

if a cable company attempts to innovate at all and provide anything other than pure television, it loses the protection of the Pole Attachments Act and subjects itself to monopoly pricing. The resulting contradiction . . . would defeat Congress' general instruction to the FCC to "encourage the deployment" of broadband Internet capability and, if necessary, "to accelerate deployment of such capability by removing barriers to infrastructure investment."<sup>154</sup>

Moreover, there is no need for any "open access" requirement for cable systems that offer IP Telephony. This is particularly true since non-facilities-based VoIP providers such as Vonage can offer their services over any broadband connection without the need for permission from the broadband provider, whether it is a cable modem, DSL or wireless service provider.<sup>155</sup>

Obviously, therefore, the theory behind open access requirements does not apply to IP Telephony.<sup>156</sup>

### C. Specific Regulatory Safeguards

Just as classification as an IP Telephony provider should carry with it certain regulatory responsibilities, specific regulatory safeguards designed to advance the Commission's long-standing goal to promote facilities-based residential telephone competition should remain available regardless of whether IP Telephony is found to be an information service or a telecommunications service. First, any IP Telephony provider should be allowed to obtain interconnection with any LEC pursuant to the standards of Sections 251 and 252. Second, IP

<sup>154</sup> *Id.* at 339 (quoting 47 U.S.C. § 157 note).

<sup>155</sup> See, e.g., Tyler Hamilton, *Cheap Choice Coming for Long-Distance Calls*, TORONTO STAR, Nov. 13, 2003, reprinted at [www.vonage.com/corporate/press\\_news](http://www.vonage.com/corporate/press_news) ("Vonage's service is a form of voice over Internet protocol, meaning you can make phone calls through a high-speed Internet connection -- cable, DSL or wireless -- and in most cases completely bypass Bell. . . . With a service like Vonage, you can forget the computer, forget software, and forget logistics. You can use your existing telephone to call anybody else with a telephone -- all you need is a high-speed Internet connection.").

<sup>156</sup> Cable Ops do not believe that this theory is valid even as to ISPs, since cable operators face ever-increasing competition from DSL and satellite broadband providers for a pool of customers who will demand to have choices among competing ISPs. See, e.g., *Mediaone Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989) ("Congress determined that the demand of consumers for diverse sources of programming should be best met if 'a cable company's owners, not government officials, . . . decide what sorts of programming the company would provide'")), *aff'd*, 254 F.3d 356 (4<sup>th</sup> Cir. 2001).

Telephony providers should be entitled to participate in the NANP, and all wireline and wireless LECs should be required to port numbers to and from IP Telephony providers. Third, facilities-based IP Telephony providers should be allowed to apply for universal service support eligibility, at least at such time as they may be required to make payments to the universal service fund. Fourth, any private contracts (*e.g.*, pole agreements, MDU contracts) restricting cable operators from offering IP Telephony should be preempted. Fifth, IP Telephony providers should be afforded the protections of Section 253 against unreasonable or discriminatory exercise of right-of-way management or entry barriers imposed by local governmental authorities. Finally, IP Telephony providers should have the option (but not the requirement) to file tariffs with the FCC or appropriate state commissions.

As discussed above, Cable Ops believe that IP Telephony is properly categorized as an “information service” to which Title II regulations do not apply. However, there are some aspects of the different regulatory treatment of Title I and Title II services that could significantly hinder or even halt the continued growth and development of IP Telephony. Accordingly, Cable Ops believe that the Commission should invoke its ancillary jurisdiction to ensure that certain rights and obligations that currently extend to telecommunications carriers under Title II are also applied to IP Telephony service providers under Title I. These rights and obligations are discussed in detail below.

#### **1. Network Interconnection**

Cable Ops believe the Commission must invoke its ancillary jurisdiction to craft rules requiring that both telecommunications carriers and IP Telephony providers engage in the mutual exchange of voice traffic, on reasonable, nondiscriminatory rates and terms. In particular, in order to complete voice communications on the PSTN, the Commission should ensure that IP Telephony providers have the ability to access signaling databases, including access to the codes

necessary for network interconnection and traffic exchange, Number Portability Administration Center (“NPAC”) databases and capabilities, SS7 interconnection for call management between IP Telephony providers and the PSTN, and customer service records housed in carriers’ databases.

