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Public Service Commission

July 14, 2004

VIA ELECTRONIC FILING

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: WC Docket No. 04-36, IP-Enabled Services

Dear Ms. Dortch:

Forwarded herewith are reply comments of the Florida Public Service Commission in the above docket with regard to IP-Enabled Services.

Sincerely,

/ s /

Cindy B. Miller
Director

CBM:tf

cc: Honorable Michael K Powell, Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S Adelstein
Brad Ramsay, NARUC
Qualex International

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	WC Docket No. 04-36
IP-Enabled Services	)	
	)	

REPLY COMMENTS OF THE

FLORIDA PUBLIC SERVICE COMMISSION

CHAIRMAN BRAULIO L. BAEZ

COMMISSIONER J. TERRY DEASON

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I. INTRODUCTION & GUIDING PRINCIPLES

In recognition of the potential benefits of emerging voice-over-Internet protocol (VoIP) technologies for Florida's consumers, the Florida Legislature has taken proactive steps to prevent unnecessary regulation of VoIP at the state level. Specifically, subsection 364.01(3), Florida Statutes, contains the following guidance to the FPSC as it relates to the regulatory oversight of VoIP:

> The Legislature further finds that the provision of voice-over-Internet protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest.

Under subsection 364.02(12), Florida Statutes, the 2003 Legislature further specified that:

> "Service" is to be construed in its broadest and most inclusive sense. The term *"service" does not include voice-over-Internet protocol service for purposes of regulation by the commission.* Nothing herein shall affect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet protocol service. (emphasis added)

It is correct that the FPSC, like most other state utility commissions, has certain responsibilities to ensure consumer protection, quality of service, public safety, and universal service, but in Florida, those responsibilities pertain *only* to specific telecommunications services by specific telecommunications providers in accordance with state law. While social policy issues are addressed, the FPSC clearly does not have such responsibilities with respect to IP-enabled services, such as VoIP, except to the extent conferred by legislation.

Florida's deregulatory model with respect to VoIP has already spurred several companies, including Vonage, AT&T, and Bright House Networks, to announce new VoIP offerings in our state. The immediate success of Florida's approach exhibits the need for a similar approach on a national scale. While we would urge other states to adopt a similar state policy with respect to VoIP, the best way to ensure that Florida's success is duplicated across the country is for the FCC to implement a

similar deregulatory policy on a national basis. Swift FCC action to reduce regulatory uncertainty for VoIP providers[1] will create an environment conducive to investment and competitive alternatives for the nation's consumers.[2]

Consistent with our longstanding legislative mandate in the telecommunications arena to promote competitive markets and expand consumer choice,[3] the FPSC hereby endorses an approach by which the FCC (from its national perspective) would apply, in the words of Commissioner Abernathy, a light regulatory touch to certain IP-enabled services. This light regulatory touch would not embrace economic regulation but would focus on addressing any social policy issues that are determined to be critical to state or national interests. Such an approach will best ensure that consumers are protected while encouraging VoIP providers to deploy a greater array of competing communications services in this country, for the benefit of our citizens. The FCC must, as it has under the current Commission, vigilantly guard against the "regulatory creep" of legacy rules to IP-enabled services.

In determining the optimal approach for minimal necessary regulation of VoIP, the FCC should be guided by the following principles:

- *Borderless Technology.* Because IP-enabled technologies like VoIP are borderless in nature, such technologies are interstate in nature and, therefore, are more appropriately addressed at the federal level than at the state level.

[1] Since some states are seeking to exercise state regulatory oversight over VoIP, the FCC must act quickly to restore certainty to the market.

[2] VoIP has the potential to compete with local exchange and wireless companies at the retail level for voice traffic. In its 2004 Mid-Year Industry Overview, the National Cable & Telecommunications Association indicates that cable broadband is available to 88 percent of homes passed by cable, and all of the major cable companies are either deploying or have announced plans to deploy VoIP. Numerous cable companies are partnering with companies like Vonage to offer VoIP service to their customers.

[3] In 1995, the Florida Legislature passed legislation calling for competition in the Florida telecommunications industry, one year prior to passage of the federal Telecommunications Act of 1996.

- *Economic Regulation – To Constrain Monopolies.* The provision of voice telecommunications was historically regulated heavily not because it was voice per se but because it was a service provided by government-sanctioned monopolies.

- *Emerging Markets.* Nascent technologies should *not* be subject to old rules designed to forge competition in monopoly markets.

- *Competition Benefits Consumers; Regulation Threatens Choice.* Intermodal competition for voice service is occurring on a national scale, offering consumers a range of services at a range of prices from which to choose. In competitive markets, economic regulation is a disincentive to the investment required to build-out networks and provide new and innovative choices for consumers.

- *Limited "Necessary" Regulation; Otherwise, Let the Market Work.* The full panoply of telecommunications regulation is not necessary to address public safety and welfare issues (e.g., E911 and USF). Policymakers must distinguish between necessary and unnecessary regulation and allow the market to address issues that do not justify a regulatory solution.

- *Regulatory Parity – Down, Not Up.* VoIP providers – new firms and established ones – should be subject to the same (de)regulatory regime. As substitute products and services emerge, we should regulate down, recognizing that regulation is a poor substitute for competition. Regulatory parity argues strongly for addressing this issue of interstate commerce at the federal level.

II. REGULATORY CLASSIFICATION – ISSUES & CHALLENGES

A. IP-Enabled Services Are Interstate In Nature

The 1934 Communications Act establishes a dual regulatory framework. Section 2(a) of the Act reserves to the FCC *exclusive jurisdiction over the regulation of interstate communications*.[4] The Act precludes state regulation of interstate communications.

