

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
IP-Enabled Services) WC Docket No. 04-36
)
Petition of SBC Communications Inc. For a)
Declaratory Ruling Regarding IP Platform)
Services)

COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom, Inc. ("TWTC"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking regarding IP-Enabled Services¹ and the SBC Petition for Declaratory Ruling² Regarding IP Platform Services.

I. INTRODUCTION AND SUMMARY

The development of IP as a protocol for the provision of voice and other services offers the promise of substantially increased efficiencies and remarkable innovation. There is little question that IP will eventually transform the telecommunications products available to end users as few technical breakthroughs have in the past. TWTC believes strongly in the promise of IP. It is investing aggressively in the routers, soft switches and gateways needed to provide IP-based

¹ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*NPRM*").

² See Petition of SBC Communications Inc. For A Declaratory Ruling Regarding IP Platform Services (Feb. 5, 2004) ("*SBC Pet. for Dec. Ruling*" or "*Petition*"). SBC also filed a petition for forbearance from the application of Title II common carrier regulation to "IP Platform Services," which has been placed in WC Docket No. 04-29. Pursuant to the instructions of the Commission staff, TWTC is filing its comments regarding the petition for forbearance under separate cover in WC Docket No. 04-29.

products and in the development of innovative product offerings for its business customers that take advantage of the capabilities of IP.

To establish the preconditions for continued investment and innovation in IP-based networks and services, the Commission must design a regulatory regime that accomplishes two fundamental goals. *First*, it must ensure that firms with market power over inputs needed to provide IP-based services are not able to exploit that market power to control their competitors' ability to provide more efficient and innovative IP network connections and IP services. In the market for serving medium and large business customers in which TWTC competes, this is an extremely serious problem. SBC attempts to gloss over this issue in its Petition by misleadingly describing all IP-based services and networks as subject to the low entry barriers and fierce competition that characterize the Internet. The Commission's own findings in the Triennial Review proceeding, however, demonstrate that competitors have been able to deploy their own fiber loops in only *three to five percent* of the commercial office buildings across the country. Furthermore, with the possible exception of those very small businesses that do not have sophisticated telecommunications needs, intermodal competitors generally do not serve business customers. Thus, SBC and other incumbent LECs own the only viable end user connection serving the vast majority of the nation's businesses. The Commission's factual findings in the Triennial Review also demonstrate that the relevant entry barriers for building loops make it highly unlikely that any competitors, even TWTC which builds its own loops wherever possible, can deploy loops to the majority of the business customers in the U.S.

A firm with overwhelming market share in the provision of an essential input of production that is characterized by high entry barriers has powerful and well-understood incentives to refuse to deal and raise its rivals' costs in downstream markets. This is not a

controversial proposition among economists, and it has been repeatedly recognized by this Commission. SBC's vague and completely unsupported assertion that "Internet" services are characterized by a "modularity" that allows any competitor to provide any network or service offering without the risk of anticompetitive harm is simply empty rhetoric. SBC and others have clear incentives to deny, delay, and degrade access to the IP-enabled high-capacity loops TWTC and others need to serve most business customers. Moreover, the appropriate prescription for this problem is obvious. The Commission must ensure that incumbent LECs provide stand-alone IP-enabled loops and interoffice transport at tariffed rates, terms, and conditions that comport with the requirements of Sections 201 and 202 of the Act. This means that Ethernet and other successors to today's TDM-based DS1 and DS3 loops and transport must be available as special access.

Second, in addressing the appropriate regulatory framework for IP-based services, the Commission should, as the Chairman and every one of the Commissioners has acknowledged, seek to limit the harmful consequences of regulatory uncertainty and unnecessary regulation. The central concern here is with voice services provided over IP. Non-voice services, other than pure data transmission, are almost all classified as information services under settled law. There is no need to revisit those issues in this proceeding. Rather, this proceeding should focus on ensuring a stable regulatory framework for IP voice services.

That goal is unlikely to be effectively advanced, however, by classifying VoIP services that offer the capabilities of conventional telephone service as non-telecommunications services. Since 1934, the technology used to provide telephone service has changed over and over as has the character of the service offered, including the introduction of sophisticated vertical services made possible by Signaling Systems 7 and Advanced Intelligent Network technology and the

mobility feature of cellular and PCS. As with IP, these technical advances have increased the extent to which service providers can take advantage of digital technology to improve the quality of voice offerings anywhere the customer wishes to use them. Yet notwithstanding these innovations, the basic transmission of the human voice has continued to be classified as a common carrier/telecommunication service. Moreover, where voice transmission has included the use of functionalities that fall within the definition of enhanced/information services, such functionalities have been classified as part of the Title II voice service offering where they do not change the basic nature of voice transmission. This rule was codified by Congress in 1996 as part of the statutory definition of “information service” and “telecommunications service.”

The Commission would run a significant risk of reversal on appeal if it were to attempt now to depart from this long line of precedent by classifying basic voice transmission service, whether offered on a stand-alone basis or bundled with other IP-based services, as a non-Title II service. Moreover, the Commission would take on even more significant legal risk if it were to try to impose the social policies embedded in Title II and expressly limited to “common carrier” and “telecommunications services” on a service classified as an information service or even a so-called “Title I” service. The terms of the 1996 Act and Supreme Court precedent demonstrate that any such attempt could well be overturned if challenged on appeal.

It would be far less risky and costly for the Commission to classify IP services that replicate the functionalities of basic telephone service as telecommunications services and, as in the past, leave other voice services (e.g., voice mail as part of IP unified messaging), in the information service classification. Under this approach, the Commission could classify all IP services that offer the two-way transmission of the human voice and that utilize NANP numbers as telecommunications services. The Commission should then exercise its broad forbearance

powers to limit applicable regulation as needed. In exercising its forbearance powers, the Commission should seek to (1) ensure that only those regulations that are required to promote clear policy goals, such as universal service, apply to VoIP, and (2) avoid skewing efficient outcomes by applying any forbearance to voice service in a technology-neutral manner so that regulatory relief applies equally to non-dominant IP and circuit-switched voice services. In addition, the Commission should convene a federal-state joint board on telephone service regulation to work with the states to achieve a similar outcome at the state level. Finally, as to inter-carrier compensation, the Commission should seek to ensure that IP-based telecommunications services are subject to the same charges for the use of circuit-switched networks that apply to other telecommunications services.

II. THE FCC SHOULD ESTABLISH A REGULATORY FRAMEWORK FOR ILEC IP NETWORKS THAT PROVIDES THE PRECONDITIONS FOR EFFICIENT INVESTMENT AND INNOVATION.

In its Petition, SBC argues that so-called “IP Platforms,” which it defines as “IP networks and their associated capabilities and functionalities,” should be deemed “securely outside legacy economic regulation” consistent with a “broad understanding of the services and networks subject to the express hands-off policy for the Internet.” SBC Pet. for Dec. Ruling at 4. That is, IP Platforms would be excluded from the definition of telecommunications services regulated under Title II (and outside of any other classification subject to regulation under the other titles of the Act except Title I), an outcome SBC asserts is justified by (1) the differences in the technical characteristics between IP platforms³ and the circuit-switched “PSTN” (*id.* at 7-11); (2)

³ SBC describes an IP platform network as “an overlay network consisting of its own routers and IP-enabled facilities, that has been built separate and discrete from the circuit-switched network and traditional Asynchronous Transfer Mode (‘ATM’) and frame relay networks.” SBC Pet. for Dec. Ruling at 10.

SBC's purported lack of market power over the "Internet" (*id.* at 11-14); and (3) the distortions that regulation would impose on purportedly competitive and dynamic IP platform services (*id.* at 14-18).

This argument is both misleading and highly flawed. SBC seems to seek complete deregulation of its evolving packet-switched *local* network (all the while confusingly indicating that it is just seeking to preserve the unregulated status of the "Internet") based on its assertion that *other* packet-switched networks (*e.g.*, Internet backbones that have never been subject to regulation) and IP *services* should not be regulated. But SBC's control over local loop bottlenecks requires a completely different assessment of the regulatory approach to SBC's local IP packet-switched network than for other networks or services utilizing the same technology.

Merely labeling the relatively new IP-based functionalities of the incumbent LEC networks as "platforms" does not change the fact that the new functionalities are simply incremental accretions to the legacy plant. The underlying transmission facilities have been upgraded from copper to fiber over time as a means of making the provision of plain old voice service more efficient.⁴ Indeed, as the Commission has explained, "incumbent LECs have been deploying fiber feeder plant for some time" for the "purpose of increasing network efficiency for the provision of narrowband [*i.e.*, plain old telephone] services." *Triennial Review Order* ¶ 290. *See also id.* n.664 (citing evidence that fiber feeder has been deployed to transport increased volumes of voice traffic).