Policymakers have long recognized that interconnection for the mutual exchange of traffic is a necessary component of successful competitive entry for dial-up voice telephone service. Both the 1996 Act and the Commission’s implementing rules require network interconnection in the context of circuit-switched services.<sup>157</sup> The primary purpose for these requirements is to secure the ability of any end-user to reach any other end-user using a standardized telephone numbering system, recognizing that this is a necessary condition for the ubiquitous deployment, acceptance and utility of the telephone network.<sup>158</sup>

Even before the passage of the 1996 Act, the Commission had a well-established record of requiring ILECs to provide interconnection services and facilities to information service providers. In the *Computer III* and *Expanded Interconnection* proceedings, the FCC used its Title II authority to require the RBOCs to provide information service providers with interconnection services and facilities.<sup>159</sup> In these proceedings the Commission found that requiring the RBOCs to provide “all parties,” including non-carriers, with access to their networks furthered the Commission’s policy of promoting competition and advanced the public welfare by maximizing the availability of information services.<sup>160</sup>

---

<sup>157</sup>See 47 U.S.C. §§ 201(a), 251(a)(1); 47 C.F.R. § 51.305.

<sup>158</sup>See *Admin. of the N. Am. Numbering Plan*, 11 FCC Rcd 2588, ¶ 8 (1995).

<sup>159</sup>*Computer III*, 104 FCC 2d 958, ¶ 113 (1986); *Computer III Further Remand Proceedings*, 10 FCC Rcd 8360, ¶¶ 18-26, 29-31 (1995); *Expanded Interconnection With Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 65 (1992) (“*Expanded Interconnection Order*”).

<sup>160</sup>See, e.g., *Expanded Interconnection Order* at ¶ 65; *Computer III Further Remand Proceedings* at ¶¶ 18-19.

In making this decision, the FCC determined that Section 201 of the of the Act provides it with full authority to “order interconnection in the public interest.”<sup>161</sup> The Commission reasoned that although the language of Section 201(a) refers to a duty to interconnect with “carriers,” Section 201(a)’s requirement that common carriers “furnish communication service upon reasonable request” and Section 201(b)’s requirement that all charges, terms and conditions for service be “just and reasonable” provided it with the authority to order interconnection with information service providers.<sup>162</sup> The Commission further based its decision on the nondiscrimination provisions of the Act, as well as on Sections 1 and 4(i) of the Act, which authorize it to regulate telecommunications in order to make communications service widely available.<sup>163</sup>

These same provisions also give the FCC ample authority to require ILECs to interconnect with IP Telephony providers, even if IP Telephony is classified as an information service. The need for universal interconnection of dial-up voice networks is no less compelling in the context of IP Telephony services than it was for information service providers in the *Computer Inquiry* line of cases or for telecommunications services providers generally. Indeed, requiring ILECs to provide interconnection facilities and services available to IP Telephony providers flows logically from this authority.

Accordingly, to ensure that all end-users continue to have the ability to reach all other users of the network, regardless of the access technology employed, the Commission must affirmatively require that providers of dialed voice services that are subject to the mandatory interconnection requirements of Sections 201 and 251 of the Act make interconnection

---

<sup>161</sup>*Expanded Interconnection Order* at ¶ 216.

<sup>162</sup>*Id.* at ¶¶ 219-221.

<sup>163</sup>*Id.* at ¶¶ 221, 226.

arrangements available to IP Telephony providers pursuant to non-discriminatory rates and terms.

From a technical standpoint, there are no impediments to requiring network interconnection where numbers administered in accordance with the NANP are used. Communications protocols for traffic exchange and technical connection methods are well established and no changes to these are needed. To the contrary, the burden is appropriately placed on IP Telephony providers to deliver voice traffic to PSTN in the appropriate form and format for proper call completion, assuming they get proper nondiscriminatory access to signaling and call-related databases. Applying non-discriminatory network interconnection rules on IP Telephony services will remove any uncertainty regarding the ability of such service providers to deliver IP Telephony traffic to the PSTN by virtue of its classification as an information service. This regulatory clarity will significantly boost investment by intermodal competitors, such as Cable Ops, and will enhance their ability to obtain any financial arrangements necessary for the launch and deployment of IP Telephony.