Even more so than wireless communications or IXC calls, IP-enabled services like VoIP are truly "borderless" and, thus, necessarily interstate in nature. The circuit-switched network developed within state borders and then was "connected" between states. Wireline voice

[4] 47 U.S.C. §152(a). Section 2(b) reserves to the states jurisdiction over intrastate communications. *See also* 47 U.S.C. §230(f)(1) (Internet is the "international computer network of both Federal and non-Federal interoperable packet switched data networks").

telephony traffic followed certain prescribed, physical geographic paths within states (and then between states). Traffic over an IP network does not follow any prescribed physical route.[5] Internet traffic is global. The jurisdictional nature of IP traffic may be impossible to determine depending on the type of IP.[6] IP-traffic, including IP voice traffic, can be carried on a network located anywhere, including outside the United States. Unlike the circuit-switched network, the IP network cannot be defined within the limited jurisdiction of states.[7]

As such, it is respectfully submitted that the FCC can only conclude that IP-enabled services are interstate in nature.

B. The FCC Should Assert Its Exclusive Jurisdiction

Because of the predominantly interstate nature of IP-enabled services, the regulatory treatment of such services belongs at the federal level. As the FCC explained in the Pulver.com decision, federal jurisdiction is *exclusive* unless (a) the service at issue is "purely intrastate" or (b) "it is practically and economically possible to separate [the] interstate and intrastate components of a jurisdictionally mixed [service]" and to do so "without negating federal objectives for the interstate component."[8]

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[5] "Indeed, Skype and similar Internet applications transcend all jurisdictional boundaries…." *See Comments of Skype, Inc.*, *In re: IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

[6] Users of Pulver's FWD or of Vonage's service have complete portability of service. Service is completely independent of whether the user can access the network for a geographically defined location (as is the case with local wireline service). Rather, users can port their service to wherever they can establish a broadband connection.

[7] Even a "local" call between two parties would likely traverse servers and gateways in different states before reaching the recipient of the voice communication.

[8] *See* Pulver.com Order, ¶20.

Based on its inherently interstate nature, public policy argues for the uniform treatment of IP-enabled services such as VoIP.[9] The FPSC is firmly of the view that a national policy regarding the proper treatment of IP-enabled services[10] would provide far greater regulatory certainty than would a patchwork of fifty different state policies.[11] We agree with the FCC's recent statement, in the Pulver.com order, that if Free World Dialup

> "were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions…. [S]tate regulation would eliminate any benefit of using the Internet to provide the service…."[12]

A national policy, one that is deregulatory in nature based on the competitive nature of the industry, would signal the market that the U.S. is receptive to emerging communications technologies. Ultimately, this signal and the resulting economic activity in the IP sphere, may be the best weapon against inconsistent and burdensome, divergent, and economically irrational state regulation.

C. A New Regulatory Regime Is Needed

1. *The Existing Regime*

Regulation has not kept pace with innovation. The very different petitions filed at the FCC regarding the same subject of IP-enabled services – including the Pulver.com petition, the AT&T petition, and the Vonage petition – demonstrate the very basic fact that a new regulatory regime is needed. Telecommunications regulation has its genesis in the economic regulation of monopoly

[9] States would clearly play a role in the implementation of a national regulatory framework and in any other areas that might be properly and rationally reserved for the states.

[10] National federal authority does not, of course, denote federal regulation. Recognizing that existing regulations are not entirely appropriate for VoIP, the FCC has considerable discretion to forbear from applying them.

[11] Unfortunately, as some states are seeking to assert jurisdiction over VoIP, a patchwork of disparate state regulatory treatment of VoIP has already begun.

[12] Pulver.com Order ¶25.

telephone companies. The original telecom regulatory structure was designed to address monopoly control over most of the nation's local and long distance network. Monopoly providers of telephone service built out the wireline network, and the economic regulation of those providers served as a proxy for competition.[13]

For purposes of these comments, the regulatory regime embodied in the 1996 Act has four essential characteristics. First, the regime is firmly grounded in a wireline paradigm.[14] Second, the regime focuses on the gradated economic regulation of wireline telephony as the market transitions to a competitive market. The 1996 Act instructs regulators to inquire as to whether and where market power exists (or, conversely, where competition does not exist) in the wireline telephony market. Third, the regime addresses how key social goals such as universal service and 911 service are to be met. Fourth, the 1996 Act draws a line in the sand between telecommunications services and information services. In general terms, telecommunications services are subject to a much broader range of regulation than are information services.

2. *The Existing Regime Does Not "Fit" IP-Enabled Services*

The existing regulatory regime, embodied in the 1996 Act and its accompanying rules and related state legislation, is not at all suited to address the market for IP-enabled services.[15] At the most

[13] A strong state role was historically more appropriate due to the physical nature of the circuit-switched network in the state, the presence of localized monopolies, and the predominately intrastate nature of local telephony.

[14] Existing regulations generally are designed to forge competition in the wireline telecommunications industry – by encouraging new wireline entrants while maintaining certain legacy regulations for the incumbent wireline provider. The competition that the 1996 Act is intended to spur is primarily ILEC versus CLEC wireline competition – not competition from other technologies, such as wireless and VoIP.

[15] The rapid pace of innovation requires a much more frequent examination of regulatory policies than has occurred. As VoIP and other technologies mixing voice and information services become more prevalent, the needlessly complicated current intercarrier compensation scheme will fall apart, as will the collection method for universal service.

basic level, the fundamental need that existed in the wireline telephony market for regulation to serve as a proxy for competition does not exist in the IP-enabled services market.

