**UNITED STATES OF AMERICA**
**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| **In the matter of** | ) | |
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| **IP-Enabled Services** | ) | **WC Docket No. 04-36** |
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| **NOTICE OF PROPOSED RULEMAKING** | ) | |

INDIVIDUAL COMMENTS OF DEBORAH TAYLOR TATE

CHAIRMAN OF THE TENNESSEE REGULATORY AUTHORITY

I respectfully submit these initial comments on the questions raised by the March 10, 2004 Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* (FCC 04-28) ("*NPRM*" or "rulemaking").

Introduction

On April 30, 2004, the Tennessee Regulatory Authority ("TRA") hosted a forum to discuss issues surrounding the deployment and implementation of voice over internet protocol ("VoIP") technology.[1] What was apparent from the presentations and discussions at the forum is that possibilities and advantages of IP-enabled technologies are so ground-breaking in both technology and application that they will transform how we communicate in the future. Further, this transformation will not occurs in months, years, or decades, but is happening now. Consumers are adopting IP-enabled services right now. One only has to travel to their local

[1] The agenda of the TRA VoIP Forum is attached as Attachment No. 1.

electronics retailer, or their online outlet, to purchase the equipment to use VoIP. There is no doubt that IP-enabled services hold great promise for bringing competitive choice to consumers. I suggest that we greet the transformative IP technology with an equally transformative approach to regulatory environment for communications. This new approach should be characterized by its consumer-centered focus conceived and implemented jointly by the FCC and state commissions.

I believe that it is necessary for Congress, the FCC and state commissions to determine the proper regulatory program for the future for several reasons. It is apparent that the current regime of classifying services between jurisdictions is becoming a frustrating endeavor. With IP-enabled technologies, the classification of services between telecommunications and information is similarly frustrating. Given the increasingly sterile debate over classification and jurisdiction, which is rooted in the vocabulary of the legacy monopoly constructs, a completely new mode of thinking is needed to describe our new world. I propose that the new regulatory program should be centered on the consumer, rather than on esoteric accounting rules designed to separate the telecom world in LATAs and states, distinctions that are increasingly irrelevant to the choices made by consumers. A successful transition into this new world can only be achieved by the federal government and states working together.[2] A successful transition would be characterized by greater consumer choice without harm to valuable social policy goals, including emergency communications and universal service. I fear that unilateral steps taken to shape the

[2] 47 U.S.C. § 706(c), as codified in notes to § 157, (establishing cooperative paradigm where both State and federal authorities are to encourage the deployment of advanced telecommunications capability) is an example of a successful partnership between the FCC and state commissions.

rules for the IP-Enabled world, however well intentioned, will likely confound the valuable efforts of states to advance social policy goals to the detriment of consumers.

VOIP should be part of a consumer centered unified regulatory program

I agree with the Commission's observation that VOIP services are diverse in nature and evolving so quickly that the regulatory constructs applied to the circuit switched network are ill suited.[3] The shortcomings of the existing regulatory construct, however, are not limited to nascent IP technologies. Rather, the regulatory construct often breaks down in its treatment of many non IP-based advanced services and even to aspects of traditional telephony services. The existence of regulatory arbitrage opportunities is sufficient to illustrate this point. While it is necessary for numerous reasons for the FCC to provide a sound framework for VoIP deployment, it is equally necessary to approach the regulation of IP-Enabled services holistically. A holistic approach focusing on a "**Consumer Expectation-Based Theory**," considers how consumers use technologies to communicate and how providers utilize network resources to meet their customers' needs. By looking at all modes of communication, it will be possible to craft rules that provide the correct economic signals to consumers and providers. A necessary implication of such rules is that regulatory arbitrage is minimized or eliminated. Absent this holistic approach, all modes of communications, and especially nascent IP-enabled services, will not reach their full potential.

[3] *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863**,** para. 45 (2004).

