

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

In the Matter of)

IP-Enabled Services)
_____)

WC Docket No. 04-36

COMMENTS OF NET2PHONE, INC.

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Dated: May 28, 2004

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Net2Phone, Inc., and its subsidiaries, (collectively “Net2Phone”) respectfully submit these Comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) issued by the Federal Communications Commission (“FCC” or “Commission”) regarding “IP-enabled services.”^{1/} The *NPRM* identifies a wide range of legal and technical issues relating to the appropriate regulatory framework for Voice over Internet Protocol (“VoIP”) and other IP-enabled services. Net2Phone commends the FCC for taking this significant step towards understanding the potential of this nascent technology and determining the proper scope of regulation to promote innovation.

I. NET2PHONE OFFERS A WIDE ARRAY OF IP-ENABLED SERVICES

Originally conceived as a computer-to-computer service, Net2Phone has developed award-winning technologies that enable consumers to make VoIP calls using traditional phones as well.^{2/} The core of Net2Phone’s services is its packet-switched network and packet-based platform technologies. Unlike providers who are only now attempting to adapt their legacy

^{1/} *In the Matter of IP-Enabled Services*, 19 FCC Rcd 4963 (2004) (“*NPRM*”).

^{2/} Following is a list of some of Net2Phone’s numerous awards for its innovative packet-based technologies: *CNET* Product of the Week - 1996; *What PC?* Software Award - June 1997; *PC Magazine* Product of the Week - 1997; *CTI* Editor's Choice and Product of the Year- 1998; *Computer Telephony Magazine* - Product of the Year - 1998; *Internet Telephony Magazine* - Editor's Choice - 1999 and 2000; *Internet Telephony Magazine* - Product of the Year 1998, 1999, 2000; *Communications Outsourcing Magazine* *Service of the Year*, In recognition of the very best solutions in hosted communications – 2001; U.S. Department of Commerce Export Achievement Certificate for Recent Accomplishments in the Global Marketplace presented by U.S. Senator Jon S. Corzine - 2003. More information about Net2Phone is available at <http://www.net2phone.com>.

circuit-switched networks to function within the packet-switched environment, Net2Phone has from the outset developed its services to function within the packet-based environment.

In the years following its initial limited PC-to-PC service offerings, Net2Phone has been at the forefront of the VoIP market by expanding its services to provide its customers with the broadest range of VoIP service choices available today. Its centrally managed platform supports a full range of consumer and corporate hardware products and services that enhance quality, lower costs, and improve ease of use and management. Below are some of the key products and services offered by Net2Phone:

- *Enterprise Solutions.* Net2Phone provides a suite of VoIP products and services targeting small and medium-sized enterprises. Net2Phone recently introduced Max Private Voice Network (“Max PVN”), which allows business customers to utilize their existing broadband connections to place free calls among their corporate offices and their primary business contacts, such as customers and suppliers. Max PVN and several other Net2Phone products also allow enterprises to access Net2Phone’s VoIP platform to make low cost VoIP calls to anywhere in the world.
- *Calling Cards.* Net2Phone sells rechargeable and disposable calling cards in the U.S. and internationally. The calling cards are offered in over 130 countries and can be used to access the Net2Phone VoIP platform to make voice calls throughout the world. Unlike traditional calling card services, packet-switched technologies and managed network features provide the capability for Net2Phone’s calling card services to function across various technology platforms such as PC-calling. Net2Phone is dedicated to using packet-based technologies to provide consumers with enhanced service functionality through the convenience of a calling card.
- *VoiceLine Broadband Telephony.* Net2Phone sells devices that can be plugged into a high-speed broadband connection anywhere in the world and allows users to be reached at the telephone number assigned to the devices. The devices also allow users to access Net2Phone’s VoIP platform from anywhere in the world with a broadband connection.
- *Satellite VoIP.* Net2Phone offers VoIP products and services to satellite broadband providers that enable them to offer voice service in conjunction with their high-speed data offerings. Net2Phone has improved voice quality over satellite by implementing voice packet prioritization and working with third party device manufacturers, including LG Electronics and Hughes Network Systems, to deliver a device that can be easily installed on existing equipment.

- *VoIP over WiFi.* Net2Phone recently announced plans to enable delivery and to develop new products and service offerings using VoIP over wireless fidelity (“WiFi”).^{3/} WiFi integration and interoperability between Net2Phone’s VoIP services and mobile devices extends the existing reach of voice and data services by removing the necessity for copper or fiber last-mile access to the Internet. Among the target markets are Wireless ISPs (“WISPs”) and rural areas. With more than 30 million U.S. homes that cannot access cable or DSL service, Net2Phone can enable WISPs to offer voice as part of their high-speed wireless product, both within specific wireless environments, such as cafes and airports, as well as Wi-Max deployments throughout entire cities. With more cities and municipalities offering their populace extensive long-range wireless networks, residents in rural areas may benefit from increased broadband WiFi Internet access as well as additional competitive choice for voice service within those networks.
- *Cable Telephony Solution.* Net2Phone also offers cable operators the ability to deliver a viable cable VoIP service to their video and high-speed data customers. For many operators, offering voice enables the “triple play” combination of video, high-speed data, and telephony, which not only delivers high quality service and convenience to consumers but also aids in competitive and technological development by creating customer demand for more broadband services (especially in underserved markets). Net2Phone manages cable operators’ networks for them so that operators can be assured of quality of service from call inception to completion. Net2Phone’s market focus is on small to medium-sized Multiple System Operators (“MSOs”) that may not have the know-how or financial and technical resources to implement their own voice solutions. Within the past month, Net2Phone has reached agreements with Northland, Bresnan, and Liberty Puerto Rico.^{4/} Many of these small to medium cable operators serve rural areas with little to no telephony competition.

II. IP-ENABLED SERVICES ARE MORE APPROPRIATELY CLASSIFIED AS INFORMATION SERVICES

A. IP-Enabled Services Are More Properly Classified as Information Services Consistent with Statutory Definitions, and FCC and Court Precedent

The Commission’s long history of a hands-off approach toward regulation of the Internet and Internet-based products has been central to Net2Phone’s continued investment in VoIP technologies and the development of new and innovative packet-based services. In doing so, the Commission has followed Congress’s thirty-year practice of refraining from regulating the

^{3/} *Net2Phone Unveils Wi-Fi VoIP Strategy*, Press Release (Apr. 22, 2004).

