

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Feature Group IP)	
)	WC Docket No. 07-256
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))	

OPPOSITION TO MOTION FOR RECONSIDERATION

Feature Group IP West, LLC and related companies (collectively, Feature Group IP) seek reconsideration of the Commission’s January 21, 2009 decision denying Feature Group IP’s October 23, 2007 Petition for Forbearance.¹

The National Exchange Carrier Association, Inc. (NECA), the National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), the Independent Telephone and Telecommunications Alliance (ITTA), and the Western Telecommunications Alliance (WTA) (collectively, the Associations)² oppose Feature Group IP’s motion and urge the Commission to deny it summarily.

¹ *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, FCC 09-3 (rel. Jan. 21, 2009) (*Feature Group IP Order*).

² NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission’s Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers (“ILECs”) that choose to participate in these arrangements. NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. OPASTCO is a national trade association representing over 600 small ILECs serving rural areas of the United States. ITTA is an organization of midsized ILECs that collectively serve over 30 million access lines in over 44 states and offer a diversified range of services to their customers. Most ITTA member companies qualify as rural telephone companies within the meaning of section 3(37) of the Communications Act of

The Associations agree, however, that the Commission should address the underlying issues raised by Feature Group IP's petition, but in a more appropriate proceeding, such as a rulemaking or a petition for declaratory ruling. Specifically, the Commission should separately confirm that access charges apply to all interexchange voice traffic terminating on the Public Switched Telephone Network (PSTN), regardless of the technology used to originate the call. The Commission should also explicitly reconfirm that competitive local exchange carriers (CLECs), such as Feature Group IP, which obtain interconnection and numbering resources on behalf of voice service providers, are responsible for payment of resulting intercarrier compensation obligations, including access charges.³

I. BACKGROUND

Feature Group IP's October 2007 petition sought forbearance from the application of access charges to "voice-embedded Internet communications."⁴ Alternatively, Feature Group IP asked the Commission to "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.⁵

1934, as amended (the "Act"). 47 U.S.C. §153(37). WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

³ See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (*Time Warner Order*).

⁴ 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 (Oct. 23, 2007).

⁵ *Feature Group IP Order* at ¶ 4.

The Associations opposed Feature Group IP's petition.⁶ Our comments showed, first, that Feature Group IP lacked standing under section 10(c) of the Act to seek the requested forbearance relief.⁷ Even if Feature Group IP could claim standing under section 10(c), the Associations demonstrated that Feature Group IP's petition failed to meet any of the forbearance standards enumerated in section 10(a) of the Act. The Associations pointed out that Feature Group IP's petition presented essentially the same claims advanced in a similar forbearance petition filed in 2006 by Core Communications, Inc. (Core),⁸ which the Commission had previously found not to satisfy section 10(c)'s requirements.⁹

The Commission agreed Feature Group IP had failed to meet any of the statutory criteria necessary for forbearance under section 10(a) of the Act, for the same reasons specified in the *Core Order*.¹⁰ Feature Group IP now seeks reconsideration of the Commission's *Order*, asserting six "reconsideration points" in support.¹¹ None of these points justify a different

⁶ Comments of the NECA, NTCA, OPASTCO, ITTA, ERTA, and WTA, WC Docket No. 07-256 (Feb. 19, 2008) (*Associations' Comments*).

⁷ *Id.* at 6.

⁸ See Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Rate Regulation Pursuant to § 251(g) and for Forbearance from Rate Averaging and Integration Regulation Pursuant to § 254(g), WC Docket No. 06-100 (Apr. 27, 2006) (*Core Petition for Forbearance*).

⁹ See *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 & Order, 22 FCC Rcd 14118 (2007), *petition for review denied*, *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir. 2007) (*Core Order*).

¹⁰ *Feature Group IP Order* at ¶ 5.

¹¹ See Feature Group IP's Corrected Motion for Reconsideration, WC Docket No. 07-256 (Feb. 23, 2009) (*Feature Group IP Motion*) Feature Group IP has also sought review of the Commission's Order before the Court of Appeals for the District of Columbia Circuit. Feature Group IP *Petition for Review*, No. 09-1070 (Feb. 20, 2009). Inasmuch as Feature Group IP's present "motion for reconsideration" renders the Commission's order non-final as to Feature Group IP, its petition for review is subject to dismissal as incurably premature. See *BellSouth v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994).

conclusion than the one reached in the *Order*. Feature Group IP's motion should accordingly be denied.