⁴ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16,978, ¶ 285 (2003) ("*Triennial Review Order*"), vacated on other grounds, *United States Telecomm. Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") (describing the incremental manner in which the PSTN network is being upgraded with "first, deployment of fiber in the feeder plant and associated equipment like DLC systems (often with line cards capable of providing xDSL services), followed by fiber-to-the-curb, followed by FTTH").

IP technology is gradually replacing circuit switching and TDM multiplexing in the local network to carry voice as well as data traffic. As a result, incumbent LEC networks may eventually include no TDM functionalities at all.⁵ The “legacy” TDM PSTN is gradually becoming a packet-switched IP PSTN. Accordingly, the technical differences relied upon by SBC between the “traditional circuit-switched network -- often referred to as the ‘public switched telephone network,’ or ‘PSTN’” and IP-based networks as a basis for deregulation (SBC Pet. for Dec. Ruling at 7) is extremely misleading. The incumbents’ IP networks are not an “overlay” but rather a step in the evolution of the regulated network in which the “PSTN” will become an IP network.⁶ Eliminating regulation from this new iteration of the incumbent PSTN will eventually eliminate all regulation applicable to the incumbents, which of course is exactly SBC’s goal.

While SBC’s description of the network facilities that are the subject of its petitions is very general, the facilities at issue appear to encompass the end user connections that have long been the basis for legitimate concern that the incumbents could, if left unchecked, harm competition and stunt innovation. SBC seeks a free pass from regulation for any service that leaves or reaches the customer in IP *and* for the underlying IP network that originates or terminates such services. *See* Pet. for Dec. Ruling at 29. Such IP networks include the facilities used to provide broadband Internet access. *See id.* at 32 n.63. Those facilities are the broadband

⁵ *See e.g.*, BellSouth Petition for Clarification and/or Partial Reconsideration, CC Dkt. 01-338 at 17 (Oct. 2, 2003) (“Installation of a TDM multiplexer at a location where an ILEC plans to deploy a packet-based network is not something an ILEC would undertake for its own customers.”).

⁶ As one former FCC Chief Economist put it, “[t]he PSTN is going to become IP-based . . . [m]aybe we’ll have to drop the ‘ST’ and just call it the public network.” *See Copps Urges FCC To Focus First On Broadband Buildout*, Comm. Daily, Feb. 26, 2004 (quoting Michael Katz).

end user connections that competitors must be able to obtain in order to compete in the provision of IP network services, a market in which SBC agrees competition must be encouraged. *See id.* at 29 (“the Internet’s future development is dependent on innovation at *both* the service and the facility levels”) (emphasis in original).

TWTC is aggressively investing in new and innovative IP services to be provided over its own IP network to medium and large business customers. Whenever possible, TWTC uses its own IP-enabled fiber loops to provide such products to its customers. But there are many customer locations at which it is not possible for TWTC to construct its own loops. Where this is the case, TWTC must purchase IP enabled end user connections such as Ethernet loops (and associated transport where necessary) as special access from the incumbents. If TWTC is unable to obtain access to such loops and transport on reasonable terms and conditions, it will be unable to compete as a viable alternative provider of IP network facilities. It will be forced to rely on less efficient TDM-based technology while the incumbent provides the advantages of next-generation loops to its customers alone.

Eliminating barriers to efficient entry by competitors deploying IP networks serving business customers should be a high priority for the Commission. The Commission has appropriately recognized the development of facilities-based competition as a central goal of the 1996 Act.⁷ As the Supreme Court has recognized, that type of competition cannot develop for the parts of the network for which competition is feasible if the incumbents are under no duty to

⁷ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd 3696, ¶ 110 (1999), vacated in part and remanded in part on other grounds, *United States Telecom. Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

provide competitors with access to those parts of the network for which competition is infeasible.⁸

There can be no question that such investment is infeasible for most businesses at this time and that the incumbents are dominant and are likely to remain so in the provision of loop facilities serving all but the smallest business customers. To begin with, the FCC has recognized that the services demanded by business customers constitute at least one separate market that is distinct from the broadband services demanded by mass market customers. As the Commission concluded, “[w]e find here that the economic characteristics of the mass market, small and medium enterprise, and large enterprise customer classes can be sufficiently different that they constitute major market segments. . . . These customer classes generally differ in the kinds of services purchased, the service quality they expect, the prices they are willing to pay, the levels of revenues they generate, and the costs of delivering them services of the desired quality.” *Triennial Review Order* ¶ 123 (citations omitted). Thus, “high-capacity loops, DS1 to OCn, are generally provisioned to enterprise customers, while voice-grade analog loops, DS0 loops, and loops that deploy xDSL services, are used to serve customers typically associated with the mass market.” *Id.* n.624 (citations omitted).

There are no non-ILEC sources of supply for the vast majority of high-capacity loops demanded by all but the smallest business customers. Except for the business customer locations with the largest traffic demand, self-deployment of fiber loops is generally not an efficient means of reaching the customer. Competitors seeking to serve enterprise customers over their own

⁸ See *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, n.27 (2002) (recognizing that “entrants may need to share some facilities that are very expensive” with competitors and that “competition as to ‘unshared’ elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service.”).

facilities face “steep economic barriers.” *Id.* ¶ 199. Importantly, “most of the costs of constructing loops are sunk costs.” *Id.* ¶ 205. This is true of the huge costs “associated with physically laying the fiber cable.” *Id.* ¶ 312. Entities seeking to deploy fiber loops must also overcome the “inability to obtain reasonable and timely access to the customer’s premises both in laying the fiber to the location and getting it into the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities.” *Id.* (citations omitted).

Given the steep entry barriers associated with investing in new fiber loops, it is not surprising that such facilities have been built to only a very small fraction of business end users. For example, the record in the Triennial Review proceeding showed that only “3% to 5% of the nation’s commercial office buildings are served by competitor-owned fiber loops.” *Id.* n.856. Accordingly, the Commission concluded that “[i]n most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC [fiber loop] facility.” *Id.* ¶ 314 (citations omitted).⁹

Furthermore, there are no widespread intermodal end user connections in the business market. The cable companies generally do not even attempt to serve business customers in

⁹ The Commission further explained that

for DS1 loops and some DS3 loops, overbuilding to enterprise customers that require services over these facilities generally does not present sufficient opportunity for competitors to recover their costs and, therefore, may not be economically feasible.” *Triennial Review Order* n. 859. Moreover, “where evidence exists that a competitive LEC is serving customers via their own DS1 loops, the record suggests this is largely because these competitive LECs have *already* self-provisioned OCN level capacity to that specific location and other deployment barriers have not precluded them from using that capacity to serve other customers at lower loop capacity levels at that same location.

Id. n. 859.

downtown areas that are outside of their network footprint, and the limited upstream capacity of cable modem service, as well as the absence of other features demanded by most businesses, make cable broadband offerings unsuitable for most of the business market. As the Commission has explained, “[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints, and bundling telephone service with cable modem services.” *Id.* ¶ 52 (citations omitted).¹⁰ Specifically, as of June 2002, cable companies “provide[d] fewer than 16,000 coaxial cable connections to medium and large businesses.” *Triennial Review Order* n.128. Even if one focuses on only the small and medium-sized business markets, cable only serves about ten percent of the market, and those customers are likely very heavily weighted toward small business customers whose demand patterns do not differ significantly from residential customers.¹¹ Moreover, businesses represent only between three and four percent of cable modem customers.¹²

There is also no reason to assume that the cable operators will enter the business market to any significant degree. Cable operators’ existing networks were built under special

¹⁰ See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844, Appendix B, ¶ 23 (2002).

¹¹ See Letter from Dee May, Verizon, to Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, 98-147, n.53 (May 17, 2004) (citing Yankee Group study). This letter was filed with the purpose of demonstrating the incumbent LECs do not have market power in the provision of broadband in any product or geographic market. But the data provided therein (to the extent independent review of the cited proprietary analyst reports that are not attached to the letter and not filed in the record is even possible) is either unpersuasive (such as statements at page 12 that cable networks run close to 30 to 50 percent of the small and medium businesses in the country, without any analysis of whether it would be possible to extend such networks to serve such customers or of whether the cable network can support the services such customers demand) or simply confirm that incumbent LECs are, and will likely remain for the foreseeable future, overwhelmingly dominant in the provision of broadband loops to all but the smallest business customers with the least sophisticated telecommunications needs (such as the ten percent market share figure in the small and medium-sized business market).

