Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Feature Group IP Petition 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)	WT Docket No. 07-256
and	
Petition of Embarq for Forbearance from Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and the Commission Orders on the ESP Exemption	WT Docket No. 08-8

REPLY COMMENTS OF THE VOICE ON THE NET COALITION

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March 14, 2008

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I. INTRODUCTION AND SUMMARY

Embarq has asked the Commission to exceed its statutory authority by forbearing where forbearance is plainly not permitted.[1] The VON Coalition strongly opposes Embarq's effort to game the Communications Act in this way. If the Commission chooses to adopt new rules governing intercarrier compensation for IP-to-PSTN communications, it should do so only through comprehensive (and procedurally appropriate) notice and comment rulemaking. Moreover, given the clarity of the

[1] Petition of Embarq Local Operation 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 (filed Jan. 11, 2008) ("*Embarq Petition*").

Commission's prior orders and rules, it would be manifestly unjust to adopt a new rule in the guise of a "clarification" that could have retroactive effect.

Congress has granted the Commission authority to forbear from application of regulations and statutes, but has not authorized forbearance from Commission orders. It has likewise granted forbearance authority only with respect to telecommunications carriers and telecommunications services. Embarq's Petition ignores each of these limits on Commission authority, asking the Commission to forbear from its Orders and to forbear with respect to non-carriers' provision of information services.

Even if Embarq's requested relief could be granted through forbearance, its request would not alter the existing access charge rules. There is no default rule that would impose access charges on ESPs and ISPs in the absence of what has been termed the "ESP exemption." Because Rule 69.5(b) applies switched access charges only to "interexchange carriers," simply forbearing from classifying an IP-PSTN provider as an "end user" would not automatically subject it to "interexchange carrier" charges. And Section 251(g) of the Act affirmatively forbids application of access charges to services not subject to access charges before adoption of the '96 Act. Embarq can only obtain the relief it seeks – imposition of access charges on non-carrier information service providers – through adoption of new rules.

Embarq's suggestion that ESP and ISP traffic is subject to access charges under existing law is likewise misplaced. The Commission has never extended access charges to parties other than interexchange carriers, and has never held that the net protocol conversion inherent in IP-to-PSTN traffic is a telecommunications service. This settled law should not be undone, and certainly may not be undone through Embarq's Petition.

Finally, the Commission has before it numerous proceedings addressing intercarrier compensation, including the proper treatment of IP-to-PSTN traffic. Changes to its existing rules should be made, if at all, as part of the comprehensive reform contemplated by the Commission's open rulemakings. In that context, the best approach to reform is bill and keep, which would quickly rationalize intercarrier compensation and enable carriers to focus their resources on competition and innovation.

II. THE COMMISSION CANNOT "FORBEAR" FROM THE "ESP EXEMPTION."

As an initial matter, Embarq's Petition must be denied because Embarq fails to point to any provision of the Act or the Commission's rules that directs that switched access charges (the access charges at issue) apply to providers of IP-PSTN services in the absence of the "ESP exemption." 47 C.F.R. § 69.5(b), which establishes which entities are subject to switched access charges, specifies: "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." Without a rule establishing an affirmative obligation to pay access charges in the absence of the provisions from which Embarq seeks forbearance, Embarq's petition, like the one the Commission addressed in *Core II*, cannot give Embarq "the relief it seeks."[2]

Embarq's request that the Commission also forbear from enforcing "section 69.5(a) of its rules to IP-originated voice traffic that terminates on the PSTN" and "47 U.S.C. section 251(b)(5) to provision to non-local traffic terminated as voice traffic on

[2] Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules, Memorandum Opinion and Order, 22 FCC Rcd. 14118, 14126 (¶ 14) (2007) ("*Core II*").

the PSTN"[3] is also unavailing. First, because Rule 69.5(a) simply provides that end users pay end user charges, there is no regulatory language in Rule 69.5(a) from which to forbear that would result in an ESP providing IP-PSTN service paying switched access charges under Rule 69.5(b). The forbearance statute does not authorize the Commission to adopt new interpretive glosses on its rules – instead, it directs the Commission, in certain limited circumstances, to "forbear from applying . . . regulation."[4] Embarq's failure to identify *any* language within the four corners of Section 69.5(a) from which the Commission can or should forbear in order to impose the switched access charges governed by Rule 69.5(b) demonstrates that Embarq petition cannot result in the relief it seeks. As a result, whether or not Embarq's request for forbearance from 69.5(a) with respect to certain ESPs is granted, Rule 69.5(b) will continue in force as written and access charges will continue to apply only to interexchange carriers – not ISPs or ESPs.