Accordingly, Cable Ops urge the Commission to ensure that the absence of a requirement that LECs provide IP Telephony providers with interconnection to the PSTN, which is universally available to circuit-switched providers, does not become a barrier to entry for this nascent service. By mandating these limited, minimum interconnection requirements, the Commission will ensure that IP Telephony voice services continue to develop as a viable, low-cost alternative to current circuit-switched services. In turn, this will ensure that consumers continue to realize the benefits of competition in the form of technological innovation, new services and competitive prices.

Truly non-discriminatory access to the PSTN requires that network interconnection arrangements be made available to IP Telephony providers either through a contract negotiation

process, or through a federal tariff. To the extent that these arrangements are made available pursuant to a contract, the Commission must institute a reliable and timely dispute resolution process for issues relating to the contract negotiations for these network interconnection arrangements. This dispute resolution process should afford similar timeframes and processes as those available under Section 252 of the Act.<sup>164</sup> In the alternative, the Commission could establish a role for state public utility commissions to arbitrate interconnection disputes between ILECs and IP Telephony providers, consistent with the procedures set forth in Section 252.

Cable Ops acknowledge that Section 252, on its face, is limited to interconnection arrangements between ILECs and other telecommunications carriers. Nevertheless, categorization of IP Telephony as an information service does not preclude the Commission from adopting the Section 252 process for IP Telephony. Promotion of competition in residential telephony was a key Congressional goal underlying the 1996 Act. The ability to obtain interconnection with incumbent telephone companies is perhaps the most fundamental prerequisite for competitive entry – no one is going to switch telephone companies if they cannot continue to place calls to anyone they choose. Thus, this is a clear case where exercise of ancillary jurisdiction by the Commission is fully justified. Moreover, given the Commission's jurisdiction over all interstate telecommunications carriers, the Commission holds the power to require that they allow interconnection upon reasonable terms and conditions.

To the extent that interconnection and database arrangements are made available in tariffs, the Commission must conduct thorough review and approval proceedings that include ample notice and comment opportunities for interested IP Telephony providers. Only through

---

<sup>164</sup> 47 U.S.C. § 252 (establishing processes and procedures for the negotiation, arbitration, and approval of interconnection agreements governing ILEC telecommunications services).

these structured processes can the Commission ensure that network access arrangements are made available to IP Telephony providers on reasonable and non-discriminatory terms.

## **2. Access to Telephone Numbers and Number Portability**

Direct access to the NANP and the associated numbering resources is essential in order for IP Telephony voice service providers to originate and terminate calls through the PSTN. Without direct access to telephone numbers, IP Telephony providers will either have to rely upon third-party carriers for their numbering resources, with the associated costs and delay, or will have to assign numbers outside of the NANP, and thereby limit the end-users' ability to send calls to, and receive calls from, customers connected to the PSTN.

To avoid this discriminatory outcome, the Commission should clarify that IP Telephony providers are eligible for access to the full range of numbering resources available to telecommunications carriers. Specifically, the Commission should require that all local number administration guidelines permit IP Telephony providers to obtain numbers directly from the source, without first requiring state certification as a telecommunications carrier or other similar requirements.

Section 251(e)(1) states that numbering should be made available on an "equitable basis." Cable Ops believe that this statutory provision provides sufficient authority for the Commission to require that numbering resources be made available to IP Telephony providers on terms equal to telecommunications and CMRS carriers. In the alternative, the Commission should exercise its ancillary jurisdiction under the Act to afford IP Telephony providers with access to numbers in the same manner and to the same extent as these carriers. This result will advance one of the Commission's key policy objectives -- promoting meaningful and sustainable intermodal competition. Further, this will fulfill the mandate contained in Section 251(e)(1), which requires that numbering resources be assigned in an equitable manner. Clearly, preventing regulatory

discrimination and promoting technical innovation and efficiencies offered by IP Telephony fulfills this obligation. Notably, the right to obtain telephone numbers on an equitable basis is not limited to telecommunications carriers. Rather, Section 251(e)(1) applies to “telecommunications numbering.” Thus, because information services are provided “via telecommunications,” classification of IP Telephony as an information service does not interfere with the right to obtain NANP telephone number assignments.