IP-enabled services, such as VoIP, are nascent technologies. There is no established market and no dominant provider. Barriers to entering the market appear low. Competition is serving to stimulate the build out of IP-enabled networks and the deployment of IP-enabled products and services. VoIP, for example, is spurring robust price competition and new service offerings by both old and new players. VoIP is a disruptive technology that is driving innovation and forcing greater cost-effectiveness among all providers. The underlying theses of regulation of the wireline telephony market – the first thesis being regulation as a proxy for competition in the wireline market and the second thesis being continuing regulation to manage the transition from monopoly to competitive wireline telephony markets – are notably absent from the market for IP-enabled services. In the emerging market for IP-enabled services, competition has already arrived. The market is working.

The four essential characteristics of the 1996 Act enumerated above further demonstrate the inapplicability of the current regulatory regime to IP-enabled services. First, while the existing regime is firmly grounded in a wireline paradigm, IP-enabled services are not. Second, the justification for economic regulation of the historically monopolized wireline telephony market simply does not exist in the rapidly evolving and competitive market for IP-enabled services. Third, while the social goals addressed by the 1996 Act arguably transcend specific technologies, how such goals can, in an economically rational manner, be met may differ based on an array of factors (such as the number of players and the nature of the technology).[16] Fourth, in the market for IP-enabled services, the distinction between telecommunications services and information services is problematic.

[16] The nation's 911 policies have evolved over the past several decades as the wireline market evolved. The 911 network is grounded in circuit-switched technologies. Policymakers, in developing and enforcing 911 policy, had to

3. *Most IP-Enabled Services Should Not Be Subject to Regulation*

In exercising its jurisdiction over IP-enabled services, the FCC should, as early on in this proceeding as possible, indicate those categories of services that are not subject to regulation of any type. As the Commission noted in this NPRM, the majority of IP-enabled services should remain unregulated.[17] The Commission should affirm that intent. In the opinion of the FPSC, one category of IP-enabled services that should clearly not be regulated is applications that ride solely over the Internet. In loose antitrust terms, absent market power over an application that could credibly be deemed to be an "essential facility," no justification exists for regulation. To eliminate as much regulatory uncertainty as early as is possible, the FCC should identify the universe of IP-enabled services that will clearly not be subject to regulation or clearly define the universe that will be.

While various commenters have proposed an array of regulatory schemes, that proposed by the National Cable & Telecommunications Association ("NCTA"), in the opinion of the FPSC, is one reasonable, balanced approach. NCTA proposes that only IP-enabled voice services meeting four criteria would be subject to a "light regulatory regime." The four criteria proposed by NCTA are whether the service: (i) makes use of the North American Numbering Plan; (ii) is capable of receiving calls from or terminating calls to the PSTN; (iii) represents a replacement to POTS; and (iv) uses IP transmission between the service provider and the end user customer. While the FPSC would be reluctant to suggest regulation of a nascent technology is proper because it represents a substitute for POTS (is not that a goal of competition?) or because a technology can talk to the PSTN, we are of the

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concern themselves with a limited number of key players (predominantly the Regional Bell Operating Companies). While the goal of a ubiquitous 911 system remains intact, how to meet that goal cannot be completely addressed by the existing 911 regulatory regime. Networks are changing. Firms other than LECs and IXCs are providing voice communications services. As such, regime change will have to occur as markets continue to morph.

[17] *See* Notice of Proposed Rulemaking, *In re: IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 (March 10, 2004) ¶35.

opinion that when a provider of a service seeks to avail itself of a social good – such as use of public numbering resources – discussing the social *quid pro quo* for that availing is justified.[18]

In determining the scope of IP-enabled services subject to regulation, the Commission should remain focused on the *quid pro quo*. Where a provider of a service seeks to avail itself of a public good (i.e., numbering resources) or of certain rights (i.e., a right of interconnection with the PSTN), the imposition of certain regulatory obligations appears reasonable. Where a provider, however, seeks no public rights, then imposing onerous economic regulatory obligations is likely unwarranted and unreasonable.

D. Current Regime: "Information" vs. "Telecommunications"

1. *A Problematic Distinction*

The line that the 1996 Telecommunications Act draws between "telecommunications services" and "information services" has blurred. Technology has rendered distinguishing a telecommunications service and an information service extremely difficult. VoIP represents the convergence of voice and information: the voice packet is 1's and 0's, and is indistinguishable from a data or video packet – neither of which are subject to regulation. Policymakers must accept the reality that the current system and its fixed classifications (i.e., information or telecommunications service, Title I or Title II regulations, inter- or intra-state) are not suited to the rapidly changing IP-enabled market. Development of new rules, and to the extent necessary, new statutes that consider new technologies is a far better solution than is attempting to pigeon-hole new technologies into dated and increasingly obsolete categories and definitions.

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[18] Ultimately, any applicable regulatory obligations ought to be neutral amongst providers and technologies.

Until such time as new rules are promulgated or a new statute is enacted, however, the FCC will have to operate within the confines of the existing rules. Under the current regime, classification of a service as "telecommunications" or "information" is of critical importance. The classification determines the rights and obligations to which a provider of the service will be subjected. Classification thus has a tremendous impact on market participants. Whatever the ultimate analysis and resulting classification, *the end result should be a minimal set of obligations – if any at all – upon the providers of IP-enabled services.*

Many existing telecommunications carriers, primarily the Bell Operating Companies ("BOCs"), are, as a result of their dominance over wireline telephony in numerous geographic markets, subject to (i) a host of "economic" regulations over the terms and conditions of providing service and access to unbundled network elements and to (ii) concomitant "social" regulations. Such regulation represents the *quid pro quo* for the historical monopoly the BOCs enjoyed over local wireline telephony. While the scope of economic regulation should lessen as competition for voice traffic increases, a switch to a new IP-enabled technology should not automatically exempt a carrier from the regulation to which, but for the technology switch, it would be obligated. It may be the case that a lessening of obligations is warranted. Absent a meaningful transition period and standards for evaluating key issues (*i.e.,* the dominance of the provider before and after the technology switch), the FPSC would not support a mere switch to IP-enabled technology as immediately abrogating the existing rights and responsibilities of existing telecommunications carriers.