The current regulatory scheme is bifurcated between traditional wireline communications and other forms of communications. The characteristics of VoIP services necessitate a new unified approach to regulation. First, it is difficult to classify IP telephony services that interconnect with the public switched network in manner that is distinct from their wireline counterpart. Given that wireline services have been described as having an interstate and intrastate component; it is plausible to apply this analogy to IP services. The important point is that assigning IP-services a different jurisdictional classification than comparable wireline services necessarily creates regulatory arbitrage opportunities.

Paragraph 37 of the *NPRM* indicates that VoIP and IP-enhanced communication services come in many forms and that the functional differences likely shape end users' expectations regarding the service.[4] I support a functional approach and suggest that the Commission should apply the same Title II scheme to those VoIP services that, from the perspective of the end user, are similar in functionality to and serve as substitutes for traditional telephone service, i.e., applied to services that enable the end user to engage in the real-time transmission and reception of voice messages.

The incentives for regulatory arbitrage are only magnified as VoIP services become increasingly indistinguishable from its circuit switched predecessor. Ultimately, the traditional circuit switched network and IP-based services are becoming two of the many ways to communicate "by telephone." As VoIP technology matures and gains acceptance, dissimilar treatment of VoIP

[4] *In the Matter of IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, para. 37 (2004).

relative to other functionally equivalent services will only increase the incentives to exploit arbitrage opportunities. After all, firms will minimize costs when given a clear opportunity to do so. A unified approach is the only way to avoid this pitfall.

Arguably, the only way to ensure that the proper economic signals are sent to providers of voice communications is to review the whole body of regulations for the purpose of eliminating arbitrage opportunities. One option, obviously, is to tear down the existing regulatory "silos." Another is to create a new unified scheme which would provide for necessary regulatory outcomes without providing incentives or disincentives for the use of any specific technology, thus encouraging continued innovation and investment. IP-enabled technology allows for the equally exciting, and plainly necessary, opportunity to develop a unified regulatory program that will to avoid the unnecessarily burdensome and increasing arbitrary aspects of the existing regulatory scheme.

I suggest that the Commission should limit some of the "old rules" to the "old wires" of traditional telephony, free the "new wires" from the remaining "old rules" by working promptly with state commissions to establish a consistent national and unified policy that does not interfere with industry's deployment of IP-enabled services but does encourage investment and promote consumer welfare.[5]

[5] Remarks of Commissioner Kevin J. Martin to the NARUC Conference, Washington D.C., March 8, 2004.

I also suggest that the Commission considers the application of the Nascent Services Doctrine in drafting rules regarding IP-enabled services.[6] The Doctrine is based on the belief that "regulators should exercise restraint when faced with new technologies and services. Such restraint should facilitate the development of new products and services without the burden of anachronistic regulations, and in turn promote the goal of enhancing facilities-based competition."[7] Once the market reaches a certain competition threshold, then it is considered a viable market and only then, the Commission will reevaluate the regulations applied to all the competitors in the field and make an assessment as to what the regulatory standards should be. Therefore, the Nascent Service Doctrine promises to "reduce unnecessary regulatory burdens and ultimately achieve regulatory symmetry for all providers."[8]

However, as indicated by Commissioner Abernathy, there will still be three circumstances where some regulation may be needed: 1) to promote public policy; 2) prevent competitors from imposing externalities on one another and to protect consumers from market failures; and 3) to eliminate barriers to entry.[9] I suggest that this is where state commissions should continue to play an important role to protect the public interest of their respective constituents.