^{4/} *Northland Selects Net2Phone for Cable Telephony Deployment*, Press Release (May 4, 2004); *Bresnan Communications Selects Net2Phone as Provider for Cable Telephony Deployment*, Press Release (May 13, 2004); *Net2Phone and Liberty Cablevision of Puerto Rico Launch VoIP Telephony Across Entire System*, Press Release (May 24, 2004), all available at <http://www.net2phone.com>.

Internet to allow the market to self-regulate and to encourage new technologies to flourish. Due to the Commission's hands-off approach, Internet technologies have developed into a new breed of services that do not neatly fall within the existing regulatory system created to govern traditional circuit-switched technologies. The Commission must, however, work within the confines of existing law. Realizing that attempting to confine the ever evolving nature of Internet services into rigid legacy regulations is like trying to lasso a cloud, the FCC has enforced Congressional intent codified in the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), by not defining VoIP as a regulated "telecommunications service" subject to Title II but rather as an "information service" subject to its Title I authority.^{5/}

The origin of the information services classification was the FCC's decisions in the *Computer Inquiry* proceedings, in which the Commission developed the categories of "enhanced service" and "basic service."^{6/} The FCC defined "basic service" as the provision of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."^{7/} By contrast, enhanced services 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.^{8/}

^{5/} NPRM ¶ 43.

^{6/} *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, ¶¶ 95, 97 (1980) (subsequent history omitted) ("*Computer II*"); see also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, ¶ 106 (1996) ("*Non-Accounting Safeguards Order*"); *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶¶ 24-26 (1998) ("*Report to Congress*").

^{7/} *Computer II* ¶ 95.

^{8/} 47 C.F.R. § 64.702; see also *Computer II* ¶ 97.

The FCC's goal in creating this new classification was to foster competition through technological development in the computer industry by keeping it free from regulation.^{9/}

Incorporating the FCC's enhanced services definition, the *MFJ* defined the term "information services" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications."^{10/} The definitions established in the *Computer Inquiries* and the *MFJ* were later codified in the Act, whereas enhanced services fell within the broader category of information services.^{11/} The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."^{12/}

In its 1998 *Report to Congress*, the Commission analyzed VoIP services in light of the "telecommunications" and "information" service classifications.^{13/} The Commission found that VoIP service blurred the line between telecommunications services and information services. The Commission stated "certain 'phone-to-phone IP telephony' services lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear

^{9/} *Computer II* ¶¶ 100-01.

^{10/} *See United States v. American Tel. & Tel.*, 552 F. Supp. 131, 178 (D.D.C. 1982) (subsequent history omitted) ("*MFJ*") (stating that enhanced services are essentially the equivalent of information services).

^{11/} *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, ¶ 2, n.6 (2001) (stating that "'enhanced services' are now referred to as 'information services'" and "Congress sought to maintain the basic/enhanced distinction in its definition of 'telecommunications service' and 'information service'" and "'enhanced services' and 'information services' should be interpreted to extend to the same functions"); *see also Non-Accounting Safeguards Order* ¶ 102 ("We conclude that all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"); *Report to Congress* ¶ 21 (noting that "we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definition of 'basic service' and 'enhanced service' developed in our Computer II proceeding and the definition of 'telecommunications' and 'information service' developed in the Modification of Final Judgment breaking up the Bell system").

^{12/} 47 U.S.C. §153(20).

^{13/} *Report to Congress* ¶ 83.

the characteristics of ‘telecommunications services.’”^{14/} The Commission tentatively defined the term “phone-to-phone IP telephony” to mean instances in which the provider: (1) holds itself out as providing voice telephony or facsimile transmission service; (2) allows customers to use the same customer premises equipment (telephone handsets) used to make voice calls over the public switched telephone network (“PSTN”); (3) permits calls to ordinary telephone numbers; and (4) transmits calls without making any net change in form or content.^{15/} Despite the Commission’s findings that phone-to-phone VoIP service resembled a telecommunications service, the FCC stopped short of concluding that it is a telecommunications service. The FCC concluded that it would be inappropriate “to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.”^{16/}

The evolution of Internet services, such as IP-enabled services, has been dynamic since the 1998 *Report to Congress*. The conclusion reached by the Commission in 1998 that phone-to-phone VoIP services should not automatically fall within the regulatory classification of “telecommunications” is even more appropriate today when applied to new, innovative IP-enabled products.^{17/} Since establishing the basic/enhanced distinction, the Commission has reviewed new technologies on a case-by-case basis to determine their proper classification. The

^{14/} *Report to Congress* ¶¶ 83, 89.

^{15/} *Report to Congress* ¶ 88. The FCC noted that computer-to-computer VoIP service is not a telecommunications service, primarily because vendors who sell the software and hardware needed to make IP voice calls with a computer are merely selling customer premises equipment, not transmission capacity. See *Report to Congress* ¶ 87. Likewise, the FCC determined that Internet service providers (“ISPs”) are not “providing” or “offering” telecommunications services because ISPs are providing a service that typically includes storage, retrieval, and manipulation of data, and generally have no way of knowing whether their customers are using Internet access services for transmission capacity to make computer-to-computer voice calls. See *id.*

^{16/} *Report to Congress* ¶ 90.

^{17/} *NPRM* ¶ 43; see also *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701 (b)(1), and Rule 69.5(b)*, Petition for Forbearance, WC Docket No. 03-266, at 11-14 (filed Dec. 23, 2003) (noting the availability of a myriad of VoIP services available today, including multimedia conferencing, high-power call centers, unified messaging, expanded call management and screening, availability awareness, location scheduling, and simplified relocation).

Commission properly concluded that IP voice applications fit within the definition of enhanced or information services.^{18/} The FCC found “that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services ‘via telecommunications.’”^{19/} IP-enabled services should not be hampered with legacy regulations merely because they may use a legacy network to transmit some part of a voice call. IP-enabled voice services use “telecommunications” in a manner indistinguishable from the manner in which other information services such as e-mail use “telecommunications” to transmit messages.