While the 1996 Act cannot be credibly held to have contemplated the IP-enabled services under consideration in this proceeding, not subjecting IP-enabled services to the plethora of

obligations that accompany a telecommunications service classification is certainly consistent with the overriding deregulatory purpose of the Act.

2. *The FCC Should Narrowly Construe the Definition of Telecommunications Service*

The FPSC respectfully suggests that the FCC limit its classification of an IP-enabled service as a "telecommunications service" to a service that satisfies the key factors in the FCC's recent declaratory ruling on AT&T's petition. Applying this ruling, an IP-enabled service would only be deemed a telecommunications service if: (i) the service uses ordinary customer premises equipment and does not offer any increased or enhanced functionality; (ii) the service both originates and terminates on the PSTN; (iii) the service undergoes no net protocol conversion; and (iv) the service provides no enhanced functionality to the end user as a result of the provider's use of IP technology.

Until such time as the FCC establishes new rules regarding the regulatory classification of IP-enabled services, the above criteria appear to provide reasonably clear guidance as to the type of service offering, despite being IP-enabled, that may constitute a "telecommunications service." Adhering to the above would send a signal to the market that the growing array of service offerings that do not meet these enumerated requirements are "safe" from being deemed a telecommunications service.

3. *Most IP-Enabled Services Should Be Deemed Information Services*

The FPSC respectfully suggests that the FCC, if applying the current regime, presumptively classify all IP-enabled services that do not meet the criteria set forth in the preceding section as information services. An effort to pigeonhole types of VoIP into a telecommunications service or information service classification, we fear, cannot be rationally done on a long-term basis.

In this NPRM, the Commission has offered a list of factors that could possibly be used to separate IP-enabled services into categories for discrete treatment. The enumerated factors include: (i) functional equivalency to traditional telephony; (ii) whether services are used in lieu of traditional telephony; (iii) interconnection to the PSTN; (iv) whether the service is a disintermediated peer-to-peer service or relies on centralized services; (v) where the service "fits" into the layered model (*e.g.,* transmission vs. application vs. content); and (vi) other factors.

The FPSC is of the opinion that attempting to categorize IP-enabled services into these or other possible categories for potentially different regulatory treatment is fraught with difficulties. Philosophically, the existence of an IP-enabled service that is either the functional equivalent of traditional telephony or that can be used in lieu of traditional telephony argue for both *not* regulating the new IP-enabled service (which certainly lacks any market power) and for less regulation of traditional telephony (which would be subject to competition from the IP-enabled service). An IP-enabled service could serve as a substitute for traditional telephony but be, from a technological perspective, an application similar to a peer-to-peer service.

Many varieties of VoIP are currently on the landscape, and many more are expected; creating multiple categories for various flavors of IP-enabled services would have several negative effects. It would likely increase regulatory risk and create uncertainty in the market as providers try to anticipate (and navigate around or try to "fit" into) a particular classification. In such a case, markets might evolve (or not) based on regulatory fiat rather than based on consumer choice. Because VoIP is a nascent technology, no one can predict the scope of IP-enabled services that will exist in the future. As new services are developed, service providers will have to commence a proceeding before the FCC seeking a determination that they fall

within or without a particular classification. We believe that such proceedings, beyond creating substantial uncertainty in the market, will substantially increase the transaction costs (which get passed on to consumers) of bringing IP-enabled products and services to the market.

The FPSC, thus, respectfully suggests that the FCC conclude that IP-enabled services not meeting the specific criteria enumerated in the preceding section be deemed "information services" subject to the Commission's Title I jurisdiction.

4. ***Approaches to Reject***

a. Regulate the Substitutes for POTS

Some argue that if, from a customer's vantage, IP-enabled voice service substitutes for traditional telephone service, then the IP-enabled service ought to be regulated as if it were traditional telephone service. The FPSC wholeheartedly disagrees with this position.

As competition increases, and as new technologies, platforms, and alternatives to "plain old telephone service" emerge, regulation *ought* to diminish, not increase. This is a fundamental tenet of a free-market economy. As consumers have more choices as to how they may communicate with one another, the market will increasingly police both price and the terms and conditions of service. Many customers have a choice of a traditional telephone, cable telephony, service from a provider like Vonage, and wireless communications. That a customer chooses an alternate to his or her traditional wireline telephony does not, indeed cannot, argue for more regulation.

b. The "Touches the PSTN" Argument

The argument has been advanced that if an IP-enabled voice service "touches" the PSTN (either originates or terminates on the PSTN), then the IP-enabled service ought to be regulated as a telecommunications service.[19] The FPSC disagrees with this position.

That an IP-enabled service might "touch" the PSTN does not argue, as a matter of logic or policy, for labeling (and subjecting to possible regulation) the service a "telecommunications service."[20] As a matter of logic, IP-enabled services are not "dependent" on the PSTN. IP-enabled voice communications, like those enabled by Vonage's software and its IP network, can be made independent of the PSTN. Public policy should certainly encourage different networks, like the PSTN and an IP network, to communicate with each other (and to exchange traffic) – but the fact that an IP-enabled service may interact with the PSTN should not argue in itself that there is a need to regulate the IP-enabled service as a telecommunications service.

The relationship of the competitive and highly-deregulated wireless industry provides a useful analogy. Wireless service is not regulated as a Title II telecommunications service that is subject to the panoply of common carriage regulation although wireless calls often "touch the PSTN." Wireline to wireless calls originate on the PSTN. Wireless to wireline calls terminate on the PSTN. As a matter of policy, having ubiquitous communications networks that "talk" to one another is an important goal. Achieving that goal does not, as evidenced by the wireless

[19] Variations on this argument might hold, for example, that if a VoIP provider uses numbering from the North American Numbering system and the IP-enabled voice communications touch the PSTN, the provider ought to be treated as providing a telecommunications service.

