

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

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In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	

**REPLY COMMENTS OF CISCO SYSTEMS, INC.**

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**INTRODUCTION AND SUMMARY**

In its Comments, Cisco Systems, Inc. (“Cisco”) encouraged the Commission to focus on the core goals of the Telecommunications Act of 1996 (the “1996 Act”) – competition, deregulation, and innovation – as it formulates a regulatory regime for IP-enabled services. Consistent with those goals, Cisco made several suggestions for how the Commission may address IP-enabled applications and services. It is significant that many parties filed comments in this proceeding that are wholly consistent with Cisco’s recommendations.

*First*, like Cisco, many commenters from disparate segments of the telecommunications sector urge the Commission to clarify that IP-enabled services are interstate and, therefore, subject to the exclusive jurisdiction of the FCC. Indeed, several parties agree with Cisco that the Commission’s analysis in the *Pulver Order* is equally applicable to most, if not all, IP-enabled services: it is impossible to determine the IP end (or ends) of an IP communication, so it is impossible to determine jurisdiction; likewise, the amount of interstate traffic is not *de minimis*, making IP-enabled communications jurisdictionally interstate and subject to the Commission’s

exclusive authority under the “mixed use” rule and general federal preemption doctrine.<sup>1</sup> Consistent with Cisco’s Comments and those of other parties, the Commission should immediately clarify its jurisdiction over IP-enabled services to eliminate the prospect of destructive and inconsistent regulation in 51 different jurisdictions.

*Second*, Cisco encourages the Commission to recognize important limits on its authority in the IP arena. Cisco continues to believe that the Commission lacks authority to regulate end-user applications,<sup>2</sup> which simply are not “*communication by wire and radio.*”<sup>3</sup> Moreover, even as to IP-enabled *services*, the Commission’s regulatory authority is limited. Many commenters agree with Cisco that, based on the Commission’s analysis in the *Pulver Order*, most IP-enabled services are properly classified as “information services” under the 1996 Act.<sup>4</sup> This is because IP networks inherently offer end users the capability to store, utilize, acquire, and process information. And the 1996 Act places “information services” beyond the reach of all regulation not strictly “necessary” to the implementation of specific statutory directives. Should the Commission determine that some IP-enabled services are “telecommunications services,”<sup>5</sup> however, the Commission should forbear from the full panoply of Title II regulation, which is neither necessary nor required.

*Third*, the Commission should narrowly target any regulation to social issues created by IP voice services that substitute for Plain Old Telephone Service (“POTS”). Nearly all

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<sup>1</sup> See *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*Pulver Order*”).

<sup>2</sup> The *NPRM* uses the terms “applications” and “services” without definition. In these Comments, the term “application” is used to denote end-user software, as opposed to software utilized by a service provider to provide its services. See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*NPRM*”).

<sup>3</sup> 47 U.S.C. § 151 (emphasis added).

<sup>4</sup> 47 U.S.C. § 153(20).

<sup>5</sup> 47 U.S.C. § 153(46).

commenters agree with Cisco that legacy economic regulation should not apply to the highly competitive IP-enabled services market. Accordingly, the Commission should limit its focus to ensuring that consumers continue to have access to the services of their choice, and to addressing critical social issues through the lightest regulation possible.

## ARGUMENT

### **I. THE COMMISSION SHOULD PROMPTLY CLARIFY THAT ALL IP-ENABLED SERVICES ARE INTERSTATE AND PREEMPT STATE JURISDICTION**

Numerous commenting parties from disparate segments of the telecommunications industry – including incumbent local exchange carriers (“ILECs”),<sup>6</sup> interexchange carriers (“IXCs”),<sup>7</sup> competitive local exchange carriers (“CLECs”),<sup>8</sup> IP-enabled service providers,<sup>9</sup> equipment manufacturers,<sup>10</sup> and even some state regulators<sup>11</sup> – agree that IP-enabled services and transmissions are interstate and subject only to the jurisdiction of the FCC. Like Cisco, these parties urge the Commission to reaffirm this conclusion on an expedited basis. Both the record in this proceeding and recent commercial experience make clear that absent immediate preemption, IP-enabled service providers will be subject to a growing body of conflicting and burdensome state regulations that needlessly threaten the deployment of IP-enabled networks and services that benefit American consumers.