As stated throughout these comments, providers like Net2Phone are developing new services to meet customer demand that are information services or are more akin to information services. While these services may share characteristics of traditional telephony services, their current functionality and future promise far exceed those traditional services. Classifying IP-enabled services as “telecommunications services” is not in the public interest. Such a classification would restrict IP-enabled services to the confines of that definition and curtail any incentive for future growth, evolution, or expansion of those services. Providers such as Net2Phone would be forced to adapt and limit their new dynamic technologies to fit into a regulatory system designed for outmoded circuit-switched services. VoIP providers would therefore be required to re-engineer their Internet-based networks to resemble circuit-switched networks rather than to update existing legacy networks to function in the Internet environment as Congress envisioned by keeping Internet technologies free from legacy regulation. As a

^{18/} *Computer II* ¶ 98 (stating “we are not foreclosing enhanced processing applications from being performed in conjunction with ‘voice’ service”).

^{19/} *Report to Congress* ¶ 13.

result, consumers will lose both the current and potential promise of enhanced functionality that IP-enabled services provide.

B. IP-Enabled Services Can Evolve and Innovation Can Continue in a “Regulation-Free Zone” Under a Title I Regime

Net2Phone has been providing VoIP services and products for almost a decade. In that time, Net2Phone has seen the quality and breadth of its services grow from a limited computer-to-computer communication, to a truly convergent Internet-based application that permits customers to make high quality voice calls over various types of networks and technologies. This is only the beginning. As Chairman Powell has stated, “Restraining from regulating the economics of Internet applications has served us well. . . . Consumers are enjoying more choices, better value, and more personalized products.”^{20/} Using a Title I regime allows the FCC to tailor specific regulations for IP-enabled services that are truly necessary without imposing overly burdensome and unnecessary Title II regulation on these nascent services.^{21/} The Commission has successfully used its Title I authority in the past to permit information services to flourish.^{22/} The present panoply of VoIP products and applications are the direct result of an open environment free from needless regulatory restraints.^{23/}

Different types of voice providers routinely have been regulated differently. For example, competitive local exchange carriers (“LECs”) are subject to less regulation than

^{20/} Written Statement of Michael K. Powell, Chairman of the Federal Communications Commission, on Voice over Internet Protocol (VoIP) before the Committee on Commerce, Science, and Transportation, United States Senate, at ii (Feb. 24, 2004).

^{21/} *NPRM* ¶ 49.

^{22/} *See generally Computer II.*

^{23/} Rather than regulate by accident, the FCC should monitor its progress by providing voluntary guidelines where appropriate. *See FCC Plans to Look Before it Takes Any VoIP Leap*, Fiber Optics News, Nov. 24, 2003 (“The chairman has been very articulate regarding what we should and should not regulate, and we don’t want to regulate VoIP ‘by accident.’”); *see also NPRM* ¶ 48. Although premature regulation would stifle the future of Internet voice, a hands-off approach permits the Commission to monitor the industry without hindering its development while retaining the ability to review regulation when appropriate.

incumbent LECs, while wireless and commercial mobile radio service (“CMRS”) providers are subject to different regulations than both competitive and incumbent LECs even though voice services may be offered by all of these providers. It follows that VoIP, as a new and fundamentally different service, does not and should not automatically fall under legacy common carrier regulation based on misleading parity arguments. Chairman Powell said it best when he stated that “[t]he creativity and innovation of the marketplace has been breathtaking and dynamic, bursting at the seams with entrepreneurial spirit. . . . There is little compelling evidence that heavy economic regulation of these vibrant services is warranted.”^{24/}

C. IP-Enabled Services Should Not Be Distinguished or Classified by Type for Purposes of Regulatory Treatment

The Commission should avoid creating artificial distinctions between different types of IP-enabled services.^{25/} The Commission, as well as some states, have based their regulatory classifications on the functionality provided to end users rather than the facilities used to provide those services.^{26/} The Commission’s overarching principle in doing so is “to develop an analytical framework that is consistent, to the extent possible, across multiple platforms.”^{27/} In its 1998 *Report to Congress*, the Commission specifically noted that “Congress did not limit

^{24/} Written Statement of Michael K. Powell, Chairman of the Federal Communications Commission, on Voice over Internet Protocol (VoIP) before the Committee on Commerce, Science, and Transportation, United States Senate, at ii (Feb. 24, 2004).

^{25/} *NPRM* ¶ 37.

^{26/} See, e.g., Case 01-C-1119, *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Order Requiring Payment of Intrastate Carrier Access Charges, at 7 (N.Y.P.S.C. May 31, 2002); see also *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Comments of the New York Public Service Commission, at 4 (filed Dec. 18, 2002).

^{27/} *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 6 (2002) (“*Wireline Broadband NPRM*”); see also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 5 (2002) (“*Cable Modem Ruling*”), *vacated Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

‘telecommunications’ to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.”^{28/} In that vein, the Commission and some states historically have applied their regulatory authority consistent with the statutory definition of telecommunications service -- “the offering of telecommunications . . . regardless of the facilities used.”^{29/}

The Commission has also applied its functionality analysis to the regulation of information services. Services that function as both telecommunications and information services, but are inseparable from the end user’s perspective, have been deemed to be information services under the functional approach.^{30/} Thus, it is generally irrelevant what technology a provider utilizes to provide an information service. While some VoIP services may provide similar functions as plain old telephone service (“POTS”) today, VoIP service providers and some regulators have emphasized that these services are more than just POTS.^{31/} For instance, POTS is a “network-level function” whereas VoIP service is an “an Internet application just like unregulated e-mail and file sharing” that can follow its users everywhere, over any network.^{32/} Indeed, many VoIP service applications combine voice and data in new and

^{28/} Report to Congress ¶ 98.