¹² See *RBOCs Gird For Broadband Battleground*, Telephony, May 3, 2004, at 7.

circumstances that do not exist with regard to the current business market for telecommunications services. *See Triennial Review Order* ¶ 98. To construct new loop facilities in the current environment, cable operators would need to clear the same hurdles that have prevented TWTC and other competitors from building loops to most business locations. Those hurdles include (1) obtaining access to public rights-of-way; (2) obtaining access to buildings on reasonable terms and conditions in circumstances in which building owners have no duty and little incentive to provide such access; (3) convincing customers to wait out the delay (lasting anywhere from six to twelve months or even longer) associated with constructing new loops; (4) generating enough revenue from a particular location over a long enough period of time (usually requiring a long-term commitment from the customer) to make loop construction efficient; and (5) ensuring that the service provider can meet the telecommunications needs of the business customer at all of its locations (not just the location at which the loop construction is efficient), which businesses increasingly demand from their carriers. These entry barriers are probably just as daunting for intermodal wireline competitors as they are for intramodal wireline competitors.

Nor do satellite or fixed wireless services offer viable broadband connections to business customers. As the Commission concluded, “[c]arriers have not generally used satellite technologies to serve the enterprise market. While there was some fixed wireless entry in the enterprise market, it has been limited.” *Id.* n.144 (citations omitted). More generally, the Commission has observed that “alternative transmission technologies such as fixed wireless, satellite and unlicensed wireless” offer alternatives to incumbent LEC loops to business customers only “in limited circumstances.” *Id.* n.630.

The Commission has of course recognized these facts by classifying incumbent LECs as dominant in the provision of special access loops. This is true even where incumbent LECs have

been granted pricing flexibility. The Commission has required that incumbent LECs that have received phase II special access pricing flexibility continue to offer special access pursuant to tariffs to prevent incumbent LECs from “abusing their market power by charging dramatically higher rates to customers that lack competitive alternatives.”¹³ Indeed, as the D.C. Circuit observed, in granting incumbent LECs pricing flexibility, the Commission did not grant the incumbents the relief afforded to carriers classified as non-dominant.¹⁴

Incumbent LECs have the incentive to exploit their control over business customer loops and associated electronics to harm competition in the provision of IP networks. As the Commission has recognized, a competitor with market power over an upstream input has the incentive to leverage that control to harm competition in downstream retail markets. The problem is especially serious in the case of new services that do not rely on well-established means of obtaining access to and interconnection with incumbent LEC networks:

Because incumbent LECs . . . compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new services to consumers. They also have the incentive to limit or control the development of new services to the extent new services compete with their current offerings. In addition, competitors often are totally dependent on incumbent LECs for last mile wireline access to end users.¹⁵

¹³ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 79 (1999) *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

¹⁴ *See WorldCom, Inc. v. FCC*, 238 F.3d 449 at 460.

¹⁵ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, ¶ 202 (1999), vacated on other grounds, *Association of Communications Enter. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

Competitors in every aspect of IP business offerings, network as well as services, are potentially targets of this conduct. SBC could not be more wrong therefore in asserting that IP platform services are not “vertically integrated” and raise none of the concerns of such integration. *See* SBC Pet. for Dec. Ruling at 18.

SBC tries to argue that the “modular” nature of IP services eliminates opportunities for incumbent LECs to harm competition. SBC asserts that anyone can enter the market to provide any part of an IP service (network transmission, service, customer equipment, etc.). The steep entry barriers associated with constructing loops, however, demonstrate that the market for end user connections is closed to entry for the vast majority of business customers. Where an incumbent LEC has control of end user bottleneck facilities, it will inevitably have the incentive to leverage that control to harm competition in the provision of either IP network facilities or IP services.

SBC also argues (*id.* at 50) that unbundling requirements under Section 251(c)(3) are adequate protections for competitors, but this is not so. Most obviously, incumbent LECs do not have any Section 251(c)(3) unbundling obligations for the packet capabilities for fiber broadband loops (*Triennial Review Order* ¶ 288), thus making Section 251(c)(3) essentially irrelevant to the needs of providers of IP-based services to business customers. Furthermore, there is significant uncertainty regarding the circumstances under which incumbent LECs will be required to provide even the “broadband” TDM capabilities of loops.¹⁶ Lastly, incumbents do not have an obligation to build out transmission facilities to meet their Section 251(c)(3) unbundling

¹⁶ The incumbent LECs have argued that they are not required to provide TDM high-capacity loops (such as DS1s and DS3s) under *USTA II*. *See CLECs Say Bells Are Improperly Using Court Decision To Nix Hi-Cap Loop Access*, TRDaily, May 12, 2004.

obligations (while they do have such an obligation for special access). *See Triennial Review Order* ¶ 645.

The only way to limit the incumbent LECs' opportunities to exploit control over Ethernet and other IP-enabled loops to harm competition is to require that incumbent LECs provide stand-alone IP-enabled broadband loops and associated transport to competitors under tariff pursuant to Sections 201-205 of the Act.¹⁷ Any other approach will have the perverse effect of slowing investment and stunting innovation in the IP business market.

That outcome would have a significant negative impact on the economy as a whole and on consumers' daily lives. Competitors like TWTC serve businesses like hospitals and universities with lower-priced and innovative service offerings that unquestionably enhance consumer welfare in concrete ways (such as students obtaining greater bandwidth in their rooms and hospitals obtaining improved ability to share data-rich files concerning research and patient records). Moreover, the promotion of facilities-based competition also enhances businesses' ability to establish effective contingency plans to rely on redundant networks in emergency situations. All of these benefits would be diminished or lost entirely if the incumbents are given free reign to exercise their market power in the business market by slipping out of the regulation of broadband loops serving business customers.

¹⁷ The requirement that incumbents tariff IP-enabled loop and transport transmission is independent of the regulatory classification of the services that "ride on top of" those facilities. In some cases those services will be information services and in others, as seems likely with regard to VoIP that replicates basic telephone service functionalities, they will be classified as telecommunications services. Either way, the incumbent LECs should be required to make the underlying IP-enabled business loop and transport facilities available to competitors.

III. THE FCC SHOULD CLASSIFY IP VOICE SERVICES THAT PROVIDE THE FUNCTIONALITIES OF TRADITIONAL TELEPHONE SERVICE AS TELECOMMUNICATIONS SERVICES AND EXERCISE ITS FORBEARANCE POWER TO PREVENT THE APPLICATION OF UNNECESSARY REGULATION TO VOICE SERVICES.

In examining the appropriate regulatory framework for IP voice services, the Commission should be guided by three basic policy objectives. First, it is obvious that the Commission should ensure that the regulatory framework applicable to VoIP is as stable and predictable as possible. This is no time to incur unnecessary legal risks. As explained further below, this consideration weighs in favor of classifying VoIP service that is functionally similar to traditional telephone service as telecommunications service. Given that the regulatory framework for non-voice IP-based services is relatively well-understood (in almost every case they would be -- and should continue to be -- classified as information services under current law), the Commission should focus in this proceeding on the regulatory classification of IP voice services. The only real uncertainty currently centers on IP voice services, and in particular the IP services that offer the functionalities delivered by traditional telephone service.

Second, as virtually every commentator has observed, regulation should apply to VoIP only where necessary to advance a legitimate and clearly defined policy objective. The point here is obviously that regulation imposes costs and distorts efficient outcomes. Those costs should only be incurred where they are outweighed by the benefits of advancing a well-understood policy objective such as access to the disabled or universal service.

Third, while limiting the scope of regulation wherever possible is important, this approach should not apply only to VoIP. For every category of regulation deemed inapplicable to non-dominant VoIP providers, the Commission must seek the same outcome for non-

dominant circuit-switched providers.¹⁸ Non-dominant providers of circuit-switched services have for too long been subject to costly and unnecessary regulation, especially in some states. To avoid skewing investment decisions by arbitrarily favoring IP over other technologies, the Commission must therefore try to ensure that the same level and type of regulation applies to non-dominant VoIP and circuit-switched telephone services. The important goal of technological neutrality must not be lost amidst the understandable eagerness to limit the impact of regulation on VoIP.

Taken together, these policy guidelines yield the conclusion that the Commission should classify as telecommunications services those VoIP services that offer customers the capability to exchange voice communications in real-time in a manner that is transparent to the end user and that utilize telephone numbers. This definition captures those VoIP services that are functionally similar to traditional telephone service. Indeed, as explained below, the Commission probably lacks the authority to classify such services as anything other than telecommunications services and any attempt to do so would cause the Commission to risk reversal on appeal and all of the costly confusion that such an outcome would create. But the classification as telecommunications service does not, as some have suggested, doom VoIP to entanglement in regulatory red tape. The Commission can and should exercise its broad forbearance powers to avoid any regulation that does not promote a clear and justified policy objective. But, again, to ensure efficient outcomes, such forbearance must apply equally to circuit-switched as well as IP-based voice services, all the while preserving the Commission's

¹⁸ Different treatment may be warranted where a service provider has market power in the provision of a service (as opposed to the underlying network facility discussed above). The question of how to address market power in the provision of voice service is not addressed herein, however.

authority under Title II to limit the consequences of market power and advance desired social policies in Title II.

