

January 8, 2009

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**RE: Intercarrier Compensation, CC Docket No. 01-92  
IP-Enabled Services, WC Docket No. 04-36  
Petition for Forbearance of Feature Group IP, WC Docket No. 07-256  
Petition for Forbearance of Embarq, WC Docket No. 08-8**

Dear Ms. Dortch:

The undersigned trade associations – COMPTEL, NCTA, and USTelecom – urge the Commission to take a number of steps to facilitate resolution of issues related to the compensation requirements applicable to the exchange of voice traffic between providers of interconnected Voice-over-Internet-Protocol (VoIP) service and traditional local exchange carriers (LECs), so-called IP/PSTN traffic.<sup>1</sup> In particular, these issues should be addressed in a rulemaking proceeding and not through pending forbearance petitions.

### **BACKGROUND**

As the record compiled in the *Intercarrier Compensation* proceeding makes clear, providers in all segments of the industry – ILECs, CLECs, cable operators, and wireless carriers – are increasingly deploying IP-based technology in their networks. The exchange of IP-based and circuit-switched traffic, however, has led to numerous disputes regarding the applicability of various Commission rules, particularly with respect to intercarrier compensation. The extent of these disputes is growing, and will continue to grow, in the absence of clear, thoughtful Commission resolution of the underlying regulatory uncertainty.

The disparate views on the compensation rules applicable to IP/PSTN traffic are evidenced by two pending forbearance petitions, both of which have approaching deadlines. In one petition, Feature Group IP (FGIP) asserts that IP/PSTN traffic is covered by the Enhanced Service Provider (ESP) exemption, but asks the Commission to forbear from applying access charges to the extent they do apply.<sup>2</sup> Absent Commission action, the petition will be deemed

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<sup>1</sup> We note that there is no established definition of IP/PSTN traffic (PSTN stands for Public Switched Telephone Network). In particular, the two forbearance petitions discussed in this letter seem to cover different, but overlapping, sets of calls. For purposes of this letter, we use the term “IP/PSTN traffic” without specifically defining it. In any future order addressing these issues, however, the Commission should be clear as to the precise scope of traffic that is covered.

<sup>2</sup> Petition for Forbearance of Feature Group IP, WC Docket No. 07-256 (filed Oct. 23, 2007) (FGIP Petition). When it applies, the ESP exemption provides that an information service provider will be treated as an end user, rather than an interexchange carrier, for purposes of the access charge regime. The Commission has not addressed the specific question of whether the ESP exemption applies when two carriers exchange IP/PSTN traffic.

granted on January 21, 2009.<sup>3</sup> In the other petition, Embarq asserts that access charge rules apply to IP/PSTN traffic, but asks the Commission to forbear from the ESP exemption to the extent it does apply to this traffic.<sup>4</sup> In the absence of Commission action, that petition will be deemed granted on January 11, 2009. The Commission has the authority extend this deadline until April 10, 2009, but it has not done so yet.

### **RECOMMENDATION**

The Commission consistently has recognized that forbearance is a mechanism for adjusting regulation, but that there are limits to its use. In particular, forbearance petitions may be an appropriate vehicle for seeking the elimination of unnecessary regulatory obligations, but they are not the right mechanism for replacing one set of rules with another or creating new rules altogether.<sup>5</sup> The United States Court of Appeals for the Ninth Circuit recently affirmed this principle.<sup>6</sup>

As explained below, the pending forbearance petitions filed by FGIP and Embarq are ill-suited to resolving the complex issues surrounding compensation for IP/PSTN traffic. All of the undersigned associations agree that these important issues would be better addressed in a rulemaking proceeding. Accordingly, to facilitate resolution of these issues, we urge the Commission to take the following steps:

**1. The Commission Need Not Resolve the Embarq Petition at this Time.** As the record in the *Intercarrier Compensation* proceeding demonstrates, the issues surrounding the treatment of IP/PSTN traffic are quite complex. Each of our Associations agrees that rushing to address these issues in the context of the pending forbearance petitions would be inadvisable and would create a significant risk of unintended consequences. While the Associations have differences of opinions as to the asserted legal arguments and policy goals espoused in the Embarq Petition,<sup>7</sup> and therefore may well disagree as to the Commission's resolution of those issues if forced to address their merits, the Commission need not resolve those difficult questions immediately. The issues presented are more than sufficiently complex for the Commission to extend the deadline by three months, as provided by the statute. Deferring resolution of the

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<sup>3</sup> *Feature Group IP Petition for Forbearance*, WC Docket No. 07-256, Order (rel. Oct. 3, 2008).

<sup>4</sup> Petition for Forbearance of Embarq Local Operating Companies, WC Docket No. 08-8 (filed Jan. 11, 2008) (Embarq Petition).

<sup>5</sup> See, e.g., *Fones4All Corp. Petition for Expedited Forbearance*, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11130, ¶ 9 (2006) (denying forbearance where grant "would simply create a vacuum . . ."); *Iowa Telecom Petition for Forbearance*, Order, 22 FCC Rcd 15801, 15805, ¶ 7 (2007) (denying forbearance where grant would not give petitioner relief it seeks without adoption of additional rules).

