoIP provider for further delivery to the VoIP patron. This, however, is likely to be a hollow victory since FeatureGroup IP is quite sure that that AT&T Long Distance will still dispute future efforts by FeatureGroup IP to collect access charges for calls *to* an Internet end-point by invoking the magicJack ruling. And AT&T ILEC will equally insist that FeatureGroup IP must pay access for calls *from* the Internet. Can FeatureGroup IP really rely on the Texas PUC's ruling that FeatureGroup IP is entitled to collect meet-point billed jointly provided access? For that matter, can we rely on the rulings that AT&T must route calls to our numbers, especially 500 numbers allocated to FeatureGroup IP for the express purpose of providing *telephone exchange service* to ESPs like magicJack?

Conclusion.

The rule of law must be implemented to allow FeatureGroup IP to rely on a predictable outcome in building its business of supporting innovation. The only way to create such a predictable outcome is to require that all LEC-LEC traffic be expressly classified under § 251(b)(5) or as jointly provided (meet-point billed) exchange access. The result must be mutual and reciprocal, and the same rule must apply regardless of whether the traffic is going to or coming from the Internet.

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