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

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

COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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1. Introduction and Summary

This proceeding presents the Commission with two important opportunities. First, in concert with such related proceedings as Intercarrier Compensation and Universal Service, the Commission can provide clear and final guidance to market participants and their investors with respect to the benefits and detriments of investing in and operating legacy networks. Second, the Commission can avoid the difficulties arising from past interventionist approaches to emerging competitive markets by taking a minimalist approach to IP-enabled service provisioning. These combined actions will restore order and certainty to the existing communications marketplace and will provide a sound foundation for the future operation of that marketplace in an IP-based environment – one substantially free from the fetters of federal and state regulation as Congress has already required.

To these ends, the Independent Telephone & Telecommunications Alliance (ITTA), on behalf of its twelve midsize incumbent local exchange carriers (ILECs) and the more than 10 million access line customers they serve, provides the following comments in this

proceeding.[1] In these comments, ITTA develops three principle points for Commission consideration:

First, for multiple reasons directly promoting the public interest, Commission policies concerning IP-enabled services which use or touch the public switched telephone network must afford such network providers the opportunity to obtain adequate revenue streams to maintain and enhance their legacy networks;

Second, policy and precedent compel the conclusion that traditional economic regulation lacks foundation in an Internet/IP-based market environment, both generally and in the specific case of midsize companies; and

Third, fulfillment of the true public interest requirements attending public safety, law enforcement, universal service, and related matters can only be achieved by the (a) full, fair, and equal distribution of these public interest obligations to all IP market participants and the (b) full, fair, and equal enforcement of these obligations by the Commission.

ITTA believes adherence to these points will improve the climate for investment in the PSTN and will forestall problems in the evolution of the IP-based networks and services of the future — results directly and favorably impacting all communications consumers.

2. Public policy requires full and equitable cost recovery from all those using the legacy network.

In the age of IP-enabled services, concern for the PSTN (public switched telephone network), like concerns in bygone days for "MTS" and "WATS," may strike some as largely anachronistic. But advanced services, however spectacular, have had to

[1] *In the Matter of IP-Enabled Services,* WC Docket No.04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("Notice").

reach consumers somehow. In the last decade the PSTN has proved the indispensable vehicle in making available to consumers the current explosion of IP-enabled services:

> Indeed, while a century of PSTN development has given rise to relatively few opportunities for user customization, a mere decade of widespread commercial use has produced a dizzying array of IP-enabled services, ranging from presence management to multimedia conferencing to unified messaging . . . .[2]

The Commission's left-handed compliment here implicitly acknowledges that the current "dizzying array" of advanced services is predicated upon the infrastructure investments (including those of small and midsize companies) that have contributed to the high quality and broad capability of the public network, the "use" of which has plainly been the critical component in the rapid evolution of advanced IP services provisioning. It is no accident that this explosion of IP-enabled services developed first on the world's foremost network – a network created by private investment within the constraints of public regulation. There is no ground to be gained in selling this major achievement short as the focus of public policy turns to the next generation of network technologies.

a. For many rural and non-urban consumers, the PSTN will remain the primary network for delivering advanced telecommunications services.

The historical position of the public switched network, like everything else in communications, is changing. Indeed, in an increasing number of markets the prominence of the PSTN is being directly challenged. Competitive alternatives for the delivery of IP-enabled services appear and expand weekly. From analog to digital, narrowband to broadband, wireline to wireless, cable or satellite, competition in and among delivery vehicles is proceeding no less rapidly than competition in and among the advanced service offerings they carry. ITTA believes that intermodal competition is an established

[2] Notice n.13.

fact, one which must be recognized and factored into any Commission policies governing the future provisioning of IP-enabled services.

But in many areas, particularly in rural and small-town America, the PSTN will continue for some time as a major pathway over which consumers will obtain IP-enabled services. As the Commission notes,

> We fully recognize that many IP-enabled services are delivered over network infrastructure that traditionally has been supported by universal service.

Such non-urban network infrastructure (whether universal service supported or not) is, and for the foreseeable future will remain, important to the delivery of IP-enabled services to a significant body of consumers. Commission policies must therefore deal effectively with ensuring that the PSTN in such markets remains technologically robust, in tandem with the technologically advanced services which that network must deliver to the public. Anything less contravenes congressional concerns for comparability enshrined in section 254.[3]

ITTA therefore agrees with the Notice's assertion that PSTN providers must be fairly and adequately compensated for the use of the PSTN network.