[20] A narrow exception would be where IP protocol might be utilized (as frame relay or ATM technology might be) merely to transport a POTS to POTS call (*e.g.,* a Qwest customer uses Qwest long distance to call a Verizon customer and Qwest uses IP protocol to transport the call across its LD enterprise).

industry, dictate that new, competitive networks or services be regulated like the PSTN (an historically monopolized network).

5. *Can Key Public Policies Be Addressed Without a "Telecom" Label?*

The FPSC is of the opinion that, if certain rights and responsibilities ultimately deemed important can flow from a designation of the particular IP-enabled service as an "information service," then such should be the designation. Alternatively, if the FCC concludes that certain key rights and responsibilities can *only* flow from designating a particular IP-enabled service as a "telecommunications service," then, with any such designation, the FCC should forbear from the panoply of common carrier regulation that would otherwise accompany a Title II designation.[21]

For IP-enabled services such as VoIP to serve as a meaningful substitute for POTS on a mass-market scale, certain VoIP providers: (i) may need to interconnect their networks with the PSTN; (ii) should have the right to exchange traffic with telecommunications companies;[22] (iii) will need numbers from the North American Numbering Plan; and (iv) will need access to the 911 network. Whether the FCC can, as a purely legal matter, extend certain aspects of the current regime to requesting VoIP providers without generally concluding the VoIP service at issue to be a telecommunications service and without concluding VoIP providers to be telecommunications companies entitled to certain rights (such as interconnection) will be determined in this proceeding.[23]

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[21] Forbearance, of course, would not provide the degree of regulatory certainty that would be provided by an "information service" designation if possible.

[22] A right to exchange traffic should go both ways. As networks emerge, public policy argues that traffic be able to move freely across platforms. The exchange of traffic, coupled with meaningful intercarrier compensation reform, will serve to reward the most efficient providers of service.

[23] The relationship between wireless providers and POTS providers is instructive. Notably, wireless providers exchange traffic with LECs and IXCs but are not providers of telecommunications services subject to Title II regulation.

Such a determination will require a thorough review of the 1996 Act, the applicable rules and agency precedents.

The FPSC recognizes that Section 4(i) of the 1934 Act grants the FCC the ancillary jurisdiction under Title I to impose such regulations on information services as may be necessary to carry out its statutory responsibilities.[24] As such, the FPSC believes that the Commission has an ability to subject certain IP-enabled "information" services to certain regulations should a clear need exist.

FCC precedent further suggests that the Commission has (and has exercised) the authority to impose public policy obligations on services deemed to be information services. For example, the FCC, in its Disability Access Order, applied Section 255 (disability access) obligations to providers of information services.[25] To the extent that such obligations might ultimately be deemed applicable to IP-enabled services, then precedent such as the Disability Access Order rebuts, at least in part, the argument that services like VoIP *must* be deemed telecommunications services in order for key public policies to be met.

E. Case by Case Analyses

An IP-enabled service such as VoIP does not refer to a single type of product or service. VoIP is commonly used to refer to software applications that work in conjunction with traditional PBX equipment or VoIP-specific equipment, to mimic the functionality of a PBX phone. VoIP can also refer to a "softphone" application that allows voice communications to be made solely over the Internet (i.e., without the use of any equipment other than the PC). VoIP can refer to the means of

[24] 47 U.S.C. §154(i).

[25] In the Disability Access Order, 16 FCC Rcd 6417 (1999), the FCC imposed disability access obligations on providers of interactive menu services and voicemail. Both of these services are considered information services.

transport (i.e., an alternate to frame relay or ATM) that a traditional phone company utilizes to transmit calls across its enterprise. Due to its enhanced functionality, VoIP is often used as the protocol within an entity's PBX network, making it an IP-PBX network.

IP-enabled services come in a variety of categories. Pulver.com's Free World DialUp is different than Vonage's provision of voice service over a broadband Internet connection. Both are different than AT&T's utilization of VoIP within its enterprise for the transport of calls. As such, at least until generally applicable rules can be (and are) crafted, any attempt to categorize the different categories of IP-enabled services (if deemed necessary) can, until such time as clear rules are developed, only rationally occur on a case-by-case basis.

III. ECONOMIC REGULATION

A. No Economic Regulation

The economic regulation to which many have become accustomed is not rational in the emerging IP-enabled communications market. In a competitive market, economic regulation is a clear disincentive to innovation. We firmly adhere to the basic principle of economics that economic regulation of competitive markets creates uncertainty that deters investment – investment in research and development, investment in new networks and platforms, and investments in enhancements to existing networks and platforms.

VoIP, for example, is part of an IP-enabled network that is being built out by robust competition. No one firm or provider dominates. There are no VoIP monopolies. As such, the economic regulation that served as a surrogate for competition in the monopoly telecommunications market of the past and that is still pervasive in the mandates of the Telecommunications Act of 1996,

has no role in the rapidly changing and fiercely competitive IP-enabled communications market. As such, providers of IP-enabled voice services should not be subject to rules designed to substitute for competition in historically monopolized wireline telecommunications markets.

B. Intercarrier Compensation

Intercarrier compensation is a critical issue with respect to VoIP. The current system, designed to recover a local telephone provider's costs of providing access to the PSTN to other carriers, is broken. Because IP-enabled voice traffic travels at least in part over an IP platform, VoIP challenges the current compensation regime. This NPRM presents a new opportunity to examine *and* modify the way wireline providers currently are compensated for use of their infrastructure.

