

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

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

**COMMENTS OF THE OFFICE OF THE PEOPLE’S COUNSEL  
FOR THE DISTRICT OF COLUMBIA**

**I. INTRODUCTION**

The Office of the People’s Counsel for the District of Columbia (“OPC-DC” or “Office”), in furtherance of its mandate as the statutory representative of District of Columbia ratepayers in utility proceedings,<sup>1</sup> hereby respectfully submits its Comments pursuant to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“*Notice*”) issued March 10, 2004.<sup>2</sup> In its Notice, the Commission seeks comment on services and applications that use Internet Protocol (“IP”), including but not limited to voice over IP (“VoIP”) services (collectively referred to as “IP-enabled services”).<sup>3</sup>

**A. SUMMARY OF OPC’S POSITION**

OPC-DC participates in this proceeding to advocate for the interests of District of Columbia ratepayers by ensuring the creation of a truly competitive market for and ubiquitous deployment of advanced telecommunications services in the District of Columbia.

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<sup>1</sup> D.C. CODE 2001 Ed. § 34-804(d).

<sup>2</sup> *In re IP-Enabled Services*, Notice of Proposed Rulemaking (“*Notice*”) WC Docket No. 04-36 (Mar. 10, 2004).

<sup>3</sup> *Id.*, ¶ 1, n.1.

In response to several questions posed by the FCC, OPC-DC's comments and recommendations address VoIP service issues concerning the appropriate regulatory framework, a state's role and jurisdiction, consumer protection measures, service quality, and contributions to federal and state universal service funding.<sup>4</sup>

OPC-DC makes the following recommendations:

- ?? The FCC should classify VoIP services that are similar in functionality to and serve as substitutes for telephone service as "telecommunications services" and, accordingly, regulate under Title II of the Telecommunications Act of 1996;
- ?? The Commission should not preempt state jurisdiction over intrastate VoIP calls;
- ?? VoIP service providers should be subject to FCC and state commission rules that govern service quality, consumer protections, customer proprietary network information and local number portability, E911 capability; and
- ?? VoIP service providers should contribute to federal and state Universal Service funds.

OPC-DC's recommendations will help ensure that consumers receive the maximum benefit from VoIP services. OPC-DC urges the Commission to adopt these recommendations.

## **II. BACKGROUND AND OVERVIEW**

Since 1999, numerous District of Columbia residential consumers and local legislators have expressed concern about an "apparent disparity" in the deployment of advanced telecommunications services, specifically, Asymmetric Digital Subscriber Line service ("ADSL") in the District of Columbia residential community. Consumers were, and are still, concerned that ADSL service is not available to all residential consumers, especially consumers residing east of the Anacostia River and other areas within the

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<sup>4</sup> The FCC has described an IP-enabled service as "offering real-time, multidirectional voice functionality,

District of Columbia. In 2000, in response to OPC-DC's petition for an investigation, the Public Service Commission of the District of Columbia conducted hearings in which community and industry witnesses testified as to the lack of ubiquitous deployment of and market entry barriers associated with offering advanced telecommunications services. Several commentators suggested that this was a further example of a growing digital divide between affluent communities and low-income areas.<sup>5</sup>

Four years later, the advent of VoIP and other IP-enabled services does not allay the concern of D.C. residential consumers that advanced telecommunication or information services will be ubiquitously available in the District of Columbia. In fact, VoIP and other IP-enabled services further widen the "digital divide" that currently exists in the District of Columbia. Local exchange carrier's entry into the long-distance service and Internet access market and offering of bundled services necessitates a paradigm shift in the regulatory framework under which service providers currently operate and provides telecommunications services. OPC-DC submits it is imperative that the FCC and state regulators institute policies that protect consumers who continue to have no access to advanced telecommunications or information services as a result of inherent technical impediments or "cherry picking" business practices.

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including, but not limited to, services that mimic traditional telephony *Notice*, n. 7.