In addition to access to numbering resources, IP Telephony providers should be entitled to local number portability (“LNP”) services, with all wireline and wireless carriers required to port numbers to and from IP Telephony providers. Section 251(b) of the Act requires LECs to provide local number portability, to the extent technically feasible, in accordance with requirements prescribed by the Commission.<sup>165</sup> In adopting rules to implement this requirement,<sup>166</sup> the Commission identified critical policy goals underlying the LNP requirement, stating that “the ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase.”<sup>167</sup> The Commission found that “number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers.”<sup>168</sup> These same important policy objectives are promoted by extending the current number portability rules to include providers of IP Telephony.

---

<sup>165</sup> 47 U.S.C. § 251(b)(2).

<sup>166</sup> 47 C.F.R. § 52.21(k).

<sup>167</sup> *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, ¶ 30 (1996) (“*Number Portability First Report and Order*”).

<sup>168</sup> *Id.*

The Commission has used its ancillary jurisdiction to extend the number portability requirement to non-carriers in the past.<sup>169</sup> Specifically, in the *Number Portability First Report and Order*, the Commission recognized that the 1996 Act excludes CMRS providers from the definition of local exchange carrier, and therefore from the Section 251(b) obligation to provide number portability.<sup>170</sup> However, the Commission nevertheless extended number portability requirements to CMRS providers.<sup>171</sup>

In the *Number Portability First Report and Order*, the Commission used its independent authority under Sections 1, 2, 4(i), and 332 of the Act to require CMRS carriers to provide number portability.<sup>172</sup> In doing so, the Commission noted that the public interest is served by requiring the provision of number portability to CMRS providers “because number portability will promote competition between providers of local telephone services and thereby promote competition between providers of interstate access services.”<sup>173</sup> Specifically, the Commission determined that enabling wireless subscribers to keep their telephone numbers when changing carriers would enhance competition between wireless carriers as well as promote competition between wireless and wireline carriers.<sup>174</sup> The Commission noted that “service provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services.”<sup>175</sup>

---

<sup>169</sup> *Id.* at ¶¶ 152-53; *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697 (2003) (“*Wireless Number Portability Order*”).

<sup>170</sup> *Number Portability First Report and Order* at ¶¶ 152-53.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at ¶ 153; see 47 U.S.C. §§ 1, 2, 4(i), and 332.

<sup>173</sup> *Number Portability First Report and Order* at ¶ 153.

<sup>174</sup> *Id.* at ¶¶ 157-60.

<sup>175</sup> *Id.* at ¶ 160.

The policy rationale for extending number portability to IP Telephony is indistinguishable from the CMRS situation. As with CMRS, IP Telephony is not subject to the number portability provisions of the Act to the extent that the Commission correctly classifies IP Telephony as an information service. Further, like CMRS, allowing customers to keep their numbers when changing carriers will promote intermodal competition between providers of voice services. To the extent that there may be any specific technical issues that will need to be addressed to fully implement number portability for IP Telephony services, such issues can be addressed by the North American Numbering Council. This is the approach the Commission took when faced with significant technical concerns relating to wireless number portability.<sup>176</sup> Through this process, the Commission can develop any standards and procedures necessary to allow for IP Telephony provider participation in LNP. However, any such technical issues should not prevent the Commission from requiring portability for IP Telephony services, as they are bound to be less daunting than the issues posed by CMRS LNP.

By requiring LNP for IP Telephony, the Commission will create incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, which will mean new services at competitive prices for end users. Accordingly, Cable Ops urge the Commission to require number portability between IP Telephony providers and telecommunications and CMRS carriers.

---

<sup>176</sup> However, in the *Wireless Number Portability Order* the Commission ultimately did not find any technical impediments to providing intermodal number portability. *Wireless Number Portability Order* at ¶ 23.

