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

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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SUMMARY

As a result of the Commission's deregulatory policies, and their codification by Congress in the 1996 Act, the Internet has developed into "a unique and wholly new medium" of "national and international dimension" that has transformed communications, revolutionized commerce, and enriched the daily lives of consumers in innumerable ways.[1] Providers of today's IP-enabled services (*i.e.*, services in which all telecommunications and information components originate in the Internet Protocol, in contrast to the "IP in the middle" service that was the subject of the recent *AT&T Declaratory Ruling*) combine computer processing, information provision and other computer mediated offering with data transport to provide functionality and features that are not, and cannot be, offered by legacy communications networks. The resulting services and applications are "information services" under the Act, and must be regulated as such.

IP voice is not another flavor of telephone service, but an application of IP-enabled service, as are e-mail, file transfer and http (hypertext transfer protocol, which forms the underpinnings of the World Wide Web). In other words, "voice communications represent but one application – one species of bits – provided alongside many others."[2] Those "bits" are carried in packets that cannot be separated or distinguished from one another. In lay terms, "the Internet is one big dumb pipe" into which subscribers to IP-enabled-services launch packets with payloads for different

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[1] *Zeran v. America Online, Inc.*, 129 F.3d 327, 328-29 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[2] Separate Statement of Commissioner Kathleen Q. Abernathy, *IP-Enabled Services,* WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004).

applications. A user may simultaneously scan and retrieve voicemail messages, initiate a real-time voice communication, forward a voicemail message as an attachment to an e-mail message, conduct research on a database and select and listen to music. IP networks "do not know or care" whether they are "carrying a web page, a phone call or a sitcom."[3] The subscriber's service, moreover, is not tied to a particular geographic location such as a home or office. The service may be used from any location worldwide at which an IP connection is available. "Arbitrary *distances*" such as "local, in-state toll, long distance and international," are "irrelevant."[4]

There is widespread consensus that the growth and development of the Internet and IP-enabled services would not have occurred absent the Commission's deregulatory policies. Those policies have allowed service providers and equipment manufacturers to attract the capital they need to fund research, development, service trials and introductory marketing campaigns. Deregulation has minimized if not eliminated the need for service providers and equipment manufacturers to comply with or accommodate costly and otherwise burdensome regulatory mandates and processes that would, at best, increase costs and risks, if not foreclose technically their efforts to develop and exploit these still nascent technologies.

As remarkable as the Internet and IP-enabled services are today, their potential has only begun to be tapped. The "convergence of computers, telephones and television

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[3] Scott Woolley and Quentin Hardy, *Riding the New Wi-Fi Wave,* Forbes, April 26, 2004, at 104 ("the Internet is one big dumb pipe. It doesn't know or care whether it is carrying a Web page, a phone call or a sitcom").

[4] Scott Cleland and John Freeman, *SIP "De-geograph-ies" Telecom: Transforms Central Office Assets into Liabilities,* Precursor (May 5, 2004) ("arbitrary *distances* are irrelevant to SIP [the protocol used in providing IP voice and other applications]: local, in-state toll … and international").

into a single integrated information environment" remains in its relative infancy.[5] Providers of IP-enabled services, equipment manufacturers and analysts expect a far wider array of features and functionality to be introduced in the future.

It is thus a matter of grave concern, and deeply ironic, that the successes generated by the Commission's deregulatory policies, and the market forces they have unleashed, have led to calls in some quarters to impose on IP-enabled services the same regulatory scheme that the Commission has rejected. Providers and analysts alike have recognized that regulation, including in particular regulation by up to fifty-one state regulatory commissions, poses the greatest concern to the continued functional development and penetration of the Internet, including Internet access and IP-enabled services. Indeed, many states, including California, Minnesota and, only two weeks ago, New York, have subjected or attempted to subject IP-enabled services to legacy, "common carrier" regulation, including rate and entry requirements.

Accordingly, to ensure the expansion of access to and development of the Internet, and realization of the full benefits of the convergence of computers and communications, it is imperative that the Commission reaffirm its deregulatory approach to the Internet, including IP-enabled services, and preempt all state regulation except consumer protection and other laws of general applicability. Such action is required by the Act, Commission precedent and sound policy considerations.

Over twenty years ago, the Commission held in its *Computer Inquiry* proceeding that subjecting "enhanced services" – "the precursor to today's Internet" – to common carrier regulation would be unnecessary and counterproductive, no matter how extensive

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[5] Searchnetworking.com Definitions, *IP Telephony,* available at www.searchnetworking.techtarget.com (last updated March 29, 2002).

there communications components.[6] The Commission predicted, correctly, that the development and availability of these services would best be promoted if regulatory rules and procedures were not "interjected between technology and its marketplace applications."[7] In the 1996 Act, Congress codified the Commission's holding through several measures. First, Congress adopted the Commission's distinction between "basic" (*i.e.*, "telecommunications") and "enhanced" (*i.e.*, "information") services, and chose to limit Title II regulation to the former. Second, Congress adopted in section 230(b)(2) as "the policy of the United States" that the "Internet and other interactive computer services [shall be] unfettered by Federal or State regulation."

These measures mandate a framework in which all IP-enabled services are subject to regulation at the federal level only, and only to those regulations that are demonstrably necessary to achieve an important social policy objective reflected in the Act. IP-enabled services (*i.e.*, in which all telecommunications and information components originate in the Internet Protocol), including IP voice applications, convert information from one form to another, process, retrieve and store information, and perform myriad other functions that constitute information services, including facilitating subscriber interaction with stored information (such as customer profiles). They thus are classified as "information services" to which Title II and certain other regulations do not apply.

IP-enabled services, including IP voice applications, are also subject to the policy of non-regulation codified in section 230(b)(2). Congress plainly recognized the harms

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[6] Separate Statement of Chairman Michael K. Powell, *IP-Enabled Services,* WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004).

[7] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC 2d 384, ¶ 116 (1980) ("*Computer II Final Decision*").

that could ensue if the Internet and IP-enabled services were subject to up to fifty-one sets of regulations. As a provision of the Act, section 230(b)(2) is subject to the Commission's authority, conferred by sections 2(a) and 201(b), to "execute and enforce," and adopt rules and regulations to "carry out", its terms. Because section 230(b)(2) has not been sufficient by itself to prevent the states from attempting to regulate IP-enabled services, as evidenced by orders and proceedings in Minnesota, California, New York and elsewhere, the Commission should make clear that the statute means what it says, and declare that all such state regulation is preempted. Given the nature of IP-enabled services, including their "complete portability" and the current inability of providers to identify the end points of IP communications, moreover, preemption is likewise compelled by the Commission's exclusive jurisdiction over interstate services.

These conclusions apply to IP voice no less than to other IP-enabled services and applications. When the Commission deregulated "enhanced" services, it recognized that they could include "voice capabilities," and that "some enhanced services may do some of the same things that regulated communications services did in the past.[8] The possibility of IP voice was also known prior to the 1996 Act. Against that background, Congress chose to include in the 1996 Act the deregulatory measures described above. There is thus no basis to ignore the Act's plain language by concluding that Congress could not have intended that it apply to IP voice.

As the Commission recognizes, however, classification as an "information service" does not necessarily foreclose all federal regulation. The Commission generally may exercise its ancillary jurisdiction under Title I to adopt and apply regulations where

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[8] *Computer II Final Decision,* 77 FCC2d. 384, ¶ 132.

doing so is necessary to advance other important policies and objectives of the Act. In that event, moreover, federal regulation would also be permissible notwithstanding section 230(b)(2). The Commission's broad mandates clearly provide it with the authority to determine how best to reconcile potentially conflicting policies reflected in the Act. At a minimum, however, section 230(b)(2) establishes a strong presumption against regulation of IP-enabled services. The Commission should rely to the maximum extent possible on market forces and industry initiatives to protect consumers and advance the Act's objectives, and exercise its ancillary jurisdiction only where those other means are demonstrably inadequate.

Under this standard, the exercise of ancillary jurisdiction to impose common carrier regulation on IP-enabled services cannot be justified. Numerous providers of IP-enabled services are already in the market, with many others poised to enter. No provider has market power. Adoption of regulation to address "social" concerns would be premature at best. The industry is working diligently with public officials and others to address issues relating to 911/E911, disability access and surveillance of IP communications by law enforcement. The Commission is considering universal service issues in another docket. Pending any reforms adopted in that docket, providers of IP-enabled services are contributing to universal service indirectly through their purchases of transmission services and capacity from telecommunications carriers.

Finally, Qwest understands that the Commission is considering in its *Intercarrier Compensation* docket compensation issues in connection with services that touch the PSTN. Qwest generally agrees with the Commission 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, and that the cost of the PSTN should be borne equitably among those that use it in similar ways."[9] The Commission should confirm, however, that until it adopts different regulations in its *Intercarrier Compensation* docket, providers of "true" IP-enabled services (as opposed to the "telecommunications service" that was the subject of the recent *AT&T Declaratory Ruling*) with a POP located in the terminating exchange are, under the long-standing ESP exemption, to be treated as end users entitled to purchase local service for the termination of IP voice communications over the PSTN, and are not subject to access charges.

[9] Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC O4-28, (rel. March 10, 2004), ¶61.

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Qwest Communications International, Inc. ("Qwest") respectfully submits these comments in response to the Commission's notice of proposed rulemaking in the above-captioned docket.[1]

INTRODUCTION

Of all the proceedings before the Commission, this one could ultimately have the greatest impact on the daily lives of American businesses and consumers. As Commissioner Abernathy correctly observes, "[w]e stand at the threshold of a profound transformation of the telecommunications marketplace, as the circuit-switching technology of yesteryear is rapidly giving way to IP-based communications."[2] Commissioner Abernathy understands that in the IP-based world, voice and other communications are indistinguishable: "voice communications . . . represent but one

[1] Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC O4-28, (rel. March 10, 2004) ("*Notice*").

[2] Separate Statement of Commissioner Kathleen Q. Abernathy, *IP-Enabled Services,* WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004) *("Abernathy Separate Statement").*

application – one species of bits – provided alongside many others."[3] In particular, these applications, and the "packets" that carry them, cannot be separated or distinguished from one another by providers or networks.[4] For these and other reasons, IP-enabled services, including IP voice applications, are not "mere substitutes for traditional telephony."[5]

This profound transformation is a direct result of deregulatory policies adopted by the Commission more than two decades ago. Then, in response to the growing convergence of computers and telecommunications, the Commission decided that the market for "enhanced" (*i.e.*, "information") services – "the precursors of today's Internet" – should be allowed to grow and develop free from the prescriptive regulations applied to transmission services provided over legacy networks.[6] As a logical outgrowth of that decision, the Commission in the ensuing years pursued a "policy of minimal regulation of the Internet and the services provided over it."[7] The Commission's approach was adopted by Congress in the 1996 Act, as reflected in its determination not to require regulation of information services, and the codification in section 230(b)(2) of federal policy that the Internet and other interactive computer services remain "unfettered by federal and state regulation."

There is widespread consensus that the growth and development of IP-enabled services and applications could not have occurred absent the deregulatory policies of the

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3 *Id.*

4 *See infra* at 21.

5 *Notice,* ¶ 4.

6 *See* Separate Statement of Chairman Michael K. Powell, *IP-Enabled Services,* WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004) *("Powell Separate Statement").*

7 *Notice,* ¶ 2.

