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

In the Matter of Petition of the Frontier 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. 08-205

REPLY COMMENTS OF THE VOICE ON THE NET COALITION

October 17, 2008

TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY

Frontier's forbearance petition is nearly identical to a petition that Embarq filed in January 2008.[1] The VON Coalition urged the Commission to deny Embarq's petition, and likewise asks the Commission to deny Frontier's petition. Frontier's petition seeks the same relief, suffers from the same flaws, and should be denied for the same reasons as Embarq's petition.

Frontier asks the Commission to exceed its statutory authority by forbearing where forbearance is plainly not permitted. The VON Coalition strongly opposes Frontier's effort to game the Communications Act in this way. If the Commission

[1] As Frontier states (at iii), its petition "mirrors a nearly identical petition filed by Embarq on January 11, 2008 in WC Docket 08-08," seeking forbearance from the ESP exemption for all IP traffic that terminates on the PSTN such that interstate and intrastate carrier access charges would apply. The VON Coalition incorporates here the arguments it made in reply comments it filed in the Embarq proceeding. See Reply Comments of the VON Coalition WC Dkt. Nos. 07-256, 08-8 (filed March 14, 2008).

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 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.

Instead of this piecemeal approach, the VON Coalition has urged the Commission to comprehensively reform the carrier-to-carrier compensation regime for the broadband era. Indeed, the VON Coalition recently joined a coalition of providers from all corners of the communications industry to urge the Commission to adopt immediate comprehensive reform. Given the importance of achieving comprehensive intercarrier compensation reform, the Commission should reject Frontier's piecemeal approach as contrary to statutory requirements; harmful to innovation and consumers; and detrimental to the broader goal of comprehensive reform of a broken system. Instead, the Commission should remain sharply focused on its stated goal of achieving comprehensive intercarrier compensation reform *this year*.

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. Frontier'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 Frontier'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. Frontier can only obtain the relief it seeks – imposition of access charges on non-carrier information service providers – through adoption of new rules.

Frontier'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 Frontier'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, Frontier's Petition must be denied because Frontier 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 Frontier seeks forbearance, Frontier's petition, like the one the Commission addressed in *Core II*, cannot give Frontier "the relief it seeks." [2]

Frontier'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 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] Frontier'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 Frontier petition cannot result in the relief it seeks. As a result, whether or not Frontier's request for forbearance from 69.5(a) with

[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*").
[3] *Frontier Petition* at 17.
[4] 47 U.S.C. § 160.

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.

Frontier'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 Frontier 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 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

[5] 47 C.F.R. § 69.5(b).
[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).

access charges contained in Section 251(g). As a result, Frontier's misguided request for forbearance from Section 251(b)(5), if granted, would not only fail to provide Frontier with the relief it seeks, but also would complicate and disrupt existing intercarrier compensation obligations.

In addition, Frontier 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 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, Frontier 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, Frontier does not seek forbearance from a specific regulation or statutory provision, and thus its request does not fall within the scope of Section 10.

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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.

Congress has granted the FCC authority to forbear from "regulation[s]" or statutory provisions under certain carefully defined circumstances.[12] But the cornerstone of Frontier'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 Frontier seeks is not the forbearance of the application of the Commission's access 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 Frontier'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, Frontier seeks to undo settled law. Frontier claims that IP-to-PSTN calls are subject to carrier's carrier switched access charges, ignoring the long line

[12] 47 U.S.C. § 160.
[13] *Frontier 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").
[15] 47 U.S.C. § 160.

of precedent underpinning what has come to be called the ESP exemption. What Frontier 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 Frontier 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

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

> 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 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-

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

[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.*

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 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.

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

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 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

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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).

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 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,

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[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).
[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).

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

[34] *Id*. at 16134-35 (¶ 348).
[35] *See, e.g., Frontier Petition* at 3.
[36] *Id.* at 3.

> 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.

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

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[37] *ESP Exemption Order*, 3 FCC Rcd. at 2631 (¶ 2) (emphasis added).
[38] *Id.* at 2633 (¶ 20) (emphasis added).
[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).

exemption in categorical terms that match the categorical language of Rule 69.5 itself.[40] Frontier 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 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 Frontier's Petition cannot retroactively alter the Commission's access charge rules.

In any event, because Frontier 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

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[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.").

[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").

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 Frontier 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 the relief Frontier 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.

Frontier's requested forbearance would not serve the public interest. Frontier suggests that there is no difference between the innovative services offered using IP that it would subject to access charges and Frontier's own services arguing that IP to PSTN traffic "purely substitutes for more traditional LEC services"[45] But there is a vast difference.

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

[42] *Qwest Services Corp. v. FCC,* 509 F.3d 531, 539 (D.C. Cir. 2007).
[43] *See supra* Part III.
[44] *Qwest Services Corp.*, 509 F.3d at 539-541.
[45] *Frontier Petition* at 10.

services that drive economic development, remove barriers for the disabled, and encourage broadband adoption. Frontier's misguided Petition puts these considerable public benefits at risk and should be rejected.