### 3. Universal Service Support Eligibility

As discussed in Section IV.B.2. above, Cable Ops support a national universal service policy that applies to IP Telephony under specific, defined circumstances. Cable Ops observe, however, that to the extent that carriers are responsible for paying USF fees for IP Telephony services, the principle of non-discrimination requires that these same carriers also be eligible to draw from the universal services trust fund. Naturally, IP Telephony providers would be required to demonstrate compliance with eligibility criteria to the same extent as any other eligible telecommunications carriers.<sup>177</sup> However, these eligibility criteria must be crafted to ensure that they are applied in a nondiscriminatory manner regardless of the transmission technology employed.

A result that essentially taxes IP Telephony service providers without also giving them the benefit of the USF subsidy supported by that tax would have a chilling effect on the development of IP Telephony. This is especially true in the rural and underserved areas that the USF is designed to address. This would be contrary to the 1996 Act's goals of promoting competition and providing the benefits of technological innovation to everyone across the United States, not just in the more affluent or populated areas.

To the extent that the FCC determines that it cannot allow IP Telephony providers to draw funds from the USF under the Act in its current form, Cable Ops would support the statutory amendments necessary to allow such access. However, until IP Telephony service providers are found to be eligible to receive USF support, they should not be required to pay into the USF.

---

<sup>177</sup> See, e.g., 47 C.F.R. §§ 54.201, 54.203, 54.307 (setting forth eligibility criteria for universal service support).

#### 4. Preemption of Contractual Impediments to Competition

Private contracts over which the Commission has jurisdiction (*e.g.*, pole agreements, service contracts covering multiple tenant environments (“MTE”) and multiple dwelling unit (“MDU”) buildings) and that restrict cable operators from offering IP Telephony should be preempted. In the pole attachment context, the Commission should make clear that any proposed or executed contractual provision that limits a provider’s ability to offer IP Telephony will be considered an unreasonable term and condition and a *per se* violation of Section 224(b) of the Communications Act.<sup>178</sup> The Commission should also make clear that, consistent with Supreme Court’s *Gulf Power* decision, a franchised cable operator offering IP Telephony services in conjunction with its cable service offerings remains subject to the cable pole attachment rental rate formula contained in Section 1.1409 of the Commission’s rules,<sup>179</sup> given that IP Telephony is properly classified as an information service.

In the MTE/MDU context, the Commission should be mindful of the long history of incumbent telephone companies using exclusive service contracts to thwart competition. These exclusive service contracts commonly involve some sort of revenue sharing or kick-back to building landlords in exchange for exclusivity. Such exclusive contracts deny MTE/MDU residents the benefits of competition, innovation and choice. In the *Competitive Networks Order*, the Commission relied on these same reasons to determine that a ban on exclusive contracts for telecommunications service in commercial MTEs/MDUs would foster telecommunications competition in that market.<sup>180</sup> Cable Ops believe that same rationale applies in the IP Telephony context, and therefore the Commission should likewise prohibit the application of any exclusive

---

<sup>178</sup> 47 U.S.C. § 224(b).

<sup>179</sup> 47 C.F.R. §1.1409(e)(1); *Nat’l Cable & Telecomm. Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002).

<sup>180</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶ 32 (2000).

contract to restrict a provider already providing cable service inside the building from also offering competitive IP Telephony service.

Even in cases where there is no grant of exclusivity to an incumbent telephone provider, the Commission should make clear that any provision in a contract between the owner of a MTE/MDU building and a cable operator that purports to restrict the provision of IP Telephony is unenforceable. Cable Ops recognize the thorny constitutional issues involved in a mandate that landlords allow any IP Telephony provider to construct facilities within privately owned buildings.<sup>181</sup> Thus, Cable Ops are merely suggesting a rule providing that, once a landlord has allowed the construction of facilities within a building, *e.g.*, for the purpose of distributing cable television service, any provisions purporting to limit the delivery of any lawful services over those facilities, including cable modem service and IP Telephony, would be preempted. Such a ruling would be entirely consistent with the Commission's decision in the pole attachment context.<sup>182</sup>

