

**Before the
Federal Communications Commission
Washington, D.C. 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. 07-257
)	
Broadband Industry Practices.)	
)	
In the Matter of)	
)	
Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption.)	WC Docket No. 08-8
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES
ON PETITIONS FOR FORBEARANCE**

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I. INTRODUCTION AND SUMMARY

On October 23, 2007, Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC (collectively “Feature Group IP”) filed a petition with the Federal Communications Commission (“FCC” or “Commission”). In its simplest terms, the

Feature Group IP petition asks the FCC to exempt Feature Group IP from having to pay access charges to the carriers on whose networks Feature Group IP's calls terminate.

On January 11, 2008, the Embarq Local Operating Companies ("Embarq") filed a petition with the FCC. The Embarq petition, for its part, seeks to ensure that carriers whose Internet protocol ("IP") calls terminate on the public switched telephone network ("PSTN") **do** pay access charges.

The FCC has put both petitions out for public comment.¹ Given the overlap of the subjects of these two petitions, and their essential opposite intentions, the National Association of State Utility Consumer Advocates ("NASUCA")² submits these combined comments to assist the Commission.

As the Commission knows, NASUCA has long questioned the use of the forbearance process.³ More substantively, NASUCA has supported the requirement that carriers using the networks of other carriers to terminate calls must compensate the

¹ Feature Group IP: DA 07-5029; Embarq: DA 08-94. In DA 08-93, the comment dates for the Feature Group IP petition were extended to match those of the Embarq petition.

² NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

³ See, e.g., *In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket 06-172, Comments of the National Association of State Utility Consumer Advocates, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Virginia Office of Attorney General, the Maryland Office of People's Counsel, the New Jersey Division of Rate Counsel, the New Hampshire Office of Consumer Advocate and the Connecticut Office of Consumer Counsel (March 5, 2007) at 10. The Commission recently opened a rulemaking to establish procedures for consideration of forbearance petitions.

carriers who own those networks.⁴ Therefore, in this arena of dueling petitions, NASUCA supports the position taken in the Embarq petition, while largely opposing that in the Feature Group IP petition. NASUCA believes, however, that the Embarq position and the underlying public policy it embodies can be best and most efficiently resolved not through forbearance, but through a declaratory ruling.

II. WHAT THE PETITIONS SEEK

A. FEATURE GROUP IP

It is not until page 24 of the Feature Group IP petition that we learn precisely what is being sought. And it is quite a list. Feature Group IP seeks forbearance from:

- Section 251(g) of the Act, insofar as it applies to the receipt of compensation for switched “exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,” pursuant to state and federal access charge rules;
- any limitation on the scope of Section 251(b)(5) that is implied from Section 251(g) preserving LEC receipt of intrastate switched access charges;
- the clause of Rule 51.701(b)(1) that excludes from the definition of telecommunications traffic subject to the Subpart H of Part 51 of the Commission’s rules “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34,36,39,42-43);”
- Rule 69.5(b), to the extent applicable;
- any “numbering representation rule” to the extent applicable;

⁴ See, e.g., *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket 01-92, Reply Comments of the National Association of State Utility Consumer Advocates (July 30, 2005).

- any signaling standard that requires or assumes a particular geographic reference point (such as a rate center) which could be used to support a billing platform to treat such traffic as ordinary “telephone toll” traffic.⁵

Feature Group IP also requests that the Commission forbear from the enforcement of these same provisions of Section 251(g), Rule 51.701 (b)(1), and, where applicable, Rule 69.5(b) with respect to incidental PSTN-PSTN traffic.⁶

Perhaps even more important than the list of statutes and rules from which forbearance is sought is the list of characteristics of the traffic for which forbearance is sought:

[T]raffic that is carried by a LEC on its side of the point of interconnection with a telecommunications carrier such as Feature Group IP and that:

- originates in IP format and terminates on the legacy [Time-Division Multiplexed⁷] TDM circuit-switched network; or
- originates on the legacy TDM circuit-switched network and is addressed to an IP-based end point;
- originates on the legacy TDM circuit-switched network and terminates on the legacy TDM circuit-switched network but (a) is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user;
- when the point of interconnection between the LEC serving the voice-embedded Internet application or service provider and the LEC serving the PSTN user end-point is located in the same LATA as the PSTN end-point....⁸

⁵ Feature Group IP Petition at 25.