1. *Intercarrier Compensation Rules Must Be Reformed*

Some argue that existing intercarrier compensation rules should not be reformed. The FPSC does not support this position.

In the near future, policymakers (and industry) will have to recognize *and address* the fact that the current intercarrier compensation scheme is a broken regulatory construct that addresses the high cost for some of maintaining their PSTN network infrastructure.[26]

Applying existing intercarrier compensation rules – old rules that arose in, and are the carry over of a regulated monopoly market – is not a sustainable long-term position. Such rules are not consistent with the broader goals of regulatory parity (*i.e.,* firms like Vonage have to bill and keep their costs) and robust competition among multiple platforms (*i.e.,* the market will not "reward" the most efficient producers so long as high cost providers may be receiving support via intercarrier

[26] The broken intercarrier compensation regime is characterized by varying carrier-to-carrier payments that have no real relationship to the actual costs of providing service. The current regime is based on the physical endpoints of calls that traverse the PSTN.

compensation). Further, long-term application of current intercarrier compensation rules may negatively impact the PSTN, as carriers are motivated to move as much voice traffic as possible to other platforms (*e.g.,* cable, wireless, and the Internet).

As such, that the FCC not allow providers of IP-enabled voice service to ultimately become entrenched in an already fragile intercarrier compensation regime is critically important. Equally important, if not more so, the FCC must not allow states to fill a regulatory vacuum with a patchwork of differing classifications on VoIP providers with regard to paying access charges, universal service contributions, and other fees and charges.[27] Instead, policymakers need to find a broad long-term solution to the intercarrier compensation dilemma, both with regard to some proper category for IP-enabled voice services and traditional telephone service providers.

2. *Intercarrier Compensation Rules Apply – Accept for the Near Term*

Others argue that voice traffic (whether traditional telephony, wireless, or IP-enabled) that originates or terminates on the PSTN is subject to the existing intercarrier compensation rules. As discussed below, the FPSC supports this position in the near term. Our support for this position is based upon the notion of regulatory parity (*i.e.*, competitors like wireless and VoIP ought to be treated similarly)[28] and basic notions of fairness *(i.e.,* for better or worse, the rules are on the books and entitle network owners to compensation).

The entry of new providers and new types of providers is an opportunity for reform of rules, but, in the meantime, rules regarding intercarrier compensation are on the books. To the extent access charges apply to certain traffic that originates or terminates on the PSTN, such charges should only

[27] If the industry is unable to reach consensus in the near term, the FCC should proceed with its own resolution.

[28] Our endorsement of this position should not be construed as an endorsement of the existing intercarrier compensation rules, which we steadfastly believe are in dire need of reform.

apply to VoIP calls where the PSTN is accessed (but only to the extent accessed). Intercarrier compensation rules should only apply to that portion of a VoIP call that actually relies upon the switched network. We suggest a simple but-for test. If a VoIP call could *not* be made *but for* access to the PSTN, then the VoIP provider would be subject to access charges under this approach.

Regulatory parity argues for treating wireless providers and VoIP providers similarly. Wireless long distance calls that touch the PSTN pay access charges to the appropriate LEC whose PSTN facilities were used to route the call to and from the IXC POPs. On balance, the FPSC is of the opinion that the owner of a network is entitled to compensation for the use of that network. We see no compelling reason to treat VoIP providers differently than wireless providers.

The FPSC agrees that the Commission should not extend the intercarrier compensation regime to IP application providers where such applications may merely be carried over the PSTN and an obligation already exists on the part of the underlying transmission provider (*i.e.,* a CLEC who has contracted with a VoIP provider for termination of calls on the PSTN) to make applicable compensation payments.

3. *A Managed Transition?*

We recognize, and do not disagree with, the general proposition that exempting IP-enabled services such as VoIP from a flawed compensation regime would likely encourage the stakeholders to commercially negotiate intercarrier compensation reform. For the reasons set forth in the preceding subsection, the FPSC favors enforcement of the rules (albeit not very good ones), until such rules are amended.

That said, one option the FCC might consider is, early on in this proceeding, establishing a date certain by which existing intercarrier compensation rules will *not* apply to IP-enabled

services that may touch the PSTN. If at the date certain, intercarrier compensation reform has occurred, then all is well. If reform has not occurred, the FCC might, for example, consider "quarantining" the flawed intercarrier compensation to purely POTS to POTS traffic and imposing a bill-and-keep system on all other traffic. Some type of managed transition would both reflect a respect for the existing rules while encouraging the beneficiaries of a flawed intercarrier compensation regime to negotiate.

IV. PUBLIC POLICY REGULATION[29]

The public policy goals set forth herein should not be dependent upon regulatory constructs or forced classifications. For example, 911 objectives are no less important if we are talking about pure IP-enabled communications, such as users having voice communications purely over cable modem service, as opposed to communications purely over the PSTN or purely over a wireless network. As such, whether the ultimate regulatory outcome is to label a particular IP-enabled voice service a telecommunications service, an information service, or something else, the FPSC believes that the public policy objectives set forth herein should be presumed applicable,[30] subject to the development of clear rules governing how and when the objectives are to be met.

The FPSC respectfully suggests that the FCC should not simply mandate the application of legacy public policy regulation to IP-enabled services. Rather, the FCC should provide a "safe harbor" – a transition period of a reasonable duration so that feasible, technologically sound standards and approaches can be developed. Social regulation relating to the PSTN and providers of wireline

[29] The public policy goals addressed herein may not, of course, be exhaustive. As the national dialog on this issue continues, other public policy objectives will likely be addressed.

[30] In certain cases, the "presumption" will clearly be rebutted, based on the facts and circumstances of a particular case. For example, it cannot credibly be argued, at this point in time, that Skype subscribers (any more than users of Microsoft's NetMeeting software in the past) should be subjected to 911 or USF obligations.

telephony developed over decades. Automatic application of such regulations without a transition period would not be reasonable.

