

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission’s (Commission) Notice of Proposed Rulemaking (NPRM) released March 10, 2004.¹ The Commission seeks comment on the appropriate classification and regulatory treatment of various services that are or might be provisioned using the internet protocol (IP). The NYDPS recommends that in fashioning a regulatory approach to IP-enabled services the Commission should focus on the functional nature of the service in question, not on the technology used to provide it. As any regulation imposes costs that must be factored into the promise of new technologies, the NYDPS concurs with the widely-held conviction that regulators should seek to impose as little regulation on services as is necessary to ensure that core public interest concerns are addressed. In that vein, the New York Public Service Commission (NYPSC), in acting upon a complaint filed by Frontier Telephone of Rochester, Inc., recently issued an order staying the application of NYPSC regulations to the IP-based telephone service offered by Vonage in New York State in order to allow the company

¹ In the Matter of IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) (“NPRM”).

sufficient time to apply for waivers of state regulations.² That order is attached to these comments. Finally, as a matter of sound policy and law, the Commission should not and may not preempt state regulation of IP-enabled services simply because they are provisioned using a particular technology.

DISCUSSION

I. Minimum State Regulation Will Not Hamper Development Of IP-Enabled Service, And Will Ensure The Security And Reliability Of Telecommunications.

States' interests in maintaining capable, robust, and efficient telecommunications networks are self-evident. Those networks enable communications that are vital in the provision of essential public services – e.g., public safety, security, and healthcare. Telecommunications are essential in averting and responding to man-made and natural disasters. State and local emergency response organizations depend on reliable telecommunications to marshal resources and direct recovery efforts. Individuals rely on public communications networks for their own safety in emergency situations.³

Telecommunications are also the lifeblood of many states' economies. For example, trillions of dollars of economic transactions that depend on telecommunications occur each day in New York. Those transactions are vital not only to New York's general economic health, but also to the financial integrity of state and local governments whose revenues are derived as a result of that economic activity.

² Case 03-C-1285, Frontier Telephone of Rochester, Inc. - Complaint, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation (issued May 21, 2004). Vonage is a telephone corporation under the New York Public Service Law, and must comply with state statutory requirements.

³ Congress recognized the local nature of 911 service when it directly empowered states to plan and deploy emergency communications infrastructure programs, while relegating the Commission to a supporting role. See 47 U.S.C. § 615.

To remain available and reliable until competition provides adequate alternative modes, New York's telecommunications network providers must remain financially sustainable. While government cannot and should not guarantee the long-term financial success of any provider in a competitive telecommunications market, neither should it perpetuate unfair regulatory advantages for some providers over others. Such inconsistent regulatory treatment, if permitted to persist, could allow competitive success not on the basis of superior product or efficiency, but as a result of regulatory arbitrage. As such unfairly won success could threaten over time the financial sustainability of providers serving customers with limited competitive choices, the state has an interest in ensuring that all providers of like services are subject to appropriate regulatory requirements.

The NYDPS shares the Commission's concern that unnecessary regulatory requirements may delay deployment of desirable new capabilities and services.⁴ The long-standing policy of the New York Public Service Commission has been to minimize regulation by ensuring that any requirements it imposes satisfy important public interests and reflect the regulated entity's ability to jeopardize those interests. For example, as competitive services advanced during the 1980s and '90s, the NYPSA provided carriers extensive pricing flexibility for competitive services and has imposed minimal service quality and financial reporting requirements on small and non-dominant carriers. More recently, in determining that intrastate services offered by Vonage are subject to its jurisdiction as a New York telephone corporation, the NYPSA embarked on a course that will allow Vonage to seek waivers of the already limited regulatory requirements that might otherwise apply.⁵ Until such time as that process is completed, the

⁴ NPRM, ¶¶ 3-5.

⁵ Case 03-C-1285, supra, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, p. 17.