II. ARGUMENT

Section 1.106(d)(2) of the Commission's rules requires a party seeking reconsideration of Commission orders to cite findings of fact and/or conclusions of law it believes to be erroneous and to state with particularity the respects in which it believes such findings and conclusions should be changed.¹² Reconsideration is appropriate "only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters."¹³ Simply repeating arguments that were considered and rejected by the Commission is not sufficient.¹⁴

Feature Group IP's motion utterly fails to meet this standard. Rather, it generally repeats prior arguments that were duly considered and rejected, and attempts to distort reality by claiming circumstances have changed. For example, Feature Group IP first asserts as a new "fact" that some Incumbent Local Exchange Carriers (ILECs) are using the Commission's denial of Feature Group IP's forbearance petition to support claims for payment of access charges.¹⁵

¹² *In the Matter of Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC*, Memorandum Opinion & Order, 22 FCC Rcd 4788, at ¶10 (Wireless Telecom. Bur. 2007), citing 47 C.F.R. §1.106(d)(2). See also, *New England Television, Inc. (Assignor) and Boston University Communications, Inc. (Assignee) For Assignment of License of WNHT-TV, Channel 21, Concord, New Hampshire*, Memorandum Opinion & Order, 11 FCC Rcd 19753 (1996).

¹³ *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Order on Reconsideration, 23 FCC Rcd 3131, at ¶4 (2007). See also, *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, Order on Reconsideration, 18 FCC Rcd 24871, at ¶5 (2003), citing *Applications of WWIZ, Inc.*, Memorandum Opinion & Order, 37 FCC 685 (1964) ("WWIZ"), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹⁴ *Coastal Broadcasting Partners*, Memorandum Opinion & Order, 7 FCC Rcd 6594 (1992).

¹⁵ See *Feature Group IP Motion* at 3-7.

Feature Group IP specifically includes with its motion a copy of a letter sent by AT&T to the Texas regulatory commission, which is currently considering a dispute between AT&T and Feature Group IP regarding non-payment of access charges.¹⁶

The fact that LECs are seeking to collect access charges for non-local “voice imbedded Internet communications” is hardly a new development. LECs have consistently maintained that access charges apply to interexchange calls regardless of the technology used to transport the calls between exchanges. Similarly, an ILEC’s use of a Commission decision to advance legal arguments in a regulatory proceeding does not qualify as the type of new fact or change in circumstance warranting reconsideration of a Commission order.¹⁷ Because there are simply no new facts or changed circumstances in this matter, Feature Group IP’s motion must be denied.

Feature Group IP has also failed to demonstrate the *Order* contains reversible error. Feature Group IP asserts in this regard that the *Order* is inconsistent with Commission findings in what Feature Group IP dismissively terms as the “*Belated and Reluctant Order Answering Mandamus to Issue Order on Remand of ISP Remand Order*” (sic).¹⁸ There, the Commission

¹⁶ *Id.*, Exhibit A.

¹⁷ The FCC granted reconsideration because of a changed factual situation in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia) ASRadio, LLC, Glade Spring, Virginia: Application for Construction Permit for New FM Station*, Memorandum Opinion & Order, 23 FCC Rcd 86 (2008). In that case, the FCC previously refused to authorize new FM radio stations because of its concern over short-spacing between two proposed radio station transmitters. However, subsequent to the original order, the two parties amended their license applications to substitute a common transmitter site, which, in turn, eliminated the short-spacing concern. This case clearly reflects the type of “new fact” or “changed circumstance” that would warrant reconsideration by the FCC in either an adjudicatory or rulemaking proceeding.

¹⁸ See *Feature Group IP Motion* at 8-9, citing *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*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (*ISP Order on Remand*).

affirmed *ISP-bound* traffic is subject to section 251(b)(5) of the Act.¹⁹ In both the *Core Order* and *Feature Group IP Order*, the Commission found that forbearance from section 251(g) would not necessarily subject *ISP-originated* traffic to section 251(b)(5) of the Act. Since, in *Feature Group IP*'s view, the statute doesn't distinguish between inbound and outbound *ISP* traffic, the Commission's concerns about a regulatory void were unfounded.²⁰

But there is no inconsistency between the Commission's decision to subject *ISP-bound* traffic to section 251(b)(5) of the Act and its conclusion that forbearance from 251(g) would not automatically subject *ISP-originated* traffic to section 251(b)(5). These Commission determinations addressed two different types of traffic. *ISP-bound* traffic consists of dial-up calls made from local subscribers to *ISPs* for purposes of accessing information on the Internet. By contrast, voice calls supposedly "originated by *ISPs*"²¹ and terminated on the PSTN by *Feature Group IP* constitute ordinary voice telephone traffic, and are therefore subject to the same compensation obligations as other such traffic. Section 251(g) of the Act explicitly preserves existing intercarrier compensation obligations for such traffic unless and until the Commission acts affirmatively to replace such mechanisms.²² As the Commission has not yet decided what

¹⁹ *ISP Order on Remand* at ¶ 6.

²⁰ *Feature Group IP Motion* at 8.

²¹ There is no apparent basis in fact for *Feature Group IP*'s assertion that its traffic originates from "ISPs" or is actually "enhanced" in some manner. These calls instead appear to be simple voice calls bearing ordinary ten-digit originating telephone numbers (except where such data has been stripped or altered in some manner). Thus, there is no way to determine the extent to which such calls originate in IP format, in TDM format, or are merely "IP-in-the-middle" calls. But even with respect to calls actually originated in IP format, there is no basis for applying the "ESP exemption" from access charges. See *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* (Jan. 11, 2008). See also, Comments of the NECA, NTCA, OPASTCO, ITTA, ERTA, WC Docket No. 08-8 (Feb. 19, 2008). See also Letter to Kathryn Zachem, Comcast, from Dana Shaffer, Chief, WCB, WC Docket No. 07-52 (Jan. 18, 2009) (suggesting calls originating on cable company's managed network constitute telecommunications services notwithstanding origination in IP format).