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<sup>6</sup> See BellSouth Comments at 11-14, 32-36, 57-59; Qwest Comments at 25-34; SBC Comments at 25-32; Joint Comments of Valor Telecommunications of Texas, L.P. and Iowa Telecommunications Services, Inc. at 8-9; Verizon Comments at 31-42.

<sup>7</sup> See, e.g., MCI Comments at 21-24; Global Crossing Comments at 6-7.

<sup>8</sup> See, e.g., CompTel/ASCENT Comments at 3-5; Pac-West Telecomm Comments at 8-16.

<sup>9</sup> See, e.g., 8x8, Inc. Comments at 10-15; Net2Phone Comments at 12-19; PointOne Comments at 13-18.

<sup>10</sup> See, e.g., Lucent Comments at 5; Motorola Comments at 4-7.

<sup>11</sup> See Maine Public Utilities Commission Comments at 5-6; Federation for Economically Rational Utility Policy (“FERUP”) Comments at 4-9.

**A. IP-Enabled Services Are Inherently Interstate and Cannot Be Segregated Into Interstate and Intrastate Components.**

At the outset, Cisco agrees with AT&T and other commenters that “[t]he Commission can unquestionably assert jurisdiction over almost all VoIP services, because those services enable communications that are in substantial part interstate communications.”<sup>12</sup> Indeed, as Verizon explains, “[b]y their very nature, IP-enabled services ignore state boundaries, and the efficient routing of IP traffic depends on the free flow of packets irrespective of the kind of point-to-point routing characteristics of circuit-switched networks. The web servers and soft-switches that allow for the provision of IP-enabled services will, in many cases, be located outside the particular state in which a user of those services is located.”<sup>13</sup> The Commission itself acknowledged this aspect of IP technology in the *NPRM*, noting that “[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries.”<sup>14</sup> Based on the record, there is no question that a substantial amount of all IP-enabled traffic is interstate.

Cisco also concurs with the assertion of many commenters – and with the Commission’s own analysis in the *Pulver Order* – that it would be “impractical and inconsistent with the very nature of the Internet itself” to attempt segregate discrete interstate and intrastate components of a given IP communication.<sup>15</sup> As Cisco explained in its Comments, the key consideration underlying the FCC’s jurisdictional analysis in the *Pulver Order* – that “Internet applications like FWD ... separate the user from geography” – applies with equal force to all IP-enabled services.<sup>16</sup>

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<sup>12</sup> AT&T Comments at 42.

<sup>13</sup> Verizon Comments at 33; *see also* SBC Comments at 27-28.

<sup>14</sup> *NPRM* at ¶ 4.

<sup>15</sup> Verizon Comments at 33-34.

<sup>16</sup> Cisco Comments at 4, *quoting Pulver Order* at ¶ 4.

With regard to the IP-portion of an IP-PSTN “call,” for example, the IP end of the communication translates the PSTN telephone number into an IP address. However, there is no means to identify the physical location of the IP address because the communication protocols used to transmit data over the Internet do not contain such information.<sup>17</sup> And even if the IP address can be mapped to a certain device,<sup>18</sup> the device itself might be portable, so its geographic location (and thus the IP end of the call) will be unknown.<sup>19</sup>

Further, IP-enabled services “allow[] end users to exert great control over their communications services.”<sup>20</sup> Today, a customer using an IP service “may change the destination of the IP address to another device or location without the knowledge of the service provider,” and in the future, a customer will be able to place and receive calls from Wi-Fi “hot spots” in airports, hotels and restaurants.<sup>21</sup> Because the location of the IP-end of an IP-enabled communication is unknown and irrelevant, one cannot determine which jurisdictional boundaries a particular IP-enabled communication crosses. Without this information, one cannot rationally separate IP-enabled traffic into intrastate and interstate components.

