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

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

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The Federal Communications Commission ("Commission") seeks comment on regulatory issues surrounding services and applications that use Internet Protocol ("IP").[1] The Commission describes "IP-enabled services" as "digital communications capabilities of increasingly higher speeds, which use a number of transmission network technologies, and which generally have in common the use of the Internet Protocol."[2]

The National Association of State Utility Consumer Advocates ("NASUCA")[3] will focus its Comments on the IP-enabled service known as Voice over Internet Protocol ("VoIP"), which the Commission has described as an IP-enabled service "offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony."[4] Concerning VoIP, NASUCA makes the following recommendations:

- In determining how to regulate IP-enabled services, the Commission should consider the perspective of the end user. Services that are similar in functionality to and serve as substitutes for telephone service – i.e., that function as telephone services; are marketed to customers as substitutes for telephone service; that originate, terminate or receive calls that originate on the Public Switched Telephone Network ("PSTN"), or have the capability to do so; or that utilize telephone numbers administered in accordance with the North American Numbering Plan ("NANP") – should be subject to regulation. Such services allow the end user to engage in the

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[1] See *Notice of Proposed Rulemaking*, FCC 04-28, 19 FCC Rcd 4863 (2004) ("*Notice*"), ¶ 1.

[2] *Id.*, n. 1. The *Notice* uses the term "IP-enabled services" to refer to both services and applications. *Id.*

[3] NASUCA is a voluntary, national association of 44 consumer advocates in 42 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[4] *Notice*, n. 7. NASUCA reserves the right to address issues regarding other IP-enabled services in reply comments.

real-time transmission and reception of voice messages, and include, but are not necessarily limited to, services that involve telephony in concert with a broadband connection or that have the capability to utilize networks of established telecommunications carriers that incorporate digital packet technology or any type of IP logic into their networks.

- In order to ensure the promotion of universal service and other programs that are beneficial to the public, the Commission should classify as "telecommunications services" those VoIP services that are the functional equivalent of traditional telephone service. The Commission may also distinguish between "basic" and "enhanced" VoIP services for regulatory purposes.

- VoIP should be subject to Title II regulation. Based on the experience of previous application of Title II regulation to other services, Title II regulation would not necessarily impede the development of VoIP.

- The Commission may use its broad forbearance powers to exempt VoIP services from unnecessary or inappropriate Title II regulation (e.g., economic regulation) instead of risking important public policy objectives by classifying VoIP under Title I.

- VoIP should be subject to local number portability requirements in order to ensure that consumers continue to benefit from this important pro-competitive function.

- The Commission should allow VoIP providers to purchase unbundled network elements, if they desire, in order to help promote competition.

- The Commission should not preclude state jurisdiction over VoIP, especially in the areas of service quality and consumer protection. Because they are obligated to ensure that telecommunications services are provided in the public interest, state public utility commissions have a responsibility to ensure that consumers in their states receive quality telecommunications services and are protected from providers' misconduct.

- The Commission should recognize that state regulators have jurisdictional responsibility over calls that begin and end in their state. The Commission must not prevent state regulators from fulfilling this responsibility.

- The Commission should extend enhanced 911 ("E911") requirements to VoIP services. Protecting the lives, health and property of VoIP users outweighs any potential risk to the rapid deployment of VoIP providers that might occur by requiring E911 capability.

- Enhanced 911 provided over VoIP should conform with 911 network systems that are already in place, rather than vice versa. State and local authorities should not have to bear additional financial burdens to adapt the existing 911 systems to a new and untested IP technology for delivering 911 calls with callback and location information. VoIP providers must collect and remit local 911 surcharges to ensure continued funding for 911.

- VoIP providers should be subject to Commission rules restricting the use of customer proprietary network information and other caller identification information.

- The use of medical and other highly personal information transmitted via VoIP should have restrictions similar to those applicable to the wireless and healthcare industries.

- In order to assist consumers in shopping for VoIP services, VoIP providers should prominently display on their websites their compliance with FCC requirements.

- Standards for VoIP access by and to those with disabilities should be developed through Commission working groups.

- VoIP should contribute to Universal Service funding.

- Similarly, VoIP providers should be able to apply for certification as "eligible telecommunications carriers" ("ETCs") for purposes of receiving Universal Service funding. If these VoIP providers meet the standards for ETC status, they should receive universal service support.

- VoIP providers that utilize the PSTN should have the same obligations as other carriers using the PSTN. Thus, such VoIP providers should be required to pay intercarrier compensation.

NASUCA's recommendations will help ensure that consumers receive the maximum benefit from VoIP services, with a minimum impact on VoIP providers. NASUCA urges the Commission to adopt these recommendations.

II. FOR REGULATORY PURPOSES, VOIP SERVICES SHOULD BE CATEGORIZED BASED ON FUNCTIONALITY, SUBSTITUTABILITY AND INTERCONNECTION TO THE PUBLIC SWITCHED TELEPHONE NETWORK, NOT ON THE TYPE OF TECHNOLOGY OR PROTOCOLS USED TO PROVIDE THE SERVICE.

The Commission solicits comment regarding how, if at all, it should differentiate among various IP-enabled services to ensure that regulations are applied to such services only when it is appropriate.[5] The Commission has asked commenters to address the following issues:

- Whether it would be useful to divide IP-enabled services into discrete categories, and if so, how the categories should be defined.
- Whether there are technical or other characteristics of particular VoIP or other IP-enabled services that suggest that providers use the underlying network in different ways or provide different functionality to end users that warrants differential treatment.
- How the regulatory framework should evolve over time, as IP-enhanced services themselves evolve.[6]

The Commission asks commenters to address these issues in light of three central questions:

- In which cases would some form of regulation be required in order to pursue national objectives?
- What differentiates those services for which some form of regulation is required from those for which it is not?
- In what relevant ways is a service like or unlike Pulver's Free World Dialup, which has been classified as an information service, free from regulation under the Commission's current rules?[7]

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[5] *Id.*, ¶35.

[6] See *id.*

[7] *Id.* NASUCA defers comment on the third question at this time.

First and foremost, the Commission should ensure that VoIP, like *all* telecommunications services, furthers the most basic, overarching and important national policy objective:

> [T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication.[8]

Ensuring that the general public, including both residential and small business customers, has ready access to affordable, reliable, high quality voice telecommunications service is essential to our society, the economy and, now more than ever, the public safety. This is true regardless of the technology used to provide the service.

As the Commission discussed at length in ¶ 37 of the *Notice*, VoIP and IP-enhanced communication services come in many flavors. Given the wide variety and nature of these services, it is appropriate to categorize them for regulatory purposes.

Specifically, the Commission should regulate those VoIP services that, from the perspective of the end user, are similar in functionality to and serve as substitutes for traditional telephone service. VoIP services that are marketed to customers as substitutes for telephone service, that have the capability to originate or terminate calls on the PSTN, that have the capability to receive calls that originate on the PSTN, or that use telephone numbers administered in accordance with the NANP should be subject to regulation. Regulation should be applied to services that enable end users to engage in real-time transmission and reception of voice messages. These include, but are not necessarily

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[8] 47 U.S.C. § 151.

limited to, services that involve customer use of a telephone (or computer software-enabled telephony via a headset or microphone) in concert with a broadband connection, and services provided over networks of established telecommunications carriers that have evolved to incorporate digital packet technology or any type of IP logic into their networks. Regulation should not be applied to services that are limited to a "peer-to-peer" group, or to services that cannot access the PSTN.

NASUCA's proposal is consistent with Commission policies that treat IP-enhanced services (i.e., computer-to-computer IP telephony) as information services and "phone-to-phone" services as telecommunications services. In the 1998 report to Congress known as the "Stevens Report,"[9] the Commission observed:

> [I]n the case of "computer-to-computer" IP telephony, where "individuals use software and hardware at their premises to place calls between two computers connected to the Internet," the Internet service provider did not appear to be "providing" telecommunications, and the service appeared not to constitute "telecommunications service" under the Act's definition of that term. In contrast, a "phone-to-phone" IP telephony service relying on "dial-up or dedicated circuits ... to originate or terminate Internet-based calls" appeared to "bear the characteristics of 'telecommunications services,'" so long as the particular service met four criteria:
>
> (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.[10]

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[9] *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 FCC Rcd 11501 (1998).

[10] *Notice*, ¶29, citing *Stevens Report*, ¶¶ 87, 88, 89.

The Commission should not develop categories for VoIP based on technology. New methods of delivering telephone service do not alter the fact that telephone service must continue to be reliable and affordable. During the past 100 years, the public telephone network has constantly evolved. Various technologies have been developed and then been replaced by more sophisticated technologies. Digital switches and fiber rings are profoundly different from cord boards and a single strand of copper, but the service customers use remains fundamentally the same.

The folly of attempting to regulate based upon the technology used to offer a service was demonstrated during the Commission's *Computer I* and *Computer II* inquiries.[11] In *Computer I*, the Commission tentatively defined "data processing" as:

> The use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, inter alia, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.[12]

Defining data processing was necessary for the purpose of *Computer I*, which was to address the issue of whether and to what extent monopoly telephone companies would be permitted to enter the data processing business.

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[11] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979 ("*Computer I*"); *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* Docket No. 20828 ("*Computer II*").

[12] *Computer I,* Tentative Decision, 28 F.C.C.2d 291, ¶ 15.

As the Commission soon discovered, however, its definition of data processing was obsolete almost as soon as the order was printed. This was due to the continual evolution of the PSTN as telephone companies began to incorporate computer processing into the provision of ordinary telephone service. As one observer noted, "[t]he problem is that there is computer processing in both communications and data communications. What was the FCC to do with things that looked like they were a little bit of each?"[13]

The technology of the PSTN had changed, but it was still being used to provide ordinary telephone service to customers. The Commission acknowledged this in its *Computer II* decision:

> [W]e recognized that the confluence of communications and data processing renders unlimited the possible combinations and permutations of services which can be offered to the consumer. *Moreover, we noted that the nature of these services are determined not by the transmission facilities, but, rather, by the specific processing applications offered through electronic equipment attached to the channel of communication.*[14]

The Commission noted that the nature of a service depends on how customers use it, rather on than the specific equipment or protocols used in the underlying transmission.

When the Commission realized that communications services were provided over networks that had evolved to utilize data processing, it did not suddenly determine that voice services should no longer be regulated. The fact that the technology used to provide telephone service has changed dramatically and continued to change does not alter the essential nature of the service or the extent to which the general public must rely

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[13] Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 Federal Communications Law Journal, 167, 174 (March 2003).

[14] *Computer II*, Final Decision, 77 F.C.C. 2d 384, 394 (1980) (emphasis added) (discussing the *Computer I* Tentative Decision).

upon it. The same is true today as networks evolve to incorporate new means of transmission.

Technology-based regulation would undoubtedly create enforcement issues similar to those encountered following *Computer I*. What happens when technology evolves and the protocols change? How would the Commission sort out the types of communication protocols used over a particular portion of transmission in order to determine the form of regulation that should apply? For example, where an Incumbent Local Exchange Carrier ("ILEC") may change its network to VoIP technology, strict application of technology-based regulation may effectively reduce or eliminate regulation on part of a network and retain regulation on another part. Regulation based on the underlying technology may create a quagmire, to the detriment of customers and providers of all services.

The Commission must, therefore, evaluate all methods of delivering telephone service, including VoIP, in a forward-looking manner. A technology-based approach runs the risk of the categories becoming obsolete as quickly as the technology changes. It would be far more straightforward, efficient and equitable to adopt the simple approach of regulating based upon how the service is used by customers and its interrelationship with the PSTN.

III. VOIP SERVICES SHOULD BE CLASSIFIED AS TITLE II SERVICES.

The Commission seeks comment regarding which classes of VoIP services are "telecommunications services" under the Telecommunications Act of 1996 ("1996

Act")[15] and thus should be subject to Title II regulation, and which are "information services" that should be regulated under Title I.[16] Classifying VoIP services as Title I or Title II services is the heart of this proceeding; it underlies many of the other issues raised in the *Notice*, such as the impact on universal service, people with disabilities, emergency services and law enforcement.[17] As discussed below, VoIP services should be classified as telecommunications services and governed by Title II of the 1996 Act.

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."[18]

By contrast, the 1996 Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."[19] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[20] The simple fact that information may be modified or manipulated in transmission does not matter; the fact that the information sent between two points is the same – in form and in content – as the information received is the

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[15] Pub. L. No. 104-104, 110 Stat. 56

[16] *Notice*, ¶43.

[17] *Id.*, ¶42.

[18] 47 U.S.C. § 153(20).