Embarq's related request that the Commission forbear from Section 251(b)(5), which governs LEC obligations to establish reciprocal compensation arrangements, will likewise not entitle Embarq or other LECs to collect access charges from any entities that are not "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[5] Just as the Commission in *Core II* held that forbearance from Section 251(g) would not automatically result in the imposition of reciprocal compensation charges pursuant to Section 251(b)(5), so too forbearance from Section 251(b)(5) cannot result in the application of switched access

[3] *Embarq Petition* at 17.
[4] 47 U.S.C. § 160.
[5] 47 C.F.R. § 69.5(b).

charges pursuant to Section 251(g) and Rule 69.5(b).[6] Instead, it would orphan the traffic at issue, leaving it subject to no default intercarrier compensation scheme at all.

This is confirmed by Section 251(g) of the Act. Section 251(g) creates a limited exemption from the default Section 251(b)(5) scheme by preserving "pre-Act regulatory treatment of all the access services enumerated under section 251(g)."[7] Section 251(g) "explicitly exempts certain telecommunications services from the reciprocal compensation obligations" of Section 251(b)(5),[8] but is not a default compensation scheme to which IP-PSTN traffic would automatically be subject if the Commission were to forbear from Section 251(b)(5). The Commission cannot, by forbearance, create a new default scheme for IP-PSTN traffic or contravene the express limits on the imposition of access charges contained in Section 251(g). As a result, Embarq's misguided request for forbearance from Section 251(b)(5), if granted, would not only fail to provide Embarq with the relief it seeks, but also would complicate and disrupt existing intercarrier compensation obligations.

In addition, Embarq asks the Commission to do something here that the Commission cannot do. Section 251(g) preserves "the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by

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[6] *See Core II*, 22 FCC Rcd. at 14126-27 (¶ 14).
[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. at 9169 (¶ 39).
[8] *Id.* at 9166 (¶ 32).

regulations prescribed by the Commission after such date of enactment."[9] As the D.C. Circuit has previously observed, Section 251(g) is "worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act."[10] Here, however, Embarq seeks, through forbearance, to extend Section 251(g)'s preservation of pre-Act rules to entities for which, as discussed further below, there is no pre-Act obligation. As the D.C. Circuit has made clear, Section 251(g) does not permit the FCC to prescribe new access rules for traffic that was not subject to a pre-1996 Act intercarrier compensation obligation.[11] This clear statutory limit cannot be contravened through forbearance.

Furthermore, Embarq does not seek forbearance from a specific regulation or statutory provision, and thus its request does not fall within the scope of Section 10. Congress has granted the FCC authority to forbear from "regulation[s]" or statutory provisions under certain carefully defined circumstances.[12] But the cornerstone of Embarq's forbearance request is the request that the Commission "forbear from enforcing the ESP exemption, *as adopted by Commission orders.*"[13] These orders are not "regulations." And Congress knows the difference – when Congress has intended to specify legal requirements other than statutes and codified rules, it has done so.[14]

The Commission likewise is without authority to grant forbearance because what Embarq seeks is not the forbearance of the application of the Commission's access

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[9] 47 U.S.C. § 251(g).
[10] *Worldcom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).
[11] *See id.* at 433.
[12] 47 U.S.C. § 160.
[13] *Embarq Petition* at 17 (emphasis added).
[14] *See, e.g.*, 47 U.S.C. § 253(a) (granting the FCC authority to preempt not only a state or local "statute or regulation," but also a "legal requirement").

charge rules – and specifically rule 69.5(b) – to carriers, but the extension rule 69.5(b) to noncarriers. This turns forbearance on its head, and is outside the scope of Section 10. Section 10 empowers the Commission to forbear only from application of statutes or regulations to "a telecommunications carrier or telecommunications service" or to "a class of telecommunications carriers or telecommunications services."[15] Section 10 cannot be used to extend the coverage of Commission rules beyond their stated terms. Moreover, because ESPs and ISPs are not telecommunications carriers and do not provide telecommunications services, the Commission is also without authority to grant Embarq's requested forbearance.