##### **5. Protection Against Governmental Entry Barriers and Unreasonable or Discriminatory Right-of-Way Management**

The Commission should state clearly that it is federal policy that any attempt by a state or locality to restrict or prohibit an entity from offering any VoIP services, including IP Telephony, is fully preempted. There is no valid jurisdictional or policy basis for states or local governments to impose prohibitive economic or entry regulation on the provision of IP Telephony. Indeed, elimination of such state or local entry barriers is expressly mandated by Section 253(a) of the

---

<sup>181</sup> See *Telecommunications Services, Inside Wiring, Customer Premises Equipment*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, ¶¶ 102-103 (1997), *appeal docketed sub nom. Charter Communications v. FCC*, No. 97-4120 (8<sup>th</sup> Cir. 1997); *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices*, Second Report and Order, 13 FCC Rcd 23874, ¶¶ 16-29 (1998).

<sup>182</sup> See *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

Act.<sup>183</sup> This conclusion also is entirely consistent with the policy of Section 621(b)(3)(B) of the Act, which restricts a franchising authority from imposing “any requirement under this title [VI] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.”<sup>184</sup> Although couched in terms of “telecommunications service,” it is clear that the policy of Section 621(b)(3)(B) was to remove any franchising authority barriers to cable operator provision of competitive telephone service. Thus, even though IP Telephony is not properly classified as a “telecommunications service,” the Commission should make clear that the policy of Section 621(b)(3)(B) precludes any effort by a LFA to prohibit, limit, restrict or condition the provision of IP Telephony by a franchised cable television operator.

As explained in Section III of these Comments, while IP Telephony requires assertion of interstate jurisdiction by the Commission, this does not preclude a carefully tailored role for the states. For example, a simple state registration process, without the imposition of any significant entry barriers such as hearings or competitive protests, may be an appropriate role for state commissions. A short-form application process with a presumptive grant after no more than fifteen (15) days, for example, would not prohibit or have the effect of prohibiting competitive entry, contrary to the policies of Sections 253(a), 332(c)(3) or 621(b)(3)(B) of the Act. At the same time, such registration would allow states to monitor entities offering services to their residents and facilitate state implementation of important regulatory safeguards, such as the arbitration of interconnection agreements.

---

<sup>183</sup> Prohibition of state or local entry barriers to the provision of IP Telephony is also consistent with the policy of Section 332(c)(3) of the Act which applies to mobile services, and provides that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.” 47 U.S.C. § 332(c)(3).

<sup>184</sup> 47 U.S.C. § 541(b)(3)(B). *See also, e.g., TCI Cablevision of Oakland County, Inc., Order on Reconsideration*, 13 FCC Rcd 16400, ¶ 11 (1998) (citation omitted) (“*TCI Oakland*”) (citing 47 U.S.C. § 541(b)(3)(B)).

The Commission also must ensure that any state and local requirements imposed on IP Telephony are fully consistent with Section 253(c) of the Act. Section 253(c) provides: “a state or local government may manage the public rights-of-way, and may require fair and reasonable compensation from telecommunications providers for the use of such rights-of-way on a competitively neutral and nondiscriminatory basis.”<sup>185</sup> The Commission has repeatedly confirmed that Section 253(c) of the Act carves out a very limited role for state and local economic and service regulation of telecommunications providers: “Congress specifically enacted section 253(c) to ensure that no state or local authority could erect legal barriers to entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition.”<sup>186</sup> Section 253(c) mandates the Commission,

subject to certain limited exceptions, to preempt any state or local statute, regulation or legal requirement that “prohibits or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253(c) ensures that no new entrant is inhibited from entering a telecommunications market because of any state law, regulation or legal requirement unless such measure is necessary to advance the public interest objectives enumerated in section 253(b) and is competitively neutral.<sup>187</sup>

While interstate information service providers are not “telecommunications providers,” the policy for IP Telephony must be the same. Cable Ops encourage the Commission to exercise its ancillary jurisdiction to fully apply the provisions of Section 253(c) to any entity seeking to construct interstate communications facilities that occupy public rights-of-way and that will be used to provide IP Telephony services.