Commission and Congress.[8] The *Notice* correctly observes that as applications have proliferated, and demand for Internet access has grown, providers have augmented network capacity to offer faster access services deployed across multiple platforms.[9] In turn, the increasing availability of Internet access and high speed services has spawned the development of even more applications. Today's IP-enabled services thus offer consumers a wide and rich array of features and functions not available over legacy, circuit-switched networks.[10]

Qwest's IP-enabled service, for example, offers subscribers voice capabilities, voice messaging, advanced call control, and a web browser-based dashboard for subscriber management of call handling and messages. These capabilities may be accessed from any location in the world at which an IP connection is available. Enhanced features and functions available through IP-enabled services include call logs, unified messaging, programmable "do not disturb" periods, "locate me" functionality,

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[8] *See Powell Separate Statement*; s*ee also* Scott Cleland and Jamie Mendelson, *VoIP Regulatory Risk is Likely Limited and Overblown,* Precursor, (Nov. 25, 2003) ("*VoIP Regulatory Risk*"); Scott Cleland, Bill Whyman, and John Freeman, *How the Rise of "Free" VoIP in Software Will Undermine Telecom*, Precursor, (March 17, 2004) ("*Rise of VoIP Software*").

[9] *Notice* at ¶ 9.

[10] Competition in the Provision of Voice Over IP and Other IP-Enabled Services Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, *IP-Enabled Services*, WC Docket No. 04-36 (May 28, 2004) ("*Huber Report*") at 24 ("VoIP already offers features and functionality that are superior to those available on circuit-switched networks"); Comments of SBC Communications Inc., *Vonage Holding Corporation's Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (Oct. 27, 2003), attached letter from Keith Epstein, Vice President & General Counsel, SBC Data Service, Inc. and Mimi Jennings, President, SBC IP Communications, Inc., to John Leutza, Director, Telecommunications Division, California Public Utilities Commission, (October 22, 2003), at 2 ("*SBC IP Communication Service Letter*") (SBC's "Hosted IP Communications Service" provides users with "robust call management and call routing functionality that cannot be utilized over today's circuit-switched networks or otherwise in the absence of computer mediation"); Eric Savitz, *Talk Gets Cheap*, Barron's, May 24, 2004 ("*Barron's*") (features and functionality available through IP-enabled services "aren't available though old fashioned circuit-switched networks").

virtual conference call functionality, and video telephony.[11] But the potential of IP networks has only begun to be tapped. The industry and analysts expect a far wider array of features to be introduced in the future, including more advanced unified messaging, message management capabilities and video-conferencing.[12]

For this to occur, however, and the cycle of development described in the *Notice* to continue, it is essential that the Commission adopt a deregulatory, national policy framework for IP-enabled services and applications. The Commission should reject regulation of true IP-enabled services,[13] allowing only for the possibility of limited federal regulation where demonstrably necessary to advance critical "social policy" objectives reflected in the Act. The investment community, the media and providers have recognized that regulation in general, and state regulation in particular, pose the greatest threat to the efficient evolution of IP-enabled services and applications, including IP voice.[14] Continued development of the physical, application and other layers that

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[11] *See Huber Report* at 24-25. *See also Barron's* (With VoIP, "[f]rom a web page, you can route your calls so they ring not only at home, but also on your cellphone or at work. Or you can take your phone adapter on the road and get your calls in a hotel room on the other side of the planet").

[12] *Id.,* at 25.

[13] "True" IP-enabled services and applications do not include the AT&T "IP in the middle" service that involves no "net protocol conversion and offers no enhanced functionality, which the Commission held in the *AT&T Declaratory Ruling* to be a "telecommunications service" that is subject to access charges. *See* Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services are Exempt From Access Charges*, WC Docket No. 02-361, FCC 04-97, (April 21, 2004) ("*AT&T Declaratory Ruling*"), ¶¶ 12, 15.

[14] *See VoIP Regulatory Risk* ("state intervention represents the biggest regulatory risk to VoIP"); *Barron's* ("the biggest stumbling blocks for VoIP … are an uncertain regulatory landscape"); Reply Comments of AT&T Corp., *Vonage Holding Corporation's Petition for a Declaratory Ruling*, WC Docket No. 03-211 (Nov. 24, 2003), at 3 ("it has become equally clear … that mindless application of legacy regulations to VoIP services – regulations that, in many cases, no longer make sense even for the legacy services for which they were designed – poses a grave threat to efficient evolution of VoIP"). State commissions in New York and Minnesota, among others, have subjected or attempted to subject IP-enabled services and applications to

underlie IP-enabled services and applications depends on the continued flow of capital from the investment community. The Commission has found consistently that regulatory requirements frustrate investment incentives.[15] For those incentives to remain, therefore, the Commission must continue its deregulatory policies toward IP-enabled services and applications, including IP voice, and preempt all state regulations except those applicable also to entities other than providers of "telecommunications and information services" (*e.g.*, consumer protection laws of general applicability).

Regulators, moreover, are unable to anticipate the impact of particular regulatory requirements on the development and functioning of new technologies.[16] This truism has

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common carrier regulation. *See generally* Order, *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, New York Pub. Serv. Comm'n Case 03-C-1285, (May 21, 2004) ("*NYPSC Order*") (concluding that Vonage's IP voice application is subject under state law to common carrier regulation); Order, *Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota,* Minnesota Pub. Utils. Comm'n Docket No. P-6214/C-03-108, issued Sept. 11, 2003 (concluding that Vonage is subject to regulation under state law).

[15] *See, e.g.,* Internet Over Cable Declaratory Ruling, *In The Matter of Inquiry Concerning High-Speed Access to The Internet Over Cable And Other Facilities,* GN Docket No. 00-185, 17 FCC Rcd 4798, ¶¶ 73, 97 (2002), *aff'd in part, vacated in part on other grounds*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 ("*Cable Modem Order*") (Commission is "mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment" and "seek[s] to remove regulatory uncertainty that may discourage investment"); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, 17 FCC Rcd 3019, ¶ 5 (2002) ("*Wireline Broadband NPRM*") ("broadband services should exist in a minimal regulatory environment that promotes investment" and "foster[s] investment and innovation … by limiting … unnecessary or unduly burdensome regulatory costs"); Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC 2d 384, ¶ 101 (1980) ("*Computer II Final Decision*") (drawing clear line for classification of services provides regulatory certainty "upon which business entities can rely in making investment … decisions" and "removes the threat of regulation from markets which were unheard of in 1934").

[16] *See Powell Separate Statement*.

even greater force as applied to packet switched technologies, which do not distinguish between applications, and interconnected networks and computers.

For all of these reasons, it would be devastating to consumers and the economy, as well as contrary to law, for the Commission to now reverse its deregulatory policies as applied to IP-enabled and other information services, or allow state regulators to do so. The Commission can instead spur their development and deployment, as well as the deployment of broadband access necessary to use them, by reaffirming those policies, and exercising its authority under the Act to preempt state regulation.

I. IP-ENABLED SERVICES ARE RADICALLY DIFFERENT FROM TELECOMMUNICATIONS SERVICES PROVIDED OVER CIRCUIT-SWITCHED NETWORKS.

Resolution of the many issues raised by the *Notice*, including the classification and appropriate regulatory treatment of, and jurisdiction over, IP-enabled services and applications, including IP voice, requires an understanding of the Internet, including its operations and capabilities.[17] The Internet is wholly different from traditional telecommunications networks. It is a "global, packet-switched network of networks that are interconnected through the use of the common network protocol - IP."[18] This common standard provides all computers on the network with the same technical

[17] As used herein, the phrase "IP-enabled services" means a service in which all telecommunications and information components originate in the Internet Protocol. This definition recognizes that most of what is currently unique about the Internet is related to IP origination. The phrase "IP-enabled application" refers to individual capabilities offered to subscribers through an IP-enabled service. The phrase "IP voice" means an application that provides real-time, two-way voice capability originating in the Internet Protocol over a broadband connection.

[18] *Notice* at n.23. *See also* 47 U.S.C. § 230(f)(1) (the Internet is an "international computer network of both Federal and non-Federal interoperable packet switched data networks").

interface and capabilities, making all Internet technologies equally available to anyone who accesses the Internet.[19] Because it is a worldwide matrix of hundreds of thousands of networks, computers, and files owned and operated by hundreds of thousands of people, no single person, entity, or group exerts any central control, administration, or authority over the Internet.[20] "It can't be … monopolized."[21]

The courts have thus described the Internet as "a unique and wholly new medium of worldwide communication."[22] The Supreme Court itself has recognized that the Internet allows millions of people to communicate and access information "from around *the world*."[23] Geographic boundaries are unknown and irrelevant to the Internet.[24] Its promise, capabilities, and issues have "national and international dimension."[25]

As a result of the Commission's policy, codified in the 1996 Act by Congress, to "preserv[e] the vibrant and competitive free market . . . for the Internet and other

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19 *Living Internet: Key Internet Features -- Universal Access* (visited May 19, 2004) <http://livinginternet.com/i/ip_access.htm> (IP protocol as a "common foundation makes all of the internet technologies equally available to anyone connected to the Internet").

20 *Notice* at n.23 (*quoting* John S. Quarterman & Peter H. Salus, *How the Internet Works* (visited Dec. 17, 2003) <http://www.mids.org/works.html>).

21 *Living Internet: Key Internet Features -- Robust Architecture* (visited May 19, 2004) <http://livinginternet.com/i/ip_arch.htm>.

22 *Zeran v. America Online, Inc.*, 129 F.3d 327, 328-29 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

23 *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997) (emphasis added).

24 *See* Scott Cleland and John Freeman, *SIP "De-geograph-ies" Telecom: Transforms Central Office Assets into Liabilities,* Precursor, (May 5, 2004) ("*SIP De-geograph-ies*") ,("arbitrary *distances* are irrelevant to SIP [the protocol used in providing IP voice and other applications]: local, in-state toll, long distance and international").

25 *Zeran*, 129 F.3d at 328-29.

interactive computer services, unfettered by Federal or State regulation,"[26] "a mere decade of widespread commercial use has produced a dizzying array of IP-enabled services, ranging from presence management to multimedia conferencing to unified messaging."[27] Indeed, as the Commission has noted, over the past ten years, "the Internet has transcended historical jurisdictional boundaries to become one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development" in this country.[28] IP-enabled services are now deployed across multiple platforms by local exchange carriers, cable operators, direct broadcast satellite, video programming providers, wireless providers, and electric companies using power lines.[29]

IP-enabled services have included applications such as peer-to-peer file sharing, instant messaging, streaming media, online gaming, and virtual private networks.[30] Advancements in processor speeds and application level protocol definition have now made it possible to carry "real time" voice inside data packets using higher level protocols. For example, Session Initiation Protocol (SIP) is an application protocol that facilitates the connections between two or more "IP Endpoints" for the exchange of a voice, video, or Instant Messaging conversation or "session." These protocols bring true "convergence" in networking, resulting in robust, high performance systems that carry indiscriminately a wide range of applications. Thus, IP voice "is not another flavor of

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[26] 47 U.S.C. § 230(b)(2) (2001).

[27] *Notice* at n.13.

[28] *Id*., ¶ 1.

[29] *Id.,* ¶ 9.