A. E911

Consumers want 911 services, and public safety and welfare goals argue compellingly for a ubiquitous 911 network. While market forces are resulting in the voluntary provision of 911/E911 services by some, the importance of a ubiquitous 911/E911 argues, as in the case of the wireless 911/E911 policy, for an umbrella national policy.

Clearly, the FCC should have primary responsibility for establishing a 911/E911 policy relating to IP-enabled services. We are firmly of the view that a national policy on this is far better to a patchwork of state policies attempting to address 911/E911 issues.[31] We are also of the view that the interstate nature of IP-enabled services calls for a national approach (again, as in the case of wireless). As such, in the appropriate proceeding, the FCC should assert exclusive federal jurisdiction over the development of a national policy. The states, as they do now, will continue to play a critical role in the implementation of that policy.

In exercising its jurisdiction to oversee the evolution of the country's national 911 infrastructure, we respectfully suggest that the FCC do so with the following principles in mind:

1. *The FCC should afford industry a reasonable time and opportunity to develop standards*. Public safety regulation to be applied to IP-enabled services (and to yet unknown platforms) should allow a reasonable opportunity for providers to develop and implement

[31] A patchwork of state approaches would likely delay the implementation of a reliable, national 911/E911 network. That the FCC has exclusive jurisdiction over the issue does not suggest that states cannot or should not provide meaningful input. For example, a state in which IP-enabled voice service is increasingly provided may have 911/E911 "best practices" that could be considered in the development of a national policy.

solutions (such as providing necessary information to the 911 answering point so that the consumer can be located).[32]

2. *Those utilizing the 911 system should support the 911 system.* IP-enabled voice providers that transfer calls to the 911 system should bear their "fair share" of maintaining the 911 system. Regulatory parity argues that those who use the system should, regardless of the platform used, support the system.

3. *Shared Responsibility*. IP-enabled voice providers have a responsibility to fully inform consumers. Consumers, likewise, have a duty to educate themselves and understand that their use of a competitive, emerging voice service may have a very different 911 functionality than their plain old telephone service.

The transition from a predominantly circuit-switched based 911 infrastructure, one that has evolved over decades, to an IP-enabled infrastructure will not occur overnight. The principles enumerated above will, we believe, provide for a manageable transition.

B. Universal Service[33]

Universal service issues cannot be easily resolved. On the one hand, nascent technologies should not be burdened with old taxes. On the other hand, the country has established universal service policies that require funding. As consumers substitute new services for old, not subjecting those substitutes to universal service fund obligations picks winners and losers. How a competitive market – one that involves networks beyond the PSTN and wireless networks and participants other

[32] For example, as the National Emergency Number Association testified at the FCC's December 2003 forum on VoIP, voluntary efforts are underway (and have been for some time) to develop an IP-enabled 911 system for the country.

[33] The relationship between universal service and whether or not interstate IP-enabled services may ultimately be deemed subject to universal service funding obligations presents complexities that are not easily resolved. Universal service rights and responsibilities have arisen in a market that could, at least historically, be divided into intrastate and interstate components. Extension of USF obligations to the wireless industry, an inherently interstate industry, has challenged the model. The emergence of IP-enabled voice services further challenges the model. That IP-enabled services are primarily interstate in nature raises the thorny issue of what authority, if any, will rest with those states that may have state-specific USF programs (or states like Florida that have the statutory authority to oversee a state USF plan). The FPSC acknowledges that it will be necessary to determine whether both interstate and intrastate USF mechanisms should apply to IP-enabled services.

than ILECs, CLECs, and wireless carriers – should impact the nation's universal service business plan must be addressed.[34]

The FPSC agrees with the FCC and others that the universal service plan and fund is in need of reform. An increasingly competitive and diversified communications landscape requires that a host of fundamental questions be addressed. These questions include:

- What should be the role of the Universal Service Fund in the 21st Century? To ensure some minimal level of service for certain categories of consumers? To support higher-cost providers? To promote competition?

- How can policymakers ensure revenue neutrality as new firms enter the market? Presumably, the goal is not an ever-increasing fund but, rather, a reallocation of costs across the changing pool of participants.

- What should be the relationship between an increasingly competitive communications market and the USF? Should it decline in size as competition increases and new providers enter the market?

- When should a new provider be subject to USF obligations? A nascent technology with a 1% share of the market for voice service is likely far less able to withstand a USF burden than is a provider with a 20% share of the voice market and an established network.

- If a provider could serve a rural area without a USF subsidy, is a subsidy needed in the first instance? Where competing platforms exist, and certain providers could price compete without a subsidy, what is the role of a subsidy?

While easy answers to these questions do not exist, policymakers must continue to address such questions as the communications market continues to evolve.

In the meantime, the FPSC respectfully suggests that any extension of USF obligations to IP-enabled voice services ought to reflect the following guiding principles. First, *expansive regulation is not required.* IP-enabled voice service (like wireless service) does not have to be subjected to the full

[34] Given the existence of multiple platforms for carrying voice traffic, replacing the current funding mechanism with a more technology neutral funding mechanism (such as a numbers-based system) is critical.

range of common carrier/telecom regulation in order to require VoIP providers to contribute to the USF. Second, any extension of USF obligations to VoIP providers (or others) ought to be *revenue neutral.* Any extension of the program should *not* constitute simply new/additional revenue or a new/additional tax. Instead, it should reflect a reallocation of an existing financial burden amongst some group of similarly situated competitors. Third, any extension of obligations ought to reflect the notion of *regulatory parity*. Those who make contributions ought to be considered for distributions.