The Commission must also be unequivocal that the power granted to states and localities by Section 253(c) to manage the rights-of-way cannot be used as a backdoor mechanism to

---

<sup>185</sup> *TCI Oakland* at ¶ 8 (citation omitted).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (citations omitted).

impose unreasonable regulations and restrictions on cable operators providing IP Telephony. Over the past ten years, localities have become ever more aggressive in imposing unreasonably onerous terms and conditions on prospective telecommunications franchisees in the franchise application process.<sup>188</sup> These practices should be curtailed, and especially in the context of VOIP services. As described above, Section 253(c) was intended to be a limit on the role on local franchising authorities' right-of-way management and not as a tool by which they could extract as many concessions from prospective franchisees as possible.

In the cable context, because local franchising authorities have already exercised their right-of-way management authority over a cable operator providing IP Telephony by awarding a cable franchise, Section 253(c) should provide no basis for them to also require cable operators to obtain separate telecommunications franchises over and above their preexisting cable franchises. Similarly, as cable operator provision of IP Telephony imposes no greater right-of-way burdens than the provision of cable service, Section 253(c) cannot be used to justify additional payments to local government over and above the franchise fee. A cable operator's franchise fee already fully compensates a locality for the cable operator's use of the public rights-of-way, and the provision of IP Telephony services over those same facilities (without any additional burden on the rights-of-way occupied) should not trigger an additional, duplicative fee. Indeed, the Commission should categorically prohibit any economic or behavioral regulation of IP Telephony at the local level other than general requirements applicable to all businesses.

---

<sup>188</sup> See, e.g., *PECO Energy Company v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999) (no franchise award standards, no cap on franchise fees); *TCG New York v. City of White Plains*, 125 F. Supp.2d 81, 90-93 (S.D.N.Y. 2000) (onerous application requirements, unfettered discretion to deny application); *City of Auburn v. Qwest*, 260 F.3d 1160, 1177-1179 (9<sup>th</sup> Cir. 2001) (burdensome application process; regulation of rates, terms and conditions of service); *TC Systems v. Town of Colonie*, 2003 U.S. Dist. LEXIS 8263 (N.D.N.Y. 2003) (unbridled discretion in awarding franchises; requirement to specify proposed services; unlimited right to inspect facilities, books and records).

## 6. Optional Tariff Filing Rights

Cable Ops urge the Commission to delegate limited jurisdictional authority to the state commissions to permit IP Telephony providers to file optional “informational” tariffs. Cable Ops believe that requiring mandatory state tariffing of IP Telephony services would harm consumers by promoting anticompetitive behavior and by impeding carriers’ flexibility to react to competition. Further, mandatory tariffing creates significant administrative burdens for small carriers and can lead to significant customer confusion.

Tariffing should not be required of IP Telephony providers, as such a requirement would negatively impact consumers without providing any public interest benefits. In the Commission’s detariffing proceedings for CMRS providers, the Commission concluded that “non-dominant carriers are unlikely to behave anticompetitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in a loss of consumers.”<sup>189</sup> IP Telephony providers are non-dominant in the provision of telephony services, and are equally unlikely to behave anticompetitively. In fact, the Commission has found that mandatory tariffs can create an anticompetitive effect, by impeding carriers’ flexibility to react to competition.<sup>190</sup> Nevertheless, IP Telephony providers should have the option to file tariffs with applicable state commissions should they so desire.

---

<sup>189</sup> *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, Second Report and Order, 18 FCC Rcd 16906, n.45 (2003) (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 173 (1994) (citing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, First Report and Order, 85 FCC 2d 1 (1980)).

<sup>190</sup> *See Biennial Regulatory Review 2002 – International Bureau, Federal Communications Commission*, Staff Report, 18 FCC Rcd 4196, ¶ 31 (I.B. 2002) (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730 (1996) (“Domestic Detariffing Order”), *stay granted*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb 13, 1997), Order on Reconsideration, 12 FCC Rcd 15014 (1997), Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *stay lifted and aff’d* *MCI Worldcom, Inc. et al. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000)).