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[6] Kathleen Q. Abernathy. The Nascent Service Doctrine. Remarks of FCC Commissioner Kathleen Q. Abernathy Before the Federal Communications Bar Association New York Chapter (NY, July 11, 2002), *available at* http://www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html

[7] *Id*. at 2.
[8] *Id*. at 3.
[9] *Id*. at 4

The FCC should act in the near-term to ensure market stability

While I support a joint effort to craft the regulatory environment for IP-enabled services, in the near term, I recommend that the FCC take jurisdiction over VoIP services that appear to have substantial interstate telephony components. In the spirit of consumer focused regulation, I would propose that consumer usage of an IP-enabled service be used to jurisdictionally classify services using existing policy and law in the near term. To illustrate the focus on consumer usage of services as a rationale for classification, consider that that many heavy long-distance users switched to cell phones or augmented their wireline services with a cellular plan with unlimited nights and weekends. In the IP-enabled world, consumers arguably purchase the ability to make a phone call any where in a defined geographic area for a set price. The consumer effectively purchases a 'bucket of minutes' to allocate anywhere in the U.S. Arguably, this is strong evidence for the FCC assuming jurisdiction in the short-term per the mixed use doctrine.[10] However, the FCC should move quickly to create a safe harbor for important social policy objectives that should be preserved in a unified regulatory program. Universal service, public safety (E-911) and homeland security (CALEA) issues should be dealt with on an expedited basis because even a short delay in resolving the proper mechanisms to ensure safeguarding the social policy goals could cause harm. As will be discussed below, it is important for the FCC and states to jointly develop these policies.

[10] The FCC's **mixed use" doctrine** was recently used and described in paragraph 22 of its Memorandum Opinion and Order, released on February 19, 2004 in the *matter of the Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Case No. *WC Docket no. 03-45*

FCC and States Should Jointly Develop a New Unified Regulatory Program

It has become apparent that carriers treat the current regulatory construct alternately as a shackle or a play thing. For instance, jurisdictional concerns are unduly burdensome when trying to craft integrated offerings of long-distance and local services but become iron-clad defenses when a state attempts to provide consumer protections for say, broadband customers. Squabbles over jurisdiction are increasingly sterile and divert energy and resources away from resolving the underlying market issues. The FCC and the states should jointly reevaluate our overall regulatory approach for all carriers, focusing on our respective strengths and with an eye on evaluation on where and why the government should intervene in the market, rather than a myopic discussion of how to intrude in the market based upon regulatory convention or history. After all, markets are created by consumers, not regulatory agencies– at least functional markets operate under this maxim.[11]

I believe that this rulemaking should itself be seen as an opportunity for both the states and the FCC to reevaluate our overall regulatory program so that consumer welfare is the centerpiece of regulation rather than restraining the market power of increasingly hypothetical monopolists. A new approach will allow the FCC and states to refine our regulatory objectives with the reality of constantly evolving technologies and markets. Since I do not believe the existing telephone model of regulation by the states fits an evolving industry where voice telecommunications is

[11] For example, Sony and Samsung have mainly relied on their unique technological capabilities to develop consumer-driven cell phones; Starbucks success resides in its detection of consumer latent need for gourmet coffee in a European-like coffee house. In order to maximize consumer satisfaction, Starbucks is now offering high-speed wireless internet connections at most of its locations. See http://www.starbucks.com/retail/wireless.asp

becoming an application of communications technology, it is necessary to develop a new regulatory program with due haste.

An integral part of the new regulatory program I propose is to allow states to do what they do well, such as enforcing consumer protection rules, resolving customer complaints, and ensuring access to the disabled. Such an approach allows the FCC to determine forward-thinking national policy issues in a partnership with the states, and allows states to provide expertise on the local level.

Tennessee's involvement in social policy

The State of Tennessee has placed a high priority on social policy objectives, and I implore the FCC not to take actions to classify IP-enabled services in manner that interferes or precludes implementation of our state's policies. Specifically, Tennessee has been at the forefront of ensuring consumer welfare by establishing Do-Not–Call and Do-Not-Fax Programs[12] and providing a venue to resolve consumer complaints at the Tennessee Regulatory Authority. Tennessee is also at the forefront of deploying a state of the art, state-wide emergency communications system. Tennessee has also taken steps to ensure equal access to telecommunication for disabled individuals.[13]

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[12] **T**he Tennessee Do-Not-Call Telephone Sales Solicitation law ***T.C.A. Section 65-4-401 et seq***., directs the Tennessee Regulatory Authority to promulgate regulations and to compile and maintain a "Do-Not-Call Register." This program was operational on July 1, 2000, making it one of the first program of its nature in the country. The Tennessee Do-Not-Fax Program is a consumer protection initiative passed into law by the Tennessee General Assembly and signed by Governor Phil Bredesen. Administered by the Tennessee Regulatory Authority (TRA) the program was established to provide relief to Tennessee citizens from unwanted fax advertisements and became effective on July 1, 2003.