^{29/} 47 U.S.C. § 153(46); see also *Wireline Broadband NPRM* ¶ 7, n.10 (reiterating the “function over facilities” principle and concluding that the Act and the Commission’s prior rulings suggest that the Commission should take a functional approach to regulation that focuses on the nature of the service provided to consumers, rather than an approach that focuses on the technical attributes of the underlying architecture used to provide the services); *Cable Modem Ruling* ¶ 38 (concluding that the classification of cable modem service turns on the nature of the functions that the end user is offered).

^{30/} Report to Congress ¶¶ 39, 58, 60.

^{31/} See, e.g., *Open IP Communications*, Presentation by Jeff Pulver Before the FCC’s VoIP Forum (Dec. 1, 2003) (discussing the differences between VoIP and traditional telephony); *VoIP*, Presentation by Florida Public Service Commissioner Charles M. Davidson before the FCC’s VoIP Forum (Dec. 1, 2003) (noting that the VoIP world is “completely dissimilar” to the traditional POTS model).

^{32/} Herb Kirchoff, *VoIP Advocates Urge States to Keep Hands Off*, COMMUNICATIONS DAILY, Sept. 9, 2003.

innovative ways, going far beyond the functionality offered by POTS.^{33/} The mere existence of a POTS capability subsumed within these offerings should not render the entire VoIP service, which is capable of significantly greater enhanced functionality, susceptible to a classification as a telecommunications service. The long-standing regulatory treatment of such combined enhanced and basic transmission services should render them information services for purposes of regulation.^{34/}

The application of VoIP technologies to different types of networks makes it virtually impossible to impose a one-size-fits-all regulatory framework that could encompass all VoIP services or overcome rapid changes in technology.^{35/} The underlying network configuration used to offer VoIP is irrelevant in determining its regulatory status as an information service.^{36/} Indeed, in defining what constitutes an enhanced service, the FCC acknowledged that such services may be “offered over common carrier transmission facilities used in interstate communications.”^{37/}

What distinguishes VoIP and other information services from telecommunications services is their use of “computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information,” which “provide the subscriber additional, different, or restructured information[,] or involve subscriber interaction

^{33/} *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Statement of Chairman Michael K. Powell (Apr. 21, 2004) (“The promise of [VoIP services] and the potential for greater competition combine to justify a minimal and innovation-friendly regulatory policy.”).

^{34/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer III)*, 3 FCC Rcd 1150, 1153, n.23 (1988) (finding that offerings combining communications and computing components should always be deemed enhanced); *see also Report to Congress* ¶ 60.

^{35/} *NPRM* ¶ 48.

^{36/} *NPRM* ¶¶ 37, 43, 48.

^{37/} 47 C.F.R. § 64.702.

with stored information.”^{38/} The development of VoIP applications is making it possible for one service to be used over any type of technology that is not geographically tied to a single location. Convergence of technologies and networks are creating a global network. The line between what constitutes a telephone and a computer is quickly blurring. IP is a disruptive technology but that disruption is bringing additional choice and better products to consumers and should be permitted to thrive in a minimally regulated environment. In light of the present and evolving functional differences between VoIP services and POTS, it would be inappropriate and stifling to nascent VoIP service products to overlay legacy regulations designed for a very different service.^{39/}

III. IP-ENABLED SERVICES ARE INTERSTATE SERVICES SUBJECT TO THE FCC’S JURISDICTION

A. The FCC Has a Long History of Exercising Exclusive Jurisdiction over Information Services

Section 2(a) of the Act gives the Commission exclusive jurisdiction over interstate communications and explicitly precludes state regulation of interstate communications services.^{40/} Thus, “questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely

^{38/} *Id.*

^{39/} See, e.g., Susan Kennedy, *Let Internet Phone Service Evolve Without Rules*, MERCURY NEWS (Nov. 3, 2003) (noting that “Someday these new technologies will be mature enough to carry their share of the social contract expected of other indispensable utilities. But until then, regulators should just keep their hands off.”); *Wireline*, COMMUNICATIONS DAILY, Dec. 10, 2003, at 9 (Chairman Powell noting that “I am a huge believer that the ladder is the only reasonable thing to do, because [VoIP] is not a telephone. It is a new technology. I don’t want it treated like a 100-year-old common carrier model.”); Opening Statement of Commissioner Michael J. Copps at the FCC’s Voice over Internet Protocol Forum (Dec. 1, 2003) (noting that it is “incumbent on us to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeon-holes without adequate justification”); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Statement of Chairman Powell (Apr. 21, 2004) (“I have stated my solid view that VoIP offers enormous potential for consumers and should be very lightly regulated.”).

^{40/} *NPRM ¶¶ 40-41; Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 16 (2004) (“*FWD Order*”) (citing 47 U.S.C. § 152(a)).

by federal law and [] the states are precluded from acting in this area.”^{41/} Courts have affirmed Commission decisions preempting state regulation of interstate communications on the grounds that “interstate communications [] are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communications Act.”^{42/} As the Commission notes in the *NPRM*, “courts have recognized the preeminence of federal authority in the area of information services, particularly in the area [of] the Internet and other interactive computer services.”^{43/}

Both Congress and the Commission have recognized the Internet as inherently interstate and applications such as Net2Phone’s IP-enabled services that ride on top of the Internet retain the interstate designation. The Act refers to the Internet as “an international computer network” and therefore jurisdictionally interstate.^{44/} The Commission also has found that “[t]he Internet is a distributed packet-switched network of interconnected computers enabling people around the world to communicate with one another, invoke multiple Internet services simultaneously and access information with no knowledge of the physical location of the server where that information resides.”^{45/} The Commission therefore has the authority to preempt state regulation that impermissibly intrudes on the Commission’s exclusive domain over interstate communications. Generally, once the FCC exercises its Title I authority over any “information service,” any state regulations interfering with the FCC’s exercise of its authority should be preempted.^{46/} In its *Computer Inquiry* proceedings, the Commission found that information

^{41/} *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968).

^{42/} *National Ass’n of Regulatory Util. Comm’rs v. Commission*, 746 F.2d 1492, 1501 n.6 (D.C. Cir. 1984).

^{43/} *NPRM* ¶ 39.

^{44/} 47 U.S.C. § 230(f)(1) (defining the Internet as an “international computer network of both Federal and non-federal interoperable packet switched data networks”); *see also Reno v. ACLU*, 521 U.S. 844, 849-50 (1997) (describing the Internet as “an international network of interconnected computers”).