III. IP-TO-PSTN TRAFFIC IS NOT SUBJECT TO CARRIER'S CARRIER ACCESS CHARGES UNDER RULE 69.5(B).

By its Petition, Embarq seeks to undo settled law. Embarq claims that IP-to-PSTN calls are subject to carrier's carrier switched access charges, ignoring the long line of precedent underpinning what has come to be called the ESP exemption. What Embarq ignores is that the core of what has been called the ESP exemption was the limitation of switched access charges in Rule 69.5(b) to "interexchange carriers." Further, in the decades since it first adopted the distinction between "enhanced" and "basic" services, the Commission has recognized repeatedly that services performing a net protocol conversion are "enhanced" or "information" services.[16] The IP-to-PSTN traffic Embarq

[15] 47 U.S.C. § 160.

[16] *See, e.g., Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations,* Report and Order, 2 FCC Rcd 3072, 3081-82 (¶¶ 64-71) (1987); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as*

has targeted in its Petition, which by definition includes a net protocol conversion (from IP to TDM), falls squarely within the definition of information service. As the Commission has long held, the definitions of "information service" and "telecommunications service" are mutually exclusive. Because a "telecommunications carrier" is a provider of "telecommunications services," an "information service" provider, by definition, cannot be an interexchange carrier subject to switched access charges under Rule 69.5(b).

A. Net Protocol Conversion is an Information Service.

The Telecommunications Act of 1996 (which amended the Communications Act of 1934) explains that:

> The term "information service" means the offering of a capability for generating, *acquiring*, storing, *transforming*, *processing*, retrieving, utilizing, or making available *information via telecommunications*, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[17]

Before the phrase "information service" was introduced in 1996, the Commission used the term "enhanced services." The Commission's regulations provide that:

> [T]he term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the *format*, *content*, code, *protocol* or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or *restructured* information; or involve subscriber interaction

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amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (¶ 104) (1996) ("*Non-Accounting Safeguards Order*").

[17] 47 U.S.C. § 153(20) (emphasis added). *See also* 47 C.F.R. § 51.5 (providing same definition).

> with stored information. Enhanced services are not regulated under title II of the Act.[18]

The Commission has found that these two terms – information service and enhanced service – substantially overlap.[19] The Commission has further explained that the statutory definitions of telecommunications service and information service do not "rest[] on the particular types of facilities used."[20] Each rests instead "on the function that is made available."[21] IP-enabled services that originate or terminate in IP are intrinsically information services when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP (or vice versa). The FCC has held that "both protocol conversion and protocol processing services are information services under the 1996 Act."[22]

B. Only Interexchange Carriers, and Not Information Service Providers, are Subject to Carrier Switched Access Charges.

By its terms, Rule 69.5 requires the assessment of carrier's carrier switched access charges only upon "interexchange carriers that use local exchange switching facilities for

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[18] 47 C.F.R. § 64.702(a) (emphasis added).

[19] The FCC regards the term "information service" as interchangeable with the pre-existing regulatory term "enhanced service," at least in the context of access-charge regulation. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. at 15982, 16132 (¶ 341 n.498) ("*Access Charge Reform Order*"); *see also id.* at 16165 (¶ 430) (describing NPRM as initially directed toward "enhanced service providers (which we now refer to as information service providers, or ISPs)").

[20] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4821 (¶ 35) (2002).

[21] *Id.*

[22] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956 (¶ 104).

the provision of interstate or foreign telecommunications services."[23] Section 69.5(b) nowhere permits the assessment of switched access charges on enhanced or information service providers.

Rule 69.5 was promulgated by the Commission in its *MTS and WATS Market Structure Order*.[24] In that *Order*, the Commission promulgated new Rule 69.5, imposing end-user charges upon end users and carriers' carrier charges upon interexchange carriers. In doing so, the Commission created what became known as the ESP exemption by describing the term "interexchange carriers" to exclude ESPs for purposes of assessing access charges. The Commission explained that it considered (and rejected immediately) imposing access charges upon ESPs, and it enacted a new regulation explicitly reserving "carrier's carrier charges" for "interexchange carriers."[25] Notably, the Commission did not apply carrier's carrier charges to ESPs and then carve out all or a certain subset of ESP traffic and exempt only that subset from its access charge rules.

