

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
IP-Enabled Services )                      WC Docket No. 04-36  
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**COMMENTS OF  
THE FEDERATION FOR ECONOMICALLY RATIONAL UTILITY POLICY (FERUP)**

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## I. INTRODUCTION

The Federation for Economically Rational Utility Policy (FERUP) agrees with the preliminary finding of the Federal Communications Commission (FCC) in its March 10, 2004 NPRM, that Voice over Internet Protocol (VoIP) services are changing and evolving so rapidly that they are not well suited to the model of regulation that has traditionally been applied to circuit switched telephone services. Still, in an effort to “preserve jurisdiction,” some state regulators are fervently trying to “fit VoIP neatly” into the telecommunications service box or some similar definition under state law. Although perhaps well-intentioned, these regulators are trying to preserve a regulatory model that is increasingly losing its purpose as intermodal competition, including that provided by VoIP, flourishes.

While VoIP may be “crammed” by regulatory fiat into the existing regulatory scheme, it simply will not “fit neatly.” To encourage competing communications technologies such as VoIP, the better approach is for federal and state regulators to work collaboratively on a way to: (i) identify those limited social issues where government *should* intervene; (ii) identify whether such intervention is most appropriately carried out by state or federal regulators (or some combination); and (iii) limit that intervention to resolving issues that will *not* be adequately addressed by the competitive market.

FERUP’s comments make the following key points:

- VoIP is a nascent technology that is borderless (*i.e.*, at a minimum, interstate) in nature, that is driving innovation, and that is spurring robust product, service and price competition.
- The existing telecommunications regulatory regime – an outgrowth of the economic regulation of monopolies and a regime designed to forge competition in the wireline telecommunications industry – is not suited to IP-enabled services, such as VoIP, and should be scrapped in favor of a new regulatory model that respects basic economic principles.

- The borderless (*i.e.*, interstate) nature of IP-enabled services and the need to avoid a patchwork of fifty different state policies argue strongly for regulation at the national level (with a rational mechanism to ensure that the legitimate concerns of states are addressed).
- A national policy should be minimalist in nature – economic regulation (including the terms and conditions of service) is not warranted in today’s emerging IP-enabled market; the focus should be on social policy (*e.g.*, E911, universal service).
- IP-enabled services, such as VoIP, do not have to be classified as telecommunications services and such services need not be subjected to the full range of telecommunications regulations in order to address public safety and welfare concerns.

## II. EMERGING TECHNOLOGY

The fundamental issues raised by this NPRM are whether IP-enabled services, such as VoIP, should be regulated and, if so, how? In resolving these issues, the FCC should remain focused on the key relevant facts:

- VoIP is a nascent technology.
- VoIP is a borderless technology. Unlike the circuit-switched network, the IP network is connectionless. Traffic is global in nature and not defined within the limited jurisdiction of states.
- VoIP is part of an IP network that is being built-out at the “edges.”
- There is no dominant VoIP provider, and there appears to be low barriers to entry.
- VoIP is spurring robust price competition and new service offerings by both old and new players.
- VoIP is a disruptive technology that is driving innovation and forcing greater cost-effectiveness among all providers that will greatly benefit consumers.
- VoIP is forcing all providers to move from the provision of traditional, stand alone voice services to advanced services, combining voice with information, multi-media and networking applications, driving investment in broadband and infrastructure deployment.

### III. CLASSIFICATION & JURISDICTION

#### A. Outdated Regime

In addressing VoIP and other emerging communications technologies, policymakers must first ask the fundamental question, what justifies regulation? Telecommunications regulation has its genesis in the economic regulation of monopoly telephone companies. With the advent of local competition regulation in 1996, the inquiry has turned to whether and where the monopoly persists, the exercise of monopoly power, and meeting certain social goals relevant to communications (e.g., E911 and universal service) that may not exist in a free-market world. The regulator is challenged even further by emerging technologies like VoIP, because these technologies often are exotic to the traditional network (PSTN), and do not have the monopoly characteristics of this network. To the extent there is a purpose for regulation of emerging communication technology today, policymakers must examine: (i) whether or not the same level of ILEC-style regulation is necessary to protect the public; (ii) whether or not the regulatory structure created to deal with a monopoly provider should be applied to competing providers (including ILECs) in an increasingly competitive market; and (iii) if the old structure is inappropriate to the new conditions, what new regulatory structure should take its place.

