MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Telecommunications Alert: FCC Denies A CLEC Petition Asking That Its IP-PSTN Traffic Be Free from Access Charges

1/23/2009

On January 21, 2009, the FCC released an order[1] denying a petition by Feature Group IP, a competitive local exchange carrier (CLEC) serving certain VoIP providers, requesting forbearance from applying access charges to "voice-embedded Internet communications." The FCC found that the statutory forbearance criteria[2] were not satisfied.

Feature Group IP's Arguments

Feature Group IP's primary contention was that voice-embedded Internet communications should not be subject to access charges to interconnect with traditional public switched telephone network (PSTN) carriers. It argued that incumbent local exchange carriers (ILECs) use their market power and control over access to customers to block IP-PSTN traffic except on terms and prices dictated by the ILEC. In effect, Feature Group IP claimed, ILECs are extending access charges to voice-embedded Internet services, even though the FCC has never officially ruled on whether access charges apply to VoIP services.

Feature Group IP argued that these voice-embedded Internet communications—which it described as "a particular subset of VoIP that uses Internet Protocol to provide voice applications"[3]—are enhanced services. Thus, it contended that the enhanced service provider exemption from access charges applies to such communications and that much lower reciprocal compensation rates under Section 251(b)(5) of the Communications Act, added by the 1996 Telecommunications Act (the "Act"), should apply instead.

Disagreement among Industry Players

Shortly before the FCC's decision, several telecom companies and industry trade associations asked the FCC to deny the petition, arguing that the current intercarrier compensation proceeding or a new rulemaking were better avenues for deciding this issue. Other commenters said forbearance was inappropriate in the first place, because it would not give Feature Group IP the relief it sought. This could only be achieved through adoption of a new rule applying reciprocal compensation to VoIP traffic.

FCC Decision

The FCC unanimously (3-0) denied the forbearance petition. It assumed for purposes of the order, but explicitly stated it did not decide, that the FCC's access charge rules apply to the type of traffic described by Feature Group IP. The FCC's primary objection to the petition was that forbearing from access charge rules, preserved by Section 251(g) of the Act until the FCC adopts new rules, would not automatically result in the application of reciprocal compensation rates. Instead, it found that granting relief would create a regulatory void and market uncertainty.

In other words, the FCC found that, rather than removing uncertainty as Feature Group IP had argued, forbearance would increase market uncertainty because there would be no rules regarding compensation for this traffic if the petition were granted. The agency also concluded that Feature Group IP had failed to provide any evidence that forbearance would benefit consumers or promote the public interest. The FCC declined to decide whether the exemption from access charges for enhanced services or information services—the so-called ESP exemption—applied to Feature Group IP's traffic.

Next Steps

The FCC ruling does nothing to clarify the ongoing controversy regarding the appropriate intercarrier compensation for VoIP traffic terminated on the PSTN. The agency's next opportunity lies with a petition for forbearance filed by Embarq, which the FCC must decide by April 11, 2009. Embarq effectively seeks a ruling that access charges *do* apply to IP-PSTN traffic. Presumably the FCC will decline to make any definitive ruling there as well, preferring to resolve the issue through a rulemaking procedure.

Endnotes

[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, Memorandum Opinion and Order, WC Docket No. 07-256, FCC 09-3 (rel. Jan. 21, 2009) ("*Feature Group IP Order*").

[2] 47 U.S.C. § 160(a)(1) states that the FCC shall forbear from applying any regulation to a telecommunications service if it determines that (1) enforcement of the regulation in question is not necessary to ensure that other regulations relating to that telecommunications service are "just and reasonable and are not unreasonably discriminatory," (2) enforcement from such regulation is "not necessary for the protection of consumers," and (3) forbearance from applying such regulation is "consistent with the public interest."

[3] Feature Group IP Forbearance Petition at 2-3.

Please contact your Mintz Levin telecommunications attorney, or any attorney listed below, for more information as we continue to follow these developments.

Howard J. Symons
(202) 434-7305
HJSymons@mintz.com

Michael H. Pryor
(202) 434-7365
MHPryor@mintz.com

Ernest C. Cooper
(202) 434-7314
ECooper@mintz.com

Stefanie A. Zalewski
(202) 585-3550
SAZalewski@mintz.com

Darren J. Abernethy
(202) 434-7347
DJAbernethy@mintz.com