^{45/} *FWD Order* ¶ 4.

^{46/} *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming the FCC’s authority to preempt state regulation of jurisdictionally mixed enhanced (information) services); *see also Cable Modem Ruling* ¶ 98 (“We note

services must remain free of state and federal regulations to promote the competitive growth of such services.^{47/} The Commission's long history in asserting exclusive jurisdiction of information services should continue to be applied with respect to IP-enabled voice services.

B. The End-to-End Analysis Is Inappropriate for IP-Enabled Services

The Commission has traditionally employed an end-to-end analysis that takes into account the origination and termination points of a communication to determine the jurisdictional nature of telecommunications traffic.^{48/} Where the specific geographic components of a service cannot easily be discerned, however, the Commission has asserted exclusive federal control over the service to preclude state regulation that could infringe on the Commission's jurisdiction under the mixed-use doctrine. Under this doctrine, where it is impossible to separate the interstate and intrastate aspects of a particular service, the end-to-end analysis is inapplicable.^{49/} The Commission has applied this doctrine to determine that DSL transmission services used to provide Internet access services are interstate services.^{50/} The Commission also affirmed the application of this analysis in 2002 in its determination that cable modem service is an interstate service.^{51/} More recently, the Commission used the mixed-use doctrine to determine that

that the courts have recognized the Commission's authority under Title I to preempt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services.”).

^{47/} *Computer II* ¶ 102 (“We seek to remove unnecessary and inappropriate FCC regulation as an inhibiting barrier to the various combinations and permutations of enhanced services that may be offered over the nationwide telecommunications network.”).

^{48/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶¶ 25, 53 (2001), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *petition for reh'g and reh'g en banc denied* (Sept. 24, 2002), *cert. denied sub nom.*, 123 S. Ct. 1927 (2003); *see also NPRM* ¶ 40.

^{49/} *FWD Order* ¶ 17.

^{50/} *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 16 (1998).

^{51/} *Cable Modem Ruling* ¶ 59.

pulver.com's Free World Dialup service is an interstate information service subject to the Commission's exclusive jurisdiction.^{52/}

The Commission's findings in the *FWD Order* should be extended to other IP-enabled services such as Net2Phone's for jurisdictional purposes.^{53/} In the *FWD Order*, the Commission confirmed that "[u]nless an information service can be characterized as 'purely intrastate,' or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed."^{54/} The Commission also has found that state regulators might find it difficult to determine the jurisdictional nature of IP-based services and to isolate the intrastate portion of those services for purposes of asserting their jurisdiction. In its 1998 *Report to Congress*, the FCC noted that it might be difficult for VoIP service providers themselves to determine whether VoIP calls are interstate or intrastate.^{55/} More recently, in the *AT&T Phone-to-Phone Order* the Commission reaffirmed that determining the jurisdictional nature of IP services might be difficult.^{56/}

Because the development of IP-enabled services is quickly obliterating geographic ties, the end-to-end analysis is inapplicable to assess the jurisdiction of VoIP services in general.^{57/} For instance, many of Net2Phone's services are portable and the actual originating location of the call may not correspond to the Automatic Number Identification ("ANI") Net2Phone receives in the call stream. In addition, due to the global nature of the Internet, services that

^{52/} *FWD Order* ¶ 22.

^{53/} *NPRM* ¶¶ 39-40.

^{54/} *FWD Order* ¶ 20.

^{55/} *Report to Congress* ¶ 91.

^{56/} *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 20 (2004) ("*AT&T Phone-to-Phone Order*").

^{57/} *NPRM* ¶ 40.

enable both phone-to-phone and computer calls cannot be deemed to be purely intrastate in nature regardless of whether some components of the service use traditional telephones or the PSTN under the Commission's mixed-use doctrine.

C. Preemption Would Promote a Unified Federal Regime for Internet-Based Services

The Commission and Congress, as well as the current Administration, have been strong proponents of a unified federal regime for Internet-based services.^{58/} In the *Computer Inquiries*, the Commission determined that information services must remain free of state and federal regulations in order to promote the competitive growth of Internet-based services.^{59/} Similarly, the Commission recently recognized in the *FWD Order* that "federal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation."^{60/}

Consistent with this approach, the Commission also acknowledged that keeping IP-enabled services that depend on high-speed Internet access free from regulation "will encourage more consumers to demand broadband service" and "is thus consistent with the requirements of the Act," in particular section 706, which requires "the Commission to encourage deployment of advanced telecommunications capability to all Americans by using measures that 'promote competition in the local telecommunications market.'"^{61/} Indeed, President Bush has announced the policy of the United States to have broadband technology ubiquitously deployed to every

^{58/} *NPRM* ¶¶ 42.

^{59/} *See generally Computer II*.

^{60/} *FWD Order* ¶ 16.

^{61/} *FWD Order* ¶¶ 18-19 (citing 47 U.S.C. § 157nt).

area of the country by the year 2007.^{62/} Thus, there is simply no question that “state regulation [of VoIP] would negate valid FCC regulatory goals,” and thus, preemption is both authorized and essential.^{63/}

Congress likewise determined in 1996 that “the policy of the United States” is “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”^{64/} Today, that sentiment still rings true as reflected in the proposed Pickering and Sununu bills, which seek “to prevent the imposition of harmful obligations or a patchwork of multiple and discriminatory regulations on the providers of applications that utilize the Internet protocol or any successor protocol to offer 2-way or multidirectional voice communications.”^{65/} These Congressional goals command the classification of IP-enabled services as interstate services subject solely to the FCC’s Title I authority.

D. Classification of IP-Enabled Services as Interstate Services Would Avoid a Patchwork of State Regulations that May Impede Continued Deployment of VoIP Services

A clear and definitive statement of federal jurisdiction over IP-enabled services is needed to avoid a patchwork of inconsistent and unduly burdensome state requirements for VoIP service providers.^{66/} Classifying VoIP services as “telecommunications services” would permit states to impose authorization requirements on VoIP providers and any other traditional telecommunications regulations the state determined to be in the public interest with respect to

^{62/} “A New Generation of American Innovation,” Remarks of President Bush to American Association of Community Colleges Annual Convention, Minneapolis Convention Center, Minneapolis, Minnesota (Apr. 26, 2004).