Reduced to its essence, the original telecommunications regulatory structure was created to address American Telephone & Telegraph's (AT&T) and other incumbent carriers' monopoly over most of the local and long distance network within their geographic service area. In the nascent telephony market, "connecting the dots" (i.e., the circuit switches) across the country required a market leader with the resources and the economies of scale/scope to drive the process. The resulting social contract: AT&T was given a monopoly, the *quid pro quo* for which was economic regulation of that monopoly by government. Economic regulation, served as a

proxy for competition. A strong state role was appropriate under this model due to the physical nature of the circuit-switched network in the state, the presence of localized monopolies, and the predominately intrastate nature of local telephony.

Regulation has not kept pace with innovation. Current state and federal regulations generally are designed to forge competition in the wireline telecommunications industry (by encouraging new wireline entrants, or CLECs) while maintaining certain legacy regulations for the incumbent wireline provider (ILEC). Notably, the competition that the landmark Telecommunications Act of 1996 is intended to spur is primarily ILEC versus CLEC wireline competition – not competition from other technologies, such as wireless and VoIP.

The rapid pace of innovation requires more frequent examination of traditional regulatory models. The advent of VoIP, for instance, makes the once-ensconced intercarrier compensation and universal service programs into crisis mode. Decisive change is mandatory. As VoIP and other technologies mixing voice and information services become more prevalent, the needlessly complicated current intercarrier compensation scheme will fall apart, as will the collection method for universal service.

The line that the 1996 Telecommunications Act draws between “telecommunications services” and “information services” is increasingly blurred. Whatever the historic appropriateness of the distinction, technological advances have made it increasingly difficult to distinguish in a meaningful way between a telecommunications service and an information service. Indeed, VoIP represents the convergence of voice and information: the voice packet is 1’s and 0’s, and is indistinguishable from a data or video packet. It is consistent with the deregulatory purpose of the 1996 Act to exempt new communication technologies from the plethora of obligations that accompany a telecommunications service classification.

## **B. Scrap the Current Classification System**

Classification of a service as “telecommunications” or “information” is, under the current regime, of critical importance. The ultimate classification determines rights and obligations to which a provider of the service will be subjected, and thus has tremendous financial and competitive impacts on market participants. The current uncertainty surrounding the regulatory treatment of IP-enabled technologies, such as VoIP, will likely result in additional development and deployment being delayed, depriving consumers of the opportunity to enjoy new and innovative services at low costs.<sup>1</sup>

Policymakers should accept that the current system and its fixed classifications (i.e., information or telecommunications service, Title I or Title II regulations, inter- or intra-state) are not suited to the rapidly changing IP-enabled market. Development of new rules, and to the extent necessary, new statutes that consider new technologies and our most educated guess as to the future of the communications industry, is a better solution.

In the words of California Public Utilities Commissioner Susan P. Kennedy, “[a]ny attempt to simply graft on some new definition or category to try to fit VoIP into the current regulatory scheme will fail.”<sup>2</sup> Although the “information service” designation is far less

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<sup>1</sup> The FCC provided some certainty with its recent order finding that the pulver.com VoIP service is an unregulated information service under the FCC’s jurisdiction. While not comprehensive, the FCC’s decision on this more narrowly-defined VoIP service will, hopefully, serve to rein in some state efforts to regulate the nascent technology. The FCC’s carefully crafted language sends a strong signal to the states and possibly opens the door wide enough for other VoIP service providers to be afforded provide services in a manner to achieve similar regulatory treatment.

While more comprehensive reform is preferable, the pulver.com decision has provided some much needed clarity and guidance. It also sends a clear message that the FCC is willing to take a deregulatory approach to VoIP within the limits of its existing authority. Where the FCC can do so, it should continue to send such signals.

<sup>2</sup> Some regulators insist that VoIP is a “telecommunications service.” Regulators appear concerned that VoIP service will escape the reach of traditional regulation without a way for regulators to rein it in. While some correctly maintain that an FCC ruling that VoIP meets the definition of a telecommunications service would not *require* the FCC to apply the gamut of telecom regulations, one thing is certain – it could. Such an outcome would not provide true regulatory certainty to the nascent VoIP industry.

troublesome than that of “telecommunications service,” it is by no means a good or permanent fit either.