NYPSC has waived application of its relevant rules to Vonage.⁶ Finally, as more competition develops, we would expect the need for less regulation of all participants in the market.⁷

II. Regulatory Classification Of IP-Enabled Services Should Reflect The Nature Of The Service Being Provided.

The Commission seeks comment on whether and how it should differentiate among IP-enabled services for regulatory purposes.⁸ Regulatory classification of IP-enabled services should reflect the nature of the service being provided. The Commission should differentiate among such services only to the extent required by the law; it should not attempt to create yet another classification or set of classifications based on the particular transmission protocol used. In other words, the fact that a service is provided via Time Division Multiplexing (TDM), Internet Protocol (IP), or Data Over Cable Service Interface Specification (DOCSIS) is not relevant to its regulatory classification as a telecommunications, information, or cable service. Attempts to further differentiate among services on the basis of the protocol used will only further exacerbate contentious service classification debates and expand opportunities for wasteful regulatory arbitrage.

In identifying which IP-enabled services should be classified as "telecommunications services," the Commission should apply the same functional approach that it has previously

⁶ Id.

⁷ The NYDPS is reviewing all regulatory requirements currently applicable to telecommunications in New York to ensure that those requirements remain appropriate as technologies and markets evolve.

⁸ NPRM, ¶¶ 35-37.

expressed.⁹ From the user's perspective, is the service in question a reasonable functional substitute for existing telecommunications services? Is the service primarily one that provides unaltered transmission of the users' content between points of the user's choosing, or is it primarily the offering of third-party provided content or the ability to interact with such content that merely uses telecommunications as an input? Such an approach would allow regulators and the industry to discern with ease among services in the vast majority of cases. The need for and value of a more specific set of classification criteria is not obvious, while the potential for difficulties with more specific criteria is.

Potential criteria that are themselves imprecise or prone to evolution are poor candidates as the bases for making classifications over the long-term. For example, differentiating among services on the basis of whether they use "specialized" terminal equipment will become ineffective as the capabilities of different equipment evolve and converge.¹⁰ Distinctions based on whether the service connects with the public switched telephone network may give rise to heated debates over exactly what constitutes the public switched telephone network at any point in time.¹¹ Similarly, reliance on a service's use of a particular addressing scheme (e.g., the North

⁹ The Commission has applied a functional approach to statutory classification as either a telecommunications or information service. In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (rel. April 10, 1998). In that report, the critical distinction drawn was whether the service provider performed some function that modifies the information, as opposed to merely transmitting it. Id. at ¶ 39. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service. Id. at ¶ 59. Thus, a service's classification depends upon the nature of the service, not the infrastructure it is carried upon. Under this rationale, IP-enabled services are not information services, to the extent that they do not offer a capability to manipulate or interact with stored data.

¹⁰ For example, is a telephone with digital storage capability a computer? Is a computer with a microphone and speaker a telephone?

¹¹ For example, are CLEC networks part of the PSTN? Are wireless networks? If they are not today, will they be considered to be in the future?

American Numbering Plan) may become obsolete as new addressing schemes become more commonly used. The NYDPS recommends that the Commission continue to base service classifications on the functional nature of the service from the user's perspective, not on the technology used or other specific classification criteria.

III. As A Legal Matter, The Commission May Not Preempt State Authority Over IP-Enabled Services.

The Commission seeks comment on how Section 2(b) of the Communications Act of 1934, as amended¹² (“1934 Act”) affects its jurisdictional analysis.¹³ As a threshold matter, the passage of the Telecommunications Act of 1996¹⁴ (“1996 Act”) does not modify the 1934 Act’s Section 2(b) preservation of state jurisdiction. Section 601(c)(1) of the 1996 Act plainly provides that “this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”¹⁵ Absent express language altering the preexisting allocation of federal and state authority over intrastate communications, the 1996 Act may not be construed to bypass Section 2(b).¹⁶

¹² 47 U.S.C. § 151 *et seq.*

¹³ NPRM, ¶ 41. Section 2 (b) of the 1934 Act reserves state authority with respect to “intrastate communications by wire or radio.” 47 U.S.C. § 152 (b).