[19] 47 U.S.C. § 153(43).

[20] 47 U.S.C. § 153(46).

distinction that classifies the transmission as a telecommunications service rather than an information service.[21]

VoIP services do not meet the definition of "information services," but more squarely fit into the definition of "telecommunications services." The Commission should not endanger the potential consumer benefits of this new technology by inappropriately classifying VoIP services as information services. VoIP services are telecommunications services, should be classified as such, and should carry the same responsibilities as other telecommunications services.

A. VoIP Services Qualify as Telecommunications Services by Providing Transmission of Information of the User's Choosing.

As discussed above, consumers may use VoIP services as the functional equivalent of telephone service. When a consumer makes a VoIP call, the recipient of the call hears the consumer's voice and the content of the call without change. Any modification or manipulation made by the VoIP provider is not significant enough to identify the service as an "information service." Thus, VoIP services offer transmission of the voice message and qualify as telecommunications and telecommunications services.

The Commission recognized this in the recent *AT&T Order*.[22] There, the Commission reviewed the important definitions of "telecommunications" and "telecommunications service" and determined that AT&T's form of VoIP qualified under both definitions.[23] AT&T's VoIP service originates on the PSTN, i.e., the AT&T call

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[21] See *Stevens Report*, ¶ 59.

[22] *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, 19 FCC Rcd 7457 (2004) ("*AT&T Order*").

[23] *Id.*, ¶¶ 5, 12-13.

originates at the subscriber's telephone and is transmitted, usually by the serving ILEC, to the originating local switch. The call is then switched to the AT&T Feature Group D trunks.[24] AT&T then reformats the call to IP format and transmits the call to its Internet backbone.[25] In order to terminate the call on an ILEC network, AT&T then reformats the call from IP and terminates the call by using either a local business line or primary rate interface ("PRI") trunk.[26] This final link in terminating the call occurs when AT&T takes the call to the ILEC end office. The final transmission through the local business line or PRI trunk may use the facilities of the local ILEC or a CLEC.

The effect of the AT&T decision may extend to other VoIP services because the method AT&T uses in terminating its VoIP calls is similar, if not identical, to the type of transmission and termination many other VoIP providers use. For example, the *Notice* explains: "When a Vonage customer communicates with a subscriber of ordinary telephone service, Vonage converts its customer's IP packets into the digital TDM (time division multiplexed) format for transfer through a media gateway to the PSTN, and vice versa."[27] Such VoIP calls are reformatted from IP, use a local gateway to be transmitted to the PSTN, and complete the final leg of the transmission – often through PRI trunks – just as AT&T has done.[28] In short, there is no real difference between the essential forms

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[24] *Id.,* ¶ 11.

[25] *Id*.

[26] *Id*., nn.48, 49.

[27] *Notice*, ¶ 15.

[28] In its Petition, Vonage has generally and consistently described this process of terminating Vonage calls on the PSTN as: "[I]f the communications is destined for a station on the PSTN, Vonage converts the information received in the IP packets to a TDM digital signal, and obtains a connection to the PSTN station using the services of an unaffiliated common carrier." *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Vonage Petition (September 22, 2003) ("*Vonage*") at 7.

of terminating local transmission accomplished by AT&T versus Vonage. Each terminates calls upon the PSTN in similar ways. Thus, just like traditional CLECs, Vonage necessarily must arrange for transmission to the PSTN at termination by arrangements to use local facilities for transmission.

The term "transmission" in the definition of "telecommunications" is broad, and the definition of "telecommunications service" encompasses telecommunications "regardless of the facilities used."[29] Accordingly, it does not matter whether the specific transmission at issue takes place over facilities owned by the VoIP provider or over services or facilities that are purchased from a CLEC or ILEC. Under the statute, the length of the transmission that may take place would not be relevant. In all cases, as the PSTN is not able to take IP formatted calls directly, the VoIP provider arranges for the voice traffic to terminate upon the PSTN through various forms of transmission over telecommunications facilities. All types of facilities or services (e.g., local business lines or PRI trunks) are sufficient to meet the broad definition of "transmission." The Commission has held: "Congress's direction that the classification of a provider should not depend on the type of facilities used ... [but] rather on the nature of the service being offered to consumers."[30] The nature of transmission relates to a functional definition, i.e., sufficient to take IP traffic, reformat, transmit and terminate such traffic on the PSTN.

Moreover, transmission also occurs when a VoIP provider, such as Vonage, has established a centralized server to coordinate the transmission of information between subscribers using the Internet. As noted above, the functional and not the technical

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[29] 47 U.S.C. § 153(43); 47 U.S.C. § 153(46).

[30] *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821, n. 140 (2002), citing *Stevens Report*, ¶ 59.

definition of transmission should apply. Vonage acts as a critical link between subscribers across the Internet. Vonage offers transmission functionality, even while using the subscriber's broadband access port to the Internet.

VoIP must engage in "transmission" particularly to the extent that VoIP providers terminate traffic on the PSTN. Thus, at a minimum, the very nature of connecting to the PSTN drives the classification of such services as telecommunications services.

B. VoIP Services Do Not Produce a Net Change in the Form of Voice Communications as Sent and Received by End Users.

A key to VoIP service is that voice is transmitted without change; thus VoIP does not influence "content." One question is whether there is a change in the "form" of the information as sent and received. This question is commonly phrased in terms of "net change." That is, if a voice message, transmitted in real time, employs packet technology, does the "packetizing" of the message constitute a net change in form sufficient to preclude classifying that message as "telecommunications?" The answer is, "no."

This *Notice* should serve as a basis to resolve this issue and to recognize the great functional affinity VoIP services share with existing telecommunications services. Establishing that VoIP services do not change the form of information as sent and received is pivotal to providing regulatory certainty to state commissions, VoIP providers, IXCs, ILECs and CLECs alike.

It is instructive to consider this issue from within the framework of familiar voice telephone service and to draw contrasts between those services and the VoIP services offered via the PSTN, Internet or cable systems. Within the realm of voice telephone service, a change in the physical form of the human voice transmitted on a telephone does

not render a change in form of the information as sent and received. For example, words simultaneously spoken and heard over the telephone do not change from a "telecommunications service" into an "information service" because they are spoken over a cordless telephone (which converts the voice to radio waves and then to an analog signal before transmitting on the PSTN). This change in form does not alter the "net protocol" of the transmission, nor should it alter the regulatory classification of that telephone call. The telephone call originates and terminates as an analog signal at a telephone. In addition, there is no serious contention that employing digital architecture within the transmission path of that call transmutes a telecommunications service into information service.

Likewise, employing packet technology to transmit voice conversations transparently does not alter the form of those conversations so that they become an information service under the 1996 Act. A dialed voice conversation, simultaneously spoken and heard, is the ultimate example of a transmission without change in the form of the information as sent and received. All comparisons in terms of "form" should stem from this known baseline. The proposition that a change in "form" includes the packetizing of voice communications for purposes of transmission would have far-reaching implications. Indeed, as the above examples show, such a radical approach to defining changes in form would render Title II of the 1996 Act meaningless.

The definition of information service or telecommunications in the 1996 Act does not contain the word "protocol." Yet, for purposes of regulatory classification, parties before the Commission (and the Commission itself) have given great weight to whether employing one protocol over another to transmit a telephone call produces a "net change"

in protocol, and if such change has occurred, whether that change produces an impact in terms of the 1996 Act.

A protocol simply is an agreed-upon format for transmitting data between two devices.[31] Protocols determine the technical aspects of an electronic communication. For example, protocols define the types of error checking, when communicating devices use data compression, and indicate how the beginning and end of a transmission is determined. Most importantly, "[f]rom a user's point of view, the only interesting aspect about protocols is that your computer or device must support the right ones if you want to communicate with other computers."[32] Protocols, including IP, are simply one means by which people employ devices to engage in communication. In this instance, the medium is not the message; form does not dictate substance for the purposes of the 1996 Act.

As early as 1998, the Commission recognized in its *Stevens Report* that this is the appropriate approach to this issue. In that Report, the Commission stated, "The protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user."[33] In a similar vein, in its *Cable Modem Order*, the Commission noted that the distinctions between "information services" and "telecommunications services" rest on the functions completed, not on the facilities used.[34] The Commission developed that reasoning from the 1998 *Stevens Report* where it noted that Congress specifically directed that the classification of a provider should not

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[31] http://www.webopedia.com/TERM/p/protocol.html (accessed April 27, 2004).

[32] *Id.*

[33] *Stevens Report,* ¶ 52.

[34] *Internet Over Cable Declaratory Ruling*, Declaratory Ruling, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*"), ¶ 35.

rely on what type of facilities a provider used, but instead on the nature of the service that the provider offers to consumers.[35]

The Commission's recent *AT&T Order* addresses this line of reasoning. The Commission described the service at issue as follows:

> The service at issue in AT&T's petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.[36]

Regarding the protocol conversion occurring in AT&T's provisioning of its service, the Commission reasoned:

> With respect to protocol conversion and phone-to-phone services, the Commission noted in the *Stevens Report* that its *Non-Accounting Safeguards Order* determined that "certain protocol processing services that result in no net protocol conversion to the end user are classified as basic services; those services are deemed telecommunications services." The Commission further stated that "[t]he protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user."[37]

The Commission squarely decided that AT&T's service has no net protocol conversions:

> We clarify that AT&T's specific service is a telecommunications service as defined by the Act. AT&T offers "telecommunications" because it provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to

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[35] *Id.*, n. 140.

[36] *AT&T Order,* ¶ 1

[37] *Id.*, ¶ 7 (footnotes omitted).

> the public." Users of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.[38]

Thus, as the Commission has determined in the *Stevens Report*, the *Cable Modem Order* and the *AT&T Order*, voice telephone calls do not involve a "change in form or content of the information as sent and received."

The Commission's recent decision concerning the Pulver Petition for Declaratory Ruling did not reach the issue of whether individual Free World Dialup members experience net protocol conversions, i.e., a change in the "form," of a telephone-based voice communication.[39] Instead, the Commission determined that Pulver's Free World Dialup service is a simple directory service; it uses neither NANPA numbers, nor does it serve as a gateway to the PSTN.[40] And, it is free.

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[38] *Id.*, ¶ 12 (footnotes omitted).

[39] *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 (2004) ("*Pulver Order*").

[40] *Id.,* ¶ 5.

The Commission determined that Free World Dialup only facilitated communications among "fellow members" through that directory.[41] In this regard, the Commission merely determined that the Free World Dialup directory function provides information different from that provided by the member.[42] Thus, the Commission's determination that Pulver's directory service is an information service does not reach the issue of whether a voice telephone call arranged by a Free World Dialup member is changed in "form" as sent and received based on the simple directory services that Free World Dialup provides.

Although the Commission did not reach the issue in the *Pulver Order*, it has considered similar issues and determined that even when protocol processing is present, some forms of protocol processing are in fact telecommunications services, and not information services. In its *Non-Accounting Safeguards Reconsideration*,[43] the Commission stated:

> We note that, under Computer II and Computer III, we have treated three categories of protocol processing services as basic services, rather than enhanced services. These categories include protocol processing: 1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user).
>
> …
>
> Because the listed protocol processing services are information service capabilities used "for the management, control, or

[41] *Id.*, ¶ 9.

[42] *Id.*

[43] *Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, Order on Reconsideration, 12 FCC Rcd 2297 (1997).

> operation of a telecommunications system or the management of a telecommunications service," they are excepted from the statutory definition of information service. These excepted protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.[44]

The exemptions outlined above show that a "change" in the form of a communication does not automatically include that communication in the information services classification.

A voice communication completed using Vonage's gateways and routers would fall under the first *Non-Accounting Safeguards Reconsideration* exception, i.e., communication in order to initiate, route and terminate a call. That communication would be in part between an end user and the network itself (Vonage gateways and routers) for the initiation, routing and termination of calls, rather than between or among users because those processing facilities are essential to the completion of the call. Vonage's service offerings at its website also make clear that Vonage employs facilities for call metering and local/long distance call segregation for billing purposes.[45] These uses relate to the management, control and operations of the Vonage system.

The service addressed in the *AT&T Order* also falls under the latter two exceptions. That is true because AT&T uses protocol conversion within the heart of the PSTN; it uses protocol conversions simply to achieve transport efficiencies in conjunction with its activities as an IXC.

The Commission's treatment of frame relay service also illustrates that the Commission does not consider protocol conversion to be the hallmark of an information

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[44] *Id.* at 2298-99.