A new system is necessary to end the jurisdictional squabbles between state and federal regulators, allowing both to shift focus to areas where some form of regulation is justified. These disputes have served no useful purpose save enriching lawyers. A state’s obsession with preservation and expansion of perceived jurisdiction as an end in itself does not serve the interests of the public. The current state of telecommunications regulation encourages rent-seeking by both the states and regulated carriers. Those who benefit from regulation are reluctant to relinquish those benefits, even for the greater good.

### C. National Regulation

Sound public policy argues strongly that any regulation of IP-enabled services such as VoIP occur uniformly. Ideally, those services should be regulated at the national level with a mechanism to ensure the concerns of the states are recognized and addressed.

First, IP-enabled services are typically “borderless” and, thus, necessarily interstate in nature. Unlike with the circuit-switched network, which developed in states and then between states, traffic over an IP network does not follow any prescribed geographic path, and thus, cannot be defined as within the limited jurisdiction of states. An otherwise “local” call between

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In an effort to preserve the ability to regulate in the future while agreeing that VoIP entrants need time to get a foothold, some may propose that the FCC forbear from applying telecom regulations “for a short period of time,” “in the interim,” or “until the market develops.” Arguably, FCC pronouncements of forbearance from applying telecom regulations could provide a hint of certainty. However, there is no guarantee that the FCC would not change its policy based on some later event or changes in the Commission itself. An ill-advised ruling that VoIP is a telecommunications service would simply give the FCC too much discretion to pursue additional regulation.

Another argument by some regulators for classification of VoIP as a “telecommunications service,” and thus application of traditional telecom regulation to VoIP, is that many VoIP calls “touch” the PSTN on one end of the call or the other. This argument is not compelling. Calls to and from wireless subscribers often “touch” the PSTN at one end or another, yet they correctly are not regulated as a telecommunications service and enjoy a thriving competitive market. In fact, numerous states (consistent with the national deregulatory policy) exclude wireless carriers from their definitions of telecommunications for purposes of state regulation. The same should hold true regarding IP-enabled services. Touching the PSTN does not alone justify a “telecommunications service” finding or the regulation that such a finding implies.

two neighbors may – and probably will – carom between servers or gateways in different states before reaching the end user. And there is no way to predetermine the path the call will travel. It is “local” only in the sense that it begins and ends within the borders of a single state.

Second, uniform national regulation over IP-enabled services would provide greater regulatory certainty than would a patchwork of fifty different state policies. This country is at a crossroads. Policymakers at the state level feel forced to choose between giving up their regulatory oversight of a new technology that is functionally similar to telephony and subjecting that vibrant new technology to legacy regulation. Unfortunately, a patchwork of disparate state regulatory treatment of VoIP has already begun.

Contrast California and Florida. In the words of California Public Utilities Commissioner Susan P. Kennedy,

California was one of the first and few states in the nation to declare VoIP to be a telecommunications service under the law. The CPUC came to that conclusion without the benefit of a single policy discussion or hearing on the issue. We acted quickly to “preserve our jurisdiction.”

While not a decision by the state commission, Florida’s Legislature passed legislation declaring that VoIP, “free of unnecessary regulation, regardless of the provider, is in the public interest.” It also specifically excludes VoIP from the definition of “service” for purposes of regulation by its public service commission.

VoIP, a technology that promises competitive alternatives for our consumers, should not be subject to political whim across numerous states and communities. A national policy – one that is deregulatory in nature and sends an unambiguous signal to the market that the U.S. is receptive to emerging communications technologies – is the best protection against inconsistent and burdensome state regulation.

National federal authority does not denote federal regulation. Recognizing that existing regulations are not entirely appropriate for VoIP, the FCC has considerable discretion to forbear from applying them. On the other hand, the FCC has shown a willingness to step in with reasonable and finite regulatory solutions to address certain social policy issues that it believes will not be addressed adequately by the market.

A national policy would subject the emerging IP-enabled industry to a single jurisdiction that, even if not ideal, is vastly preferable to a patchwork of fifty states imposing fifty policies. Armed with this greater regulatory certainty, VoIP providers likely will be more willing to expand services in more areas, even in states that now are considered riskier regulatory environments like California.