> 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 traffic originates on the PSTN, on an IP 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.[4]

The benefits of the future cannot be realized by abandoning the obligations of the past. Small and midsize companies have and continue to make substantial investments in their

[3] 47 U.S.C. §254(b).
[4] Notice at ¶ 61.

networks, to the benefit of the consuming public.[5] They cannot do so if regulatory carve-outs deprive them of revenues sufficient to recover past investments and to fund future enhancements to the basic network. To the extent they remain bound by regulation, regulatory policies must provide these companies with resources adequate to meet the public's needs.

The failure to provide a reasonable opportunity for the recovery of basic network investment resurrects the problems of confiscation and takings. As a matter of law, carrier rates set and enforced by government must be reasonable to the carriers as well as to the public. This necessitates a reasonable opportunity to earn a reasonable return on investment, lest that investment be confiscated.[6] In raising this issue, ITTA is not implicitly endorsing regulation.[7] But to the extent the Commission continues to apply legacy regulation to the legacy network, competitive responses are foreclosed to midsize company ILECs. The Commission must therefore provide reasonable regulatory opportunities to obtain reasonable returns on investments devoted to the public service.[8]

The matter of fair recovery of infrastructure investment is not the sole concern of small and midsize ILECs: all facilities-based carriers have the same stake in being fairly

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[5] Comments of the Independent Telephone & Telecommunications Alliance, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* GN Docket No. 04-54, FCC 04-55 (filed May 10, 2004) at 3 ("706 Proceeding Comments").

[6] *Smyth v. Ames*, 169 U.S. 466, 526 and 546 (1898); compare *Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 480: "The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation . . . in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail markets, **short of confiscating the incumbents' property**." [Emphasis added].

[7] ITTA affirmatively argues against imposition of economic regulation upon midsize company IP-enabled services in section 3, *infra.*

[8] *Supra*, n.6. ITTA notes parenthetically that maintenance of the residual obligation to pay for network use does not also require maintenance of the pre-existing structures under which such payments are made. The parallel proceedings on intercarrier compensation referred to by the Commission in the Notice properly invite alternative approaches to future PSTN revenue structures. ITTA and its members will continue their participation in those proceedings, as well.

compensated for their costs of carrying traffic.[9] As technologies continue to multiply, the need for fair compensation increases. ITTA recently noted in the Commission's current 706 proceedings that the problem of rural network enhancement is not unwillingness on the part of small and midsize companies to invest in their markets.[10] The problem instead is lack of sufficient financial resources. Adequate financial resources are especially important to those rural and non-urban consumers for whom, from the intermodal perspective, only limited economic substitutes to the PSTN exist.[11] Absent a reasonable opportunity to recover equitably from all network users, sufficient economic resources cannot be garnered. As a result, some consumers could be denied access to new IP-enabled services, not because they don't exist, but because they cannot be delivered over the primary network system presently available.

b. For many competitors, access to a fairly priced and technologically robust PSTN will remain critical to the delivery of their competitive service offerings.

The consumer's need for a robust PSTN in order to obtain advanced services is paralleled by the competitor's need for a robust PSTN in order to deliver such services. The Commission's observation, above,[12] that widespread commercial use of the PSTN has produced a "dizzying array" of services implicitly underscores the value of the PSTN to competitors, no less than to consumers. Congress has long recognized the nexus between advanced service offerings and technologically advanced networks, having made "other regulating methods that remove barriers to infrastructure investment" a specific

[9] See, e.g., Statement of John D. Windhausen, Jr., President of the Association for Local Telecommunications Services (ALTS press release Washington, D.C. May 11, 2004): "Finally, the [CBICC] plan re-confirms the need for carriers to be compensated for their costs of carrying telecommunications traffic, a principle that is well-grounded in the Telecommunications Act."
[10] 706 Proceeding Comments at 4-5.
[11] See Notice n.118.
[12] See n.3, *supra.*

statutory component of advanced telecommunications incentives.[13] Without full recovery from all users of the legacy network, the network foundation for competition between and among technologically expanded service offerings is harmed.

The failure to charge all PSTN network users fully and fairly has another undesirable consequence for competition and competitive markets. Rates charged for the use of the PSTN represent costs of service to the entities utilizing the PSTN as part of their own offerings. To permit some entities to pay less than other entities confers a derivative cost – and therefore, pricing -- advantage upon one entity over another. This potential discrimination is greatest where some PSTN users are fully exempted from payment of appropriate charges. As a result, this cost discrimination not only deprives the underlying carriers of necessary revenues; it promotes non-economic pricing, arbitrage, and other undesirable conduct in unrelated competitive markets and services which are dependent upon (but separate from) the basic communications capabilities provided by the PSTN. Inadequate cost recovery by ILEC incumbents is thus transformed into anticompetitive advantage among ILEC and non-ILEC competitors. As a result, competitive neutrality is skewed and consumers are harmed yet again.