Frontier's arguments ignore the vast variety of services implicated and the potential harm to consumers nationwide if the FCC changes course and begins treating ESPs/ISPs as interexchange carriers rather than users of telecommunications services.[46] Although the Commission has increasingly imposed telecommunications-like regulations on "Interconnected VoIP providers," it has done so only to the extent that such providers are offering services that approximate plain old telephone services. The Commission has not, however, found that Interconnected VoIP is a "telecommunications services" or a common carrier service. This is a rational, bright line regulatory scheme that ensures consumers have access to the basic features and functionalities of phone service when they purchase Interconnected VoIP to replace their home telephone service. Importantly, however, outside of the bright line delineating telephone replacement services, there are countless IP products and services offerings that are transforming the way American's communicate. Although these products may originate IP and terminate on the PSTN, they look and feel nothing like a plain old telephone call. They are, for example, connecting voice with the web and transforming the way people communicate on social networking sites. In fact, even among Interconnected VoIP providers, there are a multitude of business models, features, and capabilities that consumers have heretofore never been able to take advantage of. As proposed by Frontier, imposition of switched access charges on these products could potentially foreclose consumer access to a world

[46] *See* NECA et al comments at 4-5.

that is more rewarding, informative and delightful than anything imagined on the PSTN.

A continuation of the forward-looking policies that for more than 20 years have recognized the economic inefficiencies of applying the inflated access charge regime to VoIP and other Internet services will continue to generate untold benefits for consumers. For instance, studies have shown that VoIP enabled competition can save consumers an astounding $110 billion over the next 5 years – putting real money back into consumers' pockets through the power of competition at a time when families really need it. And, by harnessing VoIP as a broadband driver, just a 7% increase in broadband adoption could create nearly 2.4 million more jobs per year. In fact, VoIP is now projected to be the number one job creator of any industry in the country. Already businesses are boosting productivity by as much as 15%, and small businesses could save $16 billion over the next 5 years through VoIP enabled competition.

Some of the most exciting developments in IP-enabled voice services are just beginning to emerge. Voice 2.0 applications are integrating voice into a wide variety of different applications and services – from voice blogs to video games; there are now more than two dozen VoIP applications in Facebook alone – most of which connect to the PSTN in one way or another. These applications, software, and services are not a new kind of replacement telephone service, but instead represent a whole new frontier in communications. VoIP is allowing people to communicate in entirely new ways – connecting friends together on MySpace, giving voice to blogs, transforming video games, integrating voice and video into instant messaging, enabling people with disabilities to access a host of new accessibility tools not previously possible, allowing one telephone number to reach all your phones, enabling new privacy communication

tools, ushering in a new era of voice recognition based information retrieval tools, and integrating click to dial functionality into mapping and other web sites.

These exciting technologies are emerging as a result of the Commission's pro-growth, pro-innovation policies that for 20 years have (through the treatment of ESPs as end users rather than carriers) ensured that Internet communications are not saddled with the broken access charge regime. These applications simply would not exist if Facebook had to charge by the minute, or charge people differently depending on which friends they are communicating with and where they live in the country. Interconnected VoIP traffic terminating on a switch is often indistinguishable from Facebook originated traffic or that from a voice blog. IP to PSTN traffic, like that generated by voice blogs or online avatars are not substitutes for Frontier's POTS service, nor are they getting a "free ride." If the FCC were to apply access charges for the first time to IP applications that communicate with users on the PSTN, the results would be anti-consumer and anti-growth:

- Rates for innovative IP-enabled voice applications would go up;
- Innovation in and development of new IP-enabled voice applications would be curtailed;
- Consumer demand for broadband would be reduced, slowing the growth in broadband penetration, and thus stunting one of the policy objectives of the Congress when it enacted the Telecommunications Act of 1996.

Under any regime, the FCC must recognize what we have learned from the Internet compensation model: users do not pay a different price whether an e-mail is local or long

distance or to connect to a web site located across a LATA boundary in rural Iowa. Instead, video phones are free to communicate around the globe. It is an "all you can eat" flat-rate world that spans geography and does not charge by the minute, distance or time. Such a compensation regime, which has made Intercommunication possible and benefitted consumers enormously, is rooted in a bill and keep model.

In order to accelerate our transition from analog to broadband technologies, we should not be erecting new toll-gates when broadband users want to talk to their analog counterparts, or extending the broken system to the Internet. Instead, the Commission should reform the inequities in the current system by adopting a comprehensive, uniform, compensation regime that is modernized for 21st century communication. We are the only country in the world that has a patchwork of different terminating rates based on region. To be competitive, U.S. carriers need a single unified compensation rate that encourages, rather than discourages consumer choice, that spurs rather than slows broadband investment, and encourages rather than delays the transition to more advanced forms of communication. As other countries have learned, keeping per minute access charges off of IP to PSTN communications can accelerate the transition from analog to broadband.

Frontier's request would not serve the public interest. Frontier's request seems to suggest that there is no difference between the innovative services offered using IP that it would subject to access charges and plain old PSTN voice services. But there is a vast difference. As the various examples cited show, 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. Frontier's misguided Petition puts these considerable public benefits at risk and should be rejected.

Frontier would have the Commission believe that its petition must be granted for parity's sake. However, **granting Frontier's petition would have dire consequences for the evolution of new services on the Internet.** Indeed, Frontier's Petition could drive a myriad of evolving free services out of the marketplace or stifle 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."[47] 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.[48] In either case, the outcome would be contrary to the public interest.

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 Frontier's procedurally defective invitation to bypass these proceedings. Instead, the Commission should avoid adopting new obligations in a piecemeal and potentially incoherent fashion

[47] 47 U.S.C. § 230(b)(1).
[48] 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996).

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

Frontier's Petition for forbearance must be rejected. Frontier's Petition is wholly improper because the relief it seeks cannot be granted through the forbearance it requests. Frontier 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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