¹⁴ Pub. L. 104-104, 110 Stat. 56 (1996).

¹⁵ Pub. L. 104-104, § 601 (c) (1), 110 Stat. 56, 143 (codified at 47 U.S.C. § 152 note (1996)).

¹⁶ See Cellco Partnership v. FCC, 357 F.3d 88, 100 (D.C. Cir. 2004); see also Bell-Atlantic Md. v. MCI Worldcom, Inc., 240 F.3d 279, 307 (4th Cir. 2001) (*vacated sub nom.* on other grounds, Verizon Md. Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635 (2002)) (the 1996 Act may not be construed to bypass preexisting federal law or alter preexisting assignments of state and Commission authority unless expressly provided).

The Commission seeks comment on the applicability of its recent Pulver Order¹⁷ to the issues raised in the instant NPRM.¹⁸ In the Pulver Order, the Commission stated that Section 509 (b) of the 1996 Act (47 U.S.C. § 230 (b)) gives it authority to preempt inconsistent state regulation as applied to pulver.com’s Free World Dialup service.¹⁹ The Commission relied upon Section 230(b)(1), which states that “It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

As the Supreme Court stated, “[t]he words of a statute must be read in their context and with a view to their place in the statutory scheme.”²⁰ When read in context, it is clear that Section 230 is meant to address law and regulation concerning the content of speech transmitted over the Internet, rather than states’ application of traditional common carrier regulation. The United States Court of Appeals for the Ninth Circuit recently held that Congress’ purposes for enacting this provision were twofold. First, Congress intended to “encourage the unfettered development of *free speech* on the Internet, and to promote the development of e-commerce.”²¹ Second, it wanted to encourage voluntary monitoring for obscene or offensive content.²² The

¹⁷ In the Matter of 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, FCC 04-27 (rel. February 19, 2004) (“Pulver Order”).

¹⁸ NPRM, ¶ 40.

¹⁹ Pulver Order at ¶ 18.

²⁰ Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).

²¹ Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003) (emphasis added); see also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003). “E-commerce” has been defined as “buying and selling over the public Internet, the public Web and corporate Internets.” Newton, Harry, Newton’s Telecom Dictionary 256 (18th ed. 2002). This definition has no bearing upon regulation of the underlying communications services utilized in conducting such commerce.

²² Batzel, 333 F.3d at 1028.

overall purpose of Title V of the 1996 Act (which includes Section 230) was to strike a balance between the protection of minors and First Amendment and e-commerce interests.²³

Consequently, Section 230 cannot be read to alter jurisdiction over intrastate communications merely because the provider is using IP technology.

As for Section 2(b) of the Act,²⁴ its plain language broadly forecloses Commission jurisdiction over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.”²⁵ This provision preserves state jurisdiction over both telecommunications and information services.²⁶ Thus, to the extent that Internet protocols are utilized to enable intrastate information or telecommunications services, Section 2(b) preserves state authority to regulate that communication.

Moreover, Section 2(b) prohibits the Commission from using its ancillary authority under Section 152(a) of the 1934 Act²⁷ to declare that preemption is necessary in order to effectuate federal policy (e.g., national policy encouraging the growth of the Internet). As the Supreme

²³ Id.

²⁴ 47 U.S.C. § 152 (b).

²⁵ Id.

²⁶ Louisiana Public Service Comm’n v. FCC, 476 U.S. 355 (1986). The U. S. Court of Appeals for the Ninth Circuit also held that the Section 2 (b) reservation of state authority does not distinguish between “basic” and “enhanced” services, which are the precursors of the 1996 Act’s definitions of telecommunications and information services. California v. F.C.C., 905 F.2d 1217, 1240 (9th Cir. 1990). The Commission has recognized that the distinctions between the former basic and enhanced service categories have been incorporated into the 1996 Act’s telecommunications service and information service definitions. See NPRM at ¶ 26; see also In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956-57, ¶ 102 (rel. December 24, 1996).