^{63/} *California v. FCC*, 39 F.3d at 931.

^{64/} 47 U.S.C. § 230(b)(2).

^{65/} S. 2281, 108th Cong., § 1(b) (2004); H.R. 4129, 108th Cong., § 1(b) (2004).

^{66/} *NPRM* ¶ 41. A finding that IP-enabled services are subject to federal jurisdiction would not eliminate states’ authority to police such services under their general consumer protection powers.

intrastate services.^{67/} The Commission has asked states to refrain from regulating VoIP services until the Commission completes the instant proceeding.^{68/} While some states have honored that request,^{69/} several states are continuing to regulate VoIP services.^{70/}

For example, the New York Public Service Commission (“PSC”) recently ruled that Vonage is a “telephone corporation” under New York law, and thus, must comply with the state’s tariffing and authorization requirements applied to traditional telephony common carriers.^{71/} The New York PSC’s decision appears to ignore the enhanced functionality of Vonage’s services and focuses instead on its ability to fit a component of the Vonage service within the antiquated statutory definition of “telephone corporation” as defined by the New York Public Service Law.^{72/} As discussed above, the mere existence of POTS subsumed within a service providing greater enhanced functionality does not render it a “telecommunications service” and nor should its provider be deemed to be a “telephone corporation.”^{73/} The New York PSC appears to rationalize its conclusion by finding that the FCC’s mixed-use doctrine can only be applied to determine the jurisdiction of special access lines, not the jurisdictional nature

^{67/} 47 U.S.C. § 152(b) (giving the states authority over intrastate communications).

^{68/} *Minnesota Public Utilities Commission v. Vonage Holdings Corp.*, No. 04-1434, Brief of the United States and the Federal Communications Commission as *Amicus Curiae* (8th Cir. filed Apr. 21, 2004).

^{69/} *See, e.g.*, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Order on Reciprocal Compensation (Fl. P.S.C. Sept. 10, 2002) (“a broad sweeping decision on this particular issue would be premature at this time”).

^{70/} *See, e.g.*, Investigation No. 04-02-007, *Order Instituting Investigation on the Commission’s Own Motion to Determine the Extent to Which the Public Utility Telephone Service known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Order Instituting Investigation (C.P.U.C. Feb. 11, 2004) (tentatively concluding that regulation of VoIP services connected with the PSTN is appropriate).

^{71/} Case 03-C-1285, *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provisions of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation (N.Y.P.S.C. May 21, 2004) (finding that Vonage is a telephone corporation and must comply with the Public Service Law) (“*NYPSC Vonage Order*”).

^{72/} *NYPSC Vonage Order* at 9-10.

^{73/} *See supra* Section II.C.

of information services.^{74/} The application of the mixed-use doctrine to information services that incorporate an inseparable transmission component is well-established law as discussed above.^{75/}

The New York PSC's recent ruling poses a real threat to the continued investment and development of IP-enabled services. If upheld, it could spark a chain reaction of varying degrees of regulation by all state commissions. Adhering to fifty differing regulatory regimes makes it extremely difficult for providers to develop and deploy IP-enabled services on a national basis and thereby undercuts any hope of promoting a national broadband policy.^{76/} Indeed, "it would be deleterious to impose a patchwork of 50 different sets of regulatory regimes on such a nascent and ubiquitous technology."^{77/} Accordingly, the Commission should determine that IP-enabled services are interstate services subject to the FCC's exclusive jurisdiction.

IV. SELF-REGULATION IS THE MOST APPROPRIATE REGULATORY FRAMEWORK FOR VOIP SERVICES CONSISTENT WITH CONGRESSIONAL INTENT AND PRIOR FCC PRECEDENT

A. Utility-Type Regulation Was Developed for a Monopoly Environment and Is Inappropriate for IP-Enabled Services Offered by New Entrants

As the Commission notes, traditional telephony regulation was designed to address market failures and protect customers from monopoly abuse.^{78/} There is simply no "compelling

^{74/} *NYPSC Vonage Order* at 14-15.

^{75/} *See supra* Section III.B.; *see also FWD Order* ¶ 22.

^{76/} *See, e.g. Terry Lane, Powell Endorses Reform of Telecom Act*, COMMUNICATIONS DAILY, Feb. 25, 2004 (noting Congress's and the Commission's concerns that VoIP firms will move offshore if regulations were too burdensome); Susan Polyakova, *Citron Asks for Regulatory Clarity in VoIP*, COMMUNICATIONS DAILY, Feb. 9, 2004 (Vonage representative Jeffrey Citron noting that "regulations could slow broadband deployment" and "undermine the U.S. position as a technological leader and force service providers offshore").

^{77/} Letter from Representatives Mike Ferguson, Chip Pickering, and Jim Saxton, United States House of Representatives, to Michael K. Powell, Chairman of the Federal Communications Commission, WC Docket No. 03-211 (filed May 20, 2004).

^{78/} *NPRM* ¶ 74.

justification” for imposing burdensome, economic regulations on IP-enabled services.^{79/} Utility regulation is only necessary to provide protection for consumers in the event of market failure. Market failure occurs when the market is unable to counteract inefficient distortions and anticompetitive behavior resulting from monopoly conditions.^{80/} In the event of market failure in a particular segment of the communications industry, such as the regulation of bottleneck facilities, effective government regulation can level the playing field. Even market failure, in and of itself, however, does not provide a compelling case for applying regulation if the regulation itself could produce results counterproductive to the intended consumer benefits. Accordingly, the Commission’s decision of whether to regulate any form of VoIP depends on the likelihood of increased consumer benefit as opposed to the likelihood that unnecessary regulation would produce deleterious effects on competitive and technological development.