3. Public policy considerations support only minimal governmental intervention in the future provisioning of IP-enabled services.

The Defense Department may have been the father of the Internet, but the Commission has not been the cradle of IP-enabled services. As the Notice acknowledges, the IP-enabled services which are now "increasingly available, sophisticated and attractive alternative[s] to consumers" arose "in an environment largely free of

[13] Telecommunications Act of 1996 § 706(a).

government regulation, and the great majority, we expect, should remain unregulated."[14] ITTA would concur in that expectation. The status quo being addressed in the NPRM is vibrant and became that way without the assistance of governmental regulation. In such an environment, governmental action holds the potential for doing at least as much harm as good.

Recognizing these concerns, the Commission preliminarily concludes that traditional economic regulation should not be imported to the Internet arena.

> We believe…that traditional economic regulation designed for the legacy network should not apply outside the context of the PSTN, and therefore will be inapplicable in the case of most IP-enabled services.[15]

This conclusion correctly comprehends the factors which occasioned such legacy economic regulation, namely (a) monopoly ownership (b) of bottleneck facilities, (c) as to which consumers lack the power to negotiate rates, terms and conditions for services.[16] Absent proof that such factors exist in the Internet/IP realm, such economic regulation cannot be justified.

Clearly, these factors are wholly absent in the context of IP-enabled services.[17] Far from being monopoly owned or controlled,

> …[T]he Internet is a global, packet-switched network or networks that are interconnected through the use of the common network protocol – IP….No single entity controls the Internet, for it is a "worldwide mesh or matrix of hundreds of thousands of networks, owned and operated by hundreds of thousands of people."[18]

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[14] Notice at ¶ 35.
[15] Notice ¶ 35, n.116.
[16] Notice ¶¶ 36, 37, and 74.
[17] ITTA argues here and in other proceedings that the current advanced condition of intermodal competition between and among wireline, wireless, cable, and satellite service providers has significantly undercut the legal basis for economic regulation in traditional, non-IP based markets and services, as well.
[18] Notice n.23 [citations omitted].

These facts undercut any basis for the scattered allusions to "dominant" carrier regulation contained in the Notice.[19] No market analysis has yet appeared sufficient to support dominant treatment for any entity. Efforts to develop such an analysis based upon the point-to-point approach heretofore used by the Commission in the context of legacy networks would likely encounter difficulties.[20] In an IP-enabled services context, the development and application of such a market analysis would also likely be complicated by the frequent absence of such "points" in an IP-based universe.[21] Nor can the Commission ignore the existence of intermodal facilities in assessing the condition of competition in markets.[22] Clearly, any effort to restrain midsize company provisioning of IP-enabled service offerings by imposing legacy economic regulation will have to meet a substantial and as yet unmet legal burden.

ITTA's position here is clearly in the mainstream of congressional thought with respect to participation by midsize companies in IP-enabled service offerings. For example, Congress has already established that small and midsize companies are to be afforded substantial regulatory flexibility in the context of legacy regulation.[23] Full and fair participation in the provisioning of non-legacy, IP-enabled services by midsize companies is consistent with and a logical extension of this policy. Such participation also conforms to express congressional policy "to preserve the vibrant and competitive

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[19] E.g., Notice ¶74 and n. 218

[20] "We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment. …While it may be infeasible to define barriers to entry in a manageable form…the Commission nowhere suggests that it explored such alternatives, much less found them defective." *USTA v. FCC at al.,* No. 00-1012 (D.C. Cir. March 2, 2004) at 29 ("USTA").

[21] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. February 19, 2004) at ¶21: "Indeed, in the case of FWD [Free World Dialup] the concept of "end points" has little relevance."

[22] *USTA* at 29.

[23] 47 U.S.C. §251(f)(1) and (f)(2).

free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[24] Efforts to get the Commission to swim upstream against this congressional current waste regulatory time and resources. Worse, any 'success' from such efforts could only serve to harm consumer options and opportunities downstream.

4. Public policy considerations require the neutral application of true public interest regulation.

In making its argument against importing legacy economic regulation into the sphere of IP-enabled services, ITTA acknowledges and supports the distinction which the Notice makes between economic and non-economic types of regulation.