It is clear from the record that it is simply not possible as a practical matter to carve out the intrastate portion of *any* IP-enabled services.<sup>22</sup> For instance, while the California Public Utilities Commission asserts that it is possible to determine the end points of an IP-enabled communication because each IP packet carries a “source IP” and the “destination IP”,<sup>23</sup> this

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<sup>17</sup> See Vonage Comments at 16.

<sup>18</sup> See California Public Utilities Commission Comments at 35.

<sup>19</sup> See Vonage Comments at 17.

<sup>20</sup> Vonage Comments at 17.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., AT&T Comments at 45-46; Verizon Comments at 36.

<sup>23</sup> California Public Utilities Commission Comments at 35.

argument wholly ignores the fact that “routing of IP-based communications is based on matching a numeric address to a particular *device* . . . rather than an immovable geographic location.”<sup>24</sup>

Likewise, several state commissions mistakenly assert that jurisdiction can be determined using the telephone number associated with the end user of an IP-enabled communication.<sup>25</sup> But this approach is inherently flawed, because the end user on an IP network might be located in the calling area associated with his telephone number or he might be located anywhere else on the planet where there is access to a broadband connection.<sup>26</sup> And contrary the suggestion of some commenters,<sup>27</sup> proxies or safe harbors that deem a certain percentage of traffic interstate – such as the proxy factor used to determine CMRS providers’ contribution to federal universal service mechanisms or the percent interstate usage factors often used for access charges – would not be a reasonable means to segregate IP-enabled traffic into interstate and intrastate components. Rather, a proxy would be inherently arbitrary because it has no historical basis given the nascent market for IP-enabled services. It also could not be used in any rational way to determine jurisdiction for purposes unrelated to billing, such as tariffing, entry regulation, reporting, and public safety requirements.

Moreover, as the Commission itself recognized in the *Pulver Order*, forcing providers to track the bit streams associated with IP-enabled services solely for jurisdictional purposes “would improve neither service nor efficiency” and thus would be directly contrary to the public interest: “imposing this substantial burden would make little sense and would almost certainly be

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<sup>24</sup> SBC Comments at 31 (emphasis added).

<sup>25</sup> See California Public Utilities Commission Comments at 35; Missouri Public Service Commission Comments at 13; Public Utilities Commission of Ohio Comments at 25-26; Virginia Corporation Commission Comments at 11-12.

<sup>26</sup> See, e.g., Verizon Comments at 34; SBC Comments at 29; Vonage Comments at 17.

<sup>27</sup> See California Public Utilities Commission Comments at 37-38; Missouri Public Service Commission Comments at 9; New York Public Service Commission Comments at 10.

significant and negative for the development of new and innovative IP services and applications.”<sup>28</sup> The record is clear that the Commission’s conclusions in the *Pulver Order* are equally true with respect to all IP-enabled services.<sup>29</sup>

Thus, based on the record, it is clear that it is not practically or economically possible to separate an IP-enabled communication into intrastate and interstate components “without negating the federal objectives to preserve and promote the viability of the Internet and other interactive computer services.”<sup>30</sup> Accordingly, IP-enabled services qualify as jurisdictionally interstate under the Commission’s “mixed use” rule.<sup>31</sup> Consistent with its past precedent, the Commission should declare such traffic to be interstate in nature.<sup>32</sup>

**B. State Regulation of IP-Enabled Services Must Be Preempted Because It Would Conflict with and Undermine Federal Policy.**

Because of the inability to separate IP-enabled services into interstate and intrastate components, the Commission should preempt state regulation of IP-enabled services since it conflicts with and would undermine federal policies.

Section 1 of the Communications Act provides the Commission authority to regulate services that include interstate communications.<sup>33</sup> Section 2(b) preserves state authority to regulate intrastate telecommunications.<sup>34</sup> Yet despite the assertion of some parties (in particular

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<sup>28</sup> *Pulver Order* at ¶ 24.