[45] http://www.vonage.com (accessed April 30, 2004).

service. While frame relay protocol differs from VoIP services, both of those services take data and convert it from its existing form into discrete segments for purposes of transmission. It is apparent that both protocols seek transparency and reliability of transmission, even though each may seek those qualities to different degrees. In 1995, the Commission observed:

> Frame relay is a relatively new, high-speed packet-switching technology used to communicate digital data between, among other things, geographically dispersed local area networks (LANs). In addition, frame relay technology often serves as the intermediary format for data traveling between different computer systems employing different communications protocols.
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> As the term suggests, frame relay networks communicate "frames" containing digital data. The format of a frame-defined by a specific interface protocol-consists of a beginning "flag," a "header," a variable length data field, a "trailer," and an ending "flag." The header contains routing and congestion control information, while the trailer holds an error control sequence enabling detection of errors within frames.[46]

It is noteworthy that the Commission's description of frame relay service clearly indicates that this service is a telecommunications service even though it facilitates computer-to-computer communications.

The Commission described the particular frame relay service discussed in that *Memorandum Opinion and Order*:

> According to AT&T's InterSpan Interface Specification, the "core aspects" of its InterSpan Service are: (1) provision of bidirectional frame transfer; (2) maintaining the frames across the network in the same sequence in which they were delivered to the network; (3) detection of errors; (4) transportation of user data transparently; and (5) no acknowledgement of frames (in contrast with X.25 protocol). In addition to these core attributes, InterSpan provides

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[46] *Independent Data Communications Manufacturers Assoc. Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13718 (1995).

> protocol conversion for CPE that does not have a frame relay interface.
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> …
>
> For those customers whose CPE is not equipped to provide the network with frame format data, AT&T provides a variety of protocol conversion functions permitting communication with the frame relay network. Some conversion functions are performed at both ends of the network. That is, a customer may provide data to the network in a foreign protocol, the network converts the data into frame relay protocol, transmits the data across the network, and then converts the data back to the original foreign protocol before delivering the data out of the network. Other conversions take place only at the originating end of the transmission, or only at egress from the network.[47]

The Commission concluded that this service was a basic service, and that AT&T was required to offer it under tariff regardless of whether it was offered alone or in conjunction with enhanced protocol processing.[48] It is therefore apparent that conversion from one protocol to another, or even several conversions in a series, does not require an information services (previously "enhanced services") classification for purposes of the 1996 Act.

C. Telecommunications Services and Information Services May Exist Simultaneously Within One Bundled Service Offering.

VoIP providers frequently offer an array of ancillary data services in conjunction with their basic telephone service offers. The fact that those companies bundle their services in that manner should not cause the companies' overall communications service offerings to fall into one regulatory classification or another.

The Commission has determined that ILECs do not escape Title II regulation by virtue of bundling services like voice mail, an "information service," with basic telephone

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[47] *Id.* at 13718-19 (footnotes omitted) (emphasis added).

[48] *Id.* at 13722.

service. "It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulations of its residential local exchange services simply by packaging that service with voice mail."[49] While that is the case regarding local basic service and information services ancillary to it, the Commission has sometimes taken a different approach to so-called mixed or hybrid services.

The Commission has approached mixed or hybrid service offerings as information services because those services offered an information service in conjunction with an underlying transmission component.[50] The Commission has determined that all information services require a transmission component, and the use of an essential transmission component does not cause an information service to become a telecommunications service.[51] The Commission reasoned that if it did not follow that approach, all information services would fall under the telecommunications services classification.[52] In addition, the Commission added to the analysis the reasoning that non-facilities-based providers of such services would be treated as providing information services while facilities-based providers of such services may be providing telecommunications services.[53] This approach is apparent in the classification of ILEC basic service plus voice mail as a telecommunications service and an information service. Regarding this approach, the Commission held, "the issue is whether, functionally, the consumer is receiving two separate and distinct services."[54]

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[49] *Stevens Report*, ¶ 60.

[50] *Id.*, ¶ 56.

[51] *Id.*, ¶ 57.

[52] *Id.*

[53] *Id.*, ¶ 60.

[54] *Id.*

Although VoIP services tend to offer information processing such as calling lists and voice mail, as a replacement for plain old telephone service VoIP services epitomize a telecommunication service. To consider VoIP services as only information services is to deny that voice services constitute a separate functional role independent of whatever vertical services that VoIP providers may offer. That is to say, the Commission should not establish a regulatory scheme whereby VoIP providers may "enhance" their way into an unregulated information services classification simply by bundling information services with their telecommunications service.

A recent Ninth Circuit decision effectively supports NASUCA's position. The cable modem regulatory classification developed by that court supports the approach advocated by NASUCA. The Ninth Circuit stated: "We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act."[55] The court reasoned that cable modem service providers offer a service that contains both a telecommunications offering and an information service offering as a part of the cable modem service.[56] The court stated that in the 1996 Act, Congress defined advanced telecommunications capability "without regard to any transmission media or technology," in terms that describe cable broadband: "high-speed, switched, broadband

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[55] *AT&T v. City of Portland*, 216 F.3d 871, 880 (9th Cir. 2000), *aff'd Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[56] 345 F.3d at 1132.

telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[57]

The Ninth Circuit's reasoning here would appear to embrace VoIP services as telecommunications regardless of the fact that VoIP service providers may also simultaneously provide information services to end users. Thus, information services may be offered in conjunction with telecommunications services without causing the entire service offering to become an information service.

D. Instead of Classifying VoIP Services under Title I, the Commission Should Classify Them under Title II and Then Decide Whether to Forbear from Imposing Specific Regulatory Requirements.

The Commission seeks comment on:

> (1) what regulations, if any would apply to each class of VoIP services, given the legal classification urged for that class; (2) whether, for services classified as "telecommunications services," we should use our forbearance authority to remove a particular obligation or entitlement, and (3) whether, for services classified as "information services," we should exercise our ancillary jurisdiction to impose a particular obligation or entitlement.[58]

It is critical that the Commission appropriately classify VoIP services as telecommunications services under Title II to ensure that as many people as possible realize the benefits of these services. Placing VoIP services under Title I as information services may unnecessarily limit the Commission's ability to impose certain public policy (or other) requirements on these services, as discussed further below.

On the other hand, classifying VoIP services as telecommunications services under Title II would give the Commission flexibility in regulating VoIP. By classifying

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[57] 216 F.3d at 879.

[58] *Notice*, ¶74.

these services under Title II, the Commission would still have the opportunity to forbear from requiring certain types of regulation where an evidentiary record shows such requirements to be unnecessary.

The Commission has been given broad authority to forbear from applying a regulation to a service. The 1996 Act allows forbearance if the Commission determines that: 1) enforcement of such regulation is not necessary to ensure just and reasonable rates or practices; 2) enforcement of such regulation is not necessary for the protection of consumers; and 3) forbearance is in the public interest.[59] The Commission specifically notes this authority in the *Notice*[60] and seeks comment on whether it should exercise forbearance with regard to VoIP services.[61] The Commission has exercised its forbearance authority on various occasions. In particular, the Commission forbore from applying most Title II economic regulations on commercial mobile radio service ("wireless") providers based on the competitive nature of the wireless marketplace.[62] In the wireless context, the Commission has determined to exercise its forbearance authority several times with respect to wireless providers because it found that consumers have competitive choices available to them.[63] In so doing, the Commission declined to apply sections 203, 204, 205, 211 and 214 of the 1996 Act to wireless providers.[64]

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[59] 47 U.S.C. § 160(a).

[60] *Notice,* ¶42.

[61] *Id.,* ¶49.

[62] *Id.*, ¶67; citing, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994), *aff'd, Orloff v. FCC*, 352 F.2d 630, 642 (D.C. Cir. 1976). See also 47 U.S.C. § 332(c)(1).

[63] *Notice*, n. 219.

[64] *Id.* See 47 U.S.C. § 203 (Schedule of charges), 47 U.S.C. § 204 (Hearing as to lawfulness of new charges; suspension), 47 U.S.C. § 205 (Commission authorized to prescribe just and reasonable charges), 47 U.S.C. § 211 (Copies of contracts to be filed), 47 U.S.C. § 214 (Extension of Lines).

The Commission also exercised its forbearance authority in prohibiting long-distance carriers ("IXCs") from filing tariffs with the Commission.[65] Prior to the 1996 Act, the Communications Act of 1934 mandated a tariff regime that required the Commission to review telecommunications carriers' tariffs to ensure their reasonableness. After the adoption of 47 U.S.C. § 160, the Commission determined to forbear from applying that requirement.[66] The IXCs appealed, arguing that the Commission's intention to order mandatory detariffing both exceeded the Commission's authority and was unreasonable.[67] The D.C. Circuit, however, found that the Commission's interpretation of the forbearance provisions of the 1996 Act was entitled to *Chevron*[68] deference and upheld the Commission's forbearance actions in the matter.

The D.C. Circuit also upheld the Commission's determination *not* to exercise its forbearance authority when it refused to grant permanent forbearance to wireless providers from enforcement of wireless number portability rules. The Commission had refused to make permanent its previous grant of the Cellular Telecommunications & Internet Association's request for a temporary forbearance from the Commission's wireless number portability rules. On appeal, the D.C. Circuit again relied on *Chevron* in finding that the Commission's interpretation and application of the second prong of the enforcement test under 47 U.S.C. § 160(a) was permissible and reasonable.[69] In affirming the Commission's decision, the D.C. Circuit held that the Commission

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[65] *MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 763 (D.C. Cir. 2000).

[66] *Id.*

[67] *Id.*

[68] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[69] *Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (D.C. Cir. 2003).

reasonably found that the number portability rules are required to achieve the desired statutory goal of consumer protection.[70]

The Commission should classify VoIP services as telecommunications services under Title II. The Commission could then forbear from imposing certain regulatory requirements on these services if the statutory test is met. This approach is more appropriate than classifying VoIP services under Title I and then trying to impose (or reimpose) any requirements on these services in the future.

E. Classifying VoIP Services as Telecommunications Services Need Not Restrict the Deployment of Such Services.

As the Commission addresses the issues raised in the *Notice*, the Commission must consider that classifying VoIP services as telecommunications services under Title II need not restrict the deployment of VoIP services, as some have feared. The Commission has previously applied Title II to other industries, such as telecommunications resellers and CLECs, without damaging their business opportunities. Such classifications have been done while treating ILECs as telecommunications service providers and regulating them quite differently. Classifying VoIP services as telecommunications services need not restrict the deployment of such services.

In support of this position, NASUCA notes that telecommunications resellers provide services that are classified as telecommunications services under Title II. The Commission has held that "'resale carriers,' whether they be brokers or 'value added' carriers…, are equally subject to the requirements of Title II of the Communications

[70] *Id.* at 504.

Act"[71] and that "resellers have a duty to serve just as do the carriers owning their facilities."[72] The Commission has also concluded that the "public interest is served by our adoption of a policy requiring unlimited resale and sharing of private line services and facilities, and the regulation of resellers (but not sharers) under Title II of the Act."[73] Simultaneously, telecommunications resale has become a significant method of competitive entry into the local telecommunications business. Similar to resellers, CLECs also are classified as providing telecommunications services under Title II of the 1996 Act[74] and have obtained nearly 27 million end-user access lines.[75] Even so, resellers and CLECs are lightly regulated by the Commission under Title II. Clearly, then, classifying telecommunications resellers and CLECs under Title II has not hindered those industries.

If the Commission determines not to declare that VoIP services are telecommunications services, the Commission should consider imposing important Title II requirements on these services even though they are being classified as Title I services. As discussed throughout these Comments, the more appropriate action, however, would

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[71] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, RM-1997 and RM-2218, Memorandum Opinion and Order, 62 F.C.C.2d 588 (1977) ("*Resale Order*"), ¶ 20. See also *800 Presubscription Rules for 800 Providers and Responsible Organizations*, Docket No. 86-10, Order, 8 FCC Rcd 7315 (1993), ¶ 17 ("unique status of resellers as carriers as well as customers that sometimes carries with it obligations that are not imposed on other customers" noting, "for example, as common carriers, resellers must comply with Title II of the Communications Act."); *American Telephone and Telegraph Company*, Docket No. 83-1375, Notice of Proposed Rulemaking, 96 F.C.C.2d 1 (1984), ¶ 14 (other obligations including the requirement of just, reasonable and nondiscriminatory rates and the complaint process apply to resold services).

[72] *Resale Order*, ¶ 20.

[73] *Id.,* ¶ 27.

[74] See, e.g., *In Re: Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001) at n. 127.