<sup>6</sup> *Fones4All Corp. v. FCC*, Case No. 06-75388 (9<sup>th</sup> Cir. Dec. 16, 2008).

<sup>7</sup> The positions of NCTA and USTA on the merits of Embarq's Petition are reflected in their comments filed in this proceeding. COMPTTEL's position on the merits is consistent with the position taken in the comments filed by its member companies, including tw telecom, One Communications, Cbeyond, Broadview, NuVox and Cavalier in this proceeding.

Embarq forbearance petition will give the Commission additional time to carefully address IP/PSTN compensation issues within the context of the *Intercarrier Compensation* rulemaking.

**2. Deny the Feature Group IP Petition.** The key request contained in the FGIP Petition is for the Commission to forbear from the application of access charge rules preserved by Section 251(g) and to treat IP/PSTN traffic as if it were subject to the reciprocal compensation provision of Section 251(b)(5).<sup>8</sup> FGIP asserts that forbearance is in the public interest because it will “bring to an end the current legal uncertainty” with respect to the compensation obligations associated with this traffic.<sup>9</sup>

The FGIP Petition is substantially similar to a petition filed by Core Communications in 2006.<sup>10</sup> Core sought a ruling forbearing from the application of Section 251(g) with respect to ISP-bound traffic so that such traffic would instead be subject to the reciprocal compensation provisions of Section 251(b)(5). In denying the Core petition in 2007, the Commission flatly rejected Core’s legal analysis.<sup>11</sup> As the Commission explained:

Because section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks because the section 251(b)(5) regime would not automatically, and by default, govern traffic that previously was subject to section 251(g). If the Commission were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.<sup>12</sup>

Based on its analysis of the statute, the Commission found that Core’s request did not meet the forbearance criteria contained in Section 10 of Act.<sup>13</sup> In particular, the Commission found that “the absence of rate regulation for access services would likely result in a regulatory void and uncertainty, which may harm network investment.”<sup>14</sup>

The legal analysis in the *Core Order* compels the Commission to reach a similar conclusion with respect to the FGIP Petition. Were the Commission to grant the FGIP Petition and forbear from Section 251(g), “there would be no rate regulation” governing the exchange of IP/PSTN traffic. Consequently, without additional Commission action, forbearance not only

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<sup>8</sup> FGIP Petition at 3; *id.* at v (“If the Commission grants this Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act . . .”).

<sup>9</sup> *Id.* at iv.

<sup>10</sup> Petition of Core Communications, Inc. for Forbearance, WC Docket No. 06-100 (filed Apr. 27, 2006).

<sup>11</sup> *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 Order*).

<sup>12</sup> *Id.* at 14126, ¶ 14.

<sup>13</sup> *Id.* at 14126, ¶¶ 14-15.

<sup>14</sup> *Id.* at 14128, ¶ 16.

would complicate any existing disputes regarding the compensation applicable to this traffic, it also would perpetuate uncertainty as to the prospective treatment of such traffic. Under no circumstances could the Commission find that such an approach satisfies the forbearance criteria set forth in Section 10 of the Act.

**3. Quickly Address IP/PSTN Issues in the *Intercarrier Compensation Rulemaking or Other Appropriate Proceeding*.** The best way for the Commission to provide the industry with much-needed certainty regarding the compensation rules applicable to IP/PSTN traffic, and to establish an appropriate transition mechanism to the extent one is needed, is to act in the context of a rulemaking proceeding. Although the Commission was unable to accomplish comprehensive intercarrier compensation reform last year, the Commission should not allow these issues to once again be relegated to the back burner. The record makes clear that the current system is deeply flawed and simply retaining the status quo is not a viable option.

Even if the Commission is not able to move forward with comprehensive intercarrier compensation reform, it should at least move quickly to bring clarity to the treatment of IP/PSTN traffic. Disputes between companies concerning the appropriate compensation for IP/PSTN traffic are growing and the resulting uncertainty is harmful to all segments of the industry. Accordingly, while the three Associations currently have different views with respect to the best way to resolve these issues, we all agree they should remain at the top of the Commission's priority list.

**CONCLUSION**

Resolution of issues regarding the compensation applicable to IP/PSTN traffic is critical, and each of the Associations urge the Commission to eliminate the uncertainty surrounding these rules as soon as possible. However, the pending forbearance petitions are ill-suited to resolving these complex issues. By following the steps suggested above, the Commission and the parties can give these issues the care and attention they deserve. Such an approach would benefit the entire telecommunications industry and the consumers who rely upon it.

Respectfully submitted,

**/s/ Mary Albert**

Mary Albert  
Assistant General Counsel  
COMPTEL

**/s/ Steve Morris**

Steve Morris  
Associate General Counsel  
National Cable &  
Telecommunications Association

**/s/ Glenn Reynolds**

Glenn Reynolds  
VP – Policy  
United States Telecom Association

cc: A. Bender  
S. Deutchman  
S. Bergmann  
N. Alexander  
D. Shaffer  
D. Stockdale  
J. Veach