<sup>5</sup> *In re the Investigation into the Availability of Advanced Telecommunications services in the District of Columbia*, Formal Case No. 992, Community Hearing Before the Public Service Commission, (Oct. 2000).

### III. DISCUSSION

#### A. VOIP SERVICES THAT ARE FUNCTIONALLY EQUIVALENT TO AND ARE SUBSTITUTABLE FOR TELEPHONE SERVICE SHOULD BE CLASSIFIED AS A TELECOMMUNICATIONS SERVICE AND REGULATED UNDER TITLE II OF THE TELECOMMUNICATIONS ACT OF 1996.

The Commission seeks comment on whether classes of VoIP services should be classified as “telecommunications services” under the Telecommunications Act of 1996 (“1996 Act”)<sup>6</sup> and thus should be subject to Title II regulation. The FCC also seeks comment on whether VoIP services are “information services” that should be regulated under Title I.<sup>7</sup> While there is no bright line answer to these questions concerning a market that is characterized by converging technologies and intermodal competition, OPC recommends that the FCC classify certain VoIP services as telecommunications services.<sup>8</sup> This classification is consistent with and furthers the competitive neutrality principles of the 1996 Act which is to ensure that carriers who benefit from the PSTN contribute to the universal service fund that supports the network.<sup>9</sup>

Specifically, the Commission should regulate those VoIP services that are 1) functionally equivalent to and serve as substitutes for plain old telephone service; 2) are marketed to the public as a telephone service, 3) use the public switch telephone network (“PSTN”) to originate and/or terminate calls, or 4) use telephone numbers administered by the North American Numbering Plan (“NANP”) should be classified as a

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<sup>6</sup> Pub. L. No. 104-104, 110 Stat. 56.

<sup>7</sup> *Notice*, ¶ 43.

<sup>8</sup> The 1996 Act defines an “information service” as “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 capability for the management, control, or operation of the telecommunications system or the management of telecommunications service. 47 U.S.C. § 153(20).

<sup>9</sup> *Infra* n.8, *Stevens Report*, ¶ 133.

telecommunications service. OPC-DC's recommendation is consistent with the 1998 *Stevens Report* to Congress. In the *Stevens Report*, the Commission observed, "the classification of a service under the 1996 Act depends on the functional nature of the end-user offering."<sup>10</sup> Further the Commission observed:

[I]n the case of "computer-to-computer" IP telephony, "individuals use software and hardware at their premises to place calls between two computers connected to the Internet...IP packets carrying voice communications are indistinguishable from other type of packets...Title II requirements apply only to the "provi[sion]" or "offering" of telecommunications... the Internet service provider does not appear to be "provid[ing]" telecommunications...

A "phone-to-phone" IP telephony service provider meets the following conditions:

(1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content... [t]hese providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. From a functional standpoint, users of these services obtain only voice transmissions...this type of IP telephone lacks the characteristics of an information service....<sup>11</sup>

As noted above, the FCC recognized that the nature of a service depends on how it is used by the end user, rather than on the specific equipment or protocols used in the underlying transmission of the service. The Commission further concluded that certain forms of phone-to-phone IP telephony are "telecommunications," and to the extent that providers of such services are offering those services directly to the public for a fee, those providers would be "telecommunications carriers."<sup>12</sup> Accordingly, OPC-DC submits it would be appropriate to classify certain VoIP services as telecommunications services.

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<sup>10</sup> Notice, ¶ 29; *In re Federal-State Joint Board on Universal Service*, Report to Congress, ("Stevens Report"), CC Docket 96-45, FCC 98-67, 13 FCC Rcd 11501, ¶ 86 (1998).

<sup>11</sup> *Stevens Report*, ¶¶ 83, 87-88.

This is further demonstrated by the Commission's recent decision on AT&T's VoIP service.