**D. “Mixed Use” Rationale**

The FCC should exercise jurisdiction over “mixed use” VoIP services, where the end-to-end jurisdictional analysis is impossible because the location of at least one end of the communication is unknown. Further, the “mixed use” nature of the facilities for “Vonage-like” services, coupled with the difficulty of determining the jurisdictional nature of a communication in instances where the location of one end of the communication is unknown, provides a basis for FCC jurisdiction. This approach avoids the “either-or” dilemma of attempting to pigeonhole IP-enabled technologies like VoIP into “telecommunications service” or “information service” definitions. Presumably, it also would avoid a patchwork of fifty different state policies and would deliver the benefits of a uniform, national policy under federal jurisdiction.

#### IV. ECONOMIC REGULATION

##### A. No Economic Regulation of VoIP

The economic regulation<sup>3</sup> to which many regulators have, unfortunately, become accustomed is not rational in today's emerging IP-enabled market. In a competitive market, economic regulation is a certain disincentive to the investment that is required to build out the next-generation networks. VoIP, for example, is part of an IP-enabled network that is being built out by intermodal competition where there is no dominant player. As such, VoIP providers should not be subject to rules designed to substitute for competition in monopoly markets.

##### B. Retire the Duck

The “quacks like a duck” rationale should be retired. VoIP is not a telecommunications service in the traditional sense. Undoubtedly, it “quacks like a duck” in that it provides a similar function to traditional phone service (i.e., voice service), and some consumers perceive it as a substitute for POTS. In fact, VoIP joins the growing list of potential substitutes to POTS, including the unregulated and enormously successful wireless service. Although that point is compelling for those of us who argue that *the justification for economic regulation diminishes when a market provides consumers with a choice of substitutable products*, it does not mean that VoIP equates to traditional telephone service. VoIP's true competitive worth should be determined by the consumer, and policies that allow VoIP and other emerging technologies to vie for that consumer as an alternative to POTS, unencumbered by outdated regulatory shackles, should prevail.

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<sup>3</sup> Economic regulation refers not merely to the setting of rates or prices (i.e., conditions typically set by the market) but also to regulation of the terms and conditions of service (typically a market function) and to certain administrative regulation (such as requiring the payment of fees to support a state commission's regulatory work).

### C. Regulatory Parity (Regulate Down) and the Nascent Services Doctrine

As a normative principle, technological parity should result in regulatory parity. Two avenues exist for achieving regulatory parity: “regulating up” or “regulating down.” Intra- and intermodal service and price competition for voice services are occurring on a national scale and from firms competing via different platforms. Incumbent and competitive traditional phone companies, wireless companies, and different categories of VoIP providers are all competing for market share. Because the VoIP market is competitive and consumers have choice, regulatory symmetry amongst platforms is the ideal. Regulatory symmetry works to send accurate price signals, maintain a level playing field, and promote merit-based competition (as opposed to regulatory arbitrage). At a minimum, VoIP providers – including new firms and established ones – should be subject to the same (de)regulatory regime.

We recognize, however, that there may be a period of asymmetric regulation between nascent and traditional technologies, not to give newer technologies an unfair advantage, but because of statutorily and administratively imposed restrictions to deregulation of traditional telephony. This concept is inherently recognized in Commissioner Kathleen Abernathy’s Nascent Services Doctrine.<sup>4</sup> The Doctrine holds 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.”<sup>5</sup> Once the competitor demonstrates market viability, then the Commission will reevaluate the regulations applied to all the competitors in

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<sup>4</sup> 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://216.239.57.104/search?q=cache:i8e3AwazNigJ:www.fcc.gov/Speeches/Abernathy/2002/spkqa217.pdf+Nascent+Technologies+Doctrine&hl=en&ie=UTF-8>.