A. Classifying VoIP Service As A Telecommunications Service Subject To Title II Promotes Legal Stability More Effectively Than Alternative Approaches Without Undermining The Commission’s Deregulatory Goals.

The public discourse regarding the proper regulatory classification of VoIP has been fraught with misleading assertions. Many have suggested that the best way of advancing the goal of limiting the extent to which VoIP is subject to regulation is to classify it as an information service or, more vaguely, as some new type of Title I service. But any attempt to exempt basic telephone service from common carrier regulation, regardless of the technology used to deliver it, would be legally risky. It would run counter to the longstanding rule that basic telephone service is subject to Title II regulation, even where the provision of such service involves functionalities that fall within the literal terms of the definition of information service. Moreover, any attempt to rely on ancillary jurisdiction to impose social policy requirements found in Title II on an unregulated service is legally suspect. It would be far safer to classify basic voice service provided *via* IP technology as a telecommunications service subject to Title II.

1. Longstanding Precedent And The Terms Of The Communications Act Indicate That Telephone Service Provided Using IP Technology Should Be Classified As A Telecommunications Service.

The analysis of how to classify VoIP service begins with the definition of telecommunications service. In 1996, Congress added the defined terms “telecommunications service,” “telecommunications carrier,” and “telecommunications” to the Communications Act, and it imposed extensive new Title II obligations on “telecommunications carriers.” *See* 47

U.S.C. §§ 153(43), (44).¹⁹ The Title II provisions that preceded the 1996 Act (mostly adopted in the 1934 Act itself) apply to “common carrier” or “carrier” service. *See, e.g., id.* §§ 153(10), 201-203. The Commission has concluded that, “[t]he legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.”²⁰

Accordingly, in determining whether a firm is acting as a “telecommunications carrier,” the Commission has applied the test established in *NARUC I*²¹ for determining whether a firm is a common carrier.²² The basic question under this test is whether the transmission service is offered indifferently to all customers (*i.e.*, “for a fee directly to the public or to such classes of users as to be effectively available directly to the public,” 47 U.S.C. § 153(46)) such that customers can transmit information of their choosing without change in form or content (*i.e.*, “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” *id.* § 153(43)). *See Cable & Wireless* ¶ 14.

Where a firm makes a general offering for a fee of a service that consists of the transmission of real-time voice communications, that service likely qualifies as a telecommunications service under the *NARUC I* test. Such a service offers customers

¹⁹ A telecommunications carrier is an entity that provides telecommunications service, except that aggregators of telecommunications service are not to be classified as telecommunications carriers. *See* 47 U.S.C. § 153(44).

²⁰ *Cable & Wireless, PLC, 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*, Cable Landing License, 12 FCC Rcd 8516, ¶ 13 (1997) (“*Cable & Wireless*”).

²¹ *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”).

²² The D.C. Circuit has upheld this conclusion as a reasonable interpretation of the statute. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (“*Virgin Islands v. FCC*”).

transmission that is essentially “transparent” to the customer. This is the *sine qua non* of telecommunications.²³ When offered for a fee to the general public or such class of customers as to be effectively available to the general public, such voice service appears to fall squarely within the statutory definition of telecommunications service.

The Commission is not at liberty to ignore this definitional classification. As the D.C. Circuit explained in *NARUC I*, the Commission lacks the discretion to classify as a non-common carrier offering a service that falls within the definition of common carriage:

we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carriers is sufficiently definitive as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.

NARUC I, 525 F.2d at 644 (D.C. Cir. 1976) (citations omitted). The Second Circuit later agreed that the “FCC is not at liberty to manipulate the definition of ‘common carrier’ in such a way as to achieve pre-determined regulatory goals.” *American Telephone and Telegraph Co. v. FCC*, 572 F.2d 17, 26 (2nd Cir. 1978).

The codification of the definition of telecommunications service in the 1996 Act confirms that Congress intended that the Commission would continue to possess little discretion in determining whether a service is subject to Title II. While there are some stray suggestions in the *Computer II* proceeding that the Commission has the authority to exempt a service from

²³ See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 90 (1980) (“*Computer II Final Decision*”) (explaining that basic telephone service is a common carrier service because it provides a transmission path that is “transparent” to the end user).

common carrier regulation where the service is subject to competition,²⁴ that option has been ruled out by the 1996 Act. An administrative agency has only the jurisdiction granted it by Congress, and the FCC has no authority under the Act to ignore the codified definition of telecommunications service. In addition, Congress adopted numerous social policies applicable to telecommunications services in the 1996 Act (*e.g.*, universal service, privacy, access to the disabled, etc.) that are relevant regardless of whether a carrier possesses market power. The obvious implication is that Congress expected the telecommunications service classification to apply regardless of whether a service provider has market power. Importantly, in establishing the forbearance powers in Section 10 (applicable only to “telecommunications services”), Congress specified forbearance, rather than definitional reclassification, as the appropriate means of reducing regulation applicable to a service that otherwise falls within the definition of a telecommunications service.

Moreover, telephone service holds a special place within the telecommunications service classification. It has been viewed as the prototypical common carrier offering. It has been regulated as such regardless of the underlying physical characteristics of the network or the transmission protocols used. Indeed, basic voice service has evolved from the days of manually circuit-switched calls carried over copper wires to digitally packet-switched VoIP calls carried over microwave, co-axial cable, satellite and glass. These changes in technology have continuously improved common carrier basic telephone service to make it richer and more

²⁴ See *Computer II Final Decision* ¶ 127 (“In view of all of the foregoing evidence of an effective competitive situation, we see no need to assert regulatory authority over data processing services *whether or not such services employ communication facilities* in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment.”) (emphasis in original).

useful.²⁵ In fact, VoIP service is best understood as advancing further changes that have long been part of the evolution of regulated voice service.

For example, a key feature of IP technology is that it allows carriers the flexibility to efficiently deploy the “intelligence” in the network in servers or soft switches that can be located anywhere (thus obviating the need for circuit switches located in central offices). Moreover, IP technology severs the link between network ownership and the ability to develop service offerings by allowing anyone to design services that can then be made available to customers *via* servers and soft switches. While important, these features are merely a further step in a progression advanced earlier by SS7, Intelligent Network (“IN”) and Advanced Intelligent Network (“AIN”) technology. Those advances have allowed service providers to deploy signaling intelligence anywhere and have loosened the connection between network ownership and the design of service features. Despite the innovations introduced by SS7, IN and AIN, however, basic telephone service has remained regulated under Title II. Similarly, VoIP promises users greater mobility, since a customer can use VoIP service in any location. But commercial mobile radio service already provides complete mobility, and yet it is regulated as a common carrier service. *See* 47 U.S.C. § 332(c).

²⁵ The Commission has held that improvements to the network should be encouraged and regulated as voice services. This was the goal of the adjunct-to-basic distinction in the *NATA/Centrex Order*. *See North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 F.C.C.2d 349, ¶ 24 (1985) (“The computer processing services [which are] permissible adjuncts to basic services are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly ‘basic’ in purpose and use and which bring maximum benefits to the public through their incorporation into the network. The FCC has explicitly rejected the notion that the public interest would be served by prohibiting intelligence or new optional features from the basic network.”) (“*NATA/Centrex Order*”).

Even where a voice communication includes functionalities that fall within the literal terms of the information services definition, those functionalities are likely to be classified as part of the common carrier offering if they improve, but do not change the basic nature of, the telephone service offering. In the *Computer II Tentative Decision*, the Commission noted that these “necessary” enhanced/information services could be offered in conjunction with basic voice service without changing the character of the basic service; they were deemed essentially a part of the basic service.²⁶ In the *Computer II Final Decision*, the Commission further explained that if these services do not change the “nature” of the basic service, then the integrated package would be regulated as a telecommunications service.²⁷

The Commission further elaborated on how to regulate these “packaged” service offerings in its *NATA/Centrex Order*.²⁸ That order reiterated the Commission’s conclusion in the *Computer II Final Decision* that carriers may offer “enhanced” features as part of their basic service offering under Title II.²⁹ These enhanced features were defined in the *NATA/Centrex*

²⁶ See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Tentative Decision and Further Notice Proposed Rulemaking, 72 FCC 2d 358, n.60 (1979)(“*Computer II Tentative Decision*”) (“We are not foreclosing enhanced processing applications from being performed in conjunction with ‘voice’ service. Certain applications may be considered essential or necessary...Computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc., may be used in conjunction with ‘voice’ service.”).