In the years since, the Commission has twice considered and twice rejected changes in its regulations that would allow LECs to levy access charges against enhanced service providers – demonstrating in each case that Rule 69.5(b) does not cover ESPs at all. The Commission first revisited the issue of the ESP exemption in a 1987 Notice of Proposed Rulemaking, which tentatively concluded "that enhanced service providers, like providers of interstate basic services, [should] be assessed access charges for their use of

[23] 47 C.F.R. § 69.5(b).
[24] *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682 (1983) ("*MTS and WATS Market Structure Order*").
[25] *Id*. at Appendix A.

local exchange facilities."[26] Significantly, when the Commission reached this tentative conclusion, it specifically proposed modifying Rule 69.5(b) to apply carrier's carrier (switched) access charges to both "interexchange carriers" and "enhanced service providers."[27] This demonstrates that the term "interexchange carrier" never included enhanced or information service providers. The Commission ultimately decided to reject its tentative conclusion, and closed the rulemaking without making any changes to Rule 69.5(b).[28]

In the wake of the adoption of the landmark Telecommunications Act of 1996[29] the Commission again affirmed ESPs' status as end users, rather than interexchange carriers, under Rule 69.5. The Commission issued a major NPRM in response to the 1996 Act that, among many other issues, again considered whether carriers' carrier access charges should be extended to ESPs. The Commission began by recalling its decision in 1983 "that, although enhanced service providers (ESPs) may use incumbent LEC facilities to originate *and terminate* interstate calls, ESPs should not be required to pay interstate access charges."[30] In other words, the Commission recognized expressly that the ESP exemption applies whenever an ESP plays a role in a call, not just when it uses LEC facilities to receive calls. The Commission went on to explain that "[a]lthough

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[26] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305 (¶1) (1987).
[27] *Id.*
[28] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631 (1988) ("*ESP Exemption Order*").
[29] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[30] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354, 21478 (¶ 284) (1996) (emphasis added).

our original decision in 1983 *to treat ESPs as end users* rather than carriers was explained as a temporary exemption, we tentatively conclude that the current pricing structure should not be changed *so long as the existing access charge system remains in place."*[31]

In the resulting *Order*, the Commission (switching to the 1996 Act's jargon of "information service provider" or "ISP" rather than "enhanced service provider" or "ESP") *again* noted that "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users," and that "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[32] The Commission then made clear that it was not altering that categorical classification or its categorical effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access charges."[33] The Commission left no doubt that its decision to continue to place ESPs and ISPs outside of Rule 69.5(b) carrier's carrier access charges was deliberate, concluding, "We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system."[34]

C. Nothing in Rule 69.5(b) Supports Application of Access Charges to "Voice" Traffic or to Traffic Outbound from an ISP to the PSTN, as Distinct from Traffic from the PSTN to an ISP.

In addition to reading the term "enhanced service providers" into Rule 69.5(b), where it does not exist, Embarq baldly asserts that "the ESP exemption cover[s] only the connection between the ESP *and its subscribers,* not between the ESP and *its non-*

[31] *Id.* at 21480 (¶ 288) (emphasis added; footnote omitted).
[32] *Access Charge Reform Order*, 12 FCC Rcd. at 16132 (¶ 342).
[33] *Id.* at 16133 (¶ 345).
[34] *Id*. at 16134-35 (¶ 348).

subscribers"[35] and "when the Commission fashioned the exemption, it never intended it to cover any voice calls."[36] Once again, the plain text of Rule 69.5(b) is dispositive. Nothing in Rule 69.5(b) says that ESPs are subject to carrier's carrier charges for calls from an ESP, but not calls to an ESP, nor does it say that ESPs are subject to carrier's carrier switched access charges for "voice" calls.

The Commission has always addressed the inapplicability of Rule 69.5(b) switched access charges to ESPs and ISPs as a class, and not with respect to particular subsets of ESP or ISP traffic. When the Commission in 1987 decided not to revise Rule 69.5(b) and decided to maintain ESPs' exemption from access charges, and it described the exemption as applying across the board to ESPs as a class rather than to particular aspects of ESPs' services:

> At the time we adopted the original access charge plan, . . . we concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations and cause disruptions in providing service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, *including enhanced service providers*.[37]

In explaining its decision, the Commission noted "that this is not an appropriate time to assess interstate access charges *on the enhanced services industry*," and it terminated the proceeding without implementing the proposed changes in regulations.[38] The Commission thus maintained the application of the ESP exemption to ESP providers (and their traffic) as an industry, and did not carve out particular types of ESP traffic as exempt from the exemption.