<sup>5</sup> *Id.* at 2.

the field and make an assessment as to what the regulatory standards should be. The regulatory timeline under the Nascent Technology Doctrine is:

- 1) Competitor with a ‘new technology’ enters the market
- 2) No regulation is placed on the competitor
- 3) Competitor demonstrates market viability
- 4) Commission examines new technology and applicable market
- 5) Commission assigns regulation to the new technology or keeps it unregulated.<sup>6</sup>

The Nascent Service Doctrine should be applied to both nascent *technologies*, which “appear in the market without any clear sense of the services they will ultimately support or the markets in which they will ultimately compete,” and to nascent *services*, “new competitors to incumbents in already-defined markets.”<sup>7</sup> The Nascent Service Doctrine promises to “deliver benefits to consumers by developing facilities-based competition, both intermodally and intramodally,” and “reduce unnecessary regulatory burdens and ultimately achieve regulatory symmetry for all providers.”<sup>8</sup>

The Nascent Service Doctrine is essentially “putting a name to the face” for the success of insurgent or Shumpeterian technologies. Over the last 100 years, it is deregulation or light-touch regulation that has opened the economic flood gates for new innovative technologies to enter into the market. For example, satellite TV (DBS) was able to compete with cable because it was not subjected to the same regulatory restraints as cable modems. Wireless was able to compete with wireline because the same heavy-handed regulations were not imposed on wireless providers.<sup>9</sup>

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<sup>6</sup> *Id.* at 2

<sup>7</sup> *Id.* at 3

<sup>8</sup> *Id.* at 3.

<sup>9</sup> Abernathy at 4.

There is, however, a caveat to the Doctrine. While Abernathy advocates deregulation, she recognizes that certain circumstances warrant “targeted” regulation. She indicates 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.<sup>10</sup>

Applying the Nascent Services Doctrine to VoIP, we first note that the variety of VoIP providers and products suggests that significant competition solely among VoIP offerings is here, or at least appears to be arriving soon. Additionally, VoIP is competing against traditional ILEC and CLEC phone service, as well as against wireless phone service. In light of the development of these competitive markets, there is no logical basis for subjecting VoIP to outdated rules designed to forge competition in monopoly markets or to regulate monopoly providers. Rather, a limited national policy is needed to address only those social goals that are both necessary and unmet by the market.

As substitute products and services continue to emerge, “regulating down” will enable competition to replace the regulator. It is axiomatic that regulation is a poor substitute for competition. Again, the best way to ensure regulatory parity is for Congress and/or the FCC to set national policy with respect to competing VoIP and other IP-enabled technologies. Likewise, it is appropriate for the FCC to examine whether rapidly changing technologies are creating such competition to telecommunications services that a lighter regulatory regime is appropriate for both telecommunications and information services. Otherwise, competition from new types of services like VoIP threatens the very existence of the plain old telephone network.

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<sup>10</sup> *Id.* at 4

## V. SOCIAL REGULATION<sup>11</sup>

While VoIP and other emerging technologies should not be subject to economic regulation at the state level (and to only minimal, non-discriminatory regulation, if any, at the national level), social regulations that policymakers determine (i) are of significant societal importance and (ii) cannot be adequately addressed by market forces may be necessary. The FCC should adhere to the principle of limited “necessary” regulation. VoIP providers do *not* have to be classified as telecommunications companies and VoIP services need not be subjected to the full range of telecommunications regulations in order to address public safety and welfare concerns.

### A. E911

The provision of functionally equivalent E911 service should not be left solely to the market to address. While market forces would likely render differences in VoIP 911 services and traditional telephony 911 services largely indistinguishable over time, the societal importance and public safety implications are too great to be overlooked in the meantime.

The FCC should, however, afford a reasonable opportunity for the industry to develop an adequate system before instituting mandatory compliance standards. (This approach occurred with wireless 911 services; locating the caller via triangulation or GPS was not imposed as an initial requirement.) Resolution of the 911 service issue is likely important to the long-term ability of VoIP providers to achieve maximum customer growth – i.e., customers likely desire 911 functionality. This existing incentive, when combined with the threat of a government-

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<sup>11</sup> It should be noted that some VoIP providers have indicated a willingness to accept certain social responsibilities, particularly with regard to 911, CALEA, and universal service. Furthermore, many of these players likely would be willing to assist both federal and state agencies that may receive consumer complaints, regardless of whether an agency has jurisdiction to resolve the complaint, in the interest of consumer satisfaction with their product.

developed resolution, should result in the proper impetus for a timely industry proposal to close the gap between VoIP and traditional telephony 911 services.