[13] The Telecommunications Devices Access Program ("TDAP") was established by Chapter 417 of the Public Acts of 1999 (the "ACT"). In accordance with the Act, the program is designed to distribute

From the state's perspective, absent a jointly developed new regulatory program, the FCC's decision to classify IP-enabled services in certain existing regulatory silos may impede, or even preclude the state of Tennessee from enforcing its law underlying social policy objectives. Part of the challenge will be crafting new rules that allow such state-policy goals to be enforced. I look forward to working jointly with the FCC to make this a reality.

Consumer Issues

I believe that absent a compelling need, the competitive IP marketplace should provide adequate consumer protection, as is the case in the highly competitive wireless industry. The TRA is prepared to ensure that Tennessee consumers enjoy the benefits of IP-enabled services. Indeed, the TRA has gathered expertise in dealing with consumer protection issues. The agency resolves consumer complaints against industries regulated by the TRA. For example, during the 2002-2003 fiscal year, the agency investigated 2030 consumer complaints. The agency also carries out consumer information activities aimed at providing the information necessary to navigate competitive markets. Recently, the agency has dealt with several cases where companies have attempted to abandon service to customers. The TRA stepped in to minimize the adverse effects of interrupted phone service.

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appropriate telecommunications devices so that persons who are deaf, deaf and blind, severely hard of hearing, severely hard of hearing and vision impaired or severely speech impaired may effectively use basic telephone service. The Tennessee Regulatory Authority was given the responsibility and authority to implement and manage this program.

What is evident is that the TRA, like other state commissions, has substantial experience in resolving consumer issues. It is important to realize that resolving a complaint involving forging a partnership between the agency and companies under our jurisdiction. Given our success in the current regulatory scheme, it would be unthinkable for the FCC to pre-empt states in manner that renders our dispute resolution expertise idle. It would be an abdication of our legal statutory state authority[14], but more importantly, a disservice to the citizens of Tennessee. Therefore, a partnership between the FCC and Tennessee to jointly determine the rules for the IP world is necessary to ensure that the TRA can continue its valuable work for Tennessee consumers.

However, knowing that Tennessee consumers already contact the TRA regarding many issues and providers which we do not regulate, I would propose that IP providers, similar to their non-regulated cellular counterparts-- voluntarily provide information to state commissions regarding their customer services and billing dispute process. Just as we have developed a positive working relationship with mobile/cellular providers and meet regularly to share information regarding improved consumer services; we would encourage and welcome similar relationships with the IP providers in Tennessee as well. The companies would benefit from this relationship as most commissions have developed excellent consumer-oriented staff, protocols and have had considerable expertise in dealing with those issues. The Florida Public Service Commission, for example, regularly assists putting customers in touch with companies, including wireless companies not regulated by the Commission, in order to resolve consumer issues. Prompt

[14] The General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." Tennessee Code Annotated § 65-4-104 (1997 Supp.)

response and resolution of consumer issues will serve the companies and their customers well and may also result in a positive fiscal impact on commission time and effort as well.