> …[W]e seek ways to distinguish those regulations designed to respond to the dominance of centralized, monopoly-owned networks from those designed to protect public safety and other important consumer interests.[25]

The latter types of regulations are further described in the Notice as those "relating to emergency services, law enforcement, access by individuals with disabilities, consumer protection, universal service," and associated issues.[26] Unlike economic regulation (dominant carrier is a regulatory-created concept), these latter kinds of regulations generally arise from specific statutory requirements, often applicable to broad categories of service providers.[27] As the Commission develops, modifies, and applies such true public interest regulations, ITTA would note three matters for continuing consideration.

First, to the extent service providers are exempted or otherwise fail to meet statutory public interest requirements, consumers are directly and adversely affected.

[24] 47 U.S.C. §230(b)(2).
[25] Notice at ¶ 36.
[26] Id.
[27] See discussion and included citations in Notice ¶¶ 71-72.

Inadequate contributions to the universal service fund, for example, will strain an already straining mechanism. An unsustainable fund contravenes statutory requirements[28] and imperils service to those consumers dependent upon the "facilities and services for which the support is intended."[29] Similarly negative consequences will befall consumers with disabilities and in matters of public safety and law enforcement.

Second, as with any regulatory imposition, the burden must be shared fully, equally, and symmetrically by all market competitors if unintended impacts on consumers and competition are to be avoided. The Commissions oft-repeated emphasis on "competitive neutrality" in other settings is crucially important in this context, as well. Market participants who do not bear their fair share – who are exempted from paying for network use, who do not contribute fairly to universal service support, who do not assume the expenses associated with public safety and law enforcement – enjoy an artificial cost advantage over those who do meet their obligations. Their avoided burden must be carried by other entities, many of whom may well be in competition with those exempted. Recognizing such potential problems, some non-ILEC entities have shown an initial willingness to affirmatively undertake regulatory burdens arising from social obligations.[30] But the Commission must ensure that the fine print underlying these general pronouncements establishes common obligations and common treatment for all parties in meeting the common public interest burden.

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[28] 47 U.S.C. § 254(e): "Any such [universal service] support should be explicit and sufficient to achieve the purposes of this section."
[29] Id.
[30] See, e.g., remarks of Brian Roberts, CEO and President of Comcast Corp. to the U.S. Senate Commerce Committee, reported on XCHANGE, *http://www.x-changemag.com/hotnews/45h12131820*, (May 13, 2004): "And as VOIP providers, we have made it clear that in exchange for the rights we need to compete, we are prepared to step up to important social responsibilities like universal service, emergency services and full cooperation with law enforcement."

Third, as with other regulatory endeavors, ITTA would urge a uniform deregulatory approach to the formulation and imposition of these public interest requirements. Service providers similarly situated (from the consumer's perspective) should be brought to the same level of obligation and public interest requirement across the board, using whatever statutory authorities are appropriate. In employing its authority, the Commission should explicitly recognize that an activity conducted by hundreds of millions of people over hundreds of thousands of networks cannot be practicably managed by regulators in detail, in real time. The Commission would be better advised to clearly delineate, apply and enforce neutral requirements to be met by all relevant service providers, and thereafter to let private sector entities work out the satisfaction of those requirements as their skill and technologies afford.[31] In the long-run, Commission enforcement of evenly applied burdens will achieve more effective results more rapidly than complex regulatory constructs designed for an earlier time and less complex subjects.

5. Conclusion.

The technological divide between legacy service provisioning and IP-enabled service provisioning requires a similar divide in regulatory thought and action.

With respect to the former, the Commission needs to finalize here and in other proceedings mechanisms for the legacy network which fully, fairly, and equitably compensate PSTN service providers. Doing so will promote the public interest twice: by ensuring that any IP-enabled service provider utilizing the PSTN will do so on terms fully and fairly applied to all other PSTN users; and by ensuring financial resources sufficient

[31] See discussion in Notice at ¶¶ 54, 56, and 57.

to sustain the technological ability of the PSTN to deliver a full range of IP-enabled products to rural and non-urban consumers. This will ultimately result in stabilized industry conditions and increased infrastructure investment, consistent with congressional goals.

With respect to the latter, the NPRM candidly and correctly acknowledges that the "dizzying array" of IP-based possibilities now available to consumers emerged "largely free of government regulation." Consistent with this history and with express congressional policies, the Commission should do as little as possible to impede or handicap participation in these new markets by anyone (including especially small and midsize companies) willing to assume the risks and pursue the rewards of a truly competitive, technology driven marketplace.

Respectfully submitted,

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