Monopoly conditions do not provide a rationale for regulating VoIP services. The information services market is fully competitive. No single provider or limited number of providers can be said to have market power in any given area of IP-enabled services. Indeed, VoIP is bringing competition to consumers in the form of innovative bundled packages such as those enabled by Net2Phone’s MSO solution. As the Commission will undoubtedly see by the number of VoIP providers filing comments in this proceeding, competition in the VoIP industry is going strong and providers aggressively rival each other for customers. Utility-type regulation simply is not justified when market competition and existing consumer protection laws effectively shield consumers from excessive prices and unfair practices.

^{79/} Opening Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003) (stating that VoIP should remain as free from economic regulation as possible and that the burden should be on those wanting to apply regulation to the service).

^{80/} Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958) (explaining the classic analysis of market failure).

Furthermore, utility-type regulation is not necessary with regard to the supply of consumer information. Consumers make choices based on their preferences and product expectations. The information used by consumers to make purchasing decisions is the result of, among other things, customer experience with new technologies, marketing and advertising materials, provider reputation, word of mouth, and past experience with similar services. The proliferation of information services and IP-enabled technologies is creating a far more technology savvy consumer than ever before. Consumers decide which VoIP services are best to meet their needs, and the growth of VoIP over the past decade evidences consumer willingness to embrace these new services. The Commission likewise has taken significant steps to educate consumers about IP-enabled services.^{81/} Since providers actively compete for consumers, the market offers sufficient incentives for VoIP providers to offer high quality services and products that meet customer demand.

Net2Phone's dedication to consistently improve its services is evidenced through its continued investment in the development of IP-based technologies. Net2Phone's commitment to providing information to its customers and offering high quality services is the cornerstone to Net2Phone's longevity in the VoIP industry. In order to maintain the incentive to offer novel services, however, IP-enabled technologies must be left to flourish in an environment that embraces innovation rather than stifles it through the imposition of outmoded requirements. At this stage in the market, there is no justification for the imposition of traditional telephony regulation on IP services. The findings the Commission made in 1981 still hold true today: "the

^{81/} See <http://www.fcc.gov/cgb/consumerfacts/voip.html>.

efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if [information] services are free from public utility-type regulation.”^{82/}

B. The Industry is Working Toward Voluntary Solutions for Emergency Services, CALEA, and Disability Access

1. Emergency Services

Reliable access to emergency services is undoubtedly an important issue. There exist, however, significant public safety reasons for the Commission to refrain from imposing traditional 911 obligations on VoIP at this time.^{83/} Perhaps the most compelling public safety reasons are the technical and operational limitations of implementing 911 in a packet-switched environment.^{84/} As the Commission noted in its *911 FNPRM*, the Hatfield Report, “identifies potential technical issues that may arise with voice delivered using the Internet Protocol (VOIP) communicating the necessary call-back and location information to PSAPs.”^{85/} There is no evidence that public safety answering points (“PSAPs”), LECs or other necessary third parties have the ability to transmit, receive, and use E911 information on pure data networks.

Dr. Hatfield also correctly recognized that the existing 911 system is seriously antiquated and should be modernized in order to incorporate new technologies. For instance, Dr. Hatfield asserted that “the Selective Routers that handle E911 calls may not even be able to handle modern common channel signaling protocols like SS7, let alone a protocol like the Session Initiation Protocol (“SIP”) widely used in VoIP” and that “an additional network element may be needed to accomplish the necessary protocol conversion with attendant cost and performance

^{82/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, ¶ 83 n.34 (1981) (citing *Computer II* ¶¶ 114-16) (subsequent history omitted).

^{83/} *NPRM* ¶ 56.

^{84/} *NPRM* ¶ 54.

^{85/} *Revision of the Commission’s Rules to ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 25576, ¶ 113 (2002) (“*911 FNPRM*”) (citing Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced E911 Services*, DA 02-2666 (2002) (“Hatfield Report”).

penalties and loss of advanced capabilities.”^{86/} Requiring nascent VoIP technologies to conform to an outdated 911 system would not only impose prohibitive costs on providers, but could negate the very advances promised by these new technologies. Indeed, the Hatfield Report recommends that a possible solution to any potential customer safety concerns would be in “consumer education” rather than the premature imposition of 911 requirements on emerging technologies.^{87/}

The industry is voluntarily working towards creating 911 systems that would function to provide reliable access while upgrading outmoded PSAP technologies.^{88/} Net2Phone already is in the process of developing its own 911 solution and has implemented a PacketCable compliant 911 solution for its MSO services. Recent Congressional bills similarly recognize the inherent benefits of a voluntary regime for emergency services.^{89/} Accordingly, the best way to ensure innovation while protecting consumers is through the Commission’s continued support of voluntary industry efforts to develop a workable 911 solution tailored specifically for the VoIP environment rather than to force nascent technologies to fit the paradigms of a legacy emergency system.

2. CALEA

While access to lawfully intercepted electronic communications is a valuable tool for law enforcement, application of the Communications Assistance for Law Enforcement Act (“CALEA”) to VoIP services is not necessary at this time. As Net2Phone explained in its

^{86/} Hatfield Report at 41.

^{87/} Hatfield Report at 43.

^{88/} Agreement between the VON Coalition and the National Emergency Number Association, *available at* <http://www.nena.org/voip>; “Public Safety and Internet Leaders Connect on 911,” Press Release (Dec. 1, 2003), *available at* <http://www.von.org>.

^{89/} S. 2281, 108th Cong., § 5 (2004); H.R. 4129, 108th Cong., § 5 (2004). Both bills direct the FCC to appoint a representative industry organization to develop, as applicable, consensus guidelines, protocols, or performance requirements relating to VoIP service providers’ offering or provision of emergency services.

comments on the Petition for Rulemaking filed by the Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Agency,^{90/} the Commission should refrain from implementing CALEA in a manner that contravenes the purpose of the statute.^{91/} While Net2Phone recognizes the important concerns law enforcement has with security matters at this time, refraining from imposing CALEA on VoIP would not compromise security. Net2Phone and other IP-enabled service providers already work diligently with government agencies to comply with lawful surveillance requests without the imposition of strict CALEA mandates. Accordingly, the Commission should not impose CALEA on VoIP service providers.