C. Access to Services by Those With Disabilities

As the IP-enabled market continues to emerge, market forces will likely result in enhanced communications choices for persons with disabilities. For example, "Softphones are highly compatible with assistive technologies. Some softphones have their own screen reading capability. Hard of hearing users can select audio output devices and adjust them for optimal use."[35] As another example, the Federation of the Blind uses IP-enabled voice services to provide users with an interactive free newspaper reading service.[36] These are but two examples of how IP-enabled services, in comparison to traditional voice service over the PSTN, may be much more responsive to the needs of consumers with sensory challenges.

The above is an example of where the need for regulation may not arise in the first instance. In those cases where access to IP-enabled services cannot be adequately addressed by market forces,[37] mandated access ought to reflect the following principles. First, any regime of mandated access should set goals that are technology neutral. Second, the FCC should allow

[35] *See* http://www.inclusive.com/trng/voip/facets.htm.

[36] www.nfb.org/newsline1/htm.

[37] New technologies are typically deployed/utilized differentially across different demographic groups. Certain technologies, such as softphones may be more readily adaptable to certain communities of users than other technologies.

affected service providers the time and the flexibility – a reasonable "safe harbor" – in order to develop solutions to any applicable access requirements. As with other social policies at issue, the existing access regime addressed by Section 255 of the 1996 Act is concerned primarily with Telecommunications Relay Service systems at the state and federal level. Third, and perhaps most important, clear rules for determining the universe of IP-enabled communications services (both existing and future services) are required. [38]

D. CALEA

The FPSC's comments on CALEA requirements are subject to more in-depth commentary in response to the anticipated NPRM from the FCC regarding CALEA. For purposes of these comments, the FPSC supports the following preliminary principle. While CALEA and other security regulations should, like all public policy, be balanced against the economic impact on those subject to the regulations, public safety and welfare concerns argue for subjecting providers of IP-enabled communications services to law enforcement and CALEA requirements equivalent to those imposed on a traditional telecommunications providers. Completely exempting VoIP providers, for example, from laws designed to protect our homeland could provide a dangerous loophole to the nation's legitimate security concerns.

This general position statement is subject to several caveats. First, we recognize that not every single type of IP-enabled voice communication may be subject to interception or surveillance. For

[38] An "easy" rule might be one that holds, for example, "A Local Exchange Company currently subject to Section 255 of the 1996 Act may not avoid its existing obligations to make services available to disabled persons by virtue of providing service via an IP network rather than the PSTN." More difficult to articulate would be a rule that defines how existing access obligations – which have come about primarily in the context of a regulated wireline telephone market – apply to new categories of providers that are providing IP-enabled services.

example, it may be that Skype[39] users can communicate PC to PC without having those voice communications intercepted. Second, CALEA requirements, as with the other public policy objectives, should not be dependent on regulatory constructs such as whether a service is an information or telecommunications service. CALEA requirements ought to, to the extent technologically feasible, apply to mainstream voice communications. Third, IP-enabled voice providers ought to be provided the time and the flexibility – a reasonable "safe harbor" – in order to develop solutions to CALEA requirements.

Law enforcement requirements have evolved over decades and have been primarily concerned with communications over the PSTN (and more recently wireless networks). The different varieties of VoIP may call for different technological responses and flexibility on the part of both providers and government law enforcement agencies.

E. Consumer Protections

As competitive choices emerge, the market will become increasingly effective in addressing consumer issues. If a customer is dissatisfied with a product or service, such as VoIP service provided over cable modem service, the customer may switch services. If some batch of customers is dissatisfied, Economics 101 teaches that the service provider will either have to address legitimate concerns or face hurdles in acquiring or retaining customers.[40] Further, existing federal and state generic consumer protection laws should be sufficient to address the vast majority of consumer concerns. Absent a compelling need to initiate a rule to address a VoIP-specific consumer issue, the competitive market should provide adequate protection, as is

[39] Skype is a company that enables users with its software and an equipped computer to send and receive voice communications over the Internet (currently, for free). www.skype.com.

the case in the highly competitive and highly successful wireless industry. As such, the FPSC sees no reason at this point in time for Title II consumer protection obligations to be imposed upon a nascent and rapidly evolving industry.[41]

While the FPSC is opposed in principle, based both on its legislative mandate and on basic economic principles, to imposing unnecessary regulatory burdens on an emerging IP industry, one in which the market will be increasingly effective in policing business practices, we would support, for example, VoIP providers voluntarily providing contact information and escalation lists to the federal and state agencies that are likely to receive consumer complaints about VoIP service regardless of an agency's jurisdiction over such providers. This approach is aimed at getting consumers in touch with those in the company that can provide timely assistance in getting the consumers' concerns resolved. This approach has worked well in Florida with respect to consumer complaints regarding wireless service, which is specifically excluded from the FPSC's jurisdiction.

V. CONCLUSION

As set forth herein, the FPSC respectfully requests that the FCC: (a) conclude IP-enabled services to be interstate in nature; (b) assert its exclusive jurisdiction over interstate communications; (c) establish a national policy, deregulatory in nature, to govern those IP-enabled services within the Commission's jurisdiction; (d) not subject IP-enabled services to economic regulation; and (e) only subject IP-enabled services within its jurisdiction to public

[40] In a competitive market, VoIP providers will have to avoid deceptive billing practices, slamming, and other issues in order to acquire or keep its customers.

[41] The FPSC respectfully suggests that the FCC not assume that the provision of VoIP service in a competitive market will raise unique consumer protection issues that can only be addressed by Title II obligations. Rather, we believe the prudent course is to allow the market to evolve and apply Title II-type consumer protection regulation legislation *only* if the facts call for such.

policy regulation deemed important after affording the industry a sufficient period of time in which to develop solutions and standards for meeting public policy objectives.

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Respectfully submitted,

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