[30] *Id*.

telephone service," but simply another application offered by IP-enabled services.[31] It "is an important part of the convergence of computers, telephones and television into a single integrated information environment."[32]

A. Packet-Switched Networks

In IP networks, data is segmented into packets that are individually addressed and then transmitted over a series of physical networks. Packets may include text, video, computer programs, voice, or other forms of information.[33] These packets are indistinguishable from one another to networks and providers.[34]

Unlike circuit-switched networking, which requires reservation of a dedicated transmission path between two parties for the entire duration of the communication, when packets are transmitted via IP, there is no dedicated path between the points. Instead, routers read each packet address and determine which route to use on a packet-by-packet

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[31] Press Release, Voice on the Net Coalition, New Industry Coalition Seeks Policies to Allow Promise of VoIP (Feb. 23, 2004) ("*VON Press Release*"). *See* also *Notice* ¶ 4 ("VoIP services are not necessarily mere substitutes for traditional telephony").

[32] Searchnetworking.com Definitions, *IP Telephony,* available at www.searchnetworking.techtarget.com (last updated March 29, 2002).

[33] *See, e.g.,*White Paper on IP Voice Services submitted by Voice on the Net (VON) Coalition, *Report to Congress on Universal Service*, CC Docket No. 96-45 (March 18, 1998), at 1 ("*VON Coalition White Paper*"); *SBC IP Communication Service Letter* at 3 (packets associated with voice transmission appear to the packet router no different than packets associated with other applications, such as web browsing or e-mail); Marguerite Reardon, *Capellas: Net Telephony is the Future,*CNET/News.com (last modified May 11, 2004) (*quoting* Michael Capellas), available at http://msnbc-cnet.com.com/2100-7352_3-5210447.html?tag=guts_lh_7352 ("*Net Telephony is the Future*") ("The rules are changing," he said. "Voice, data, music--they have all been digitized, and people want to access this content. But it's really just packets on a network. And on an IP network, packets all look the same.").

[34] Report to Congress, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501, ¶ 87 (1998) ("*Stevens Report*"); *see also* Scott Woolley and Quentin Hardy, *Riding the New Wi-Fi Wave,* Forbes, April 26, 2004, at 104 ("*Riding the New Wi-Fi Wave*") ("the Internet is one big dumb pipe. It doesn't know or care whether it is carrying a Web page, a phone call or a sitcom").

basis.[35] In fact, different packets carrying payloads from a single communication often take different physical paths to the same destination.[36] When a packet reaches its final destination, it is unwrapped and the data inside are used for an application.[37] Data may be transmitted over the same IP connection by a single user to many other users, and vice-versa, at the same time.[38] Within the Internet, these data may use the same transmission path, or different paths. All packets are intermingled as they flow through the network to their destinations. This is true for both the public Internet and IP connections to the Internet.

Users may dynamically use bandwidth for a variety of simultaneous streams of information over a single connection, including video, voice, and others, all subject to the user's information management systems. Thus, a user can simultaneously, over a single connection, engage in a real-time voice conversation with a friend, watch a video news clip, send an e-mail to her mother, conduct research in an IP-available database, and check voice messages, sending a stream of intermingled packets to and through the Internet for routing and delivery.

B. IP-Voice is an Incremental Application of Integrated IP-Enabled Services That Yield Numerous Efficiencies and Other Benefits.

Although it permits real-time, two-way voice communications, IP voice is very different than "basic" service provided over circuit-switched networks. IP voice is an

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35 *Notice,* ¶ 8. In other words, an IP-enabled communication involves transmission of individually addressed packets into the Internet, with the individual (and often independently owned) routers establishing an efficient delivery path on a cooperative basis for each packet.

36 *Stevens Report,* 13 FCC Rcd 11501, ¶ 64.

37 *Notice* at n.25.

38 *VON Coalition White Paper* at 1.

application of IP-enabled service, as are e-mail, file transfer, and http ("hypertext transfer protocol," which forms the underpinnings for the World Wide Web). The subscriber to an IP-enabled service causes packets carrying the payload for the application(s) it is using, indistinguishable to the provider, to be launched over IP networks, as described above. Indeed, IP voice has been described as "an incremental application on packet networks,"[39] and as "an enabling feature that is likely to be embedded in a range of software applications from Customer Relationship Management, call centers, collaboration tools, and e-commerce."[40]

IP networks yield numerous efficiencies and other benefits relative to circuit-switched networks. These efficiencies and benefits hold for all communications originated by subscribers to IP-enabled services, whether those communications are terminated to another IP-enabled service subscriber or over the PSTN. First, IP-enabled services offer an array of new and different features and functions to enhance communications capabilities that are not, and cannot be, offered by telecommunications services provided over circuit-switched networks. For example, a user may be provided with consolidated access to all communications resources, including voice features and services, e-mail, instant messaging, conferencing, etc. Such a user may set up special communications handling rules for multiple situations, such as how to reach the user when out of the office, and special handling options for certain callers. Other features allow conferencing with shared screens, simultaneous revisions to text messages and

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[39] *SIP De-geograph-ies*.

[40] *Rise of VoIP Software*; *Barron's* ("Internet telephony also enables the creation of virtual call centers, with call center agents working from home answering calls sent to them online, reducing the need for expensive brick-and-mortar centers").

other documents by multiple parties on the same call, etc. These features and functions are provided "separate[ly] from voice switches and transport, " in contrast to features and functions offered by circuit-switched networks, [41]

Second, "the architecture of IP networks upends the tie between the subscriber and switch location – 'degeographying' telecommunications."[42] Stated another way, IP-enabled services "defy jurisdictional boundaries."[43] With circuit-switched networks such as those comprising the PSTN, each subscriber's premise has a dedicated connection to a switch in a central office, typically located within ten miles of the premise. A portion of that switch, the port, is permanently dedicated to the PSTN customer and contains the customer profile, which identifies the appropriate set of telephony features to which the customer has subscribed. The customer's telephone itself has no "identity;" instead, the switch to which the phone is connected contains the customer information.

In contrast, a subscriber's IP-enabled service may be customized from any location, as opposed to at the central office closest to its premises. Further, a subscriber to an IP-enabled service (including IP voice and other applications) may use it from any location at which there is an available IP-connection, including a connection arranged or established by a third party. This means that a subscriber to an IP-enabled service may

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41 As one analyst has explained, Session Initiating Protocol used in IP networks "is an open software platform for converged voice and data applications, enabling any third party software developer to write new software applications," in contrast to circuit-switched networks, for which "the easy, inexpensive customization of value added software applications could never be separate from voice switches and transport." Scott Cleland, John Freeman, Bill Whyman, *SIP Happens: How VoIP Technology "Re-unbundles" Telecom*, Precursor (April 12, 2004) ("*SIP Happens*"). Thus, "VoIP offers a much cheaper product with richer functionality and software-integrated features." *Id*.

42 Scott Cleland, Jamie Mendelson, *VoIP is a "Game Changer" that Favors Cable at Bells' Expense*, Precursor (Jan. 30, 2004) ("*VoIP is a Game Changer*").

43 *Notice,* ¶ 4.

use its applications from almost anywhere in the world -- a very different arrangement than how PSTN subscribers are tethered to a Class 5 Switch in a particular central office.[44] Thus, for example, a subscriber could use its service with through a broadband connection at a London hotel.[45] The network and the provider have no concept of where the subscriber is at the time.[46] The provider's "Feature Server" merely associates identifying information from the London hotel's broadband connection with the subscriber's profile.[47]

Third, because a continuous circuit is not needed for the duration of a communication, packet switching used by IP networks "minimizes the time that a connection is maintained between two systems, which reduces the load on the network," and "allows several [communications] to occupy the amount of space occupied by only one in a circuit-switched network."[48] Fourth, each IP communication "requires only a single port per gateway," while "sharing a common IP interface," in contrast to

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[44] Upon power-up or network connection, the customer's CPE ("VoIP Endpoint") identifies itself to the provider's Feature Server," which then dynamically maps the VoIP Endpoint identity and a customer profile registered with the IP address currently associated with the VoIP endpoint. *See infra* at 21.

[45] In contrast, to use the AT&T specific service found to be a telecommunications service in the *AT&T Declaratory Ruling*, subscribers use the same telephones they use for all other circuit-switched calls, and in the same manner as any other circuit-switched long distance call. *AT&T Declaratory Ruling,* ¶ 11.

[46] A subscriber to an IP-enabled service that includes IP voice applications may request multiple phone numbers (including multiple area codes) for use with its services, without regard to geography. The subscriber may then place and receive calls on a single device, and decide on a call-by-call basis which number is represented to the network on an outgoing call.

[47] The broadband connection in the London hotel is assigned identifying information for purposes of routing information to the Endpoint that is connected to it. However, like the information identifying the computer using the connection, this identifying information bears no relationship to -- and contains no information regarding -- the physical location of the connection.

[48] *See howstuffworks/Packet Switching* (visited May 25, 2004) <http://computer.howstuffworks.com/ip-telephony2.htm>.

"traditional circuit-switched networks, in which each long distance call occupies two ports per Class 4 switch."[49] Fifth, IP networks offer the potential of higher reliability than the PSTN, as they "automatically re-route packets around problems such as malfunctioning routers or damaged lines, and do not need to rely on separate signaling networks.[50] Sixth, an IP network is capable of handling both data and voice, reducing significantly operational, maintenance and administrative costs.[51]

II. ALL IP-ENABLED SERVICES ARE "INFORMATION SERVICES" UNDER THE ACT AND COMMISSION PRECEDENT.

The Commission seeks comment on the appropriate classification of IP-enabled service (*Notice* at ¶¶43-44), and whether and how such services should be further "categorized" (*Notice* at ¶¶35-37). Under the statutory definitions, IP-enabled services are appropriately classified as "information services, not "telecommunications services." A "telecommunications service," as defined in the Act, offers "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 and received."[52] An "information service" offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

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[49] *VocalTec/Products & Solutions/White Papers*, Inherent Cost Advantages of VoIP Networks, available at http://www.vocaltec.com/html/White_Papers/white.shtml (visited May 19, 2004). In addition, "[a] SIP softswitch is about one-tenth the cost of a circuit switch on a one for one replacement basis." *See also SIP De-geograph-ies*.

[50] VON Coalition White Paper, at 2.

[51] *Id.*

[52] *See* 47 USC § 153(43) & (46) (2001) (definitions of "telecommunications" and "telecommunications service").

telecommunications."[53] The Commission has held that these terms have essentially the same meaning as "basic services" and "enhanced services," as defined by the Commission in its *Computer Inquiry* decisions.[54]

As explained below, the plain language of these definitions, and the Commission's precedents, warrant the classification of all IP-enabled services as "information services." The Commission's precedents, and the nature of IP-enabled service, moreover, preclude any effort to isolate particular applications of an integrated service for purposes of classification or categorization.

The classification of services as "telecommunications" or "information" has its origin in the Commission's *Computer Inquiry* proceeding. The Commission's decisions in that proceeding are thus highly relevant to both the classification of IP-enabled services, and whether the Commission should further "categorize" such services.

The *Computer Inquiry* proceeding was intended to address the "regulatory and policy problems posed by the growing interdependence of communications and data processing."[55] In particular, "as computer and communications technology continued to merge, the line between regulated and unregulated activities became increasingly

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[53] 47 USC § 153(20) (2001).

[54] *Notice* ¶ 26; First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections of 271 and 272 of the Telecommunications Act of 1934, as Amended,* CC Docket No. 96-149, 11 FCC Rcd 21,905 (1996), ¶ 102 ("*Non-Accounting Safeguards Order*"); Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom, *In the Matter of Cable & Wireless, PLC,* FCC 97-204, 12 FCC Rcd 8516 (1997), ¶ 13, *aff'd*, *Virgin Islands Telephone Corp*., 198 F.3d 921, 926-27 D.C. Cir. 1999).