[75] *Local Telephone Competition: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (released December 22, 2003) at Table 10.

be to declare VoIP services to be telecommunications services and then forbear from imposing some Title II requirements on those services if the Commission chooses to do so upon consideration of a fully developed record. Title I alone, however, is likely to be a poor substitute for the consumer protections afforded by Title II regulation, particularly as this vital technology becomes more widespread. Rather, classifying VoIP services as a telecommunications service will enhance consumer safeguards and not restrict the deployment of such services.

F. If the Commission Classifies VoIP Services as Information Services, It Should Simultaneously Impose Additional Requirements on Such Services to Protect the Public Interest.

VoIP services are telecommunications services and are properly regulated under Title II. If the Commission classifies VoIP services as information services, however, it should simultaneously impose additional requirements on such services to protect important public policies, as discussed throughout these Comments.

Certainly, this is not the first time the Commission has been faced with the issue of whether to classify a new service or technology as an information service under Title I or a telecommunications service under Title II. As discussed throughout the *Notice*, the Commission has long distinguished between "basic" and "enhanced" service offerings, initially through its *Computer Inquiry* line of decisions[76] where the Commission exercised its Title I jurisdiction to impose conditions on both telephone carriers' entry into the enhanced services market and their provision of basic service to enhanced service providers.

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[76] *Notice,* ¶25.

Then, in 1996 Congress codified the Commission's distinctions between "basic" and "enhanced" services through definitions of "telecommunications," "telecommunications service" and "information service."[77] The Commission has addressed these terms recently in the wireline broadband reclassification proceeding[78] where the Commission intends to address the regulatory classification of wireline broadband Internet access services. In the *Wireline Broadband NPRM*, the Commission tentatively concluded that broadband Internet access services supplied over telecommunications infrastructure with no underlying transmission services also supplied at the wholesale level are information services.[79] In the *Pulver Order*, the Commission declared Free World Dialup service to be an unregulated information service subject to the Commission's jurisdiction. In doing so, however, the Commission specifically stated that its holding applied only to the specific functions Free World Dialup provides its members.[80]

Unfortunately, and despite these determinations by the Commission, it is unclear what being classified as an information service under Title I means. Title I is primarily an administrative section of the 1996 Act. Title I, among other things, delineates the composition of the Commission, provides definitions of various terms and articulates the fee schedule for certain filings and other actions. Title I has been referred to as the Commission's "ancillary jurisdiction" over "matters not within the reach of Title II

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[77] *Notice*, ¶¶ 26-27.

[78] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*").

[79] *Id.,* ¶ 17.

[80] *Pulver Order,* ¶ 7.

regulation."[81] In *United States v. Southwestern Cable Co.*,[82] the Supreme Court held that the Commission might assert jurisdiction over activities that are not within the reach of Title II if such activities were "reasonably ancillary to the effective performance of the Commission's various responsibilities."[83] One of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices.[84] The Commission has recognized that it has only rarely sought to regulate information services using its Title I authority.[85]

The Commission has previously found that e-mail, the World Wide Web, newsgroups, fax store-and-forward, interactive voice response, gateway, audiotext information services and protocol processing, for example are all enhanced services classified under Title I.[86] Clearly, VoIP is more like telecommunications services than any of these other services.

The Commission may have little or no authority over VoIP services under Title I. Essentially, classifying VoIP services as information services may not give the Commission effective authority over what are essentially voice telephone services. Much is at stake. It is better to have the option of effective regulation of these services – and forbear from exercising this authority – than lose the opportunity of effective regulation.

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[81] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999), ¶ 94, citing, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[82] 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

[83] 392 U.S. at 172-173.

[84] 693 F.2d at 213.

[85] *Pulver Order* at n. 64.

[86] See Cannon, *supra* note 13, at 188 (citations omitted).

Classifying VoIP services solely as information services under Title I is shortsighted and fails to recognize the trend of more voice traffic being carried over these services. More people will be relying on VoIP services as their sole source of telecommunications services. If the Commission now classifies VoIP services as information services, then Title II regulation may effectively vanish and support for universal service and consumer protection may likewise erode. The Commission should have the foresight now to avoid such a situation and maintain Title II regulation over VoIP services.

As discussed throughout these Comments, classifying VoIP services as telecommunications services under Title II of the 1996 Act would allow for consumer protection provisions to be afforded as well as protections regarding quality of service, switching service providers, truth-in-billing and service termination, at both the state and federal levels. Classifying these services as information services under Title I may defeat these protections and do a great disservice to the public interest. Even so, if the Commission chooses to apply Title I regulation to VoIP services, it should continue to apply specific regulatory requirements as identified in these Comments.

G. VoIP Services Should Also Comply with Number Porting Requirements.

Congress and the Commission have guaranteed that consumers will enjoy the benefit of local number portability ("LNP") between telecommunications carriers.[87] This is an essential consumer benefit that is now offered to consumers of wireline and wireless services. Congress determined that the inability of consumers to port their phone numbers from one competitor to another would greatly diminish the ability of consumers

[87] 47 U.S.C. § 251(b)(2).

to enjoy telephone competition. Where consumers are unable to port their telephone numbers from one telecommunications service provider to another, consumers are much less likely to change providers.

The Commission inquires whether it should apply requirements, such as LNP, that are applicable to local exchange carriers to VoIP providers.[88] NASUCA understands that in some instances VoIP providers allow consumers to port their telephone numbers to the VoIP provider, but will not allow consumers to port that number from the VoIP provider to another competitor. Consumers who are accustomed to porting their telephone numbers between ILECs, CLECs and wireless carriers may never consider the possibility that they will not be able to port their telephone number to and from a VoIP provider. Consumers will be harmed to the extent that they inadvertently lose the telephone numbers they have had for many years when switching to a VoIP provider that may not allow them to port out their number.

NASUCA notes that the Commission has generally referred to local number portability as a form of economic regulation.[89] It is more appropriate, however, to consider LNP in the context of promoting competition and consumer benefits. The Commission should not deny LNP to consumers depending upon whether they use an ILEC, CLEC, wireless or VoIP provider.

VoIP providers qualify as a local exchange carrier pursuant to 47 U.S.C. § 251(b)(2) and must offer LNP. A local exchange carrier is defined as any person offering telephone exchange service or exchange access.[90] Telephone exchange service is defined

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[88] *Notice*, ¶¶ 73-74.

[89] *Id*.

[90] 47 U.S.C. § 153(26).

as a service by which a consumer can "originate and terminate a telecommunications service" within an exchange.[91] NASUCA has explained above how VoIP providers that use the PSTN offer a telecommunications service. VoIP providers offer telecommunications services for calling within the local exchange, as well as for interstate and international calls. Offering telecommunications service is at the heart of being a local exchange carrier. Thus, VoIP providers would also qualify as local exchange carriers for the purpose of requiring LNP. Nonetheless, whether or not the Commission decides to classify VoIP providers as local exchange carriers, it should clearly apply LNP requirements to VoIP providers.

H. VoIP Providers Should Be Able to Use Unbundled Network Elements.

The Commission states: "The Act also entitles providers of telecommunications services to use certain incumbent LEC network elements on an unbundled basis and at cost-based rates."[92] The right to purchase Unbundled Network Elements ("UNEs") applies to telecommunications carriers pursuant to 47 U.S.C. § 251(c)(3). A "telecommunications carrier" is essentially defined as a provider of telecommunications services. Once again, NASUCA has explained above how VoIP providers offer telecommunications services. Thus, VoIP providers qualify as telecommunications carriers for the purpose of purchasing UNEs.

It may be advantageous for VoIP providers to purchase UNEs in order to provision services. VoIP providers often use a broadband connection in order to provision the service. It may prove helpful to purchase UNEs in order to accomplish

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[91] 47 U.S.C. § 153(47).

[92] *Notice*, ¶ 73 (footnote omitted).

such service. Accordingly, NASUCA advocates that the Commission should allow VoIP providers to purchase UNEs.

I. VoIP Providers Should Certify Compliance with Commission Requirements to Assist Consumers in Shopping for VoIP Service.

Because VoIP is a telecommunications service, VoIP providers should be compelled to abide by the applicable Commission rules. NASUCA also notes that, however the Commission chooses to apply regulatory requirements to VoIP providers, the problem of regulatory noncompliance and consumer misunderstanding as to the types of service offered by VoIP providers may persist. It is possible that, even as the Commission compels VoIP providers to abide by various requirements, e.g., E911 service, privacy, etc., some VoIP providers may offer their services without complying with the applicable rules. Moreover, it may be difficult for consumers to understand the Commission requirements and crosscheck the VoIP service that they wish to purchase and make sure of regulatory compliance.

Consumers need to be informed as to the regulatory compliance of the VoIP providers as they shop for services. Much of the shopping that now takes place for such services occurs on the Internet. In other cases, solicitation for VoIP services may take place through telemarketing calls. Whatever the context, the Commission should require VoIP providers, in any solicitation to customers, to certify whether or not they are complying with Commission requirements. On their web sites, VoIP providers should prominently display such certification – or should be required to announce their lack of certification.

Moreover, NASUCA is uncertain how the Commission will impose these requirements and the extent to which VoIP providers will comply. Presently, there is no

easy way to determine whether the VoIP provider is complying with any applicable standard. NASUCA emphasizes that, no matter how the Commission wishes to apply the applicable rules to VoIP providers, all VoIP providers that seek to sell VoIP service within the United States must indicate whether they either do or do not comply with Commission requirements in their consumer solicitations, including telemarketing calls to consumers.

J. Dominant ILECs Should Not Be Able to Avoid Regulatory Requirements Simply by Modifying the Protocols over which Their Calls Are Taken.

Most ILECs operate under rate of return or price cap regulatory regimes that have been in existence for decades. These regimes largely recognize the dominance of ILECs in their local exchange markets. Some smaller and rural ILECs remain local service monopolists and, despite the efforts of legislators, regulators and competitors, will likely remain monopolists for the foreseeable future. This is because many of these ILECs' markets are unattractive to competitors, primarily due to the cost of providing service ubiquitously to residential or small business customers.

Most larger ILECs remain the dominant local service provider in their territories, especially for residential service. In many areas, competitors have only recently obtained pricing for the ILECs' UNE-platform ("UNE-P") that makes serving residential customers a lucrative venture. In Ohio, for example, residential competition soared when UNE-P rates were lowered two years ago. Use of the UNE-P now accounts for more than 90% of residential competition in Ohio. Still, ILECs provide more than 80% of the residential local exchange service in most states. Moreover, because of the aggressive bundling and win-back programs of most ILECs, their underlying market position will

not change simply because they use a more efficient network protocol and migrate to VoIP.

Thus, it is important for ILECs that transition to VoIP to retain their current regulatory regime. Many ILECs will likely move to VoIP based upon the applicable network efficiencies and services available. The regulatory regime of the established services of dominant ILECs that serve residential or small business customers should not change even though the mode of transmission may change from circuit switched to VoIP. The Commission should not adopt any rules that would exempt dominant ILECs from the applicable regulations simply because they migrate to VoIP. This Commission and state commissions should ensure that monopolist and dominant ILECs remain subject to economic regulation.

IV. THE COMMISSION SHOULD NOT PRECLUDE STATES FROM ADOPTING SERVICE QUALITY AND OTHER CONSUMER PROTECTION STANDARDS FOR VOIP.

Even if the Commission determines VoIP is an interstate service, some aspects of VoIP are intrastate in nature. Thus, state regulators should be able to establish and enforce service quality and other consumer protection standards.

A. The Commission Should Recognize that Calls that Begin and End in the Same State Are Subject to the State's Jurisdiction.

As discussed in the previous sections, VoIP service (along with possibly other IP-enabled services) is a telecommunications service.[93] The next question is, then, whether

[93] Free World Dialup is an information service. The services discussed here are functionally different from Free World Dialup, thus not subject to the Commission's determination that Free World Dialup is an information service subject to exclusive state jurisdiction. *Id.*, ¶ 38. Yet as discussed herein, the principles in the *Pulver Order* can show the appropriateness of state regulation of VoIP.

federal regulators (the Commission) or state regulators (state commissions), or both, have jurisdiction over the service.

In the "good old days" where the PSTN was the only network, a call that began and terminated within the same state was clearly an intrastate call, subject to state commission jurisdiction. Likewise, calls that terminated in a different state were interstate calls.

This is the fundamental proposition of the Commission's "end-to-end" analysis. The Commission used that proposition to argue that calls to ISPs were interstate, because they ended up in the Internet "cloud."[94] In *Bell Atlantic*, the Court of Appeals found that the Commission had inadequately justified its determination that ISP-bound calls were interstate, while upholding the correctness of the end-to-end analysis.