In the recent *AT&T Order*,<sup>13</sup> the Commission concluded that AT&T's VoIP service qualified under both the definitions of "telecommunications" and "telecommunications service."<sup>14</sup> As described in AT&T's petition, customers subscribing to its VoIP service place and receive calls with the same telephones they use for all other circuit-switched calls. These calls are routed over AT&T's Feature Group D trunks, through a gateway and subsequently, converted to IP format.<sup>15</sup> AT&T transmits the call to its Internet backbone.<sup>16</sup> The call is reformatted from the IP format and terminated through the local exchange carrier local business lines or local primary rate interface trunks ("PRI").<sup>17</sup>

Conversely, the Commission concluded that the Pulver.com's ("Pulver") Free World Dialup ("FWD") is an unregulated information service subject to the Commission's jurisdiction and, thus is neither telecommunications nor a telecommunications service.<sup>18</sup> FWD is a free worldwide directory or translation service that allows its members to identify when they or a fellow member is online using their own broadband Internet access via a non-NANP number.<sup>19</sup> In reviewing the type of

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<sup>12</sup> *Id.*, ¶ 91.

<sup>13</sup> *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order ("*AT&T Order*") (rel. Apr. 21, 2004).

<sup>14</sup> *Id.*, ¶ 12.

<sup>15</sup> *Id.*, ¶ 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, nn.48, 49.

<sup>18</sup> *In re Petition for Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 ("*Pulver Order*") (2004).

<sup>19</sup> *Id.*, ¶¶ 4,-6.

information transmitted through FWD, the Commission concluded that the FWD directory function or peer-to-peer communication provides information different than that provided by the member.<sup>20</sup> In the *Pulver Order*, the Commission found that the end-to-end analysis was not applicable to Pulver's FWD service.<sup>21</sup> The FCC found that FWD's portable nature without fixed geographic origination or termination points meant that no one member could know where the termination points were on the respective Internet Service Provider's ("ISP") server.<sup>22</sup> The FCC's rationale in the *Pulver Order* implies that an IP-enabled service that can be characterized as "purely intrastate" or is economically possible to separate interstate and intrastate components of a jurisdictionally mixed service should be subject to state jurisdiction.<sup>23</sup> VoIP services falls squarely within this regulatory parameter.

**1. VoIP Services That Originate and Terminate Calls Within a State Should Be Subject To That State's Jurisdiction.**

In its *Notice*, the Commission seeks comment on the jurisdictional nature of IP-enabled services and applicability of an end-to-end analysis. In response, OPC-DC submits it is appropriate for the Commission to use the "mixed use" doctrine for determining whether a VoIP services is subject to federal or state regulatory jurisdiction. The Commission has applied the "mixed use" doctrine in circumstances in which it is "impractical or impossible to separate out interstate from intrastate traffic carried over a shared facility."<sup>24</sup> In *Re GTE Telephone Operation Co.'s GTOC Tariff No. 1* the FCC concluded that GTE's DSL Solutions-ADSL Service was subject to federal jurisdiction

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<sup>20</sup> *Id.*

<sup>21</sup> *Pulver Order*, ¶ 21.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, ¶ 20.

and tariff filing requirements based upon the end-to-end nature of the communications transmission and the mixed-use facilities rule.<sup>25</sup> The FCC concluded that not all DSL services [were] interstate in nature and, found that some DSL services, for example “work-at-home” DSL applications, may be appropriately tariffed at the state level.<sup>26</sup> Accordingly, OPC-DC submits that it would be appropriate for the Commission to apply the “mixed use” doctrine for VoIP services that originate or terminate calls within the same state.

Furthermore, the Commission concluded that certain forms of “phone-to-phone IP telephony” services lack the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.”<sup>27</sup> The federal 1996 Act reinforces the continuing right and concomitant duty of State commissions to take action to address local conditions, issues, and concerns as the telecommunications service market is opened and matures.<sup>28</sup> OPC-DC submits the Commission should not be swayed to change its policy on a service that has not been demonstrated to be wholly interstate in nature. VoIP services that begin and end

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<sup>24</sup> *Id.*, n.130.