3. Disability Access

Net2Phone is committed to ensuring that its services are accessible by individuals with disabilities.^{92/} Rather than force IP-enabled technologies to conform to outdated TTY equipment specifications developed for the circuit-switched environment, the Commission should encourage voluntary efforts that utilize these new technologies to bring additional access and convenience to individuals with disabilities.^{93/} For instance, voice-to-text translation technologies coupled with Internet applications may eliminate the need for an intervening operator or special equipment for a hearing impaired individual to make an ordinary phone call.

^{90/} *Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act*, Joint Petition, RM-10865 (filed Mar. 10, 2004).

^{91/} *Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act*, Reply Comments of Net2Phone, Inc., Net2Phone Global Services, LLC, and Net2Phone Cable Telephony, LLC, RM-10865, at 2 (filed Apr. 27, 2004).

^{92/} *NPRM* ¶¶ 58-60.

^{93/} *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 Services, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 16 FCC Rcd 6417, ¶ 176 (1999) (noting the voluntary commitment by some providers to offer accessible IP-based services); *see also* Letter from Bruce D. Jacobs, Counsel to the VON Coalition, to Magalie R. Salas, Secretary, Federal Communications Commission, WT Docket No. 96-198 (filed July 7, 1999) (discussing the Voice on the Net Coalition's voluntary commitment to ensure that VoIP services are accessible to individuals with disabilities and that access needs are taken into account in the development of new products and services).

This is especially significant for access to emergency services by individuals with disabilities. In addition, the added portability of various VoIP services could provide additional freedom and convenience that has not been achieved with existing circuit-switched services for the disabled. The Commission has begun to investigate these issues through several industry meetings to determine the types of applications available to people with disabilities in the VoIP environment and the industry response has been positive.^{94/}

C. Consideration of Universal Service and Intercarrier Compensation Should Be Deferred to the Commission's Pending Proceedings

There is no dispute that the existing universal service fund ("USF") regime is in need of reform. To that end, the Commission is in the process of revamping the USF system to comply with its statutory mandate to make universal support subsidies "explicit" and to remove anticompetitive effects resulting from implicit subsidies.^{95/} While Net2Phone shares the Commission's admirable goal in ensuring that all individuals have affordable access to basic telephone service, the imposition of unnecessary regulation on nascent VoIP technologies would not accomplish this goal.^{96/}

From its inception, the provision of VoIP products has never been regulated as anything other than the provision of information service. The USF, however, still remains intact. It is important for the Commission to examine whether a theoretical threat to the USF is worth regulating a nascent and beneficial service out of existence, and whether the goals of universal

^{94/} *FCC Internet Policy Working Group To Hold Second "Solutions Summit" on Friday, May 7*, News Release (rel. Mar. 11, 2004); *see also* John Spofford, *Voice-Over-IP Deployment*, COMMUNICATIONS DAILY, Sept. 19, 2002, at 6 (discussing industry's efforts to create "patches and adaptors" to allow new technologies to work with old assistive technologies or migrating persons with disabilities to new assistive technologies that may be more compatible with VoIP technology).

^{95/} *Federal-State Joint Board on Universal Service, et al.*, 17 FCC Rcd 3752 (2002); *see also* Opening Remarks of Commissioner Michael J. Copps at the FCC's Voice over Internet Protocol Forum (Dec. 1, 2003) (noting that addressing the VoIP issue may force the FCC to first deal with other pending proceedings).

^{96/} *NPRM* ¶ 64.

service could better be achieved through technological and competitive development.

Net2Phone's commitment to providing services in rural markets is evidence that maintaining the regulatory *status quo* related to VoIP would better accomplish the goal of universal access.

Furthermore, because VoIP does not depend on any specific types of technologies, problems associated with last mile bottleneck facilities are quickly becoming a thing of the past.^{97/} The need for universal service can therefore be met through technological development and competition, but only if the providers offering these innovative services can do so in an environment free from unnecessary regulations.

Likewise, the Commission should defer any decision for the development of a VoIP-specific intercarrier compensation regime until the Commission has completed its pending reform of all intercarrier compensation regimes.^{98/} As Commissioner Copps recognized, the Commission should undertake "the sorely needed reform of intercarrier compensation" before applying the existing intercarrier compensation regime to IP-enabled services.^{99/} This will allow the Commission to ensure that IP-enabled services are subject to an appropriate and relevant compensation scheme if at all.^{100/}

^{97/} Cf. *Inquiry Regarding Carrier Current Systems, Including Broadband Over Power Line Systems, Notice of Inquiry*, 18 FCC Rcd 8498 (2003).

^{98/} *NPRM* ¶¶ 61-62; see also *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001). As Level 3 explains, it is no longer necessary for the Commission to distinguish between interstate and intrastate traffic for compensation purposes. See *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701 (b)(1), and Rule 69.5(b)*, Petition for Forbearance, WC Docket No. 03-266, at 32-36 (filed Dec. 23, 2003).

^{99/} *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Statement of Commissioner Michael J. Copps (rel. Apr. 21, 2004).

^{100/} This proceeding, and the FCC's pending unified intercarrier compensation proceeding, presents an opportunity for the Commission to remedy the damage caused by the Commission's finding in the *AT&T Phone-to-Phone Order* that AT&T's services were subject access charges. See *AT&T Phone-to-Phone* ¶ 14; see also *id.* ¶ 10 (stating that the decision does not foreclose the Commission from finding differently in other pending proceedings). Since the issuance of that decision, many carriers have been engaging in self-help or initiating legal proceedings to collect compensation charges they claim are due. Rather than provide the industry with "clarity," the *AT&T Phone-to-Phone Order* has created additional barriers to entry and less incentive for IP-enabled service providers to enter the market. Cf. *id.* ¶ 2 (noting the goal of the decision is to provide clarity to the industry).

CONCLUSION

For the foregoing reasons, Net2Phone respectfully requests that the Commission classify IP-enabled services as interstate, information services and refrain from imposing traditional telephony regulation on nascent IP-enabled services such as those provided by Net2Phone. Consistent with Congressional intent, self-regulation is the most appropriate regulatory framework for VoIP services rather than the application of outdated, irrelevant requirements.

Respectfully submitted,

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Dated: May 28, 2004