If a VoIP subscriber makes a call to a number within the same state, on an end-to-end analysis the call is intrastate, even if the call has traversed the Internet cloud to reach its destination. Thus state commissions should have jurisdiction over such calls.

In the *Pulver Order*, the Commission found that the end-to-end analysis did not work for Free World Dialup.[95] Free World Dialup does not use the NANP, and cannot be used to communicate with non-Free World Dialup members. By contrast, most VoIP services are absolutely dependent on their customers' ability to terminate calls on the PSTN and vice versa. The end points of the conversation are determinable.

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[94] *Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 99-96, 14 FCC Rcd 3689, 3690 (1999), *rev'd, Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*").

[95] *Pulver Order*, ¶ 21.

The Commission states that, as to information services, federal authority is preeminent.[96] No such preeminence applies to telecommunications services. For telecommunications services, the other issues that the Commission used to assert federal jurisdiction over Free World Dialup also apply, but are equally not determinant of whether there should be intrastate jurisdiction. For example, the Commission states in the *Pulver Order*, "We also determined that state-by-state regulation of [Free World Dialup], an Internet application, is inconsistent with the controlling federal role over interstate commerce required by the Constitution."[97] No such "controlling role" is required for telecommunications services.

The "mixed use" doctrine is used where it is "impractical or impossible to separate out interstate from intrastate traffic carried over a shared facility."[98] On the assumption that the Internet is a shared facility, it is entirely practical to separate VoIP calls that begin and end within a single state, where those calls use NANP numbers.[99]

The Commission also requests comments on whether "one or more classes of IP-enabled service should be deemed subject to *exclusive* federal jurisdiction…."[100] Clearly, the federal government has not occupied the field of voice communications so as to leave no room for state regulation.[101] Preemption of state regulation of VoIP is not necessary

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[96] *Notice*, ¶ 39.

[97] *Id*.

[98] *Id*., n.130.

[99] This addresses the Commission's concern over locating the source of a packet. *Id*., ¶ 40.

[100] *Id*., ¶ 41.

[101] *Id*.

under *Maryland PSC v. FCC*.[102]

The Commission notes the prohibition in 47 U.S.C. § 253(a) against state regulation that may prohibit the ability of any entity to provide telecommunications service.[103] Of course, this prohibition applies only if the service in question is a telecommunications service. As demonstrated above, VoIP is indeed a telecommunications service, so the restriction in § 253(a) would apply. Yet the Commission fails to note that § 253(b) explicitly allows state regulation "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."[104] As discussed elsewhere, those are precisely the areas in which state regulation of VoIP service is necessary.

If, as demonstrated here, VoIP service is both intrastate and interstate, then the states should be permitted to regulate (or not[105]) as they deem appropriate. Even if this Commission determines to assume regulatory primacy over VoIP service, however, this does not mean that the Commission should preempt all state regulation of VoIP. In particular, as discussed below, the Commission should allow the states – that clearly have

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[102] 909 F.2d 1510, 1515 (D.C. Cir. 1990). Preemption is appropriate where "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of intrastate aspects." (Internal quotations and citations omitted.)

[103] *Notice*, ¶ 41.

[104] The prohibition on states regulating the entry of wireless providers (*id.*) would apply only if the VoIP provider's service was exclusively wireless.

[105] See *id.*, ¶ 34, n. 115.

an interest in the intrastate use of the service – to enforce service quality standards as the states deem appropriate.[106]

As the Commission recognizes, E911 issues are key in the discussion of the proper regulatory treatment of VoIP.[107] (The need for VoIP providers to provide E911 capabilities is discussed at length elsewhere in these comments.) Commission preemption of state action on VoIP will have severe impacts on state E911 capabilities. More specifically, if the Commission preempts state action on VoIP, this will at best lead to questions, and at worst lead to effective challenges to the states' abilities to fund E911.

The same concerns arise over universal service issues, which the Commission has also recognized as important for VoIP.[108] Commission preemption of state action on VoIP will prevent the states from taking, on the intrastate level, whatever action the Commission takes on the interstate level to bring VoIP within the fold of services that contribute to universal service support.[109]

B. States Need to Be Able to Apply Service Quality Standards to VoIP in Order to Avoid Erosion of Service Quality on the PSTN.

A federal regulatory scheme for VoIP that does not address service quality could have a far-reaching impact on state regulation of the PSTN. If states cannot apply service quality standards to VoIP, there may be a "race to the bottom" as ILECs, and even non-VoIP CLECs, move their customers off the PSTN or seek to reduce the regulatory

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[106] VoIP providers will have recourse to the Commission – as well as to states courts – to address "oppressive" service quality regulation.

[107] *Id*, ¶¶ 50-57.

[108] *Id*., ¶¶ 63-66.

[109] Notably, if the Commission determines that VoIP is an exclusively interstate service, then 100% of VoIP revenues should be assessed for the federal universal service fund.

obligations of their PSTN-based operations by claiming a need to level the competitive playing field.

Rather than fulfilling the promise of improved service quality, VoIP service that excludes state service quality regulation may instead subject customers to lower service quality, with few alternatives. As in most industries, telecom companies play "follow the leader" in their operations. If a VoIP provider is allowed to offer telephone service without meeting certain service quality standards (e.g., by providing bills on a less timely manner or with inadequate detail, or providing customers inadequate notice of disconnection), others will follow suit, either by offering VoIP service or by seeking waivers of the standards. As a result, consumers may have more choices for service, but the service they get would be inferior to the service they now receive. This runs counter to the vision of the 1996 Act.

The "race to the bottom" has already been attempted in at least one state. ILEC interests argued at the Public Utilities Commission of Ohio ("PUCO") that ILECs should be granted the same waivers from the state's minimum telephone service standards that they believed were granted to the proposed VoIP service of Time Warner.[110] SBC Ohio asserted that the waivers were necessary to "restore the competitive equilibrium to the marketplace in which [Time Warner] *will* compete…."[111] In other words, the largest

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[110] *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC to Offer Local and Interexchange Voice Services*, PUCO Case No. 03-2229-TP-ACE, SBC Ohio's Application for Rehearing (January 16, 2004) (http://dis.puc.state.oh.us/CMPDFs/E9V1W4Y2W9K8NOJ@.pdf) and Application for Rehearing of the Ohio Telecom Association (January 16, 2004) (http://dis.puc.state.oh.us/CMPDFs/SCB+$5XQO8L9OQJU.pdf). See also *In the Matter of the Amendment of the Minimum Telephone Service Standards As Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, PUCO Case No. 00-1265-TP-ORD, SBC Ohio's Request for Waiver (January 16, 2004) ("SBC Ohio Waiver Request") (http://dis.puc.state.oh.us/CMPDFs/J2+BUGD$VLI6LMG6.pdf).

[111] SBC Ohio Waiver Request at 5 (emphasis added).

telephone company in Ohio – one that has been in business in Ohio for more than 100 years, that still has approximately 80% of the residential access lines in its service territory[112] and that still faces no facilities-based competition for residential customers in many of its exchanges[113] – claimed that it needed PUCO intervention to compete with a company that at the time had yet to begin providing VoIP service in Ohio.[114]

Because they are closer to the affected consumers, and in some cases are elected by those consumers, state public utility commissions are in a better position to determine which service quality standards are necessary for the provision of VoIP in their states. The Commission should not preclude oversight of VoIP by state regulators.

C. States Should Not Be Precluded from Enforcing Their Own Consumer Protection Statutes Against VoIP Providers.

Consumers should be entitled to benefit from the same consumer protections whether their phone service is carried over switched access circuits or the Internet. VoIP and IP-enabled service providers will have an incentive to exaggerate their claims and minimize their defects due to competitive market pressures. Telecom companies, Internet service providers, and others are marketing VoIP and IP as a cheap alternative to

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[112] See *In the Matter of the Joint Application of SBC Communications, Inc., Delaware, Inc., SBC Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, PUCO Case No. 98-1082-TP-AMT, Executive Summary of the Year 2002 Competition Report Using the Diagnostic Method for Assessing Competition (March 31, 2003) at 2 (http://dis.puc.state.oh.us/CMPDFs/YMBEBD5ZTBP2XXE7.pdf).

[113] For example, evidence in the PUCO's Triennial Review proceeding shows that no competitive local service providers have obtained mass market unbundled network element loops from SBC Ohio in nine of the 19 central offices in the Akron Metropolitan Statistical Area ("MSA"), nine of the 40 central offices in the Cleveland-Elyria-Mentor MSA, eleven of the 30 central offices in the Columbus MSA, eight of the 20 central offices in the Dayton MSA and four of the 12 central offices in the Toledo MSA. See *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market*, PUCO Case No. 03-2040-TP-COI, Prefiled Direct Testimony of William C. Deere, (November 12, 2003), Attachment WCD-3 (http://dis.puc.state.oh.us/CMPDFs/FN1RSYBCP9N8A0QJ.pdf).

[114] The PUCO later clarified that it had not granted any waivers for Time Warner's VoIP service, and would address the waiver issue in its own generic VoIP docket.

local, long distance and international calling services that offer many computer-enhanced features. Consumer protections on privacy, truth in billing, and truth in advertising may be ignored unless the Commission affirmatively acknowledges the need for such protections.

The Commission appears to have concluded preliminarily that consumer protections existing for traditional phone line customers should extend to VoIP and IP-enabled service customers.[115] This tentative conclusion is correct and is necessary to ensure consumer confidence in VoIP and IP-enabled services. If consumers discover that they cannot rely on their VoIP phones to contact emergency personnel, or rely on VoIP service providers' marketing representations and promises, or understand their VoIP billing statements, or count on IP-enabled services to protect their Customer Proprietary Network Information ("CPNI") and privacy, then consumers will eventually stop purchasing VoIP products and the VoIP industry will falter. While the "invisible hand" of the competitive market is working, however, many consumers will suffer. It is therefore in the VoIP industry's best interest and in the public interest to require VoIP and IP-enabled service providers to submit to the same consumer protection that apply to traditional phone providers.

This principle should apply to state as well as federal consumer protection laws. As a matter of convenience and familiarity, consumers are often more willing to file

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[115] "As discussed below, other aspects of the existing regulatory framework – including those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access for authorized wiretapping purposes, consumer privacy, and others – should continue to have relevance as communications migrate to IP-enabled services. … As discussed above, fencing off IP platforms from economic regulation traditionally applied to legacy telecommunications services would not put them beyond the reach of regulations designed to promote public safety and consumer protection (such as E911) or other important public policy concerns." *Notice*, ¶ 5.

complaints with state agencies than with federal authorities. Thus, it is essential that the Commission not preclude state officials from applying state consumer protections standards to VoIP services.

Federal preemption of VoIP regulation could have a damaging impact on state consumer protection standards. Some states exempt transactions between public utilities and their customers from state consumer sales practices acts ("CSPA").[116] This is because public utilities are regulated by state commissions, and thus legislators avoid subjecting the utilities to a second state authority, i.e., the attorney general. Nevertheless, the state commission will often apply CSPA principles to consumers' complaints about utility service. If the Commission strips state commissions of all authority over VoIP, however, consumers will lose an important level of protection and the Commission may expose itself to reversal in court.[117]

State CSPAs are designed to protect consumers, even in a competitive environment. Consumers should not be deprived of that benefit. The Commission should not preclude states from applying consumer protection standards to VoIP.

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[116] See, e.g., Ohio Rev. Code Ann. § 1345.01(A) (Anderson 2000).

[117] The Commission should find instructive on this point recent consumer protection preemption litigation in the wireless industry. In at least one circumstance, a wireless carrier that attempted to challenge the application of state consumer protection laws in federal court found its petition remanded to state court for lack of subject matter jurisdiction. See *State Ex Rel Nixon v. Nextel West Corp.,* 248 F. Supp.2d 885 (E.D. Mo 2003) (State Attorney General's claims of deceptive advertising and packaging against Nextel and Sprint in consumer billing label dispute was not federally preempted and did not raise substantial federal question under the Communications Act of 1934). As there is no clear expression of Congressional intent to preempt state consumer protection laws as they apply to VoIP services, the Commission should not attempt to prevent states from exercising their responsibilities to their citizens.

V. THE PUBLIC INTEREST REQUIRES FULL ENHANCED 911 ACCESS FOR CUSTOMERS OF VOIP, AND THE COLLECTION AND REMITTANCE OF 911 SURCHARGES BY VOIP PROVIDERS.

Public safety and homeland security depend upon citizens' ability to quickly and efficiently access emergency services by dialing 911. Public Safety Answering Points ("PSAPs") must have accurate callback and location information to respond quickly to a 911 call. Lives depend on it and seconds count. When weighed against the "risk that regulation could slow technical and market development" of a new service or technology for transmitting voice and data, there is no contest – public safety, homeland security, and citizens' lives and property must be paramount.