<sup>25</sup> *In re GTE Telephone Operating Cos, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, FCC 98-292, CC Docket No. 98-79 (Oct. 30, 1998). The mixed-use facilities rule is applicable when more than 10 percent (the *de minimis* test) of the total traffic is interstate and where it is not possible to separate the uses of separate access lines by jurisdiction. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Stevens Report*, ¶ 83 (citations omitted).

<sup>28</sup> *See*, Comments of National Assoc. of Regulatory Utility Commissioners (“NARUC”), at 4, *In re Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147 and *Petition of Association of Local Telecommunications Services for Declaratory Ruling*, CC Docket Nos. 98-147, 96-98, and 98-141 (Jan. 23, 2002).

within a state should be subject to that state's jurisdiction, service quality standards, and consumer protection rules.

**B. VOIP Services Should Be Subject to Federal and State Service Quality Standards and Other Consumer Protection Measures.**

In an industry that is becoming increasingly deregulated, consumers are vulnerable to misinformation and market abuse. Consumers should be entitled to the same consumer protections whether their telephone service is carried over the PSTN or the Internet. The Telecommunications Act of 1996 gives state regulatory authorities the ability to impose quality of service standards in order to protect the welfare of consumers:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.<sup>29</sup>

There is no question that bundled local, long distance telephone and Internet access services are becoming commonplace in the industry and the District of Columbia. As competition evolves, consumers receive an increasing number of advertisements and telemarketing phone calls encouraging them to switch their local exchange service to a different provider. This onslaught is ripe for consumer abuse and is evidenced by an increase in consumer complaints. For example, OPC-DC has learned through its complaint investigation process customers who subscribe to bundled services are often not told they are in jeopardy of losing all of their services for failure to pay their bill. There is an increasing need for consumer protection measures and truth-in-billing rules as consumers are confronted with shrewd marketing techniques, and subsequently find

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<sup>29</sup> 47 U.S.C. § 253 (b).

themselves helpless and without recourse when they experience a service outage or have a billing dispute.

Consumers face other quality of service issues resulting in unnecessary delays and potential lapses in service. OPC-DC's Consumer Service Division and attorneys have interceded in several "hot cut" and "switchback" consumer complaint matters when carriers fail to coordinate service disconnection and installations dates. Furthermore, OPC-DC has learned through its complaint investigation process customers are often told it will take them longer to get new telephone service from a competitor if they keep their old telephone number at the same location. Customers pay a local number portability ("LNP") surcharge to keep their telephone number. OPC-DC submits inducing customers to change their telephone number when switching carriers, but not their residence, contravenes the goal of the Telecommunications Act of 1996, that is, to create a fair and open telecommunications market.

Unfortunately, because neither the FCC nor D.C. PSC have adopted concrete rules that determine how and to what extent advanced telecommunications services can be regulated, District of Columbia consumers are without an effective forum in which to file complaints and obtain timely resolutions. This problem will be further exacerbated, as more local exchange services are bundled with long distance, advanced telecommunications and Internet access services. More often than not, D.C. residential consumers are powerless as telecommunications service providers continue to "pass the buck" from one provider to the other. Consumers are entitled to a uniform and consistent level of service quality irrespective of who provides the service or what telecommunications service is purchased. The Commission must adopt a policy that

promotes the development and growth of new technologies, but not at the expense of the consumer.

**C. VOIP PROVIDERS SHOULD CONTRIBUTE TO FEDERAL AND STATE UNIVERSAL SERVICE FUNDS.**

In its *Notice*, the FCC seeks comment on whether facilities-based and non-facilities-based providers of IP-enabled services should contribute to the universal service fund. OPC submits that any service provider that uses the PSTN to provide its service should contribute to the fund. OPC's position is consistent with the FCC's position in other proceedings.