Ensuring effective emergency communications

Tennessee is at the forefront of deploying state-wide advanced emergency communications capabilities. Currently, Tennessee is one of the 'most deployed' states for E-911 with all 95 counties, save one, with Phase 2 online. The issue of having operational emergency communications services in the IP-enabled world has been greatly discussed. At our recent VoIP forum, several industry representatives indicated that they are working toward a solution to the '911' problem and that one will be developed in the near future. They were in agreement that IP-enabled services have important benefits but can affect consumer welfare negatively. I am hopeful that they are correct. However, it is not a regulatory burden to set standards for IP services, at least those that are designed to replace traditional telephony, to comply with the same 911 standards. Ensuring such parity is only removing another potential source of regulatory arbitrage while extending the proven benefits of emergency communications to new technologies. I also suggest that the Commission should encourage the industry to explore new ways of working with local municipalities to bring the benefits of IP technology to the public safety sector.

Disability access

Ensuring continued and increased access to telephone services for the disability community is an important policy goal that should be expanded to IP-enabled services. At our recent VoIP Forum, several panelists stated that current VoIP products that mimic wireline telephony are

compatible with existing enabling devices. One panelist discussed the potential of using IP-enabled technology to perform real-time text conversion. Such technology would be a vast improvement to the disability community. Once again, it does appear that it would impose a burden on the VoIP industry to ensure access to all Americans, just like their wireline counterparts. In order to minimize the impact and effects of IP-enabled technologies on the disabled community, it is critical that disability access is built in those technologies when at the design stage rather than trying to remove barriers or create alternatives later.[15]

There is a need for an effective dispute resolution

Because IP-enabled services are new and spreading very rapidly to all consumers, the potential for consumer complaints and carrier-to-carrier disputes is also very high. If unresolved in a timely manner, such complaints and disputes will impair the competitive marketplace for IP-enabled services. Therefore, I suggest that the FCC must establish a swift and efficient dispute resolution forum that allows carriers to quickly resolve disputes and keep their focus on delivering service to consumers. An arbitration procedure similar to that used in major league baseball whereby each party to a dispute puts forth its "best and final" offer would be ideal.[16]

The existing intercarrier compensation system must be reformed

The Commission has recognized that the existing intercarrier compensation system is under severe stress in light of technological change.[17] More recently, the industry has been working

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[15] Comments by Carol Westlake, Tennessee Disability Coalition, Nashville, TN, April 30, 2004.
[16] **See** Global Crossing Outlines VoIP Regulatory Vision to FCC at http://www.globalcrossing.com/xml/news/2004/may/28.xml
[17] Statement of Chairman Michael K. Powell in *Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order.

hard to finding solutions to the system. However, all indications are that with the arbitration of the Commission, telecommunications providers fail to reach a compromise. That is why I encourage the FCC to establish a uniform inter-carrier compensation arrangement that not only recognizes that a "minute is a minute," but also that a "packet is a packet." I strongly believe that all traffic exchanged between carriers, regardless of jurisdiction or type (voice, data or video) must be exchanged at a uniform rate to be negotiated between individual carriers without the distortion of past regulatory policies.[18]

**CONCLUSION**

For each and all the foregoing reasons, I respectfully suggest that the Commission should : (1) develop, together with state commissions, a consumer centered and unified regulatory regime; (2) avoid a piecemeal and complex regulatory structure that could lead to increased barriers to entry in the delivery of IP-enabled services; (3) adopt clear and specific regulations that can satisfy the goal of promoting IP-enabled services without restraining competition in the marketplace; (4) regulate when and if there is evidence that the marketplace constraints are inadequate to ensure fair competition and consumer welfare; (5) consider and respect the role of state commissions in protecting consumer interests; (6) not rely on voluntary industry efforts to ensure the delivery of “911/E911” services, or to ensure disability access or to fund universal service but allow the industry a short period to develop expertise, best practices and establish minimum standards regarding both “911/E911” and disability access; and (7) develop a system

[18] **See** Global Crossing Outlines VoIP Regulatory Vision to FCC at http://www.globalcrossing.com/xml/news/2004/may/28.xml

of regulatory incentives in order to encourage continued investment and technological improvement of IP-enabled services. The Commission should strive to work with state commissions and the industry to draft rules which are technologically neutral and which will promote consumer welfare and fair competition.

Respectfully submitted,

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