The public safety community best articulated the appropriate Commission standard for determining whether to extend E911 requirements to particular entities: if the user has a reasonable expectation that a service or device will provide access to emergency services by dialing 911, then the provider must be required to equip the service or device with the capability to route the call to the appropriate PSAP with the callback and location information.[118] By this standard, VoIP must provide E911 access to customers. And, VoIP providers who transmit 911 calls using the PSTN and 911 networks must also contribute to their support by collecting and remitting the surcharge established in each state and locality.

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[118] See Comments of the Association of Public-Safety Communications Officials International, Inc. ("APCO") at 4 and Comments of NENA and NASNA at 2, 16 in *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Amendment of Parts 2 and 25 to Implement the Global Mobile personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band,* CC Docket No. 94-102, IB Docket No. 99-67, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576 (2002).

The Commission in its *E911 Scope* Order identified four criteria for determining whether it should extend its wireless and wireline E911 requirements to other entities: (1) the entity offers real-time, two-way switched voice service over the PSTN; (2) users of the service or device have a reasonable expectation of access to 911/E911 services; (3) the service competes with traditional wireline or wireless service; and (4) E911 is technically and operationally feasible through the service or device.[119] While NASUCA agrees that these are all relevant criteria for determining whether to extend the Commission's E911 requirements to VoIP providers, customer expectations of being able to reach 911/E911 emergency services should drive the Commission's decision.[120]

The public interest in this instance must be defined by public safety and homeland security considerations. In an emergency, consumers will pick up the nearest telephone and dial 911 with the expectation that the responding PSAP will know their callback number and location. (In some cases, consumers will be unable to give that information themselves.) Immediate public safety response to protect life and property depends on location information, the key difference between basic and enhanced 911. When seconds count, customers must be able to call 911 on services that are marketed and function as basic telephone service, regardless of the fine print to the contrary buried in the terms and conditions often overlooked by consumers.

The Hatfield Report, prepared for the Commission in 2002, emphasized the criticality of E911 to public safety and homeland security:

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[119] See *Notice*, ¶ 55.

[120] Although NASUCA relies on the customer expectation criterion in its response, VoIP services that use the PSTN via packet switching and are marketed or function like wireline or wireless local exchange service meet the first and third criteria as well. We will discuss the fourth criterion separately.

> *First,* the importance of 911 as the Nation's universal emergency assistance number has long been recognized. That importance was acknowledged with the passage of the Wireless Communications and Public Safety Act of 1999. Subsequent developments, e.g., the tragic events of September 11, 2001 and growing dependence on wireless networks, serve to further emphasize the importance of E911 in general, and wireless E911 in particular, to the safety of life and property and homeland security. The automatic provision of location information with wireline and wireless 911 calls – i.e., E911 – is critical to those emergency services.[121]
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> …
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> Even before the events of September 11, 2001, the importance of wireless E911 to those who must react to emergencies was clear and increasing. PSAPs, and the public safety community, are on the front lines in the defense against these emerging threats, as well as in handling conventional emergencies. Accurate position reporting is essential in both types of situations. In the case of terrorist activity, for example, accurate position information is essential to allowing law enforcement units to respond quickly to reports of suspicious activity. Indeed, a timely response to a call conveying such a report could make the difference between a foiled or successful attack. In the event of an actual attack, it is almost certain that a large number of emergency calls would be placed to the PSAP. Once again, accurate position information is important because it helps the PSAP screen calls that may be placed in response to the same event.[122]

The Hatfield Report's emphasis on the critical importance of E911 to public safety and homeland security applies equally to services and devices that compete with and function like telephone service, whether wireline or wireless. A few illustrations of 911 problems that have already occurred with VoIP will make this point.

A Vonage customer made a 911 call in Minnesota, but had to go next door and use her neighbor's phone. Her husband was missing and later found unconscious and overcome by smoke in the garage. Although she had initially signed up for Vonage's 911

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[121] Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services*, prepared for the Federal Communications Commission (2002), p. ii (emphasis in original).

[122] *Id*. at 15.

service, she did not know she had to re-apply when Vonage gave her their old home phone number a few months later. The woman "didn't read the fine print" and so was unaware of the need to re-apply for the 911 option.[123]

Recently, a 911 call made in Houston, Texas through a VoIP provider was routed to Nashville, Tennessee, some 800 miles away, instead of to the local PSAP.[124] Also, in Tarrant County, Texas, an Air Trans pilot asked for police help when his flight landed at Dallas/Fort Worth Airport. The gate agent dialed 911 and the call was routed to the PSAP in Anne Arundel County, Maryland. Air Trans uses an IP-based phone system.[125] The homeland security implications of the Air Trans example are disturbing.

In Colorado and other states, PSAPs also use the Automatic Location Identification ("ALI") database, through reverse 911 or emergency notification service, to send automated calls to citizens in a particular area to alert them to emergencies such as fires, floods, or evacuations. Citizens in that area who have substituted VoIP service for traditional wireline service would not receive the call and thus be unaware of the emergency or of the need to evacuate. Again, in emergencies, seconds count and lives depend on immediate response or notification.

This Nation's commitment to the ubiquitous 3-digit number 911 for citizens to call in an emergency, and the FCC's commitment to E911 for wireline and wireless telephone service, will suffer if VoIP is permitted to avoid this important public safety obligation simply because to impose it might slow down the development and

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[123] "Internet Phones, 911 Systems Could Clash," St. Paul Pioneer Press (Feb 18, 2004) at B1.

[124] APCO Letter to the Honorable John Sununu (April 12, 2004).

[125] "Official warns FCC of '911' VoIP glitch," State NewsWire (April 5, 2004).

deployment of IP-enabled services. To be effective, E911 must be universally accessible on services and devices with which consumers would reasonably expect access.

The Commission asks whether voluntary agreements and cooperative arrangements between the industry and public safety organizations, such as that between the Voice on the Net ("VON") Coalition and the National Emergency Number Association ("NENA"), might achieve E911 availability without the Commission imposing regulatory requirements.[126] While NASUCA applauds the VON/NENA agreement and the efforts of certain VoIP industry players to seek E911 solutions, voluntary efforts will not ensure the universal availability of E911 over VoIP service, either on an interim or permanent basis.

First, the VON coalition is a voluntary organization and does not include all industry players. Notably, Vonage is not a member, although it says it endorses the principles in the agreement. Second, adherence to the agreements' six points is voluntary on the part of the industry. Third, most companies will choose profits over social responsibility, unless social responsibility is more profitable. Without government regulation and penalties for noncompliance, companies have little incentive to cooperate. In fact, the incentive today is the opposite – VoIP providers can offer their telephone service at a more favorable rate than traditional wireless and wireline phone services by

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[126] See VON Coalition and NENA, "Public Safety and Internet Leaders Connect on 911," News Release (December 1, 2003). The six points of this agreement are: (1) Route 911 calls to a PSAP's 10-digit number for customers using phones that look and function like conventional phones within three to six months of providing service, and before that time, inform customers of the lack of 911 access; (2) VoIP provider contacts the local PSAPs when offering service to inform of routing calls to their 10-digit number and confirm the number; (3) Support for current NENA and industry work towards interim solution that routes 911 calls to the existing 911 network with callback and, in some cases, location information; (4) Support for current NENA and industry work towards long-term solution with full E911 capability and PSAPs having direct IP connectivity; (5) Support for an administrative approach to maintain funding of 911 resources; and, (6) Consumer education, including working with NENA to create materials explaining any 911 differences.

excluding taxes and surcharges (including the 911 surcharge). Although some industry players, to their credit, such as ICG, Cbeyond, Comcast, Cox Cable, Cablevision and other cable companies will offer VoIP with full enhanced 911, other VoIP providers will have no 911 access (such as gee-fōn), will offer a stripped-down version of 911 as an option (e.g., Vonage) or as a required service offering (AT&T).[127] Consumers will be unable to discern which companies have 911/E911 and which do not.

To be clear, the 911 option currently offered by Vonage, and by AT&T with its CallVantage VoIP service, is less useful than basic 911. For example, if a Vonage customer elects 911 as a feature, any call to 911 is routed to a 10-digit administrative number in the PSAP that may or may not be attended around the clock. The administrative number may be answered by voice mail or receive a lower priority for response than standard 911 emergency calls. The 911 calls sent to the administrative lines in the PSAP are routed over the PSTN, rather than the 911 network with its dedicated trunks. Delivering 911 calls to the PSAP this way is better than not delivering them at all, but not much better. As APCO points out, this is a 1960s method of 911 call delivery by a 21st century IP technology.[128]

Requiring disclosure to customers that a particular VoIP service offers no 911 access or limited 911 access is an unacceptable substitute for requiring E911 access. The Commission can take little comfort that as long as providers disclose the absence or limitations of their 911 service, the public is protected. Even if the VoIP customer is aware of the limitations (not a certainty), visitors and children in the house or at the

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[127] See www.geefon.com; www.vonage.com and www.usa.att.com/callvantage/home.

[128] See APCO position on Internet Telephone (VoIP) (last updated December 11, 2003) (available at http://apcointl.org/about/gov/alerts/voip.htm, accessed May 21, 2004.)

business would be unaware and would expect 911 access from the VoIP telephone. Public safety officials have spent decades educating consumers to dial 911 in an emergency. Exempting VoIP from 911 requirements would undermine the universal awareness and reliance on 911. The risks to life and property are too great to substitute marginally effective disclosures for E911 access.

The Commission should require VoIP providers to provide E911 access for any service that creates in customers a reasonable expectation of E911 access, that is, where the service or device is similar in appearance and functionality to telephone service and is marketed as competitive with telephone service. Mandatory requirements are necessary to spur deployment of E911 capability and to expedite technological solutions to E911 for certain mobile or nomadic VoIP applications. The Commission's mandatory deadlines for Wireless E911 Phases 1 and 2 implementation spurred technological solutions and compliance by the industry, with temporary waivers granted if good cause were shown. The Commission should adopt a similar approach here, but with more immediacy. The Commission has the opportunity now to establish the E911 requirements before VoIP subscription rates increase substantially when retrofitting may become more difficult.

The Commission should establish the first deadline for VoIP providers to implement the so-called interim or native solution: routing 911 calls over the existing 911 network to the appropriate PSAP with callback and location information. This deadline should be no later than March 31, 2005. If, as Intrado and Vonage suggest, the inability of VoIP providers to interconnect with the 911 service provider is an impediment to routing 911 calls through the selective router into the 911 network, then the Commission

should require such interconnection.[129] Fixed location VoIP providers should provide full enhanced 911 capability now. The deadline for the interim solution applies to mobile or nomadic VoIP applications since these services require a technical solution now being addressed by NENA.

The long-term solution that involves routing 911 traffic over the IP network, sometimes called I911 or the I-3 solution, could be developed through voluntary cooperation between the industry and the public safety community and establishment of NENA standards. NASUCA's primary concern is that E911 capability by routing calls to the existing 911 networks be required as soon as possible of all VoIP providers that use the PSTN. The more robust, full-featured IP solution envisioned in the Commission's E911 Solutions Summit on March 18, 2004 can develop on a separate and longer timeframe as long as VoIP customers have E911 access using today's 911 networks.[130] The long-term IP solution will require resolving a number of issues including security and privacy, particularly if it involves PSAP and VoIP provider access to and transmission of medical and other sensitive caller information over the Internet or over private IP networks. These issues are discussed at greater length below.

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[129] See "Order Instituting investigation on the Commission's own motion to determine the extent to which the public utility telephone service known as Voice over Internet Protocol should be exempted from regulatory requirements," Public Utilities Commission of the State of California, Investigation 04-02-007, Comments of Vonage Holdings Corporation (April 2004) at 23. Vonage states it has been unable to interconnect with the ILEC's E911 trunks because there is no specific legal requirement for the ILECs to interconnect. Some VoIP providers have established such interconnection through CLEC partners. See also Stephen Meer, "VoIP and 911 – The Technology is Not the Problem," Intrado, January 27, 2004, www.intrado.com.

[130] FCC's Solutions Summit: 911/E911 Issues Associated with Internet-based Communications Services, March 18, 2004. Available as archived audio webcast through http://www.fcc.gov/realaudio/publicforums.html.

In addition, the Commission should take no action that would impair the legal or operational ability of state and local governments to assess and collect a 911 surcharge from VoIP providers and their customers. Preferably, the Commission should require VoIP providers to collect and remit state and local 911 surcharges, but if the Commission declines to impose such a requirement, the Commission should do nothing to constrain state and local 911 surcharge assessment. The future funding support for 911 depends on the ability to at least maintain revenues at current levels.