²⁷ See *Computer II Final Decision* ¶ 98 (“...while POTS is a basic service, there are ancillary services directly related to its provision that do not raise questions about the fundamental communications or data processing nature of a given service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service. Any option that changes the nature of such telephone service is subject to the basic/enhanced dichotomy and their respective regulatory schemes...Thus, any tariffed optional services must not change the nature of traditional telephone service.”).

²⁸ See generally *NATA/Centrex Order*.

²⁹ See *id.* at ¶ 23 (“It is clear, however, that although [in *Computer II*] we drew the rules so as to limit the scope of tariffed basic service to the provision of a pure transmission capacity, we did not intend that our definition of enhanced services should be interpreted as forbidding carriers to use the processing and storage capabilities within their networks to offer tariffed features which facilitate use of traditional telephone service.”).

Order as “adjunct-to-basic.” Although these services might fall within the literal meaning of an enhanced service, they were deemed “basic” if they 1) facilitate the establishment of a transmission path over which a telephone call may be completed; and 2) do not alter the fundamental character of telephone service.³⁰ The means or technology used to provide the adjunct-to-basic service is irrelevant; if the service meets this two part test, it is be regulated as a basic service.³¹

The 1996 Act essentially codified the “adjunct to basic” concept. In the *Non-Accounting Safeguards Order*, the Commission determined that the 1996 Act explicitly classified adjunct-to-basic services as telecommunications services because they fall within the Act’s “telecommunications management exception” for information services.³² Under that exception,

³⁰ See *NATA/Centrex Order* at ¶¶ 25, 27. For example, the Commission determined that electronic directory assistance is an adjunct-to-basic service because directory assistance enables the user to complete a phone call. See *Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission’s Rules, Revisions to Tariff F.C.C. No. 68, Transmittal No. 1741*, Memorandum Opinion and Order, 5 FCC Rcd 3792, ¶ 13 (1990) (“In the instant case, the purpose of DLC, which, as proposed, is no more than a particular electronic form of the directory assistance discussed in the Commission’s Orders, is to facilitate the placement of telephone calls. Accordingly, we conclude that the service is properly treated as an adjunct to basic service.”). By contrast, reverse directory assistance, which gives the caller the ability to obtain the *name* of a telephone customer if the service is provided with a telephone number, is an enhanced service; a name is not necessary information to place a call. See *US West Communications, Inc. Petition for Computer III Waiver*, Memorandum Opinion and Order on Reconsideration, 11 FCC Rcd 7997, ¶ 14 (1996) (“*US West*”) (“While US West’s reverse-search service enables customers to avoid calling a number without knowing the name and address of the called party, the customer already possesses the telephone number that is needed to place the call. The additional information gained through the reverse-search capability -- the name and address -- is not necessary to make the call. Therefore, we conclude that the reverse-search capability is not an adjunct to basic service because it provides information in addition to that necessary to use the network to place a call.”).

³¹ See *Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf*, Memorandum Opinion and Order, 11 FCC Rcd 6808, ¶ 18 (1996); *US West* at ¶ 14.

³² See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, 11 FCC Rcd 21905, ¶ 107 (1996) (“*Non-Accounting Safeguards*”) (“...services that the Commission has classified as ‘adjunct-to-basic’ should be classified as telecommunications services rather than information services. In the NATA Centrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services. Although the latter services may fall within the literal meaning of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character if the telephone service.”).

a service that otherwise meets the definition of information service is excluded from that classification if used for “the management, control or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). The Commission has applied the two-part test established in the *NATA/Centrex Order* to determine whether a service falls within the telecommunications management exception.³³

Furthermore, although voice calls carried by certain VoIP providers undergo a net protocol conversion during transmission, it is hard to see how this fact renders such calls information services rather than telecommunications services.³⁴ The Commission concluded in the *Non-Accounting Safeguards Order* that net protocol conversion is an information service under the Act, but this rule has never been used as the basis for removing voice service from Title II regulation. For example, voice traffic among cell phones and between cell phones and wireline phones is often converted between CDMA, TDMA, FDMA, and TDM protocols. Yet, these voice calls have never been classified as information services.

Similarly we conclude that ‘adjunct-to-basic’ services are also covered by the ‘telecommunications management exception’ to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act.” (citations omitted); *see also Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, n.46 (2004) (“In the *Non-Accounting Safeguards Order*, the Commission recognized that certain capabilities previously treated as basic services when provided by a carrier fell within the telecommunications management exception: adjunct-to-basic services and ‘no net’ protocol processing.”).

³³ *See Bell Operating Companies’ Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, Memorandum Opinion and Order, 13 FCC Rcd 2627, ¶ 19 (1998); *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 Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 77 (1999) (reiterating the *NATA/Centrex Order* definition of “adjunct-to-basic”).

³⁴ For example, when a customer using a service similar to Vonage’s or Level 3’s calls a customer on the PSTN, that call begins in IP format with the VoIP customer, is transported on the Internet to the VoIP company’s gateway and translated into TDM for delivery to the PSTN customer.

It is also important to recognize that the FCC may not even have the authority to treat net protocol conversions as information services. While net protocol conversion was included in the definition of enhanced services,³⁵ Congress excluded protocol conversion from the statutory definition of information services.³⁶ Under the doctrine of *expressio unius est exclusio alterius*,³⁷ it is arguable that the Commission must construe Congress's omission of protocol conversion from its information services definition to mean that net protocol conversions cannot be classified as information services.³⁸

The relevant case law indicates that the *expressio unius* doctrine applies when the circumstances, as they arguably do here,³⁹ support the inference that the exclusion was intentional.⁴⁰ It has been used to exclude possible implicit meanings of a statute even when a

³⁵ See 47 C.F.R. § 64.702(a) (“For the purposes of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.”).

³⁶ See 47 U.S.C. § 153(20) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunication and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.”).

³⁷ The mention of one thing implies the exclusion of another thing. See *Halverson v. Slater*, 206 F.3d 1205, 1207 (D.C. Cir. 2000).

³⁸ The Commission itself admitted as much in the *Stevens Report* when it noted that, “Senators Stevens and Burns raise a substantial point. The conference committee’s decision not to adopt language explicitly classifying services employing protocol conversion supports the inference that the conferees did not intend that classification.” See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 51 (1998) (“*Stevens Report*”).

³⁹ The conference Committee explicitly declined to adopt the Senate version of the information services definition, which included protocol conversion, while adopting the House version, which had no such reference. See *Stevens Report* ¶ 49.

⁴⁰ See *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) (“The maxim’s force in particular situations depends entirely on context, whether or not the draftsmen’s

statute has no historical antecedent.⁴¹ Yet, the doctrine has special force in situations like the one at hand where it is used to interpret a statute that is meant to supercede,⁴² *in toto*,⁴³ a similar⁴⁴ prior statute or regulation.⁴⁵ Accordingly, a strong argument can be made that the definition of information services in the Act superceded *Computer II*'s enhanced services definition.⁴⁶

2. There Are Substantial Legal Risks Associated With Attempting To Apply The Requirements Of Title II To Information Services Or Other Title I Services.

mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives.”).

⁴¹ See *United States v. Smaw*, 22 F.3d 330, 333 (D.C. Cir. 1994) (holding that because a sentencing commission was “expressly thinking” about what types of jobs to include in a list that would be subject to increased sentences, the doctrine operates to prohibit the guidelines from covering non-listed jobs).

⁴² See *NPRM* ¶ 26 (“In 1996, the Telecommunications Act *codified, with minor modifications*, the Commission’s distinction between regulated “basic” and largely unregulated “enhanced” services.”)(emphasis added); see also *Stevens Report* ¶ 21 (“Reading the statute closely, with attention to legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act.”).

⁴³ When it is presumed that the legislature has spoken on an entire topic, usually by specifically listing its components, but has chosen to remain silent on a particular subset of the topic, it leads to the inference that silence implies exclusion. See *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 22 F.3d 1110, 1112 (D.C. Cir. 1994).

⁴⁴ See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C. Cir. 1980) (holding that the *expressio unius* doctrine is at its strongest when comparing two similar pieces of legislation).