[55] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 204 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

blurred."[56] In its *Computer II Final Decision*, the Commission considered but rejected proposals to classify activities as either communications or data processing, finding that the "[r]espective technologies had become so intertwined that it had become impossible to draw an enduring line of demarcation between them."[57] The Commission then adopted two service classifications, "basic" and "enhanced." It defined basic service as a "pure transmission capability over a communication path that is virtually transparent in terms of its interaction with customer supplied information."[58] "Enhanced" services, in contrast, use basic service, but also involve the performance of processing applications or other actions, by either the provider or the subscriber, on the transmitted information.[59]

Especially significant for purposes of this proceeding, the Commission observed that enhanced and basic services each may encompass "voice" and "data" capabilities.[60] It also acknowledged expressly that "some enhanced services may do some of the same things that regulated communications services did in the past,"[61] and that "some enhanced services are not dramatically dissimilar from basic services or dramatically different from

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[56] *Id*. *See also Computer II Final Decision*, 77 FCC 2d 384, ¶ 100 (observing that "the computer industry and the communications industry are becoming more and more interwoven").

[57] *Computer and Communications Industry Ass'n*, 693 F.2d at 204-05 (*quoting Computer II Final Decision*) (quotations omitted).

[58] *Computer II Final Decision*, 77 FCC2d. 384, ¶ 96.

[59] *Id*., ¶ 97. The Commission made clear that such processing applications need not change the content of the transmitted information for the service to be classified as enhanced. The Commission reached the same conclusion following enactment of the 1996 Act. *Id. See also Non-Accounting Safeguards Order*, 11 FCC Rcd 21,905, ¶ 104 ("We reject Bell Atlantic's argument that 'information services' only refers to services that transform or process the content of information transmitted by an end-user, because … the statutory definition makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'").

[60] *Computer II Final Decision,* 77 FCC2d. 384, ¶ 90-91.

[61] *Computer II Final Decision,* 77 FCC2d. 384, ¶ 132.

communications as defined in Computer Inquiry I."[62] The Commission nevertheless found that although enhanced services use basic service, they also "involve some degree of data processing that changes the form or content of the transmitted information," and that "generally, services that result in a protocol conversion are enhanced services."[63]

The Commission stressed that the "enhanced" classification covered a wide range of different services, each with communications and data processing components. Some might seem to be predominantly communications services; others might seem to be predominantly data processing services. The Commission declined, however, to carve out any subset of enhanced services as regulated communications services. It found that no regulatory scheme could "rationally distinguish and classify enhanced services as either communications or data processing," and that any dividing line the Commission drew would at best "result in an unpredictable or inconsistent scheme of regulation" as technology moved forward.[64] Such an attempt would lead to distortions, as enhanced service providers either artificially structured their offerings so as to avoid regulation, or found themselves subjected to unwarranted regulations. The Commission therefore determined that enhanced services, which are offered "over common carrier transmission facilities," were themselves not to be regulated under Title II of the Act, no matter how extensive their communications components.[65]

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62 *Id*., ¶ 130.

63 *AT&T Declaratory Ruling*, ¶ 4. *See Computer II Final Decision,* 77 FCC2d. 384, ¶ 132.

64 *Computer II Final Decision,* 77 FCC2d. 384, ¶¶ 107, 108, 113.

65 *Stevens Report,* ¶ 27.

The Commission "conclude[d] that all enhanced services should be accorded the same regulatory treatment."[66] Finding the market for enhanced services to be sufficiently competitive to render regulation unnecessary, the Commission reasoned that "[w]ith the nonregulation of all enhanced services, FCC regulations will not directly or indirectly inhibit the offering of these services, nor will [the Commission's] processes be interjected between technology and its marketplace applications."[67]

In the 1996 Act, Congress codified the distinction between "basic" and "enhanced" services (renaming them "telecommunications" and "information" services, respectively), chose to subject only the former to Title II and certain other regulations, and adopted a national policy that the "Internet and other interactive computer services" shall be "unfettered by Federal or State regulation." Both before and after the 1996 Act, the Commission has adhered to these definitions and policies. In particular, the Commission has held consistently that a service that offers transmission incorporating the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information, is an unregulated information service even though it uses telecommunications to do so.[68] Most recently, in addition to considering as part of its classification inquiry whether the service before it involved a "net protocol

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66 *Computer II Final Decision,* 77 FCC2d. 384, ¶ 113.

67 *Id.,* ¶ 116.

68 *Cable Modem Order,* 17 FCC Rcd 4798, ¶ 41, *citing Universal Service Order,* ¶ 39. Some of the services the Commission has treated as enhanced services include voice mail, e-mail, store-and-forward services, interactive voice response, protocol processing, and gateway and audiotext services. *See Wireline Broadband NPRM* at n.77.

conversion,"[69] the Commission has also considered whether the service provides "enhanced functionality to end users due to the provider's use of IP technology."[70]

Against this background, it is clear that all IP-enabled services, including the Qwest service described below, offering subscribers enhanced functionality through the use of data processing should be classified as "information services" under the Act. All IP-enabled services convert information from one form to another, process, retrieve, and store information, add protocol information, process protocols, and perform myriad other functions that constitute information services, including facilitating subscriber interaction with stored information (such as customer profiles). Qwest's IP-enabled service, for example, uses the Internet Protocol and, through data processing, offers subscribers voice capabilities, voice messaging, advanced call control, and a web browser-based dashboard for subscriber management of call handling and messages. This enhanced functionality was entirely absent from the service that the Commission classified as a "telecommunications service" in the *AT&T Declaratory Ruling*.[71] Further, communications originated by a Qwest subscriber in the Internet Protocol that terminate

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[69] A service that originates and terminates in both the Internet Protocol that offers enhanced functionality may be an information service even though it involves no net protocol conversion, however. *See, e.g., Pulver Declaratory Ruling,* ¶ 9 (Pulver service, which involves no net protocol conversion, is an information service because it "provides new information" to members).

[70] *See AT&T Declaratory Ruling*, ¶ 1 (AT&T service is a telecommunications service, not an information service, because it "undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology"). *See also Pulver Declaratory Ruling,* ¶ 12 ("to find that [Pulver's FWD service is a telecommunications service] would … ignore the [enhanced] capabilities described above that FWD makes available to its members"). The *AT&T Declaratory Ruling* was based on the critical difference between an IP-enabled service (*e.g.*, Qwest's service) and the use of IP technology as a transmission technique (*e.g.*, AT&T's service).

[71] *AT&T Declaratory Ruling,* ¶¶ 11-13 (describing AT&T's service as offering customers nothing different than traditional circuit-switched service).

over the PSTN are delivered to a gateway for conversion to the TDM protocol; hence, again in contrast to the service at issue in the *AT&T Declaratory Ruling*, Qwest's service involves a "net protocol conversion."[72]

Use of Qwest's IP-enabled service requires an IP connection, whether DSL, cable-modem, or wireless, which may be obtained from Qwest or a third-party. Customers use the service through special devices (initially, a "VoIP Phone" or an "Analog Telephone Adapter") generically referred to as 'VoIP Endpoints,' which are actually powerful computers with processors for running software and Ethernet ports to connect to a Local Area Network and on to the Internet over a broadband connection. The VoIP Phone has a display with programmable softkeys for controlling its functions. The display and the buttons can also be used to access information on the Internet such as stock quotes, flight delays, news headlines, weather, etc.

Qwest's IP-enabled service is software-based and runs on industry standard, general purpose web servers called "Feature Servers," which are connected to the Internet by Qwest's IP backbone. These Feature Servers are accessed by customers using the very same Internet protocols that customers use to access other web servers, such as Qwest.com. When a VoIP Endpoint establishes a connection to the Internet, software in

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[72] The Commission has found that an end-to-end protocol conversion that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly "transforms" user information. *Non-Accounting Safeguards Order,* 11 FCC Rcd 21,905, ¶ 104. The protocol conversion involved in Qwest's service, moreover, does not fall within the "management exception" to the definition of an "information service." *See Notice,* ¶ 43. The processing performed in connection with voice applications offered as part of Qwest's IP-enabled service is qualitatively different from the processing that this Commission has held to be part of a "basic" service. Most fundamentally, the processing involved in Qwest's service is not used to facilitate transmission within a single network, but rather between disparate networks. That is the precisely the kind of protocol conversion that the Commission has found to be characteristic of "enhanced" services. *See Computer II Final Decision, 77 FCC 2d 382,* ¶ 99 (code and protocol conversion that "allow[] disparate terminals to communicate with one another" are "more appropriately associated with the provision of enhanced services").

the VoIP Endpoint detects that connection and notifies the Feature Server by sending a message to a web address associated with the service provider. The VoIP Endpoint identifies itself to the Feature Server, and provides information needed by the Feature Server to send to it return messages. Thus, the subscriber can connect to the Internet from anywhere in the world and use the service in the same manner as from the subscriber's "home" location. Once connected, the VoIP Endpoint will seek out the Feature Server by transmitting information over the Internet.

Subscribers use a standard web browser to initiate a web session to access their control dashboards, which are associated with their account profiles and stored on the Feature Server. One of the control panels available on the dashboard is a list of the subscriber's voicemails, along with the attributes of each message, including a timestamp, caller ID, caller name, message length, among others. Users can scan the list visually, click on the voice message that she deems most important, and play the voice message using a standard software media player on her PC. A user can simultaneously scan and listen to voicemail messages, initiate a real-time voice communication, and forward a voicemail message as an attachment to an e-mail message. During such a session, a wide array of IP packets would flow between the VoIP Phone, the Feature Server, its voicemail counterpart, and e-mail servers. The user's broadband connection would carry IP packets for the voice conversation itself, the voicemail message downloaded from the voicemail server, and the e-mail message. These packets would be virtually indistinguishable from each other as they traverse IP networks. Internet routers act on the IP addresses in headers of the packets to determine how to route them, without regard to their contents.

Qwest's IP-enabled service easily satisfies the definition of an "information service" under the Act. Qwest's service offers its subscribers "the capability" for: *generating* SIP sessions and voice transmissions; *acquiring* information such as stock quotes, flight information, news, etc.; *storing* information regarding the subscriber's profile, configuration of the service, and voice messages; *transforming* voice transmissions for termination over the PSTN and damaged or lost information through repair and reconstruction applications; *processing* subscriber-generated changes to service configuration and protocols associated with voice transmissions; *retrieving* stored profile information and voice messages; and *utilizing* certain information such as identifying numbers and passwords to access the service and configure their service in accordance with their preferences.

The Commission should reject proposals to isolate and separately classify individual applications offered as part of an integrated, IP-enabled service. The classification of Qwest's IP-enabled service, for example, should be based on the service as a whole, as opposed to IP voice or other individual applications the subscriber may utilize. To do otherwise would ignore Commission precedent, as well as the nature of IP-enabled services and applications. More specifically, the Commission has analyzed services by examining the offering as a whole and the benefits a service offers to end users.[73] If the end user can receive enhanced functionality, the service is an information service.[74] Further, the fact that a particular end user may not use all of the functions

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[73] *Cable Modem Order,* 17 FCC Rcd 4798, at ¶¶ 35, 38 (application of the statutory definitions rests on the functions the end user is offered).