²⁷ Section 152 (a) has been read to confer upon the Commission authority “reasonably ancillary” to its specific statutory responsibilities. See California, 905 F.3d at 1240-41 n.35 (citing U. S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)).

Court clarified in AT&T v. Iowa Utilities Board,²⁸ the Commission’s ancillary jurisdiction cannot be utilized to override Section 2(b)’s reservation of explicit state authority over intrastate communications.²⁹ Thus, absent express Congressional intent, the Commission’s establishment of a particular regulatory policy cannot displace states’ Section 2(b) preserved authority over intrastate aspects of IP-enabled services.³⁰ Thus, the Commission may not unilaterally reapportion jurisdictional authority in order to further its regulatory goals concerning evolving communications technology.

The Commission seeks comment on whether the impossibility exception should apply to IP-enabled services.³¹ If it were impossible to separate the interstate and intrastate components of regulation of a particular service or aspect of a service, then and only then would preemption be permissible.³² In that situation, the Commission bears the burden of showing that its preemption order is narrowly tailored to preempt only such state regulations that would negate valid Commission regulatory authority.³³ At best, it is premature to determine that state regulation will make it impossible for the Commission to regulate IP-enabled services.

The Commission further seeks comment on whether it should apply its “mixed-use” standard to IP-enabled services (other than pulver.com) in the event that it decides to retain the end-to-end approach for asserting jurisdiction over such services.³⁴ The Commission’s mixed-use rule, which has been used to assign exclusive jurisdiction over a special access service to the

²⁸ 525 U.S. 366 (1999).

²⁹ Id. at 381 n.8.

³⁰ Louisiana, 476 U.S. at 375.

³¹ NPRM, ¶ 41.

³² Louisiana, 476 U.S. at 375 n.4.

³³ Id.

³⁴ NPRM, ¶ 40.

Commission where more than a *de minimis* amount of interstate traffic is carried over a special access facility,³⁵ should not be applied broadly to IP-enabled services. The mixed-use rule was created as an administrative convenience, intended merely to obviate measurement of intrastate versus interstate usage on certain non-switched shared facilities.³⁶ If there is a need for an administrative rule of convenience, then the Commission could just as easily utilize a different substitute for actual measurement of traffic. For example, the estimated percent interstate usage (PIU) that is sometimes utilized for separations and access charges could just as easily be utilized for the sake of administrative convenience.

Lastly, the Commission seeks comment on whether the Commerce Clause applies to limit state regulation of IP-enabled services.³⁷ The Supreme Court has held that nondiscriminatory state regulation incidentally affecting interstate commerce is valid unless the burden on such commerce is clearly excessive in relation to the state's effectuation of its own legitimate interest.³⁸ State regulation is nondiscriminatory unless it differentially treats in-state and out-of-state economic interests in a manner that favors the former.³⁹ Thus, the Commerce Clause is not a barrier to state regulation of intrastate telecommunications and information services enabled by IP-based technology, because for over 100 years the states have regulated intrastate

³⁵ In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 78-72, Decision and Order, 4 FCC Rcd 5660 (rel. July 20, 1989).

³⁶ Unlike asymmetrical digital subscriber line ("ADSL"), which simply carries data over a dedicated circuit to and from an ISP and which performs no routing of data, VoIP is not special access, at least to the extent that it provides routing over networked facilities. See generally, In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22480, ¶¶ 24-25 (rel. October 30, 1998) (finding that GTE's ADSL service is a special access service).

³⁷ NPRM, ¶ 41.

³⁸ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

³⁹ Oregon Waste Systems v. Dept. of Env. Quality, 511 U.S. 93, 99 (1994).

communication without burdening interstate commerce. In sum, the Commission may not use the widespread development of IP-based technology as a rationale for prohibiting the states from acting in the best interests of their citizens.

Respectfully submitted,

Dawn Jablonski Ryman
General Counsel

By: John C. Graham
Assistant Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-2510

Dated: May 28, 2004