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[35] *See, e.g., Embarq Petition* at 3.
[36] *Id.* at 3.
[37] *ESP Exemption Order*, 3 FCC Rcd. at 2631 (¶ 2) (emphasis added).
[38] *Id.* at 2633 (¶ 20) (emphasis added).

The text of the 1996 *Access Charge Reform Order* likewise makes clear that access charges d not apply to ESPs as a *class,* not merely to some unspecified subset of ESP communications:

> In the NPRM, we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no reason to extend such a system *to an additional class of customers*.[39]

Moreover, as in all previous orders dealing with the exemption, the Commission did not distinguish among various types of information service providers, based on differing uses of the underlying PSTN or any other basis. To the contrary, the Commission has repeatedly described the scope and effect of its access charge rules and the ESP exemption in categorical terms that match the categorical language of Rule 69.5 itself.[40] Embarq cannot rewrite Rule 69.5(b) through wishful thinking.

D. The Commission Cannot Retroactively Apply Access Charges to ESPs and ISPs.

The Commission may not retroactively apply access charges to ESPs and ISPs through forbearance. The purpose of forbearance is not to resolve the scope of existing law, but rather to determine whether certain statutory prerequisites to forbearance are

[39] *Access Charge Reform Order*, 12 FCC Rcd. at 16132-33 (¶ 343) (emphasis added; footnotes omitted). The Commission also rejected arguments from ILECs that nonassessment of access charges results in information service providers imposing uncompensated costs on ILECs. *See id*. at 16133-34 (¶¶ 346-347).

[40] *See id.* at 16003 (¶ 50) ("[W]e adopt in this Order our earlier tentative conclusion that incumbent LECs may not assess interstate access charges on information service providers (ISPs)."); at 16133 (¶ 344) ("We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs."); at 16133 (¶ 345) ("We decide here that ISPs should not be subject to interstate access charges."); at 16134-35 (¶ 348) ("We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system."); and at 16165 (¶ 430) ("[W]e sought comment on whether to continue to exempt enhanced service providers (which we now refer to as information service providers, or ISPs) from any requirement to pay access charges.").

satisfied with respect to the statutory and regulatory provisions at issue – and thus whether current law will be prospectively applied. Unlike a declaratory ruling, this is an essentially forward-looking analysis that only gives rise to future regulatory relief; it is a determination to alter the rules applicable to the petitioning entity.[41] For that reason, Commission action on Embarq's Petition cannot retroactively alter the Commission's access charge rules.

In any event, because Embarq asks the Commission to "substitute new law for old law that was reasonably clear," its request for relief is not subject to a presumption of retroactivity.[42] As detailed above, it is well settled that access charges only apply to interexchange carriers and that the ESP exemption applies to IP-to-PSTN traffic.[43] There is no basis, beyond Embarq and others' self-serving claims, to conclude that the Commission's access charge regime is or has ever been unclear. The Commission's rules have long applied switched access charges to interexchange carriers only, and the Commission has consistently declined to modify Rule 69.5(b) to apply switched access charges to ESPs and ISPs. The Commission's Orders have repeatedly confirmed that the access charge rules means what it says, and have gone even further by confirming that ESPs and ISPs are end users exempt from access charges. For the same reasons, even if

[41] *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("a statutory grant of rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); *id*. at 221 (Scalia, J., concurring) (retroactivity is not permissible in rulemaking, but it is normal in the context of adjudication because "[a]djudication deals with what the law was; rulemaking deals with what the law will be").
[42] *Qwest Services Corp. v. FCC,* 509 F.3d 531, 539 (D.C. Cir. 2007).
[43] *See supra* Part III.

the relief Embarq requests were capable of retroactive application, retroactive application would be barred as manifestly unjust.[44]

IV. THE COMMISSION SHOULD NOT STIFLE INNOVATION BY EXTENDING ACCESS CHARGES TO IP-TO-PSTN VOICE CALLS.

Embarq's requested forbearance would not serve the public interest. Embarq suggests that there is no difference between the innovative services offered using IP that it would subject to access charges and Embarq's own "innovative services and features."[45] But there is a vast difference. Embarq is only now "rolling out" services that many IP-enabled service providers, including interconnected VoIP providers, pioneered and have been providing for years. And Embarq does not even indicate that it is aware of the myriad of voice services that could be affected by its misguided request for forbearance.