[74] *Stevens Report,* 13 FCC Rcd 11501, ¶59.

offered by a service is not relevant to its classification.[75] Rather, the critical inquiry is whether the end user *can receive* enhanced functionality.[76] Classifying services based on its individual applications would also be inconsistent with the Commission's determination to classify a service as an "enhanced" or "information service" notwithstanding the presence of a "basic" component.[77]

Moreover, that an IP-enabled service includes voice applications provide no basis either to classify the service as a whole, or the voice application, as a "telecommunications service." When Congress codified in the Act the distinction between information (enhanced) and telecommunications (basic) services first adopted in the Commission's *Computer Inquiry* proceeding, the Commission had already made clear that enhanced services could include "voice capabilities," and that "some enhanced services are not dramatically dissimilar from basic services or dramatically different from communications as defined in Computer Inquiry I."[78]

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75 *Cable Modem Order,* 17 FCC Rcd 4798, ¶ 38.

76 *Stevens Report,* 13 FCC Rcd 11501, ¶ 59.

77 *See generally id*. In addition, the Commission has held that under the "contamination" theory, "a combination of enhanced and basic services could be treated in its entirety as a unitary unregulated enhanced services," and has "permitted resellers who have engrafted a combination of end-to-end 'basic' and end–to-end enhanced services on underlying facilities provided by others to treat the entirety of the resale offering as unregulated." Notice of Proposed Rule Making, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85- 229, 50 Fed. Reg. 33581, ¶¶ 32, 46 (Aug. 20, 1985) ("*Computer III NPRM*"). Because Qwest's IP-enabled service, for example, is provided by Qwest Communications Corporation over transmission facilities that it purchases from Qwest Corporation, the "contamination" theory provides an additional basis to "unregulate" the service in its entirety.

78 *Computer II Final Decision,* 77 FCC2d. 384, ¶ 130. Even if it were appropriate to base classification determinations on individual applications of an integrated service, the voice applications offered by Qwest's IP-enabled service would qualify as "information services" under the factors previously identified by the Commission as relevant to the classification of "IP telephony." *Stevens Report,* 13 FCC Rcd 11501, ¶ 88. First, subscribers to Qwest's IP enabled services must use CPE different from the CPE necessary to place an ordinary touch-tone call over

Equally if not more important, the individual applications included as part of an IP-enabled service are indistinguishable to the networks that provide them. As explained *supra*, the packets that carry IP voice, voicemail messages, e-mail messages, text messages, video and other applications are all intermingled, and appear the same to network facilities and equipment. These facts underscore the integrated nature of IP-enabled services, and the futility of attempting to isolate applications for classification purposes. Regulations that would, either directly or in practice, require the isolation of such applications could prevent the offering of those IP-enabled services that are available today, and hinder or even foreclose the development of new services and applications.

These facts likewise underscore the perils associated with attempting to "categorize" IP-enabled services for regulatory purposes. Even before the advent of packet-switched networks and the Internet, the Commission recognized the difficulties and policy implications of attempting to classify and differentiate "categories" and "subcategories" of enhanced services.[79] Such an undertaking would be that much more difficult where the same underlying networks handle, but are unable to distinguish between, different applications.

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the PSTN," *i.e.*, a special VoIP phone or an "analog telephone adapter." Second, the conversion from IP to TDM protocol that is necessary to allow the subscriber to place calls that terminate over the PSTN constitutes "a change in the form and content of the transmitted information." *See Vonage Holdings Corp v. MPUC*, 290 F.Supp.2d 993, 1000 (D. Minn. 2003) (IP telephony "is not a telecommunications service because from the user's standpoint, the form of a transmission undergoes a net change").

[79] *See supra* at 17.

III. ALL IP-ENABLED SERVICES AND APPLICATIONS ARE SUBJECT TO THE EXCLUSIVE JURISDICTION OF FEDERAL LAW AND THE COMMISSION; STATES MAY NOT REGULATE ANY IP-ENABLED SERVICE OR APPLICATION, INCLUDING IP VOICE

A. Federal Jurisdiction Is Indisputable

The *Notice* seeks comment on the "jurisdictional nature of IP-enabled services."[80] In particular, the *Notice* inquires as to "the appropriate basis or bases for asserting federal jurisdiction over the various categories of IP-enabled services."[81] The clear terms of the 1996 Act, and the nature of IP-enabled services and applications, provide compelling "bases" for federal jurisdiction, as explained below.

The Supreme Court and the Commission have both recognized the national and international reach and importance of the Internet. The Supreme Court has described the Internet as "an *international* network of interconnected computers enabling tens of millions of people to communicate with one another and to access vast amount of information from *around the world*."[82] Other courts have characterized the Internet as "a unique and wholly new medium of *worldwide* communication," and noted that its promise and issues are "of *national* and *international* dimension."[83] The Commission itself has recognized that "packets routed across a global network with multiple access points *defy jurisdictional boundaries*."[84]

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80 *Notice,* ¶ 38.

81 *Id*., ¶ 40.

82 *Reno*, 521 U.S. at 849-50 (emphasis added); Memorandum Opinion and Order, *GTE Telephone Operating Cos.,* FCC 98-292, CC Docket No. 98-79, 13 FCC Rcd 22,466, ¶ 5 ("*GTE ADSL Order*").

83 *Id*.

84 *Notice,* ¶ 4 (emphasis added).

It is thus not surprising that Congress chose in the 1996 Act to assert federal jurisdiction over the Internet. In particular, Congress defined the Internet as the "*international* computer network of both Federal and non-Federal interoperable packet switched data networks," and mandated as "policy of the United States" that development and use of the Internet be "unfettered by federal or state regulation."[85] The courts have consistently heeded that policy,[86] including deferring to its implementation by the Commission.[87]

IP-enabled services and applications are, by definition, provided over the Internet, and thus are subject to federal jurisdiction.[88] Even if some of these services and applications were deemed "substitutes" for, or "functionally equivalent" to, those offered over circuit-switched networks, that would provide no basis for overriding Congress' clear assertion of federal jurisdiction over this "unique and wholly new medium." That is so even if it were technically feasible and practical – as it is not today – to identify the "end points" (*i.e.*, the points of origination and termination) of individual communications, and the many packets that carry each such communication. To the best of Qwest's knowledge, no party has suggested in any Commission or other proceeding

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85 47 U.S.C. § 230(b)(2) (2001).

86 *See*, *e.g.*, *Zeran*, 129 F.3d at 334; *Vonage*, 290 F.Supp.2d at 997.

87 *See*, *e.g.*, *SWBT v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998). *See also* Written Statement of Michael K. Powell on Voice over Internet Protocol (VoIP) Before the Committee on Commerce, Science and Transportation, United States Senate, February 24, 2004, at I (explaining that "FCC has not generally moved to regulate" IP-enabled applications, including "Internet voice," as a result in part "of our charge in section 230 of the Communications Act").

88 *See Vonage*, 290 F. Supp. 2d. at 997 (the "backbone of Vonage's service is the Internet").

that Congress may not assert jurisdiction under the Commerce Clause over all Internet communications, regardless of their "end points," as it has now done in the 1996 Act.[89]

The conclusion that all IP-enabled services and applications, including individual communications, are subject to federal jurisdiction, and the jurisdiction of this Commission, are "unaffected by section 2(b)" of the Communications Act of 1934.[90] When Congress expressly asserts jurisdiction over a subject, as it has in section 230, section 2(b)'s "rule of construction," which excludes "intrastate" communications from the scope of the Act, is inapplicable.[91] Through section 230, Congress has clearly and unequivocally carved out IP-enabled services and applications from the scope of the subject matter that, prior to the 1996 Act, had been reserved to the states by section 2(b).

Finally, given the national and international reach of the Internet, and the nature of Internet communications, federal jurisdiction would lie even without regard to section 230 or other provisions of the 1996 Act. Section 2(a) of the 1934 Act, 47 U.S.C. § 152(a), grants the FCC exclusive jurisdiction over interstate communications. It is indisputable that far more than a *de minimis* amount of communications over the Internet originate in one State and terminate in other States (or countries).[92] Indeed, to "characterize" IP-enabled services and applications "as intrastate would," no less than

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89 *See generally*, *AT&T Corp. v. Iowa Utils. Bd. v. FCC*, 525 U.S. 366, 378 n.6 (1999) (noting that Congress "unquestionably" took "regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act").

90 47 U.S.C. § 152(b) (2001). *See also AT&T Corp.*, 525 U.S. at 379.

91 *AT&T Corp.*, 525 U.S. at 421.

92 *Pulver Declaratory Ruling* ¶ 22; *GTE ADSL Order*, 13 FCC Rcd 22,466, ¶ 26 (finding that "more than a *de minimis* amount of Internet traffic is destined for websites in other states or countries, even though it may not be possible to ascertain the destination of any particular transmission," and concluding therefore "that GTE's ADSL service is subject to federal jurisdiction").

with respect to cable television, "disregard the character" of the Internet and providers that use it to deliver or facilitate IP-enabled services and applications, "and serve merely to prevent" the implementation of "national" policy.[93]

B. Federal Jurisdiction Over IP-Enabled Services and Applications is "Exclusive"

The Commission also "seek[s] comment regarding whether, and on what grounds, one or more classes of IP-enabled service should be deemed subject to *exclusive* federal jurisdiction with regard to traditional common carrier regulation."[94] Again, the plain language of the statute, the international reach of the Internet, and the characteristics of IP networks compel the conclusion that all IP-enabled services and applications are subject to the Commission's exclusive jurisdiction. That exclusive jurisdiction extends, moreover, not merely to "traditional common carrier" or "public utility" regulation," but to all regulation other than that of general applicability (e.g., consumer protection laws). State commissions will, however, continue to play a significant role as the Commission shapes the policy of non-regulation adopted by Congress.

In addition to recognizing that communications over the Internet are a matter of nationwide significance, and thus asserting federal jurisdiction, Congress has mandated that as a matter of federal policy, communications over the Internet shall be "unfettered" by "regulation."[95] Congress did not limit that policy to "federal" regulation, but expressly applied it to "state" regulation as well. Thus, "Congress has spoken with unmistakable

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93 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 (1968) ("to categorize respondents' [cable television] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is not only appropriate but essential to the efficient use of radio facilities")(citations omitted).

94 *Notice,* ¶ 41 (emphasis in original).

clarity" against state regulation of the Internet and Internet-related services and applications.[96] Any notion that the FCC should disregard the policy of non-regulation as applied to IP voice applications on the ground that states have traditionally regulated voice communications would ignore the statutory language, and "significantly lessen Congress's power, derived from the Commerce Clause, to act in a field whose international character is apparent."[97]

While the Commission may interpret section 230(b)(2) so as not to foreclose regulation where necessary to accomplish an important "social policy" objective reflected in the Act, as explained *infra*, it does mandate minimal and consistent regulation. In particular, Congress recognized that the mere possibility of regulation by as many as fifty-one separate jurisdictions would stifle if not foreclose investment in and development of the Internet, and realization of its almost limitless potential benefits. Indeed, as one federal court concluded recently, "[s]tate regulation [of IP voice] would effectively decimate Congress's mandate that the Internet remain unfettered by regulation."[98] The Commission itself found in its *Pulver Declaratory Ruling* that

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[95] 47 U.S.C. § 230(b)(2) (2001), as noted *supra*.

[96] *Zeran*, 129 F.3d at 330.