²² *Feature Group IP Order* at ¶ 3; *Core Order* at ¶ 14; *ISP Order on Remand* at ¶ 16.

should replace existing state and interstate access charges for interexchange traffic, it was reasonable for the Commission to find a regulatory void would result from forbearance for ISP-originated traffic. Findings reached in the *Remand Order* with respect to ISP-bound traffic are consistent with this assessment.

Other “reconsideration points” presented by Feature Group IP are equally unavailing. In assuming *arguendo* access charges apply to Feature Group IP’s traffic (“Reconsideration Point 3”), the Commission simply granted one of the alternative premises of Feature Group IP’s petition (*i.e.*, that forbearance might be justified to relieve Feature Group IP of a regulatory burden). Feature Group IP does not explain how restatement of this assumption would lead to a different result. Accordingly, there is no basis for reconsidering the *Order* on this ground.

Feature Group IP also complains the *Order* failed to address whether access charges apply to IP-enabled traffic (“Reconsideration Point 4”) and if so, whether CLECs who present the traffic for termination can be held liable for such charges (“Reconsideration Point 5”). The Associations readily agree it would be beneficial for the Commission to resolve the controversies identified in Feature Group IP’s petition. But it should do so by confirming, in the context of a pending rulemaking or in a declaratory ruling, that access charges in fact apply to all non-local calls terminated on the PSTN, regardless of the technology employed to originate the call.²³ The fact the Commission chose not to address these issues in the context of Feature

²³ *E.g.*, Reply Comments of NECA, *et al.*, WC Docket No. 08-152 (Sept. 2, 2008), at 8; Comments of NECA, *et al.*, WC Docket No. 08-8 (Feb. 19, 2008), at 9. As for the issue of whether a CLEC (such as Feature Group IP) can be held accountable for access charges on interexchange traffic sent to a fellow LEC for termination, the Commission has already determined carriers who provide interconnection and numbering resources to IP voice service providers are responsible for the resulting traffic. *See Time Warner Order* at ¶¶16-17. To the extent Feature Group IP sends traffic to ILEC networks bearing its own carrier identification code (rather than the codes of other carriers supposedly originating the traffic) it shouldn’t complain when it is billed the resulting access charges.

Group IP's misplaced forbearance petition certainly does not warrant reconsideration of the *Order*.

Finally, Feature Group IP argues the *Order* did not sufficiently credit evidence of economic benefits that would supposedly flow if forbearance were granted ("Reconsideration Point 6").²⁴ Even if the assertions contained in Feature Group IP's petition regarding supposed benefits of forbearance could fairly be described as an "economic analysis", the Commission was entirely justified in giving more weight to the harms that would flow from forbearance. The *Order* describes the difficulties faced in determining any alleged consumer benefits resulting from forbearance, partly due to the fact the petition was unclear as to what traffic would be covered by a decision.²⁵ The *Order* also correctly points out that Feature Group IP's claims regarding economic benefits were based on a faulty premise (namely, traffic covered by the request would automatically default to a section 251(b)(5) compensation regime).²⁶ Given these uncertainties, the Commission reasonably determined Feature Group IP's claims of economic benefits were unfounded.

III. CONCLUSION

The Commission should deny Feature Group IP's Motion for Reconsideration. The "Reconsideration Points" listed in Feature Group IP's Motion fail to present any evidence of changed facts or circumstances warranting a different result, and Feature Group IP has failed to

²⁴ *E.g.*, *Feature Group IP Motion* at 15 ("The petition was replete with numbers and it contained an extensive economic analysis of how granting the petition would facilitate the expansion and use of the PSTN to support Group Forming Networks.").

²⁵ *Feature Group IP Order* at ¶ 12.

²⁶ *Id.*

show that the conclusions reached in the *Order* were inconsistent with prior Commission decisions or were otherwise unreasonable.

While Feature Group IP's Motion should be denied, the Associations nevertheless agree the Commission should resolve issues surrounding intercarrier compensation payment for interconnected VoIP traffic in an appropriate rulemaking proceeding or by declaratory ruling. Specifically, pending further action on Intercarrier Compensation Reform, the Commission should confirm that access charges apply to all interexchange voice traffic terminated on the PSTN, regardless of the technology used to originate the call. The Commission should further reconfirm that carriers who obtain interconnection on behalf of other voice service providers or provide numbering resources to such providers are responsible for payment of resulting intercarrier compensation obligations for that traffic, including access charges for non-local calls.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Opposition was served this 5th day of March, 2009 by electronic filing, email and US Mail to the persons listed below.

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