⁴⁵ See *Department of Air Force, Sacramento Air Logistics Center, etc. v. Federal Labor Relations Authority*, 877 F.2d 1036, 1040 (D.C. Cir. 1989) (“[w]hile the Assistant Secretary’s regulation provided that employees appearing as witnesses would be granted *both* official time *and* travel expenses, Congress expressly included only the ‘official time’ portion in section 7131(c). The statute is silent on the subject of travel expenses and per diem, leading to the inference that Congress intended to continue the Executive Order practice with respect to official time, *but not with respect to travel expenses.*”) (emphasis added).

⁴⁶ Indeed, both the *Stevens Report* and the *NPRM* in this proceeding discuss Internet telephony in terms of 1996 Act terminology. See *Stevens Report* ¶ 55 (“We consider the regulatory status of various forms of ‘phone-to-phone’ telephony service mentioned generally in the record. The record currently before us suggests that certain of these services lack the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’”); *NPRM* ¶ 6 (“Part IV examines the jurisdictional issues associated with VoIP and other IP-enabled services and seeks comment on whether to extend the application of the Commission’s ruling that a certain type of VoIP offering is an *unregulated information service* subject to federal jurisdiction.”) (emphasis added).

There seems to be an emerging consensus in the industry and at the Commission that at least some of the social policy requirements in the Act, such as universal service, access to the disabled, and E911, must apply to VoIP service. But the terms of the sections of the Communications Act that establish the social policy requirements in Title II generally limit their application to common carriers or telecommunications carriers. Moreover, an examination of the concerns underlying the social policies Congress has enacted as part of Title II demonstrates that many of them are highly relevant to VoIP, in some cases (as with privacy) perhaps even more so than with TDM-based service. This is not to say that the Commission must apply all of these requirements to VoIP. But it seems contrary to the structure of the Act and the intent of Congress for the Commission to exempt VoIP services from these requirements without determining whether the standards established by Congress in Section 10 (the forbearance provision) for making such determinations have been met.

Universal Service. Under Section 254(d), universal service contributions are only obligatory for providers of “telecommunications service,” and the Commission has permissive authority to impose contribution requirements on providers of “telecommunications.” *See* 47 U.S.C. § 254(d).⁴⁷ The provision of telecommunications arguably means private carriage. If VoIP were classified as a Title I service other than private carriage (a classification that in most cases would not be possible given that VoIP providers are likely to make their service generally available to the public, an approach that is incompatible with private carriage), it might not

⁴⁷ *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 6 (1997) (“*USF First Report and Order*”) (“... as the statute requires, we will require equitable and non-discriminatory contributions from all providers of interstate telecommunications service.”); *id.* ¶ 39 (“In addition, we find that the public interest requires providers of interstate telecommunications on a non-common carrier basis and payphone aggregators to contribute to the support mechanisms pursuant to the Commission’s permissive authority over ‘other providers of interstate telecommunications.’”).

therefore be subject to universal service contribution obligations. This would of course place further pressure on the existing contribution system, under which contributions are based on end user interstate telecommunications service (a large portion of which is voice service) and telecommunications revenues. Exempting IP voice offerings from the current 8.7 percent universal service contribution requirement would obviously create a powerful incentive for customers to substitute circuit-switched with IP voice service.⁴⁸ While it may be possible to replace the current contribution methodology with one that is not based on the classification of a retail service offerings, the Commission has thus far been unable to agree on such an approach.

More obviously, Section 254(c) restricts the class of services that is subject to universal service subsidy to “an evolving level of telecommunications service.”⁴⁹ VoIP services that are not so-classified would therefore be ineligible for subsidy under the terms of the Act. While TWTC does not believe that VoIP should be eligible for universal service subsidy as a general matter, excluding IP voice service from subsidy under *any* circumstances runs counter to the policies underlying universal service. Universal service subsidies currently apply only to telephone service,⁵⁰ and voice service is likely to remain the focus of universal service funding

⁴⁸ The same concern applies to other funding requirements such as contributions to support local number portability and telecommunications relay service. If those contributions were imposed on only one type of technology, efficient outcomes would be skewed.

⁴⁹ See 47 U.S.C. § 254(c)(1) (“The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by the Federal universal support mechanism shall consider the extent to which such telecommunications services...”); *USF First Report and Order* ¶ 58. The only exceptions are certain services provided to schools and libraries. See 47 U.S.C. § 254(h)(2).

⁵⁰ The currently supported services consist of single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance, toll limitation services for qualifying low-income consumers; and an amount of local usage minutes to be determined by the Commission. See *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 18 FCC Rcd 15090, ¶¶ 3, 7 (2003) (“*USF Order*”); 47 C.F.R. § 54.101(a)(1)-(9). The Commission periodically reviews the services subject to federal subsidy

for the foreseeable future. Yet all providers of telephone service are in the process of gradually replacing existing TDM-based voice service with IP-based voice service. Eliminating VoIP from the class of service subject to subsidy would therefore gradually reduce the number of eligible recipients of universal service funding or relegate those recipients to less sophisticated TDM voice offerings. It is hard to see how this outcome comports with the intent of Congress in enacting Section 254.

Disabled Access. Section 255(c) states that a “provider of telecommunications service shall ensure that” the service “is accessible to and usable by individuals with disabilities, if readily achievable.” 47 U.S.C. § 255(c). Moreover, Section 225 requires that services be made available to the hearing and speech impaired only to the extent that a service provider is a “common carrier.”⁵¹ Thus, these social policies would not apply to VoIP if it were classified as a non-telecommunications service.⁵² Yet the legislative history of Section 225 at least demonstrates that it was intended primarily, if not exclusively, to enable the disabled to use telephone service.⁵³ The Commission itself has focused on the relevance of these provisions to

after receiving recommendations from the universal service Joint Board. As part of that process, the Commission recently declined to include “advanced or high speed services” as a service eligible for USF support. *See USF Order* ¶¶ 8-13.

⁵¹ *See* 47 U.S.C. § 225(c) (“Each common carrier providing telephone voice transmission services shall...provide...telecommunications relay services...”).

⁵² The Commission did extend the application of Section 255 to two information services (voice mail and interactive menus). *See Implementation of Sections 255 and 251(a)(2) of the Telecommunications Act of 1934, As Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order, 16 FCC Rcd 6417, ¶ 93 (1999) (“*Disabled Access Order*”). This order was not appealed, and for the reasons explained below with regard to the limitations on the Commission’s ancillary jurisdiction, is based on a shaky legal basis.

⁵³ Section 225 of the Telecommunications Act was enacted in 1990 as a part of the Americans With Disabilities Act (“ADA”). The Conference Report to the ADA plainly contemplated relay services as a replacement for voice services for the disabled: “The Senate bill specifies that each common carrier providing telephone voice

voice service.⁵⁴ Given the promise that IP-based services hold for improving access to the disabled, preventing the application of Sections 255 and 225 to VoIP service would seem to frustrate the intent of Congress.

Customer and carrier proprietary information. The requirements of Section 222 designed to prevent unauthorized use and disclosure of customer proprietary information⁵⁵ and carrier proprietary information⁵⁶ only apply to providers of telecommunications services.⁵⁷ There does not appear to be any basis for concluding that the privacy concerns or the competitive concerns underlying these provisions are any less relevant in a VoIP environment than in a TDM environment. If anything, the concern that carriers should not have unbridled discretion to use and share customer proprietary information would seem even more compelling in the context of VoIP service, since VoIP providers will likely develop sophisticated means of tracking

transmission services shall provide telecommunication relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment... The House amendment specifies that a common carrier must only provide relay services ‘within the area in which it offers service’... The Senate recedes with an amendment. The amendment deletes the word ‘within’ and substitutes in lieu thereof the term ‘throughout.’” H.R. CONF. REP. NO. 101-596 at 82 (1990).

⁵⁴ See *Disabled Access Order* ¶¶ 77-8 (1999) (“Telecommunications services, however, does include services previously classified as adjunct to basic... We decline to expand the meaning of ‘telecommunications services’ to include information services for the purposes of section 255...”); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 15 FCC Rcd 5140, ¶¶ 3-4 (2000) (“...the statutory obligation to deliver relay services falls to common carriers... TRS is required by statute to provide telecommunications services which are *functionally equivalent* to voice services to the extent possible.”) (emphasis added).

⁵⁵ See 47 U.S.C. § 222(c)(1).

⁵⁶ See 47 U.S.C. §§ 222(a)-(b).

⁵⁷ See *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, Second Report and Order, 13 FCC Rcd 8061, ¶ 1 (1998) (“Section 222 establishes a new statutory framework governing carrier use and disclosure of customer proprietary network information (CPNI) and other customer information obtained by carriers in their provision of telecommunications services.”), vacated on other grounds, *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

customers' locations (*e.g.*, as E911 capabilities are deployed) and user preferences. The power of IP is therefore likely to provide service providers with access to much more intrusive customer information than is the case with TDM-based service. Thus, in this case as well, the social policies underlying the specific requirements applicable only telecommunications services would seem relevant to VoIP.