The benefits of not requiring tariffs was not lost on Congress, which effectively adopted a detariffing rationale in the 1996 Act to promote that statute's purpose "'to provide for a pro-competitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition.'"<sup>191</sup> In implementing the 1996 Act, the Commission found that tariffing was not necessary "'to ensure just and reasonable, non-discriminatory rates, nor necessary for the protection of consumers.'"<sup>192</sup>

While tariffs should not be mandatory for IP Telephony, there are significant benefits to allowing IP Telephony providers to file informational tariffs on a voluntary basis with applicable state commissions where market conditions or service offerings warrant. Informational tariffs are a reliable and uniform mechanism by which IP Telephony providers can make their terms and conditions for service available to new customers before contractual relationships have been established. This promotes competition by making it easier for customers to change carriers and allows them to begin using services pending the negotiation of contractual agreements. In addition, informational tariffs create a reliable way for IP Telephony providers to limit their liability. This can be of critical importance, for example, where emergency calls are at issue. Where a provider can employ informational tariffs to limit its liability, it may be able to significantly reduce the cost of obtaining insurance.

Section 621(d)(1) of the Act is in accordance with permitting informational tariffs, as that provision allows states to "require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in

---

<sup>191</sup> *Ting v. AT&T*, 319 F.3d 1126, 1132 (9<sup>th</sup> Cir. 2003) (citing H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 100 Stat. 5, 124) ("*Ting*").

<sup>192</sup> *Id.* (citing *MCI Worldcom, Inc., v. FCC*, 209 F.3d 760, 763 (D.C. Cir. 2000) (citing *Domestic Detariffing Order* at ¶ 21).

whole or in part, to Title II of this Act.”<sup>193</sup> Again, only the policy of this statutory provision is applicable to IP Telephony, and this provision cannot be read to allow states to mandate the filing of IP Telephony tariffs, because IP Telephony (an interstate information service) is not a service that would be subject to Title II of the Act if offered by a common carrier.

## V. CONCLUSION

Cable Ops commend the Commission for undertaking this comprehensive proceeding to clarify the regulatory status and responsibilities associated with the provision of IP-enabled services. We fully appreciate that this proceeding raises a multitude of complex issues, many of which regulators have been grappling with for decades and some of which (*e.g.*, intercarrier compensation, universal service, CALEA) may need to be addressed in other ongoing proceedings before their applicability to IP Telephony can be determined. Nevertheless, Cable Ops wish to again stress their wholehearted agreement with Chairman Powell’s recognition that regulatory uncertainty is perhaps the greatest impediment to the ongoing efforts by Cable Ops and others to roll out IP Telephony as promptly as possible.

Cable Ops accordingly emphasize the critical need for prompt action in this proceeding -- even if it requires that individual aspects be addressed in a piece-meal fashion. In particular, many of the issues raised herein can only be fully resolved after the proper statutory classification of IP Telephony is determined. Expedited consideration of the statutory classification issue will have a profound beneficial impact in advancing the two overarching

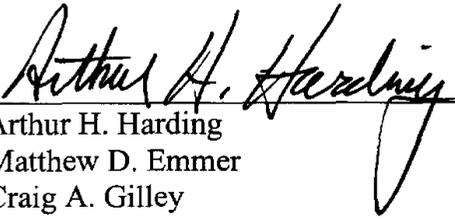
---

<sup>193</sup> See 47 U.S.C. § 541(d)(1).

goals of the 1996 Act: promoting universal availability of broadband services and spurring facilities-based residential telephony competition.

Respectfully submitted,

BEND BROADBAND  
CEBRIDGE CONNECTIONS, INC.  
INSIGHT COMMUNICATIONS COMPANY, INC.  
SUSQUEHANNA COMMUNICATIONS

By: 

Arthur H. Harding  
Matthew D. Emmer  
Craig A. Gilley  
Steven J. Hamrick  
James N. Moskowitz  
David A. Konuch

Fleischman and Walsh, L.L.P.  
1919 Pennsylvania Avenue, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 939-7900

Their Attorneys

Dated: May 28, 2004  
165289