According to a May 2003 survey by the New Hampshire Enhanced 911 Commission, all but two states impose an end user surcharge for wireless and wireline subscribers to fund 911.[131] This means that if VoIP subscribers pay no 911 surcharge, and VoIP penetration levels increase substantially while traditional wireline and wireless penetration levels decrease as a result, PSAP revenues will decline significantly. This revenue death spiral will occur at a time when PSAPs are already fiscally challenged to upgrade their communications centers to implement wireless E911 Phase 2, and will be asked to upgrade to implement 911 over IP. As long as a VoIP subscriber is required to provide a subscriber location address (regardless of whether the user then also chooses a different service area code), the 911 surcharge amount can be assessed on the basis of that location address.

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[131] New Hampshire Enhanced 911 Commission, "Letter to the Honorable Craig Benson, Governor" (May 29, 2003), Appendix A, State by State listing of surcharge rates.

VI. THE PRIVACY OF VOIP CUSTOMERS AND THEIR CUSTOMER INFORMATION MUST BE PRESERVED.

In the *Notice*, the Commission asks whether subscribers of VoIP or other IP-enabled services should be afforded the CPNI and other consumer protections afforded in the 1996 Act.[132] The Commission has also requested comments on "customer privacy issues, separate from those raised in section 222 of the Act" which the Commission should consider.[133]

NASUCA has explained above how consumers often look to VoIP as a substitute telecommunications service. Thus, consumers have migrated from ILEC, CLEC and IXC service providers to VoIP as another way to receive telecommunications service. As with service quality, consumers should enjoy the same privacy protections with VoIP providers as they do with conventional service providers. Moreover, VoIP will be able to handle consumer information in new ways and disseminate that information in IP format more broadly than can now be achieved on the PSTN. It is not generally apparent to consumers that a switch from the PSTN to VoIP carries with it any privacy implications. For example, consumers who block their telephone number from Caller ID display should also enjoy that level of privacy whether or not they or the called party use VoIP. The Commission should act to make certain that a customer's personal information is kept just as private when VoIP providers are handling the call, as when the call is being carried by other means of transmission.

Given the Commission's interest in comments reflective of the dynamic, evolving nature of IP-VoIP services, NASUCA's comments will also address three specific

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[132] *Notice,* ¶ 71.

[133] *Id.,* ¶ 77.

scenarios where customer privacy interests must be protected: 1) protection of CPNI by VoIP providers, 2) preservation of call blocking protections related to Caller ID and 3) the use of medical information only to emergency services personnel to assist in medical care related to calls to 911.

A. VoIP Providers Should Comply with the Commission's CPNI Restrictions.

As shown in these comments, VoIP is a telecommunications service. Thus, the customer privacy protections guaranteed by Section 222 of the 1996 Act[134] extend to subscribers of VoIP services. The Commission should require protection of VoIP consumer privacy.

The Commission has previously declined to differentiate among different types of carriers in determining which carriers are subject to Section 222.[135] The fact that IP-enabled services are an evolving market subject to competition is not adequate cause for the Commission to find that Section 222 does not apply. Carriers that provision telecommunications services through use of the Internet are subject to the duties and obligations of Section 222, regardless of the technology employed or the degree of competition.

Assuring customer privacy of CPNI is necessary given the marketing of VoIP as interchangeable with wireline or wireless. The switching customer may not readily recognize the sacrifice of privacy protections as part of the calculus of whether to switch. Likewise, customers currently served by a telecommunications carrier should not lose

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[134] 47 U.S.C. § 222.

[135] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999), ¶ 13.

Section 222 privacy protections simply because their carrier modernizes its network to include some element of VoIP services.

Section 222 reflects Congress's recognition that "telecommunications carriers are in a unique position to collect sensitive personal information – including to whom, where and when their customers call. Customers maintain an important privacy interest in protecting this information from disclosure and dissemination."[136] The Commission's CPNI rules have focused on the use of CPNI in the context of carrier-customer relationship. Information concerning calls made by and to a consumer is highly sensitive. Such information should not be misused by any VoIP provider, or other type of telecommunications provider, for purposes other than what is necessary to render service to the customer as the CPNI rules generally allow. Such CPNI should not be used for marketing or any other purpose not necessary to deliver the requested service. The Commission should apply CPNI restrictions to VoIP providers just as it applies them to other telecommunications service providers.

B. The Commission Must Safeguard the Privacy of Calling Party Number Information Against Caller ID Disclosure by VoIP Providers.

Consumers who block their Calling Party Number ("CPN") information from disclosure through Caller ID should have that request honored by VoIP providers. The Commission's current regulations require:

> No common carrier subscribing to or offering any service that delivers CPN may override the privacy indicator associated with an interstate call. Carriers must arrange their CPN-based services, and billing practices, in such a manner that when a caller requests that

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[136] *Id.*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002), ¶¶ 2, 67. In the *Order*, the Commission used "communications-related services" informally as a catchall phrase "to mean telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment." *Id.*, n. 4.

> the CPN not be passed, a carrier may not reveal that caller's number or name, nor may the carrier use the number or name to allow the called party to contact the calling party.[137]

This regulation preserves the privacy of consumers who wish to block their CPN from Caller ID disclosure. These and other Commission regulations concerning Caller ID services should apply to VoIP providers.

Caller ID – and the related blocking – has been in effect for many years. Caller ID blocking is widely accepted and has worked well. Caller ID blocking by certain individuals may be not only a matter of personal preference but a matter of life and death as well. The Commission should not frustrate this successful policy by allowing some providers to avoid blocking CPN depending upon the transmission protocols that the providers have elected to use.

Consumers have a right to preserve the privacy of their CPN whether the person they are calling purchases circuit switched telephone service or VoIP telephone service. Consumers have no reason to expect their rights to block their CPN in the first case but have that number revealed in the second. Moreover, a consumer would have no way of knowing whether the person they are calling has purchased VoIP or any other form of telephone service. All providers offering telephone service should follow the same Caller ID privacy rules.

The relevant Commission regulations apply to common carriers. As explained above, VoIP providers offer telecommunications services and should be properly classified as common carriers. Therefore, the Commission privacy regulations concerning Caller ID blocking should properly apply. Whether or not VoIP providers are

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[137] 47 CFR § 64.1601(b).

treated as common carriers, however, the Commission should make sure that VoIP providers apply the above regulations in order to preserve customer privacy.

C. The Commission Must Safeguard the Privacy of Personal Information Transmitted with VoIP 911 Calls.

In the *Notice*, the Commission envisions the potential "that IP-enabled services may enhance the capabilities of PSAPs and first responders – and thus promote public safety – by providing information that cannot be conveyed by non-IP-enabled systems."[138] As part of this rulemaking, the Commission seeks comment on how or whether "the natural evolution of IP-enabled services … will lead to technological improvements and cost savings in the transmittal of and response to emergency information, interoperability among public safety entities, and other elements of critical infrastructure needed to provide for public safety…."[139] The potential to automate VoIP provider access to some national medical database as part of a VoIP call to 911 was one such future modification raised at the Commission's Solutions Summit: 911/E911 Issues Associated with Internet-based Communications Services.

This would allow, for example, an Emergency Medical Technician to receive and forward images of those involved in medical emergencies. Emergency information in IP format could be forwarded to emergency personnel – locally or across the country – to assist in emergency 911 calls. NASUCA supports such technical improvements and such improvements could lead to better service for those involved in emergencies.

At the Commission's March 18, 2004 Solutions Summit, however, the potential for VoIP providers to access a database of consumer medical records and forward those

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[138] *Notice,* ¶ 53.

[139] *Id*.

records in an emergency situation was discussed. A 911 system that allows the exchange of IP information has the potential to enhance and improve emergency medical services. At the same time, such a system has the potential to cause substantial harm if access to such sensitive information is abused. Although NASUCA supports changes that will improve the effectiveness of the public safety communications system, the Commission must also carefully consider how such sensitive medical information can be used on behalf of the person for whom emergency services are requested.

NASUCA notes above that it is important to safeguard CPNI. It is also important to safeguard the personal information in a consumer's medical records as the Commission oversees the migration of emergency services to an IP format.

Some restrictions concerning the use of medical information are already in effect. When Congress amended Section 222 through the Wireless Communications and Public Safety Act of 1999 ("911 Act"),[140] the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[141] was already in place. HIPAA was enacted to improve the efficiency of the national healthcare system and protect patient privacy.[142] As part of the amendment to Section 222 under the 911 Act, Congress approved the receipt by PSAPs, other emergency responders, and emergency support services, including database providers, of certain wireless customer information, which would otherwise be private, when needed to respond to a user's call for emergency service or to assist in the delivery

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[140] Pub. L. No. 106-81, 113 Stat. 1286 (codified at 47 US.C. §§ 222, 251(e)).

[141] Pub. L. No. 104-191; see 42 U.S.C. § 1320d, et seq.

[142] Pub. L. No. 104-191, Title II, Subtitle F, Sec. 261. See also U.S. Department Health & Human Services, Office for Civil Rights, "Summary of the HIPAA Privacy Rule" (revised May 2003) at 1 (available at http://www.hhs.gov/ocr/hipaa, accessed May 21, 2004).

of emergency services.[143] NASUCA supports emergency medical service providers having quick access to medical information. The transition to VoIP has the potential for enhancing this availability. However, NASUCA is concerned that access to such a national medical database carries the potential for misuse of such information.

NASUCA notes that under this statutory scheme, information about the telecommunications user (e.g., wireless call location) and/or subscriber (wireline caller location based on the Master Street Address Guide) is available to the PSAP and emergency responders. If the call to 911 involves a medical emergency, the emergency medical service provider, hospital or other responders who are already subject to HIPAA can access confidential health information about the telecommunications user.

Just as Section 222 provides telecommunications carriers with a public safety exception to the obligation to protect the privacy of a customer's telecommunications records, the HIPAA regulations allow "covered entities"[144] to disclose protected health information[145] under a public safety exception.[146] Under HIPAA, all covered entities, such as health plans or hospitals, have an obligation to preserve the confidentiality of all "individually identifiable health information" which the covered entity may hold or transmit. The hospital, for example, may only disclose such protected health information of a patient when a) allowed or required by the HIPAA Privacy Rule, or b) as authorized in writing by the individual patient or the individual's personal representative. The

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[143] 47 U.S.C. § 222(d)(4).

[144] 45 C.F.R. § 160.103. "Covered entities" includes a health plan, a health care clearinghouse, and "a health care provider who transmits any health information in electronic format…." The HIPAA rules also apply to "business associates" such as a medical billing service of "covered entities."

[145] *Id*.

[146] 45 C.F.R. § 164.512(j) (uses and disclosures for which an authorization is not required).

hospital may release such protected health information without the individual's consent in the event of an emergency. But the hospital must comply with "applicable law and standards of ethical conduct" in deciding whether to make the disclosure, and when "in good faith [it] believes the use or disclosure … [i]s necessary to prevent or lessen a serious *and imminent* threat to the health or safety of a person of the public; and … [i]s to the person or persons reasonably able to prevent or lessen the threat, including the target of the threat…."[147] Clearly, under the HIPAA privacy rules, the public safety exception may only be invoked by hospitals or other covered entities based on specific information of the incident. That includes identification of the person in need of emergency medical services, who may or may not be the VoIP customer of record. However, HIPAA does not appear to contain any exceptions applicable to VoIP providers.

The Commission should carefully consider the type of consumer medical databases that could be accessible by VoIP providers. Access to such databases outside the context of medical services personnel at times of medical emergencies raises important privacy issues. NASUCA is particularly concerned about such unrestricted access by VoIP providers that could themselves be largely unregulated.

VII. THE COMMISSION SHOULD CONTINUE TO ADDRESS THE ACCESSIBILITY OF VOIP BY THOSE WITH DISABILITIES.

The Commission seeks comment on how to apply the disability accessibility requirements of Sections 251(a)(2)[148] and 255[149] to VoIP or other IP-enabled services

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[147] 45 C.F.R. § 164.512(j)(i)(A), (B) (emphasis added).

[148] 47 U.S.C. § 251(a)(2).