Slamming. The slamming requirements in Section 258 apply only to “telecommunications carriers.”⁵⁸ Moreover, the slamming requirements apply specifically to providers of “telephone exchange service” and “telephone toll service,” just the types of service that VoIP delivers. It is not clear how the use of IP protocol diminishes the underlying concern that customers should be protected from the cost and general aggravation of being slammed.

Service Discontinuance. During the past several years when many telecommunications carriers experienced financial distress and bankruptcy, the Commission has become increasingly focused on ensuring that telephone and other telecommunications service customers are granted an adequate transition period to choose another service provider before their existing service arrangements are discontinued. For example, the Commission (along with the Department of Justice) has argued (successfully in most cases) in numerous carrier bankruptcy proceedings that the bankruptcy court should order the debtor carrier to continue to provide service to its

⁵⁸ See 47 U.S.C. § 258(a) (“No telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service...); *id.* § 258(b) (“Any telecommunications carrier that violates [section (a)]...shall be liable...”); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumer’s Long Distance Carriers*, Second Report and Order, 14 FCC Rcd 1508, ¶ 12 (1998) (“Because the anti-slamming provisions of section 258 apply to all telecommunications carriers, we must assess whether existing safeguards against slamming are adequate...”).

customers until it has complied with the discontinuance notification requirements in the Commission's rules.

In seeking the enforcement of these rules, the Commission relies on its authority under Section 214(a) to require any "carrier" to obtain the Commission's approval before discontinuing service.⁵⁹ The definition of "common carrier" in the Act clarifies that the term "carrier" means a common carrier.⁶⁰ In addition, as explained more fully below, the definition of telecommunications carrier states that a telecommunications carrier may be treated as a common carrier only to the extent that the telecommunications carrier provides telecommunications service. Thus, the Commission would not have the authority under Section 214 to oversee the discontinuance process for VoIP service if that service were not deemed a common carrier or telecommunications service.

In response to the concern that the relevant statutory provisions themselves do not apply the relevant social policies to Title I/information services, proponents of classifying VoIP as a non-telecommunications service argue that the FCC could apply such requirements pursuant to its ancillary jurisdiction. But as Commissioner Copps has aptly observed, such an approach "could cause many more problems than it resolves -- if it resolves any."⁶¹

⁵⁹ See 47 U.S.C. § 214(a) ("No carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section.").

⁶⁰ See 47 U.S.C. § 153(10) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire...").

⁶¹ See *Powell Urges Timely Solutions to VoIP Disability Access Issues*, Communications Daily, May 10, 2004, at 2.

The FCC can only exercise ancillary jurisdiction where the object of Commission action is “interstate or foreign communication by wire or radio” under Section 2(a) of the Act (47 U.S.C. § 152(a)) and where the Commission seeks to impose regulation that is “reasonably ancillary” to the effective performance of its responsibilities elsewhere in the Act.⁶² Indeed, the regulation in question must be “imperative if [the FCC] is to perform with appropriate effectiveness certain of its other responsibilities.” *Southwestern Cable*, 392 U.S. at 173 (1968).

While there is little question that the transmission of VoIP traffic constitutes “interstate or foreign communication by wire or radio,” it is far from clear that imposition of Title II-like requirements on VoIP service that the Commission has exempted from common carrier regulation could be understood to be “imperative if [the FCC] is to perform its Title II responsibilities.” The likely response to such an assertion is that the Commission would not have departed from 70 years of precedent under which voice service was regulated as common carrier service if applying the requirements of Title II were in fact “imperative” to advancing the policy goals set forth in Title II.⁶³

But even if the *policy goals* advanced in applying Title II-like requirements could be understood as reasonably ancillary to specific Title II statutory requirements, the Commission must also advance those policy goals using *means* that are consistent with the legislative scheme. This further hurdle poses a significant legal risk for the Commission. For example, in *Midwest Video II*, the Supreme Court reviewed certain common carrier obligations imposed on cable

⁶² See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (“*Southwestern Cable*”).

⁶³ See, e.g., Letter from Mark D. Schneider, Counsel for WorldCom, Inc., to Ms. Marlene H. Dortch, CC Dkt. No. 02-33 (Jan. 7, 2003) at 5.

operators by the Commission pursuant to its ancillary jurisdiction. The Court did not question the Commission's conclusion that the imposition of these obligations advanced the Title III policy objectives of increasing outlets for local self-expression and augmenting the public's choice of programs. But the Court held that the Commission could not advance those goals in a manner that would be prohibited if applied directly to broadcasters subject to the Commission's authority under Title III. As the Court observed, the definition of common carrier in the statute prohibited the Commission from treating a broadcaster subject to Title III as a common carrier. *See* 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"). The Court therefore concluded that the imposition of such a requirement was not reasonably ancillary to the Commission's jurisdiction under Title III.⁶⁴

The Commission appears to face almost exactly the same limitation on the exercise of its ancillary authority in the instant case. The statutory definition of "telecommunications carrier" states 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." 47 U.S.C. § 153(44). Thus, common carrier obligations (*i.e.*, Title II obligations) arguably cannot be imposed under ancillary jurisdiction concepts on a carrier where its activities fall within a statutory classification other than telecommunications service. If VoIP were classified as an information service or possibly even as a "Title I" service, a service provider offering VoIP would not be "engaged in providing telecommunications services." Attempts to extend

⁶⁴ *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 704-06 (1979) ("*Midwest Video II*").

regulations to VoIP that apply under the terms of the statute only to common carriers/telecommunications carriers would therefore rest on a shaky legal foundation.

B. The Commission Should Seek To Ensure That All Non-Dominant Providers Of Voice Service, Regardless Of The Technology Used, Are Subject To Minimal Levels Of State Regulation.

Given the legal risks associated with pursuing the Title I approach to VoIP, the Commission should classify VoIP services that are functionally equivalent to traditional telephone service (*i.e.*, those that include the transmission of two-way real time voice communications and utilize NANP numbers) as telecommunications services. This of course does not mean that all of the requirements of Title II or all state common carrier regulations should apply to non-dominant VoIP offerings. In fact, the Commission should ensure that only those federal and state common carrier regulations that are necessary and appropriate apply to VoIP. But in limiting the regulatory burden on non-dominant VoIP services, the Commission should be equally aggressive in scaling back the regulations applicable to non-dominant providers of circuit-switched services. Any other approach would skew efficient outcomes by imposing more costs of circuit-switched service providers than IP voice providers.⁶⁵

As to federal regulation, the Commission should exercise its broad forbearance powers under Section 10 to preclude application of Title II requirements to non-dominant VoIP and circuit-switched voice services that the Commission concludes meet the standards set forth in

⁶⁵ The extra costs of regulation are real, and they have concrete consequences for market outcomes. For example, hiring extra employees to meet reporting requirements forces companies to incur extra costs that ultimately translate into higher rates for service offerings. More dramatically, requiring regulatory approval prior to the sale of debt or stock can influence the timing of a carrier's offering and therefore increase its cost of capital. Neither circuit-switched nor IP voice services should be subject to these requirements, but if only one type of technology is subject to it, investment decisions and pricing signals to end user customers will be artificially skewed. Carriers will invest in IP technology sooner than they would otherwise and customers will likely buy more IP services than they would otherwise. This is exactly the type of distortion that regulators must avoid.

Section 10.⁶⁶ It has been suggested that acting pursuant to Section 10 is administratively burdensome because the Commission must separately apply the criteria set forth in subsections (a) and (b) of Section 10 to each statutory provision or regulation. But this is not the case. Nothing in Section 10 precludes the Commission from applying the Section 10 criteria to all statutory provisions or regulations that are intended to address similar policy concerns.⁶⁷ For example, the Commission could address all common carrier regulations that are focused on constraining market power in a single analysis of whether market power would be a concern with regard to providers of VoIP service *and* non-dominant providers of circuit switched telephone service.

Most of the remaining regulations applicable to non-dominant common carriers/telecommunications carriers concern social policies. The Commission would probably undertake an analysis of whether such requirements as access to the disabled, E911, universal service and so forth should apply to VoIP even if that service were classified as a non-common carrier service. Such an analysis would require consideration of the criteria set forth in Section 10. Thus, it may well be that applying the forbearance standard would not result in a more

⁶⁶ Section 10(a) requires that the Commission forbear from applying any regulation or statutory provision if it determines that the regulation or provision is not necessary to ensure that a service is provided on just, reasonable and not unreasonably discriminatory terms and conditions, enforcement of the requirement is not necessary for the protection of consumers, and forbearance is in the public interest. *See* 47 U.S.C. § 160(a). Section 10(b) states that the Commission may conclude that forbearance is in the public interest if it determines that it would promote competition in the provision of telecommunications services. *Id.* at § 160(b).