In the *Stevens Report*, the FCC concluded that “[t]o the extent we conclude that the services should be characterized as “telecommunications services,” the providers of those services would fall within the 1996 Act's mandatory requirement to contribute to universal service mechanisms.”<sup>30</sup> In that report, the Commission noted that “it is our duty and intention to ensure that financial support for federal universal service support mechanisms is maintained.”<sup>31</sup> Further, the FCC concluded that “[o]ur rules should not create anomalies and loopholes that can be exploited by those seeking to avoid universal service obligations.”<sup>32</sup>

Second, in the recent *Notice* the Commission stated:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP

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<sup>30</sup> *Stevens Report*, ¶ 3.

<sup>31</sup> *Id.*, ¶ 4.

<sup>32</sup> *Id.*

network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.<sup>33</sup>

VoIP service providers should contribute to federal and state universal service funds. The 1996 Act authorizes this Commission and state commissions to adopt explicit universal service support mechanisms. Section 254(f) of the 1996 Act grants state commissions the authority to establish state universal service funds (“USFs”) to help provide that support.<sup>34</sup> Moreover, section 254(j) of the federal Act entrusts states with the authority “to adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.”<sup>35</sup> Many states have enacted their own universal service funds.<sup>36</sup> For example, in January 2000, the Public Service Commission of the District of Columbia established Formal Case No. 988 to address issues related to the development of a universal service program and fund.<sup>37</sup>

In promoting and achieving universal service telecommunications services, the Commission must ensure that universal service policies are implemented in manner that is competitively neutral and will not hinder the development of effective competition that will ultimately result in lower rates and quality of service for all consumers. Local, long-distance and Internet access service providers are offering an array of technologically advanced services that have reduced the costs of providing these services. An evolving definition of Universal Service should be the underlying premise of the FCC’s universal

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<sup>33</sup> Notice, ¶ 33. *See, also*, Bell Atlantic’s (now, Verizon Communications) reply comments indicating that Internet access providers should make universal service fund contributions to the extent of the telecommunications component of their services. *Stevens Report*, ¶ 80, n.166.

<sup>34</sup> 47 U.S.C. § 254(f).

<sup>35</sup> 47. U.S.C. § 254(j).

<sup>36</sup> *See*, Nat’l Exchange Carrier Ass’n, State Universal Service Fund Summaries, at [www.neca.org/media/susfsum.pdf](http://www.neca.org/media/susfsum.pdf).

<sup>37</sup> *In re the Development of Universal Service Standards and the Universal Trust Fund for the District*, Order No. 11595 (Jan. 31, 2000).

service policy that recognizes consumers want more than simply “plain old telephone service”.<sup>38</sup>

#### IV. CONCLUSION

For the foregoing reasons, OPC-DC respectfully requests the Commission consider its Comments and recommendations discussed herein:

- ?? The FCC should classify VoIP services that are similar in functionality to and serve as substitutes for telephone service as “telecommunications services” and, accordingly, regulate under Title II of the Telecommunications Act of 1996;
- ?? The Commission should not preempt state jurisdiction over intrastate VoIP calls;
- ?? VoIP service providers should be subject to FCC and state commission rules that govern service quality and consumer protections; and
- ?? VoIP service providers should contribute to federal and state Universal Service funds.

Respectfully submitted,

Elizabeth A. Noël  
People’s Counsel

Sandra Mattavous-Frye

Sandra Mattavous-Frye  
Deputy People's Counsel

Barbara L. Burton  
Assistant People’s Counsel

Joy M. Ragsdale  
Assistant People’s Counsel

OFFICE OF THE PEOPLE'S COUNSEL  
FOR THE DISTRICT OF COLUMBIA  
1133 15th Street, N.W., Suite 500  
Washington, D.C. 20005-2710  
202-727-3071

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<sup>38</sup> International Research Center, *Universal Service to Universal Access* (1995) available at <http://www.researchedge.com/uss/dev.html> (last visited Mar. 24, 2004).