⁶ Id. at 26. Non-specific hints are made at pp. 10-11.

⁷ “In its primary form, TDM is used for circuit mode communication with a fixed number of channels and constant bandwidth per channel. What distinguishes time-division multiplexing from statistical multiplexing such as packet mode communication (also known as statistical time-domain multiplexing, see below) is that the time-slots are recurrent in a fixed order and pre-allocated to the channels, rather than scheduled on a packet-by-packet basis.” http://en.wikipedia.org/wiki/Time-division_multiplexing.

⁸ Id. at 25.

Feature Group IP refers to this traffic as “Voice-Embedded Internet-based communications.” Even that requires an extensive explanation:

Voice-embedded *IP* communications is generally referred to as “Voice-over-Internet Protocol” or “VoIP.” Voice-embedded *Internet* communications is a particular subset of such communications that do not merely use the Internet Protocol to transmit voice signals undifferentiated from PSTN traffic, but actually uses Internet Protocol to provide voice applications as part of a larger Internet communications experience. Feature Group IP uses “voice-embedded Internet communications” because that term more accurately describes voice as just one of many applications that can be transmitted in an IP format, including applications that integrate voice with data or other things. We think it is important for policymakers to recognize a qualitative difference between services that merely use IP technology to provide PSTN - equivalent offerings and services that enable IP-based applications as part of a larger, next-generation Internet communications experience. There is a significant overlap in the use of the terms “Internet-based” communications and “IP-based communications.” Acknowledging the often-subtle distinctions between the terms “Internet communications” and “IP-based communications,” we attempt, in this Petition, to use the term that best relates to the particular context in which the service or application is being considered.⁹

Under its explicit terms, Feature Group IP’s forbearance request would apply only to itself, that is, the Feature Group IP companies and their traffic.¹⁰ Yet Feature Group IP states that “any LEC that tariffs its services as a common carrier on a LATA by LATA basis and commits to operate in a non-discriminatory manner that furthers the pro-technology policies spelled out by Feature Group IP in this Forbearance Petition could also apply for its own forbearance.”¹¹

⁹ Id. at 2, n.3 (emphasis in original).

¹⁰ Id. at 11.

¹¹ Id. Despite this caveat, Feature Group IP opens its petition by arguing that under the current regime, in general “would-be providers of Voice-Embedded Internet-based communications, services and application are chilled from providing next-generation Internet services with a voice component to potential users....” Id. at iii.

Feature Group IP lists the interesting capabilities of its services.¹² Yet it is clear that forbearance is sought for calls that include none of those “bells and whistles.”

Notably, however, it seems that Feature Group IP would be satisfied without forbearance, if the Commission holds 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 and this exemption is carried forward into the intercarrier compensation regime under either § 251(b)(5) or the *ISPRemand Order* (e.g., § 201). If the Commission reaffirms these principles, it can deny this Petition, without harming or stifling emerging Internet networks and applications.¹³

If the Commission declines this offer, then it “must” forbear.¹⁴

B. EMBARQ

Embarq’s request is only marginally easier to identify, although in simplified terms it is stated as forbearing “from any application of the [enhanced service provider] ESP exemption to IP-to-PSTN voice traffic.”¹⁵ It is only on page 17 of Embarq’s Petition that the specifics are given:

The Commission should (1) forbear from enforcing the ESP exemption, as adopted by Commission orders, and (2) section 69.5(a) of its rules to IP-originated voice traffic that terminates to the PSTN. Finally, the Commission should (3) forbear from

¹² Id. at 20-21.