⁶⁷ *Cf. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶¶ 94-95 (2002) (tentatively concluding that the Commission should forbear from all common carrier regulation of cable modem service should that service be classified as a telecommunications service).

significant administrative burden than would be the case if the Commission sought to exercise ancillary jurisdiction to apply needed regulation.⁶⁸

The Commission should also seek technology neutral regulation of voice service at the state level. The dual jurisdictional scheme established in Section 2(b) of the Act preserves state authority to regulate any “communication service by wire or radio” provided by “any carrier.” 47 U.S.C. § 152(b). Notwithstanding Section 2(b), however, the Commission has substantial preemption powers. It can preempt state regulation of a carrier service or facility by exercising its rulemaking authority under Section 201(b) to implement any provision of the Communications Act that applies to intrastate services or activities,⁶⁹ or where a Commission rule or policy applies to a jurisdictionally mixed service or facility (*e.g.*, CPE used for both interstate and intrastate traffic) and where it is impossible as a practical matter to separate the interstate and intrastate components of the service or facility.⁷⁰ Moreover, Section 253 grants the FCC the authority to preempt state legal requirements that constitute entry barriers. *See* 47 U.S.C. § 253(a), (d).

The Commission has in recent years been reluctant to exercise its preemption powers with regard to voice service, and some states have not been adequately attuned to the need to eliminate unnecessary regulation. As a result, in some states, nondominant providers of intrastate telecommunications service are inappropriately subject to onerous regulatory requirements that were designed for dominant carrier utility regulation. For example, in some

⁶⁸ Indeed, the ancillary jurisdiction analysis itself could prove extremely complex and contentious, thereby consuming substantial administrative resources.

⁶⁹ *See AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 377-380 (1999).

⁷⁰ *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 at n.4 (1986).

states, TWTC is required to comply with cost of service reporting requirements originally intended for dominant carrier rate of return regulation; to comply with service quality reporting originally designed to prevent dominant carriers subject to rate ceilings from earning monopoly profits by degrading the quality of service; and to obtain approval from state regulators before selling debt or equity, regulations that were designed to prevent harm to captive ratepayers caused by a dominant carrier's imprudent financial transactions.⁷¹ While there is a legitimate role for state regulation (especially in situations like E911 implementation), regulations such as these should not apply to non-dominant service providers regardless of whether they use TDM or IP to provide service.

The Commission should therefore use the introduction of VoIP service as an opportunity for a comprehensive assessment of the role of state regulation of voice services. While the FCC likely has the authority to preempt many of the state requirements that should no longer apply to nondominant service providers, such an approach could lead to protracted legal challenges and some measure of unnecessary uncertainty. The Commission should therefore seek to establish a cooperative working relationship with the states to review appropriate state regulation for voice service. For example, the Commission could establish a federal-state joint board to study this issue and recommend a model set of state regulations that would apply equally to circuit-switched and IP-based non-dominant voice service providers. The state joint-board participants and the FCC would then seek national compliance with the proposed model. The Commission

⁷¹ See e.g., IND. CODE ANN. §§ 8-1-2-26, 8-1-2-16, 8-1-6-5 (2001) (mandating cost reporting for all public utilities in Indiana); *id.* §§ 8-1-2-77, 78, 80 (mandating state commission approval of issuance of stock by public utilities); WIS. STAT. §§ 196.07, .66 (2003) (mandating that all public utilities in Wisconsin must file balance sheets with the state commission and setting penalties for non-compliance).

must, however, be prepared to preempt state regulations that are inconsistent with the model regulatory regime where appropriate.

It is also important to point out that, while many have asserted that classifying VoIP service as an information service would make it easier for the Commission to preempt state regulation, it is not clear that this is the case. For example, in reviewing the FCC's *Computer III* rules, the Ninth Circuit held that the FCC does not have greater power to preempt state regulation of intrastate enhanced/information services provided by a carrier than it has with regard to state regulation of intrastate common carrier/telecommunications services.⁷² Similarly, the D.C. Circuit held that the Commission does not have greater power to preempt state regulation of unregulated installation and maintenance of inside wires than it has with regard to state regulation of intrastate common carrier/telecommunications services.⁷³ Indeed, even the Supreme Court has found that Section 2(b) generally governs the exercise of the Commission's ancillary jurisdiction.⁷⁴ There is a substantial risk therefore that the Commission would be forced to meet the same legal standard to preempt state regulation of VoIP service provided by carriers regardless of the specific regulatory classification of that service.

Finally, it has also been suggested that the Commission may preempt state regulation of VoIP because that service is inherently interstate (rendering state regulation inapplicable) because VoIP telephone numbers are not associated with a fixed geographic location and users

⁷² See *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (holding that the restrictions placed on the Commission's authority over intrastate carrier activities pursuant to Section 152(b) apply equally to the exercise of authority under Title II and to the exercise of authority ancillary to Title II: "The system of dual regulation established by Congress cannot be evaded by the talismanic invocation of the Commission's Title I authority").

⁷³ See *National Assoc. of Regulatory Util. Commissioners v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989).

⁷⁴ See *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. at 381 (1999).

can originate or receive calls anywhere a broadband connection exists. *See* SBC Pet. for Dec. Ruling at 34-41. The Commission should approach such assertions with caution, however. There are many types of state regulation (such as the requirements to obtain state certification and to obtain prior approval for transfers of state certifications and the sale of securities) that could apply to any entity that offers callers the capability to make intrastate calls and that do not depend on the ability to differentiate intrastate from interstate traffic. Moreover, once location-identification capabilities are established for VoIP as part of E911 or CALEA compliance, it is likely that service providers would be able to differentiate interstate from intrastate traffic.

C. To The Extent Possible, VoIP Should Be Subject To The Same Inter-Carrier Compensation Rules That Apply To Circuit-Switched Voice Service

The development of VoIP service has further illustrated the need to reform the existing inter-carrier compensation rules. The current rules apply different charges to local, intrastate interexchange and interstate interexchange traffic. Because it is currently not possible for VoIP providers to differentiate among these different types of traffic, VoIP creates significant challenges for the current, flawed inter-carrier compensation scheme.

The long-term solution to this problem is of course to reform inter-carrier compensation so that the same rate applies to all types of traffic. TWTC and other members of the industry have expended substantial resources studying ways in which the existing inter-carrier compensation regime can be reformed.⁷⁵ But the challenges to such comprehensive reform are significant, and reform is likely to be very slow in coming.

⁷⁵ Until recently, TWTC participated in the inter-carrier compensation forum (or “ICF”), the industry group seeking to develop a comprehensive proposal for the reform of the inter-carrier compensation system. Like several other carriers, however, TWTC concluded that the ICF reform proposal suffers from several serious flaws and was forced to drop out.

Until comprehensive reform is adopted, the FCC must devise a framework for the exchange of VoIP traffic with circuit-switched voice customers that limits inefficient incentives. The goal should be to ensure that investment decisions in IP voice capabilities are not influenced by the inter-carrier compensation rules. This is obviously made more challenging by the difficulty VoIP providers have in determining the geographic location of a VoIP service user.

That inability to determine the geographic location of a VoIP user leaves the FCC with at least three choices for applying inter-carrier compensation to VoIP traffic. Those choices are as follows: (1) apply an existing rate to all VoIP traffic traversing circuit switches -- the interstate access charge rate might be appropriate since it is somewhere in-between the reciprocal compensation rate and most intrastate access charge rates; (2) devise a blended rate applicable to VoIP traffic based on average telephone usage for circuit-switched service ($x\%$ interstate access, $y\%$ intrastate access, and $z\%$ reciprocal compensation), subject to a demonstration by the VoIP provider that its traffic patterns are different from the average; or (3) use a methodology under which interstate, intrastate, and local usage would be determined based upon traffic studies unless a service provider stipulates that it is unable to conduct such traffic studies, in which case a blended rate would apply. Upon initial review, it appears that the first of these options is the most promising because it is simple, does not embroil the Commission in disputes about how to devise a blended rate or perform traffic studies, and it is interim in nature -- it will be replaced by the inter-carrier compensation reform regime ultimately adopted by the FCC.

IV. CONCLUSION

The Commission should classify VoIP service that provides real-time transmission of voice traffic and that utilizes NANPA telephone numbers as a telecommunications service and

exercise its broad forbearance (and where necessary preemption) powers to eliminate inappropriate common carrier regulation.

Respectfully submitted,

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