[149] 47 U.S.C. § 255.

providers.[150] NASUCA has no recommendation at this time on specific compliance standards, but recommends that these standards be created through IP industry and disabilities working groups, through the use of access guidelines issued by the Architectural and Transportation Barriers Compliance Board and other disabilities compliance organizations, and through government-sponsored meetings such as the Commission's "Solutions Summit" of May 7, 2004. Forward-looking standards and regulations should continue to provide for backward compatibility for those consumers with disabilities who cannot afford or will not purchase PCs and Internet connections but choose instead to continue to use Text Telephones ("TTYs") over the traditional PSTN with add-on devices. The Commission should encourage such groups to hasten development of the standards and, when necessary, to refer complaints against noncompliant manufacturers and service providers to the Commission's Enforcement Bureau and other state and federal disabilities enforcement agencies.

The Commission also asks commenters to refresh the record developed in the *Disabilities Access Order*'s notice of inquiry and comment on whether those requirements should include all types of IP-enabled services, not just telephony.[151] In the related *Vonage* VoIP docket[152] and the Commission's *Disabilities Access Order* Notice of Inquiry regarding Section 255 and 251(a)(2) accessibility requirements,[153] consumer

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[150] *Notice*, ¶ 58.

[151] *Id.*; *Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities,* WT Docket No. 96-198, Order, 16 FCC Rcd 6417 (1999) ("*Disabilities Access Order*).

[152] See note 28, *supra*.

[153] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999) ("*Disabilities Access NOI*").

advocate groups for the deaf and blind urged the Commission to find that IP-enabled service providers must comply with Section 255 by providing complete, equal access to the fullest extent possible.[154] These same groups also urged the Commission to require that the new technologies be compatible with existing TTYs, including the traditional TeleTypewriter.[155]

Under Section 255, manufacturers and providers of telecommunications services must make their products and services accessible, subject to a "readily achievable" standard set forth in the Americans with Disabilities Act of 1990.[156] The Commission should incorporate by reference those comments and should extend this proposition to encompass all IP-enabled services, including IP-enabled telephony. Such an extension will allow the disabled to expand and enhance their abilities to communicate with others. The Commission should require that all VoIP and IP-enabled services, not just IP telephony, be accessible to those with disabilities.

The *Notice* observes that the *Disability Access Order* determined that voice mail and interactive menu services are "information services." The *Notice* seeks comment on whether the same approach should apply to other VoIP and IP information services.[157] Whether the Commission decides that VoIP is an "information service" or a "telecommunication service," VoIP should be accessible to those with disabilities.

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[154] *Vonage,* WC Docket 03-211, Reply Comments of Telecommunications for the Deaf, Inc. (filed Nov. 24, 2003); *Disabilities Access NOI*, WT Docket No. 96-198, Comments of Telecommunications for the Deaf, Inc. and the Consumer Action Network (filed Jan. 13, 2000), Comments of the National Association of the Deaf (filed Jan. 13, 2000), Reply Comments of the National Association of the Deaf (filed Feb. 14, 2000), Comments of the American Foundation for the Blind (filed Jan. 13, 2000), and Reply Comments of the American Foundation for the Blind (filed Feb. 14, 2000)

[155] See, e.g., Comments of the National Association of the Deaf (filed Jan. 13, 2000) at 3-4.

[156] 42 U.S.C. § 12101 et seq.

[157] *Notice*, ¶ 58.

Because there is no functional difference between the two architectures in terms of what they present to the caller accessing them, the Commission should apply equivalent standards of functional and technical accessibility. This applies to IP-enabled services as well, because these services may be necessary to access VoIP services. As the telecommunications industry shifts toward VoIP and away from traditional switched access phone service, those who cannot gain access will be relegated to a lower class and will not enjoy the same benefits and advances as those who can gain access. Computer-based equipment that can provide voice mail and interactive menu services must be accessible by persons with disabilities because it is integral to using the VoIP service.

In addition, the Commission seeks input on how migration to IP-enabled services will affect the interstate and intrastate Telecommunication Relay Service ("TRS") Funds, and the cost recovery mechanism for TRS created under Section 225.[158] The Commission is also seeking comment in another docket on the payment formula and TRS Fund size estimate proposed by the TRS Fund administrator, the National Exchange Carrier Association ("NECA"), for July 2004 through June 2005.[159] NASUCA urges the Commission to incorporate the comments from the TRS Fund docket, CC Docket 98-67, into the instant proceeding to assist in estimating the effect of migration to IP-enabled services.

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[158] *Id.*, ¶ 60.

[159] CC Docket 98-67, DA 04-1258 (released May 4, 2004). NECA proposes a carrier contribution factor of 0.00356 and estimates the TRS Fund requirement of $289.4 million. NECA also recommends a per completed minute compensation rate of $1.349 for both traditional TRS and for IP Relay, $1.440 for Speech-to-Speech and $7.293 for Video Relay Service. *Id.*

VIII. VOIP PROVIDERS SHOULD PAY INTO THE UNIVERSAL SERVICE FUND AND BE ALLOWED TO OBTAIN ELIGIBLE TELECOMMUNICATION CARRIER STATUS IF THEY MEET MANDATED FEDERAL REQUIREMENTS.

In the 1998 *Stevens Report*, the Commission identified computer-to-computer IP telephony as an "information service." However, the Commission repeated at least eight times within the report that phone-to-phone IP telephony was a "telecommunications service."

The 1996 Act authorizes both this Commission and individual 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.[160] Many states have already established state USFs that supplement the federal USF.[161] State and federal regulators have used universal service funding to help reduce end user rates for telecommunications services for people living in rural and other high-cost areas and for eligible low-income consumers and to help extend the availability of advanced telecommunications service capabilities to schools, libraries, and rural health care providers.

With these facts in mind, regulators should expect VoIP services that make use of the PSTN or NANP resources to contribute to federal and state universal service programs on a par with other contributors. The principles of universal service – ensuring

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[160] See 47 U.S.C. § 254(f).

[161] See *United States General Accounting Office, Telecommunications: Federal and State Universal Service Programs and Challenges to Funding*, GAO-02-187, at 12-17 (Feb. 4, 2002).

affordable telephone service is available to high-cost areas and low-income users – is a cornerstone of national communications policy.[162]

The USF issue is typically framed in terms of whether VoIP providers should have the obligation to pay into state or federal USFs on the same basis as traditional telecommunications carriers. Telecommunications carriers are required to pay a certain percentage of total inter-state revenue (currently ranging from 8% to 10%) to fund the federal USF. Allowing VoIP providers to avoid paying universal service funding obligations poses important public policy issues even beyond universal service funding. Exemption from USF funding obligations would provide VoIP an initial pricing advantage of 8-10% over traditional carriers – e.g., IXCs, regular landline-based local exchange carriers and wireless carriers – who do contribute to the USF. If VoIP providers are not required to help fund the federal USF, the dollar amount of telecommunications revenues upon which the Commission bases current federal universal service contribution requirements will continue to shrink – and at the worst possible time, since funding needs for federal universal service support have continued to increase. The issue of whether VoIP providers may receive USF funding for the provision of eligible telecommunications services will also be important, especially if VoIP is in fact a more efficient, lower-cost operation than the more traditional PSTN.

Cable companies offering telecommunications services subject to assessment currently pay into the fund, as do wireless carriers. VoIP services that also make use of NANP resources and access to the PSTN should also be expected to help fund universal

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[162] See 47 U.S.C. § 254.

service programs. If not, then policymakers need to consider alternate methods of funding the USF, particularly with respect to the provision of VoIP services.[163] If VoIP is determined to be an interstate service, then 100% of VoIP revenues should be assessed for federal universal service support. If VoIP is mixed interstate and intrastate service, then an allocation of revenues will have to be made. Perhaps a safe harbor such as that used for wireless carriers could be adopted.

Universal service is an important public policy goal and NASUCA supports reforms that will improve the current system. VoIP providers whose services connect to the PSTN and originate or terminate on traditional local exchange service facilities should, at a minimum, be treated as telecommunications services with respect to the form of interconnection and inter-carrier compensation required. Other companies providing voice telephone services are required to contribute to the USF. The Commission has taken a similar position in the *Notice*:

> 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 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.[164]

NASUCA agrees. There is no legitimate reason for exempting VoIP service providers from universal service funding requirements.

At the same time, VoIP providers that meet the standards for ETC status must be afforded nondiscriminatory access to universal service support. Thus, VoIP providers

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[163] See *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002).

[164] *Notice*, ¶33.

should be able to apply for certification as ETCs for purposes of receiving Universal Service funding. Any other approach would fail the competitive neutrality principles for universal service and discriminate against otherwise eligible providers based solely on technology.

IX. VOIP CALLS THAT TRAVEL ON THE PSTN SHOULD BE SUBJECT TO INTERCARRIER COMPENSATION.

The issue concerning intercarrier compensation is not whether the rules should or should not apply but how to reconcile the many different rules – and different prices – applying to exchange of traffic. The exchange of traffic today is governed by a variety of rules dependent on things like the type of traffic exchanged, the beginning and end source of the traffic, or the types of providers. Those differences, in turn, dictate not only different prices dependent on the traffic type, but also which party pays. The Commission has a proceeding under way to examine and potentially resolve these issues. When that proceeding is resolved, new rules should apply to VoIP-based services utilizing the PSTN as well.

At least one state commission has already determined that some VoIP providers are carriers for intrastate access charge purposes. The New York Public Service Commission ("NYPSC") ruled that a specific form of VoIP was "plain old telephone service" and not an information service.[165] The NYPSC held that US DataNet Corporation should pay access charges to the local exchange carrier whose customers

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[165] *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, NYPSC CASE 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (May 31, 2002).

were using US DataNet Corporation VoIP provider equipment and the VoIP network to make long distance calls.

The NYPSC relied heavily on the definitions of "telecommunications" and "information service" found in the 1996 Act.[166] The NYPSC determined that simply because information may be modified or manipulated in transmission does not matter; the fact that the information sent between two points is the same – in form and in content – as the information received is the distinction that classified the transmission as a telecommunications service rather than an information service.[167]

The New York decision is significant, because many VoIP providers maintain the view – based on this Commission's 1998 *Stevens Report* – that the mere fact they transmit traffic in IP format (as opposed to a circuit-switch format) has the effect of insulating them from being treated as a carrier, regardless of the issue. The NYPSC concluded, however, that the *Stevens Report* was not that expansive. The NYPSC noted that this Commission had made "an extensive analysis of telecommunications services, enhanced services and IP telephony, in particular."[168] Rather than classifying all IP-formatted services as "information services," however, the Commission plainly acknowledged that some could be "telecommunications services":

> We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP Telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain forms of "phone-to-phone IP telephony" services lack the characteristics

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[166] *Id.* at 6, citing *Stevens Report*, ¶ 30.

[167] *Id.* at 7, citing *Stevens Report*, ¶ 59.

[168] *Id.* at 6.

> that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."[169]

The Commission reaffirmed its position in the *AT&T Order*,[170] finding that a VoIP service "where an end-user customer originates by placing a call using a traditional touch-tone telephone with 1+ dialing, utilizes a provider backbone for transport, but is then converted back from IP format before being terminated at a LEC switch, is a telecommunications service and is subject to section 69.5(b) of the Commission's rules."[171]

In the *AT&T Order,* the Commission also recognized that its statutory obligation to "preserve and advance universal service … remains intertwined with the interstate and intrastate access charge regime."[172] The Commission also reiterated its warning from the notice of proposed rulemaking in the *Intercarrier Compensation* proceeding,[173] that "[IP] telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay."[174]

The invocation of the "Internet Protocol" talisman may not, in the future, suffice in preventing specific types of VoIP provisions from being classified as "plain old telephone service." As a result, these providers should be held to the same rules and regulations governing that "plain old telephone service" when offering these specific

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[169] *Stevens Report,* ¶ 83 (citations omitted).

[170] See *AT&T Order*, ¶ 12.

[171] *Id.*, ¶ 24.

[172] *Id.*, ¶ 14, citing 47 U.S.C. § 254.

[173] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rule Making, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").

[174] *AT&T Order*, ¶ 9, citing *Intercarrier Compensation NPRM* at 9657, ¶ 133.

types of VoIP service, including the payment of access charges to ILECs for use of the PSTN to route calls to and from consumers.

X. CONCLUSION

The Commission should regulate as "telecommunications services" those VoIP services that, from the end-user's perspective, are capable of functioning as and substituting for traditional telephone service and that are capable of interconnecting with the PSTN. Such VoIP services should be regulated under Title II, and have the universal service, LNP, E911 and intercarrier compensation obligations discussed above. The Commission should also continue to address access to VoIP by those with disabilities.

The Commission should also refrain from preempting state regulation of VoIP. States should be allowed to ensure that VoIP customers have the same service quality and consumer protection safeguards accorded to ILEC and CLEC customers.

Respectfully submitted,

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