¹³ Id. at 3.

¹⁴ Id. Feature Group IP has an inflated view of its authority in this process. It indicates that it “does not, at present, agree to any geographic exemptions, or any exemption based on the type of ILEC,” but it “would voluntarily exclude from this Forbearance request any incumbent LEC from any rural area” if the Commission finds that the subsidies and inherent non-cost based arbitrage of the current intercarrier regime that the rural LEC claims are in fact necessary and that this need for implicit support outweighs the positive network effects and other benefits that would result from allowing rural Americans to participate in Group Forming Networks and other Internet-based communications communities.” Id. at 12-13.

¹⁵ Embarq Petition at iii.

enforcing 47 U.S.C. 251(b)(5) to provision to non-local traffic terminated as voice traffic on the PSTN.¹⁶

The ESP exemption, its origins twenty-five years ago, and the Commission orders setting it out are described in Embarq's Introduction.¹⁷

The bottom line for Embarq's Petition is that all non-local voice traffic that terminates on the PSTN, whether it originates on the PSTN or on an IP network, would have to pay access charges.

III. FEATURE GROUP IP'S PETITION GOES TOO FAR

In its Executive Summary, Feature Group IP says that it wants:

to ensure that consumers and users of Voice-Embedded Internet-based communications services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of Voice-Embedded Internet communications applications are given the assurance that they may deploy and offer such services without the threat that they will be mired in the archaic access charge quagmire that currently plagues legacy telecommunications.¹⁸

But the Petition nowhere adequately explains why these services should be free from the requirements that face (or "plague," if you will) traditional telephone services. That includes the carrier's obligation to compensate the owner of a network if the carrier terminates traffic on that network.¹⁹ In other words, Feature Group IP seeks to have its

¹⁶ Id. at 17.

¹⁷ Id. at 1-3.

¹⁸ Feature Group IP Petition at iii.

¹⁹ In this respect, Feature Group IP's reference to AT&T's and Verizon's earnings (id. at 28) is irrelevant to the principle.

services enjoy a cost advantage over traditional service -- above and beyond whatever efficiencies Feature Group IP may have established on its **own** network.²⁰

The simple principle that a carrier should be compensated for the use of its network trumps all of Feature Group IP's claims about "the network effect of evolving Internet-based communities and networks"²¹ and "Group Forming Networks."²² It also calls into question Feature Group IP's presumption that its traffic is an enhanced service where "enhanced functionalities are offered to the user,"²³ *even if that offer is declined and the call is a standard voice call.*

Likewise, Feature Group IP says that "[t]here is no reason why users of the narrowband PSTN should be denied the benefits of participating in Internet based communications simply because they do not have a broadband connection."²⁴ This has the public policy backward: There is no reason why Feature Group IP should be excused from paying to reach consumers who do not have a broadband connection simply because its voice traffic goes over the Internet.

Among other claims, Feature Group IP asserts that forbearance is in the public interest because it would "reduce regulatory uncertainty and associated costs."²⁵ This fails to recognize that **any** decision will reduce regulatory uncertainty. For example, a

²⁰ Feature Group IP asserts that paying access charges is paying "monopoly rents" and is the result of "anti-competitive action by AT&T and other incumbents. Id. at 4-5. It should be clear here that in supporting the principle that carriers should be paid for the use of their networks, NASUCA is not condoning any anti-competitive actions on the part of AT&T or any other incumbent, or any "self-help" actions taken by those carriers. See id. at 15.

²¹ Id. at 7.

²² Id. at 8. See also id. at 32-36.

²³ Id. at 11.

²⁴ Id. at iv.

²⁵ Id. at 49. The long list of questions that Feature Group IP claims to be implicated here (id. at 51-52) mostly have little to do with whether voice calls terminated on the PSTN should pay access charges.

decision that IP calls are subject to access charges would also reduce the level of uncertainty that carriers face.