[97] *Id.* at 334. There is abundant evidence that Congress understood and desired that its policy of non-regulation not distinguish between voice and other Internet applications. "The possibility of voice communications travelling over the Internet" was known at least as early as February 1995, an entire year before Congress adopted in the 1996 Act the policy of non-regulation, when providers introduced "Internet Phone" software. *See* VoIPWatch.com, What is VoIP? Overview, (visited May 19, 2004) <VoIPWatch.com/about_us.php3?op=viewarticle&artid=7>. In addition, the complexity and impracticality of a dual regulatory scheme even as applied to geography-based circuit switched networks were well known. *See Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986). Thus, in 1996, Congress could plausibly, and did, recognize that a dual regulatory scheme was entirely inappropriate as applied to IP-enabled voice applications.

[98] *Vonage*, 290 F. Supp.2d at 994.

subjecting providers of IP-based communications to "more than 50 different certification, tariffing and other regulatory obligations" would "eliminate" one of the "fundamental advantages of IP-based communication."[99]

Section 230(b)(2), and the Commission's "hands off the Internet" policies, however, have by themselves thus proven insufficient to eliminate the severe and immediate threat posed by state regulation to the development and promise of IP-enabled services and applications, including IP voice.[100] By the third quarter of 2003, at least fifteen states had begun either to regulate or were considering the regulation of IP voice offerings.[101] Less than two weeks ago, the New York Public Service Commission decided that its legacy regulatory scheme, including rules regarding rates and entry, applied to IP voice offerings.[102] These facts demonstrate an urgent need for a Commission statement preempting all state regulation of IP-enabled services and applications, including but not limited to IP voice offerings.[103]

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[99] *Pulver Declaratory Ruling,* ¶ 25. Distinctions between Pulver's "Free World Dialup" offering and other IP-enabled services and applications are not relevant to the type or magnitude of the harms caused by subjecting such services and applications to fifty different regulatory schemes.

[100] Significantly, the investment community, which provides the capital necessary to fuel the development of the Internet, including IP-enabled services and applications, as well as Internet access, has characterized "state intervention" as the "biggest regulatory risk" to realization of the enormous consumer benefits offered by "VoIP." *VoIP Regulatory Risk*.

[101] *See* Comments of SBC Communications, Inc., *In the Manner of Vonage Holding Corp.'s Petition for Declaratory Ruling*, WC Docket No. 03-211, at 5-6 (Oct. 27, 2003).

[102] *See NYPSC Order*, at 2. The *NYPSC Order* is inconsistent with federal law, notwithstanding its purported recognition of the need for "lessened" regulation of IP Voice, and invitation to providers to submit "waivers" with regard to particular regulations. The *NYPSC Order* stands on its head the presumption against regulation established by Section 230(b)(2), and wholly ignores the problems of requiring providers to satisfy up to fifty different regulatory schemes.

[103] The Commission can and should preempt state regulation regardless whether IP-enabled services are classified as "telecommunications" or "information" services. *See* Joint Reply

The Commission has both the authority and the duty under sections 2(a), 201(b) and 230(b)(2) to issue such a statement. Section 2(a), 47 U.S.C. §152(a), authorizes and requires the Commission "to execute and enforce the provisions of this Act." Section 201(b), 47 U.S.C. § 201(b), authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Like the local competition provisions of sections 251 and 252, the policy of non-regulation codified in Section 230(b)(2) was "not adopted as a free standing enactment," but as "an amendment to the Communications Act of 1934." Thus, section 230(b)(2), no less than sections 251 and 252, "is a part of 'this Act'" to which the authority conferred upon the Commission by sections 2(a) and 201(b) applies.[104]

Preemption of state regulation of IP-enabled services and applications is authorized and appropriate even without regard to section 230(b)(2).[105] First, no IP-

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Comments of MCI & CompTel, *In the Manner of Vonage Holding Corp.'s Petition for Declaratory Ruling*, WC Docket No. 03-211, at 9 (Nov. 24, 2003).

[104] *See AT&T Corp.*, 525 U.S. at 378, n.5. Because the 1934 Act, as amended by the 1996 Act expressly charges the Commission with responsibility for implementing the federal policies established in the Act, and because that policy applies unambiguously to "state" as well as federal regulation, "the rule that preemption must be narrowly tailored does not come into play." *See Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 563 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046, (affirming Commission decision to preempt state regulation of local coin calls, in light of language in section 226 authorizing Commission to ensure fair compensation to payphone service providers). Further, the Commission "is not required to wait for States to impose requirement" to exercise its preemption authority. *See* Report and Order, *Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, FCC 91-384, CC Docket No. 90-623, 6 FCC Rcd 7571, ¶ 121 n.246 (Dec. 20, 1991) ("*Computer III Remand Order*") (preempting state regulation of enhanced services), *aff'd*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994). The mere prospect of such requirements is a threat that the Commission can and should eliminate now.

[105] Even prior to the 1996 Act, the Commission had the authority to preempt in order to deregulate as well as regulate. *See Computer and Communications Industry Ass'n*, 693 F.2d at 214.

enabled service or application of which Qwest is aware is "purely intrastate."[106] IP-enabled services and applications are marketed and provided to customers for use in multiple jurisdictions for both interstate and intrastate communications. Even if it were possible technologically to identify the end points of communications, "it is not possible to market intrastate and interstate" IP-enabled services and applications "separately, because customers do not want such services, and because it would create great customer confusion to attempt to do so."[107]

Second, in contrast to services offering telecommunications entirely over a circuit-switched network, IP voice and other IP-enabled services and applications are "completely portable" with the subscriber.[108] That is, the subscriber may initiate communications at any location with an IP connection, and request multiple "phone numbers" with area codes that differ from those traditionally associated with the geographic location of the subscriber's home or office.[109] IP-enabled applications such as IP voice "thus separate the user from geography and the application enabling voice or other types of communications from the network over which the communication occurs."[110] That fact underscores the inapplicability to IP-enabled services and applications of a regime that provides for jurisdiction based on the fixed geographic locations of its users. Moreover, providers of IP-enabled services and applications,

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106 *Pulver Declaratory Ruling,* ¶ 17 ("exclusive [federal] jurisdiction has prevailed unless, *inter alia*, a "service can be characterized as 'purely intrastate'").

107 *Computer III Remand Order,* 6 FCC Rcd 7571, ¶ 126.

108 *Notice,* ¶ 39 (*citing Pulver Declaratory Ruling,* ¶¶ 21-22).

109 *See supra* at 12-13.

110 *Pulver Declaratory Ruling*, ¶ 4.

including Qwest, currently lack the technological capability to identify the geographic location of the end-points of communications.[111]

In sum, even prior to the 1996 Act, where (as here) the interstate and intrastate portions of a service are practically or technically "inseverable," and state regulation would in practice foreclose application of the federal rule or policy to interstate communications, preemption is appropriate.[112]

Finally, the Commission' preemptive statements should be clear in scope. In particular, the Commission should not qualify or narrow those statements by using terms such as "economic," "common carrier," "public utility" or "entry/exit" regulations.[113] Preliminarily, because those terms are vague and subject to varying interpretations, their use would continue rather than end the existing uncertainty over the applicability of particular regulations to IP-enabled services.

More fundamentally, the language of section 230(b)(2) codifying the federal policy of non-regulation,[114] and the harms associated with subjecting IP-enabled services to up to fifty-one sets of regulations, are not limited to "economic," "common carrier" or "public utility" regulations. In considering whether to adopt or apply, pursuant to its ancillary jurisdiction, any type of regulation, the Commission will have to ascertain and

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111 *See Vonage*, 290 F. Supp. 2d at 995.

112 *See* Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by Bell South Corp.*, FCC 92-18, 7 FCC Rcd 1619, ¶ 14 (Feb. 14, 1992) (preempting state commission order prohibiting intrastate provision of voice mail service based on findings that "service is provided and marketed, and uses the same equipment and underlying basic services, without regard to the jurisdictional nature of a customer's use of the service in general or for a particular call").

113 *Pulver Declaratory Ruling*, ¶¶ 15, 18.

114 *See also Zeran*, 129 F.3d at 334 (preempting common law).

balance the need for and consequences of such regulations, as described *infra*. Absent preemption, states may make different findings and/or arrive at different conclusions based on their own balancing processes and policy preferences, thereby subjecting national and international services and applications to disparate and inconsistent requirements.[115] The federal policy that IP-enabled services and applications be "unfettered by federal and state regulation" must, at a minimum, foreclose multiple and conflicting regulations regarding the same subject matter.[116] The Commission should thus preempt all state regulation of IP-enabled services and applications (including IP voice), except for state laws and regulations (*e.g.*, consumer protection) of general applicability.[117]

Whether undertaken for the purpose of implementing the federal policy of non-regulation, or preventing interference with the Commission's regulation of interstate

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[115] The *NYPSC Order* subjecting IP voice applications to regulation expressly acknowledges that the parameters of specific regulations it chooses to apply will be the result of a "balancing" process. *See NYPSC Order* at 2. However, the result of any balancing undertaken by that or any other state commission will be superceded by the Commission's decisions as to the same subject matter. *See*, *e.g.*, *California v. FCC*, 75 F.3d 1350, 1359 (9t^{h} Cir. 1996), *cert. denied*, 517 U.S. 1216 ("FCC may, in determining what regulations will best support development of CPN for interstate calls, make a predictive judgment that its regulations will better serve that goal than would the California commission's default plan"); *Computer III Remand Order*, 6 FCC Rcd 7571, ¶ 131 (preempting state regulations of the timing of network disclosures, reasoning that "[a] state rule that required timing of initial disclosure at a time that differs from the federal rule would substitute a state balancing for the federal balancing of [relevant] concerns," including the "need for independent ESPs to receive network information on a timely basis, and preventing premature disclosure that could impair carriers' service development efforts and inhibit network innovation").

[116] *See* Brief of the United States and the FCC as *Amici Curiae*, *Vonage v. MPUC*, Appeal No. 04-1434 (8th Cir), at 24 (April 21, 2004) ("[u]niformity and consistency are particularly important in the regulatory treatment of internet services because of the Internet's interstate (and international) architecture and the lack of any necessary correlation between service provider and physical locations").

[117] The need for preemption of laws and regulations of general applicability may be determined on a case-by-case basis.

services, preemption by the Commission of attempts by states to assert jurisdiction over and regulate IP-enabled services and applications will leave the states with a meaningful role in the regulatory process. First, state commissions and the industry should be encouraged to work together to formulate solutions to matters of public importance. Second, state commissions can and should participate, as objective and knowledgeable parties, in Commission proceedings regarding the adoption or application of federal regulations. In addition to making recommendations, state commissions may assist the Commission with the development of relevant facts.[118] For example, to the extent that state governments are responsible for certain matters of public health and safety, they will have an important role in working with the industry and advising the Commission as to the status of the industry's efforts to meet their needs in an expeditious, yet practical and cost-effective manner.[119]

Finally, state commissions are free to petition the Commission for individualized waivers that would permit them to impose additional or different requirements based on particular local conditions creating special problems that make the federal resolution inadequate.[120] As the Supreme Court has confirmed, that is the appropriate process when the subject matter is interstate in scope, and Congress has delegated administration of that subject matter to the Commission.[121] This process also adheres most closely to the policy

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118 *See United States Telecom. Assoc. v. FCC*, 359 F.3d 554, 566-67 (D.C. Cir. 2004) ("legitimate [state commission] input into agency decision-making processes" includes "fact gathering").

119 However, state commissions may not unilaterally impose regulatory obligations on providers of IP-enabled services and applications.

120 *See City of New York v. FCC*, 486 U.S. 57, 69 n.5 (1988).

121 *Id.*

of non-regulation mandated by Section 230(b)(2). In contrast, a process that allowed state commissions to regulate at will, subject only to after-the-fact, case-by-case adjudications by the Commission or the courts, would largely nullify that policy.