Embarq's Petition could impose legacy access charges on the voice element of any number of innovative services, such as:

- *Phone Notify* – A CDYNE VoIP application that allows a person with a speaking or hearing disability to type text and have it delivered as a computerized voice message to someone's telephone.
- *Web-Based Click-to-Call Services* – Services that allow users to click on websites to obtain immediate help or assistance. Gerber, for example, has a helpline that allows new parents to call with feeding or other urgent questions at any time of day or night.
- *Online Gaming* – Services that allow gamers to speak in real time with their teammates and opponents, including IP-to-PSTN communications.
- *Unified Communications* – Services that unify communications in any number of ways, including providing a single phone number that can forward calls and messages to any other phone number or email address, allowing text, voice, and

[44] *Qwest Services Corp.*, 509 F.3d at 539-541.
[45] *Embarq Petition* at 10 n.27.

video in a single communications, session, and allowing users to manage and retrieve communications over the web.

- *Privacy and Social Networking* – Services that allow users to communicate by voice with friends or connections from social networks by proving temporary virtual phone numbers.

- *Web-Based Conferencing* – Services that allow parties to an integrated conference call to share, edit, and interact with presentations, video and text.

Voice is increasingly integrated into IP applications and services, and the potential for these services to evolve to bring further innovation and benefits is unlimited. The very flexibility of the Internet and of IP facilitates the continued development of services that drive economic development, remove barriers for the disabled, and encourage broadband adoption. Embarq's misguided Petition puts these considerable public benefits at risk and should be rejected.

Indeed, Embarq's Petition could drive a myriad of evolving free services out of the marketplace, or at least reduce their availability in rural and other high access rate areas. Websites like MySpace and Facebook are experimenting with voice integration, but might well have to end these efforts if, instead of paying cost-based rates, they were required to pay above-cost and geographically variable subsidies. Discouraging development and deployment of these services would be directly contrary to our national policy of "promoting the continued development of the Internet and other interactive computer services."[46] Alternatively, providers of these services could be forced to deny access to these features in rural areas and other high cost areas, undermining the goals of Section 706.[47] In either case, the outcome would not be contrary to the public interest.

[46] 47 U.S.C. § 230(b)(1).
[47] 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996).

V. THE COMMISSION SHOULD ADOPT NEW RULES FOR COMPENSATION FOR IP-TO-PSTN CALLS ONLY AS PART OF COMPREHENSIVE REFORM.

The Commission has ongoing proceedings in which it may adopt new rules governing compensation for IP-to-PSTN traffic, and should not accept Embarq's procedurally defective invitation to bypass these proceedings. Instead, the Commission should avoid adopting new obligations in a piecemeal and potentially incoherent fashion by addressing the liability of all providers involved in the handling of calls simultaneously. Only a rational and coherent approach to intercarrier compensation can be expected to result in rational and coherent intercarrier compensation rules that will foster continued competition and innovation. As the Commission considers changes to its intercarrier compensation regime, it should consider adopting bill and keep rules for all traffic. Bill and keep would quickly rationalize intercarrier compensation and relieve the industry of many unnecessary and resource-draining disputes over compensation, enabling all providers to devote their resources, instead, to providing their customers with the best communications services possible.

Conclusion

Embarq's Petition for forbearance must be rejected. Embarq's Petition is wholly improper because the relief it seeks cannot be granted through the forbearance it requests. Embarq nowhere points to an affirmative duty for ESPs or ISPs to pay access charges that would apply if forbearance is granted. Indeed, current law does not permit the application of switched access charges to ESPs or ISPs – who by definition are not "interexchange carriers." As the Commission has recognized each time it has considered the question, applying access charges to ESPs or ISPs is bad policy, and would stifle a wide variety of innovative new services and features.

Respectfully submitted,

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March 14, 2008