The VoIP industry and ultimately the FCC should consider the possibility of adopting the 911 system being developed for mobile services for use with VoIP devices or applications. A host of other options that should be evaluated in the effort to arrive at a timely and cost-effective solution likely exist. Given the mobile nature of the caller, the ultimate solution may involve some customer responsibility to identify his or her location to emergency authorities.

In the interim, VoIP providers should be required to inform consumers if their VoIP service does not offer 911 service that is functionally equivalent to that provided by traditional telephone providers. The FCC could, after industry input, adopt uniform, national guidelines for VoIP providers regarding disclosure requirements in interacting and establishing initial VoIP service with potential consumers.

Lastly, VoIP providers utilizing the 911 system should bear their “fair share” of maintaining the 911 system. Regulatory parity argues that those who use the system should, regardless of the platform used, support the system.

## **B. Universal Service**

Universal service presents another fundamental policy challenge. While, as a general matter, nascent technologies should not be burdened with old taxes, the country has established universal service policies that require funding. As consumers increasingly turn to substitutes for a taxed service, not subjecting those substitutes to USF obligations results in regulation picking market winners and losers. Some competitors – but not others – would bear the brunt of funding the program. To further a uniform, non-discriminatory policy, the FCC must ultimately subject

the “proper pool” of participants to non-discriminatory USF funding obligations.<sup>12</sup> Regardless, VoIP providers would *not* have to be subjected to the full range of common carrier/telecommunications regulation in order to require VoIP providers to contribute to the USF.

Ultimately, any extension of USF obligations to VoIP providers (or others) should *not* constitute new or additional revenue for the government to redistribute. Rather, it should reflect a reallocation of a burden amongst some group of similarly situated competitors. It is far preferable for policymakers to determine the amount needed to meet a defined universal service goal and charge the pool of participants for their share of the needed amount.

Finally, if VoIP providers ultimately are required to share in the burden, they ought to be considered for USF distributions. However, the FCC perhaps should examine equity issues associated with consumers who pay USF charges on multiple lines and should examine methods to prevent multiple USF distributions to the same consumer.

### C. CALEA

Because the FCC has indicated that it will release another NPRM with respect to law enforcement and CALEA requirements, FERUP’s comments are limited to the following preliminary principle: while such regulations should be balanced against the ultimate economic impact, there appears to be a role for the federal government to subject VoIP providers to similar law enforcement and CALEA requirements as traditional telecommunications providers. Completely exempting VoIP providers from laws designed to protect our homeland may provide a dangerous and publicized loophole for those seeking to inflict harm on our citizens.

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<sup>12</sup> Defining the “proper pool” might consider factors such as: the share of the voice market held by the provider (so as to exclude providers with but a negligible share of the market); whether the VoIP is a computer-to-computer application (such as Skype); or whether the VoIP does not “touch” the PSTN at either end.

#### **D. Consumer Protection**

Existing federal and state generic consumer protection laws are sufficient to address the vast majority of consumer protection issues. Specific issues the FCC should consider include how to apply Local Number Portability and Do Not Call restrictions uniformly on all carriers, including VoIP providers, that utilize North American Numbering Plan resources. Absent a compelling need to initiate a rule to address other VoIP-specific consumer issues, the competitive market should provide adequate protection, as is the case in the highly competitive and highly successful wireless industry. That said, FERUP also would support VoIP providers voluntarily providing contact information and escalation lists to federal and state agencies that are likely to receive consumer complaints about VoIP service regardless of an agency's jurisdiction over such providers. This approach is aimed at getting consumers in touch with those in the company that can provide timely assistance in getting the consumer's concerns resolved. This approach has worked well in Florida with respect to consumer complaints regarding wireless service, which is specifically excluded from the state commission's jurisdiction. State regulatory commissions currently handle most consumer complaints (even of unregulated industries)<sup>13</sup> and have developed considerable expertise in dealing with those issues. State commissions should continue to have a significant role in facilitating the resolution of consumer complaints.

#### **VI. INTERCARRIER COMPENSATION**

Intercarrier compensation is a critical issue with respect to VoIP. The current system, designed to recover a local telephone provider's costs of providing access to the PSTN to other carriers, is both complicated and broken. Because VoIP traffic travels at least in part over an IP

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<sup>13</sup> 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.

platform, VoIP challenges the broken compensation regime. This NPRM presents a new opportunity to examine *and* modify the way wireline providers currently are compensated for use of their infrastructure.