Finally, Feature Group IP presumes the result of the Commission's generic inquiry into intercarrier compensation, stating, "To apply access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic now means applying access charges during the transition to a uniform intercarrier compensation regime, only to remove those charges as part of that transition."²⁶ This presumes that the Commission will ultimately do away with the requirement that carriers compensate each other for the use of their networks. That issue has not been decided, and NASUCA believes that a "uniform intercarrier compensation regime" will not absolve carriers of voice traffic like Feature Group IP of that responsibility.

And the notion, oft-repeated by Feature Group IP, that all of this traffic is (or will be) covered by reciprocal compensation arrangements (and their accompanying interconnection agreements) under 47 U.S.C. § 251(b)(5),²⁷ is disposed of by noting that reciprocal compensation is for local traffic:

Section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under a reciprocal compensation arrangement, "[w]hen a customer of carrier A makes a **local** call to a customer of carrier B, and carrier B uses its facilities to connect, or 'terminate,' that call to its own customer, the 'originating' carrier A is ordinarily required to compensate the 'terminating' carrier B for the use of carrier B's facilities." *SBC Inc. v. FCC*, 414 F.3d 486, 490 (3d

²⁶ Id. at 52.

²⁷ See, e.g., id. at v, 17, 42, 57-58, 60.

Cir.2005) (citing *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 254 (D.C.Cir.2001)).²⁸

IV. EMBARQ'S PETITION IS MUCH MORE REASONABLE

Embarq makes some good points at the outset:

- “[T]he ESP exemption has never properly applied to IP-to-PSTN voice calls.”²⁹
- “It has never applied ... to voice calls to nonsubscriber third parties on the PSTN.”³⁰
- “It has never applied to telecommunications carriers.”³¹

These same points undercut much of Feature Group IP's argument.³²

Nonetheless, NASUCA cannot fully support Embarq's Petition, because it seeks forbearance (problematic in and of itself³³) from a regulation that Embarq effectively and correctly argues does not apply to the traffic at issue here. Therefore, it is to some extent irrelevant whether this forbearance meets the statutory standard, as argued by Embarq.³⁴ NASUCA would note that Embarq's Petition comes much closer to the standards than does Feature Group IP's.

It would be consistent with regulatory efficiency if the Commission were simply to issue a declaratory ruling -- in the course of the order denying Feature Group IP's

²⁸ *In re Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006) (emphasis added).

²⁹ Embarq Petition at iii.

³⁰ *Id.*

³¹ *Id.*

³² See *id.* at 1-4, 8-9.

³³ See footnote 3.

³⁴ See *id.* at 18-29.

petition -- that IP-to-PSTN calls are not exempt from access charges. In this way, the need to review and respond to future similar petitions could be obviated, conserving regulatory resources. As Embarq notes, the Commission has stated that “the cost of the PSTN should be borne equitably among those that use it in similar ways.”³⁵ The use of the PSTN at issue here, “[w]hether the provider markets its service as ‘VoIP’ -- or as digital phone, Internet calling, or any other label -- ... is intended and is understood as a substitute for traditional voice services....”³⁶

V. CONCLUSION

The keystone of the argument in Feature Group IP’s forbearance petition is that an exemption from paying access charges is in the public interest. Clearly, it is not. Most specifically, forbearance is not “necessary to ensure that Voice-embedded IP applications allow users to avail themselves of the full promise of IP-based communications.”³⁷ On the other hand, Embarq’s forbearance should also be denied, but the Commission should issue a declaratory ruling that IP-enabled voice calls terminated to the PSTN are subject to access charges. Forbearance should not be granted.

³⁵ Id. at 7, quoting IP Enabled Services, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 61 (2004).

³⁶ Id. at 10. Embarq points out that the offering of additional features does not alter the nature of the call. Id.

³⁷ Feature Group IP Petition at 65.

Respectfully submitted,

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