IV. THE COMMISSION SHOULD EXERCISE ITS ANCILLARY JURISDICTION TO APPLY REGULATIONS TO IP-ENABLED SERVICES AND APPLICATIONS ONLY UPON A DEMONSTRABLE SHOWING OF NECESSITY TO ACHIEVE AN IMPORTANT OBJECTIVE UNDER THE ACT

The Commission seeks comment on the implications of its classification of IP-enabled services, including in particular whether it should classify them as "telecommunications services" and consider forbearing from regulation, or classify them as "information services" and limit regulation to that adopted pursuant to its ancillary jurisdiction.[122] The Commission also asks whether, under the latter approach, it should now adopt any particular regulations for IP-enabled services.

The approach that is most consistent with -- indeed, required by -- section 230(b)(2), the Act's definitions, and Congress's decision to limit most regulatory mandates to "telecommunications services" is the one that allows the Commission to impose regulation of IP-enabled and other "information services," if at all, pursuant to its ancillary jurisdiction. These same statutory provisions and definitions, as well as the Act's deregulatory and pro-competitive purposes, require that the Commission adopt or apply regulation to such offerings only where demonstrably necessary to achieve an important objective recognized elsewhere in the Act. Even in those circumstances, the Commission should also balance the perceived necessity and benefits of the proposed

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[122] *Notice,* ¶¶ 48-49.

regulation against potential inference with or adverse impact on the offering and provision of IP-enabled services and applications that would not be included.[123]

A. Ancillary Jurisdiction Generally

As explained *supra* in Part II, all IP-enabled services are "information services" within the meaning of the Act. Accordingly, many of the provisions of the Act are, on their face, inapplicable to these services. In addition, Section 230(b)(2) expresses the clear preference of Congress for reliance on market forces to the maximum extent practicable, in lieu of prescriptive forms of regulation.

As the Commission explains, however, the classification of a service is not necessarily conclusive of its regulatory treatment.[124] The Commission may exercise its ancillary jurisdiction under Title I to adopt and apply regulations where doing so is necessary to advance policies and objectives of the Act.[125] In that event, moreover, federal regulation would not be foreclosed by Section 230(b)(2). The Commission's broad mandates clearly provide it with the authority to determine how best to reconcile potentially conflicting policies reflected in the Act.

Indeed, the concept of ancillary jurisdiction has special relevance to new communications media such as the Internet. "In designing the Communications Act,

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123 The potential for such interference is not insubstantial, in view of the fact that IP-voice is simply one of many applications available through integrated offerings such as the Qwest service described *supra*, and the fact that "on an IP network," packets carrying voice, video, music and other data "all look the same. *Net Telephony is the Future*. *See also Riding the New Wi-Fi Wave*, at 104 ("the Internet is one big dumb pipe. It doesn't know or care whether it is carrying a Web page, a phone call or a sitcom").

124 *Notice,* ¶46.

125 The Commission's authority to adopt regulations governing enhanced services has been expressly upheld by the courts. *See*, *e.g.*, *Computer and Communications Industry Ass'n*, 693 F.2d 198.

Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications."[126] In particular, Congress gave the Commission "various bases of jurisdiction and various tools with which to protect the public interest," and the courts have accorded substantial deference to the Commission's decisions regarding "which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."[127]

The 1996 Act now effectively forecloses applying to IP-enabled services the "alternative" scheme described in the *Notice*, which would apply to such services all Title II and other regulation that apply to "telecommunications services," subject only to possible piecemeal "deregulation" through "forbearance" upon a proper showing to, and further action by, the Commission.[128] That approach, which has been described by Chairman Powell as "regulation by accident," entails "working [the] way down" "from the myriad of telecommunications regulations" that apply to circuit-switched services today, [129] and would stand on its head the policy of non-regulation codified in section

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126 *Id*., at 213. *See also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

127 *Id*., at 212.

128 The point here is that classifying IP-enabled services as "information services," eliminating the need to affirmatively forbear from regulation, is far preferable to the alternative approach, not that the Commission may not or should not forbear from regulation if it were to find, incorrectly, that one or more IP-enabled services and applications are "telecommunications services." To the contrary, forbearance would be amply justified in that event.

129 *Avoiding Regulating by Accident*, Remarks of Michael K. Powell, Chairman, FCC, On Voice Over IP (delivered October 20, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241750A1.pdf

230(b)(2). In short, beginning from a "blank slate" is not merely sound policy;[130] it is also the law.

At a minimum, section 230(b)(2) establishes a strong presumption against regulation of IP-enabled services and applications, particularly legacy regulation designed for other media. The Commission should to the maximum extent possible rely on market forces and industry initiatives to protect consumers and advance the Act's objectives. It should exercise its ancillary jurisdiction to regulate IP-enabled and other information services only upon a demonstration that market forces and other processes cannot achieve an important objective reflected in the Act.[131] The policy of non-regulation that has heretofore allowed the Internet to flourish,[132] and also supported the explosive growth of wireless services, must continue for the Internet to reach its full potential to bring to residential, business and institutional customers the fully array of benefits it is capable of providing.

Qwest recognizes that some aspects of IP-enabled services that permit real time two-way voice communications (including those that may terminate on the PSTN) may raise unique policy concerns. The Act generally permits the FCC to address these policy issues when they arise, as discussed above. However, the Commission's ancillary

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130 *Id*.

131 Even prior to the 1996 Act, the Commission and the courts recognized that relying on ancillary jurisdiction to regulate enhanced services is appropriate only when neither Congress nor the FCC has found rate and other regulation to be essential, and reliance on market forces insufficient. *See generally*, *Computer and Communications Industry Ass'n*, 693 F.2d at 211 (noting reluctance to declare that free market forces must be supplanted by rate regulation when neither Congress nor the Commission has found it essential) (quotation omitted).

132 *VoIP Regulatory Risk*, Nov. 25, 2003 (explaining that Commission policies exempting data services from regulation "has fostered the Internet, email, instant messaging, low monthly flat rates for data usage, and accelerated both the rate and amount of Internet penetration in the US").

jurisdiction to address actual problems which arise with the offering of information services, especially those that originate or terminate on the PSTN, cannot be seen as an open invitation to regulation of the Internet itself, or any IP-enabled service or application that is not directly involved in whatever issue the FCC is attempting to address. In other words, the existence of a policy issue raised by IP voice that may be legitimately addressed by the Commission should not be seen as spilling over into other aspects of the Internet. The Internet and all IP-enabled services are information services and should be regulated accordingly, subject only to the most limited use of ancillary jurisdiction to examine specific issues raised by individual applications such as IP voice.

B. Specific Regulations

1. "Common Carrier," or "Public Utility" Regulation

As "information services," IP-enabled services are not, by definition, common carrier services. On their face, the common carrier regulations prescribed by the Act apply only to "telecommunications services," not "information services."[133] Common carrier regulation of any IP-enabled services is unnecessary and would be counterproductive, and therefore is unsupported by the Commission's ancillary jurisdiction. No provider of IP-enabled services has market power.[134] "IP voice," for example, is still in the nascent stage, and there are already many competing providers. IP voice also competes with regulated circuit-switched services. The Commission should

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[133] *See Vonage*, 290 F. Supp. 2d at 996-97. The phrase "common carrier regulation" is used herein by Qwest to refer to regulations that are necessary to protect consumers from the exercise of market power, including rate regulation, tariff filing requirements, and exit and entry regulation.

[134] *Huber Report* at 2-11 and Appendix B (describing competition in the provision of IP-enabled services).

decline to exercise its ancillary jurisdiction to impose common carrier regulation on IP voice or other IP-enabled services and applications. It should also preempt the application of common carrier regulation by the states, as discussed *supra*.

2. Carrier Compensation

The *Notice* (¶¶61-62) seeks comment on several important issues involving compensation of carriers for terminating IP voice and other IP-enabled communications on behalf of other providers. Of primary interest is the compensation due and owing to local exchange carriers ("LECs") whose local exchange switching facilities are used to terminate IP voice communications that originate in a different local exchange—a communication that would ordinarily be subject to payment of "carriers' carrier charges" if delivered to the LEC by a long distance carrier (or delivered to one LEC from a long distance carrier through another LEC's tandem), for delivery to the terminating LEC's end user.[135]

The Commission is examining in a separate docket broad-based reform of its regulations governing compensation for use of the PSTN to originate and terminate communications. Qwest generally agrees with the Commission's statements in the *Notice* 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," and "that the cost of the PSTN should be borne equitably among those that use it in similar ways."[136] The Commission should confirm,

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[135] *See* 47 CFR § 69.5(b) (2004).

[136] *Notice,* ¶ 61. Qwest has been troubled by the disparate compensation schemes that apply to "information" services, local exchange services, and interexchange services. Qwest submits that a reasonable solution to this issue is the "bill and keep" proposal now under study in the Intercarrier Compensation docket. In a bill and keep regime, IP-enabled service providers,

however, that pending adoption of new regulations in its separate docket, providers of "true" IP-enabled services and applications (including IP voice) may, under the "ESP exemption," purchase local service from an ISP POP within the local exchange, regardless of the point at which the subscriber originated the communication, and are not subject to access charges.[137] The Commission should also confirm that LECs are required, at the request of an IP voice provider, to originate and terminate IP voice communications via local services such as ISDN-PRI.

3. 911/E911

Section 222(g) of the Act, 47 U.S.C. 222(g), on its face limits to providers of "telephone exchange service" the obligation to furnish providers of emergency services the information described in section 222(i), 47 U.S.C. 222(i). Congress has not required that these obligations be imposed on providers of IP-voice or other IP-enabled services.

Qwest nevertheless understands the critical nature of emergency services and the role of first responders, not only with respect to day-to-day problems but grave matters involving acts of god or terrorist activities. Customers demand quality, reliable access to emergency services and they have come to expect the availability of such access through the 911 dialing pattern. To meet this demand, and notwithstanding the absence of a legal mandate, Qwest is working on solutions that will enable it to offer the subscribers to its

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including providers of true IP voice applications (*infra* at n.139), would remain end users and would retain the right to purchase end user services as they do today. The IP-enabled service provider's selected carrier would thereafter interconnect with other carriers on a bill and keep basis.

[137] "True" IP enabled services and applications do not include the AT&T "IP in the middle" service that involves no "net protocol conversion" and "offers no enhanced functionality," and that the Commission held in the *AT&T Declaratory Ruling* to be a "telecommunications service" that is subject to access charges.

IP-enabled service the capability of reaching an appropriate Public Safety Answering Position ("PSAP") utilizing the 911 dialing pattern.

Qwest is not alone in its pursuit of an emergency response infrastructure supportive of the 911 dialing pattern.[138] As the significance of VoIP offerings became increasingly apparent, the National Emergency Number Association ("NENA") in conjunction with an association of IP voice providers (the Voice Over Net or VON Coalition) entered into an agreement in principle regarding the provision of 911 functionality. They have committed to continue working together to further refine and enhance 911 connectivity and service to IP voice customers. In support of this kind of industry initiative, Qwest Corporation (the local exchange company), has entered into a trial with King County to test and evaluate new ways of enabling 911 connectivity with VoIP providers who could then, in turn, extend the benefits of such functionality available to their customers.[139]

Thus, just as IP-enabled service providers have shaped their functions, prices and quality not by regulatory fiat but by market considerations, so too will they be driven to make 911 functionality available in connection with IP-enabled voice applications. In this circumstance, the exercise of the Commission's ancillary jurisdiction to subject

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[138] *See*, *e.g.*, *VON Press Release* ("technical challenges such as integrating 911 service with VoIP technology are already being addressed voluntarily by the industry in cooperation with public safety and security officials").