The current scheme was created as a regulatory construct designed to deal in part with the high cost of maintaining network infrastructure. In that sense, intercarrier compensation has become a support mechanism, which is now relied on by many high cost providers. The system worked so long as there was no way to bypass the system. Now, there is, to the extent VoIP calls can be made without the use of the PSTN.

Some policymakers appear to have coalesced around idea that any voice traffic, regardless of technology, that connects to the PSTN should pay existing traditional access charges. In fact, the FCC's recent decision regarding the AT&T petition suggests exactly that. However, this widely-endorsed solution: (1) can only be temporary; (2) may not be consistent with larger goals, such as promoting regulatory parity and competition among multiple platforms; (3) will not solve the universal service problem in the long run; and (4) will seriously disadvantage one network platform, the PSTN, as carriers move as much traffic as possible to competing networks (cable, wireless, and the Internet). Although it may be appropriate as an interim measure while policymakers focus on comprehensive reform of the intercarrier compensation framework, the FCC decision in the AT&T petition is akin to placing a band-aid carefully over a festering blister.<sup>14</sup> Regulators should be hesitant to *fully* extend the current intercarrier compensation system to VoIP providers who touch the PSTN exactly because that would drive customers and carriers to purposefully avoid the PSTN, thus harming LECs and the Universal Service Fund even more. Regulators should not artificially decrease demand against the PSTN in a misguided attempt to meet unachievable social goals.

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It is critically important that the FCC not allow a temporary and ultimately unsustainable solution on VoIP providers to become entrenched in an already fragile intercarrier compensation regime. It is even more critical that the FCC not allow states to fill a regulatory vacuum with a patchwork of differing classifications on VoIP providers with regard to paying access charges, universal service contributions and other intrastate fees and charges. Instead, policymakers need to find a broad long-term solution to the intercarrier compensation dilemma, both with regard to VoIP *and* traditional service providers. Access reform that recognizes the weaknesses of the current system and, at a minimum, considers and addresses the implications of what appears to be a major industry shift to VoIP, is desperately needed. Currently, the FCC awaits at least one known industry effort to address intercarrier compensation reform. If the industry is unable to reach consensus in the near term, the FCC should occupy the field of jurisdiction forthwith and proceed with its own resolution.

## **VII. CONCLUSION**

Instead of wasting more time over who gets to regulate which piece of a competitive communications market, federal and state regulators should work collaboratively to: (i) identify issues where government *should* intervene; (ii) identify whether such intervention is most appropriately carried out by state or federal regulators (or some combination); and (iii) limit that intervention to resolving issues that will *not* be adequately addressed by the competitive market. As for the industry, VoIP providers should be seeking market solutions to as many of these issues as possible, a method that will greater reduce the threat of government regulation of the service.

VoIP is not well suited to the model of regulation that traditionally has been applied to the provision of circuit switched telephone services by a monopoly. The FCC's aggressive

schedule for addressing the plethora of thorny issues surrounding this emerging technology is encouraging. Based on FCC actions to date that indicate a general willingness to regulate sparingly or to forbear from regulation completely depending on the nature of a particular VoIP service, we look forward to increasing announcements of innovative VoIP service roll-outs across the country and to increasing alternatives for the consumers in our states.

In closing, FERUP echoes the sentiments of Colorado Public Utilities Commission Chairman Greg Sopkin, who stated, “There should be minimal, rational regulation (as determined by the FCC) so there will be little incentive to flout it. And that regulatory model should apply to all modes of telephony to the extent feasible, lest we – the regulator – pick the winners and losers.”

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The Federation for Economically Rational Utility Policy (FERUP), founded in 2004, is a new, national organization of state utility commissioners who believe in reforming regulation through proven economic principle. FERUP questions command and control thinking endemic to so much governmental regulation, preferring a rigorous application of rational economic theory to today’s rapidly evolving network industries. [www.ferup.org](http://www.ferup.org) (coming soon)

These comments herein represent, collectively, those of the individual signatories to the comments and do not necessarily represent the positions of either the public utility commissions on which the signatories serve or the states in which the signatories serve.

Dated: May 28, 2004

Respectfully submitted,

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