[139] Additionally, it must be remembered that no 911 solution for IP voice can focus solely on the providers of that service, ignoring the critical role that PSAPs of necessity would play in bringing 911 services to the public in such context. One of the important teachings from the deployment of wireless 911 is that imposing deadlines on carriers to implement or upgrade certain 911 functionality extends no benefits to consumers if the PSAP has not upgraded its facilities due either to lack of funding or fear of technology. The industry and the PSAP community are engaged in meaningful discussions focused on determining a reliable, quality means in which to deliver 911 to subscribers to IP-enabled services that include voice applications.

providers of IP voice applications to 911/E911 regulations is unnecessary and, at best, premature.

4. Disability Access.

Section 225 obligates "[e]ach common carrier providing telephone voice transmission services" to provide Telecommunications Relay Service ("TRS") in compliance with Commission rules, and extends jurisdiction to the Commission over "common carriers engaged in intrastate communications."[140] The scope of Section 225 is clear on the face of the statute. It applies to common carriers providing voice services. However, the inapplicability of the statute to IP-enabled services and application does not mean that persons with disabilities will be relegated to inadequate or inferior access to relay services. Quite the contrary may be the case.

Section 255 uses the term "provider of telecommunications service" rather than common carrier. Still the results are the same. Section 255(c) requires that any "provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[141] When the Commission considered the scope of Section 255, it determined that it "may not reinterpret the definition of telecommunications services, either for purposes of section 255 only or for all Title II regulation."[142] The Commission emphasized "that the term 'information services' is defined separately in the Act" and that "there was no indication in the legislative history

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140 47 U.S.C. § 225(c), (b)(2) (2001).

141 47 U.S.C. § 255(c) (2001).

142 Report And Order And Further Notice Of Inquiry, *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer*

of the 1996 Act that Congress intended these terms to have any different, specialized meaning for purposes of accessibility."[143] Thus, the Section 255 accessibility obligations do not apply to information services generally,[144] which include IP-enabled services.

Moreover, "an entity that provides both telecommunications and non-telecommunications service … is subject to section 255 only to the extent that it provides a telecommunications service."[145] This "limitation on the scope of section 255 to cover an entity only to the extent that it provides telecommunications service comports with an analogous limitation in section 3(44), which expressly provides that a telecommunications carrier 'shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.'"[146] Thus, if Qwest Communications Corporation, an entity that provides telecommunications services, also provides an information service, it is subject to Section 255 requirements only in the provision of telecommunications services.

The fact that neither of these statutory provisions apply to IP-enabled services and applications does not mean that persons with disabilities will be without access to their capabilities. For example, in March 2003, the Telecommunications Industry Association

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Premises Equipment by Persons with Disabilities, FCC 99-181, WT Docket No. 96-198, 16 FCC Rcd 6417, ¶ 78 (1999).

143 *Id*.

144 Under a limited exception to this rule, the Commission applies section 255 accessibility requirements to voicemail and interactive services associated with the PSTN. *Id*., ¶¶ 93-108. The Commission considered but declined to exercise its ancillary jurisdiction to reach other information services, which it found to be alternatives to telecommunications services that are not essential to the effective use of telecommunications services. *Id.,* ¶ 107.

145 *Id.,* ¶ 80.

146 *Id*.

("TIA") advised both the Alliance for Telecommunications Industry Solutions ("ATIS") as well as the Network Reliability and Interoperability Council ("NRIC") that tests were being conducted on Teletypewriters ("TTY") and Telecommunications Device for the Deaf ("TDD") equipment connected to IP networks. TIA reported that a high level of "network quality was achievable within properly traffic engineered and managed IP networks."[147] TTY/TDD/IP voice interoperability is undoubtedly being incorporated in IP deployment plans by service providers of all kinds in light of the current industry and standards efforts.

Beyond TTY/TDD functionality and VoIP the Internet community is actively working on accessibility issues. As but one example, Avaya, a company that offers IP-enabled voice applications promotes its products, in part, on their accessibility.[148] Thus, it is clear that even absent regulation, creative efforts are being extended by various industry sectors to create access to IP-enabled services and applications by persons with disabilities. As such, regulatory measures are unnecessary, and could be counterproductive.

5. Universal Service Contributions

Under the Commission's current rules, information services are not subject to federal universal service contributions. Thus, absent changes to the contribution rules, any VoIP service that constitutes an information service would be exempt from universal contribution obligations. That is not to say that providers of IP-enabled services and

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147 Letter from Bob Bell, Chair, TR41.4 and Keith Chu, Chair TR30.1, TIA to Ed Hall, Chair, TTY Forum ATIS and Cliff Naughton, Chair, NRIC (March 24. 2003).

148 Avaya Inc., *IP Telephony and Messaging Solutions*, Accessibility Evaluation vs Cisco Systems, (Feb. 2004) available at http://www1.avaya.com/enterprise/resourcelibrary/labtestreports/tolly_204115.pdf

applications make no contributions to universal service. Like other providers of information services, such providers contribute to universal service indirectly when they purchase transmission services and capacity from telecommunications carriers.

Nevertheless, the exemption of providers of IP-enabled services and applications from direct universal service contribution obligations could have a significant impact on the long-term viability of the federal universal service mechanism. The Commission, however, is considering in the universal service docket various proposals to rationalize the current contribution methodology, given rapid changes in technology and the services purchased by customers.[149] Given the multitude of issues that the Commission must consider in adopting a new contribution methodology, the universal services issues are best addressed in the universal service docket, rather than this docket. The same applies to the question whether IP-enabled services and applications should be considered "supported services" eligible for federal high cost support.[150] All of these issues are best addressed in the universal service docket.

6. CALEA

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[149] Report and Order and Second Further Notice of Proposed Rulemaking, In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, NSD File No. L-00-72, 17 FCC Rcd 24952 (rel. Dec. 13, 2002).

[150] *See* 47 U.S.C. § 254(c)(2) (2001) (authorizing the Federal-State Joint Board to recommend and the Commission to adopt modifications of the list of services eligible for universal service support "from time to time."). *See also In the Matter of Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, CC Docket No. 96-45 (rel. July 14, 2003) (maintaining the current list of supported services).

The Commission has stated its intention to address the applicability of CALEA to IP-enabled services and applications in a forthcoming NPRM, and has not in the *Notice* sought comment on this issue. Accordingly, Qwest limits its comments here to urging the Commission to reject the requests of some parties to distort the definitions of "information service" and "telecommunications service" for the purpose of subjecting IP-enabled services and applications to CALEA.[151]

No present danger is presented to the American public from the inapplicability of CALEA to IP-enabled services and applications.[152] Law enforcement is nevertheless sufficiently empowered to engage in interceptions of digital transmissions over the Internet; and it has had such authority since 1986 – well before CALEA was ever enacted – when Congress authorized the interception of electronic communications.[153] A variety of existing laws give law enforcement the authority to engage in surveillance and

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[151] A number of government offices agree, however, that CALEA does not apply to IP-enabled services and applications, and that further action by Congress would be necessary to support a different conclusion. A report of the Office of Inspector General of the United States Department of Justice, following a detailed review of CALEA's history and implementation, notes that legislative changes would be required to apply CALEA to emerging technologies, including IP voice. *See* "Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation," available at http://www.usdoj.gov/oig/audit/FBI/0419/final.pdf ("OIG Report"), at 20 ("[s]ome modification of the information services exemption may be necessary in order to ensure that Voice-over-Internet-Protocol (VoIP) services are subject to law enforcement requests for lawful electronic surveillance").

[152] OIG Report at ii-iii (noting that the FBI was unable to demonstrate the extent to which lawful electronic surveillance has been adversely impacted" by any "lack of CALEA implementation"). Indeed, the annual Wiretap Report shows that law enforcement has been quite successful with its packet mode surveillance. For example, in 2003, the most active federal wiretap, in the District of Minnesota, intercepted as part of a racketing investigation a total of 141,120 messages on a DSL line over a twenty-one day period. Moreover, only twelve of the 1442 authorized wiretaps involved computers. *See* www.uscourts.gov/wiretap03/2003WireTap.pdf

[153] *See* 18 U.S.C. § 2511 (2001) (as amended by the Electronic Communications Privacy Act of 1986).

interceptions calculated to protect the public against crimes and terrorist acts.[154] And the Federal Bureau of Investigation ("FBI") has itself adapted to new technologies, such as with its "Carnivore" technology that allows it to gather packet-mode information. Service providers, moreover, generally have an obligation to work with law enforcement on electronic interceptions. Providers are working, even in the absence of legal compulsion, to assure that their networks remain capable of accommodating lawful interceptions.[155]

Congress is fully capable of addressing the issue in the event, highly unlikely in Qwest's view, that current surveillance capabilities and coverage, or efforts to adapt them

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[154] These include the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1862 (2004); Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2712; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(d) (2004); and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272 (2001))("Patriot Act"). Significantly, Congress stated that the Patriot Act was not intended to amend CALEA or to "impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance." *Id.*, 115 Stat. at 292, § 222.

[155] Service providers and equipment manufacturers that support them have committed substantial resources and have expressed a willingness to work with law enforcement to develop new technical capabilities and procedures to facilitate surveillance of advanced technologies. For example, the Voice on the Net Coalition ("VON") has noted that Cisco has advertised a MGX 8000 Series Carrier Voice Gateway supporting CALEA requirements, and incorporated CALEA-compliant capabilities into its cable equipment. *See* VON Comments*, In the Matter of United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration; Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM 10865, filed April 12, 2004, at 15 and nn.35, 36. In the same proceeding, Verizon stated that it was including a requirement that its VOIP services equipment comply with CALEA in its Requests for Bid. Verizon Comments at 1-2, 15. Qwest also has worked with its equipment vendors regarding CALEA compatibility. In addition, providers and manufacturers have participated in various standards development activities, which are ongoing. Earlier this year, the FBI's CALEA Implementation Unit noted that it was "pleased with the spirit of cooperation demonstrated by the industry that has resulted in significant progress" to meet the needs of law enforcement. *See* Proposed Scope for Version 2 of T.168, *Lawfully Authorized Electronic Surveillance (LAES) for Voice over Packet Technologies in Wireline Telecommunications Networks,* Electronic Surveillance Technology Section Federal Bureau of Investigation (T1S1 LAES Ad Hoc Group January 19-23, 2004.

to new technologies, are deemed insufficient. All these facts demonstrate that the social objectives of CALEA can be achieved without a manipulation of long-standing legislative and administrative definitions of "information service" and "telecommunications service." That conclusion is underscored by Congress' intention that CALEA "not imped[e] the introduction of new technologies, features, and services."[156]

Respectfully submitted,

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156 *See* H.R. Rep. No. 103-827, *reprinted in* 1004 U.S.C.C.A.N. 3489, 3493 (CALEA implementation was "to avoid impeding the development of new communications services and technologies") (1994).

May 28, 2004

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused 1) the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System in WC Docket No. 04-36, 2) a copy of the **COMMENTS** to be served, via e-mail, on Ms. Janice M. Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, via janice.myles@fcc.gov, and 3) a copy of the **COMMENTS** to be served via e-mail on the FCC's duplicating contractor, Qualex International, Inc., via qualex.int@aol.com.

/s/ Ross Dino
Ross Dino

May 28, 2004

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