<sup>29</sup> *See, e.g.*, AT&T Comments at 46; Verizon Comments at 36; SBC Comments at 32-33.

<sup>30</sup> *See* AT&T Comments at 45.

<sup>31</sup> *See, e.g.*, AT&T Comments at 43; Verizon Comments at 37-38.

<sup>32</sup> *See Pulver Order* at ¶ 24; *see also MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 (1989); *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998). And contrary to the assertion of some parties, the FCC can apply the “mixed use” rule to services other than special access, as demonstrated by its *Pulver Order* analysis.

<sup>33</sup> *See* 47 U.S.C. § 151.

<sup>34</sup> *See* 47 U.S.C. § 152(b).

the state commissions),<sup>35</sup> the Supreme Court has found that the Act does *not* “divide the world of domestic telephone service neatly into two hemispheres – one comprised of interstate service, over which the FCC has plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction.”<sup>36</sup> Instead, “[e]ven within the bounds established by Section 2(b), there is broad scope for pre-emption of state regulation where that regulation ‘negates the exercise by the FCC’ of its lawful powers.”<sup>37</sup> More precisely, the courts have found that “‘where it [is] not possible to separate the interstate and intrastate components of the [ ] FCC regulation’ involved, the *Act sanctions federal regulation of the entire subject matter (which may include preemption of inconsistent state regulation)* if necessary to fulfill a valid federal regulatory objective.”<sup>38</sup> Thus, the Public Utilities Commission of Ohio’s broad assertion that “the FCC *simply cannot preempt state authority* concerning areas not granted exclusively to the FCC by the 1996 Act,” including state regulation of the intrastate component of an IP-enabled service,<sup>39</sup> is simply a misstatement of the law.

There is little doubt that “there is a strong federal interest in allowing [IP-enabled] services to develop free from harmful regulation” such as “[r]equiring applications providers to qualify as telecommunications carriers and subjecting IP-enabled applications to potentially open-ended state regulation designed for traditional telecommunications services.”<sup>40</sup> Congress

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<sup>35</sup> See, e.g., National Association of Regulatory Utility Commissioners Comments at 11; Public Utilities Commission of Ohio Comments at 20-21; New York Public Service Commission Comments at 9.

<sup>36</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986).

<sup>37</sup> AT&T Comments at 44.

<sup>38</sup> *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-115 (D.C. Cir. 1989), quoting *Louisiana PSC v. FCC*, 476 U.S. 355, 376, n.4 (1986); see also *California v. FCC*, 905 F.2d 1217 (9<sup>th</sup> Cir. 1990); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036 (4<sup>th</sup> Cir. 1977).

<sup>39</sup> Ohio Public Utilities Commission Comments at 20-21 (emphasis in original).

<sup>40</sup> AT&T Comments at 45; see also Verizon Comments at 36-37.

has set forth a clear national policy that the Internet should remain free from regulation, and imposing traditional common carrier regulation on IP-enabled services would frustrate that objective.<sup>41</sup> The Commission should, therefore, reaffirm and extend its *Computer II* conclusion that states are preempted from imposing “public utility-type regulation” on information services – including all IP-enabled services.<sup>42</sup>

By and large, the only commenting parties that oppose preemption are state commissions,<sup>43</sup> state consumer advocates,<sup>44</sup> local government,<sup>45</sup> and rural ILECs.<sup>46</sup> These parties seek to assert broad-based state jurisdiction over IP-enabled services as a means to extend outdated regulatory regimes to new technologies and services. In addition to their flawed claim that Section 2(b) erects an insurmountable barrier against federal preemption, some state commissions rely on the savings clause in Section 253(b)<sup>47</sup> to argue that states are authorized to examine local service issues related to the intrastate component of IP-enabled communications.<sup>48</sup> Contrary to the states’ argument, however, Section 253(b) does not grant state commissions such regulatory authority. Rather, Section 253(b) is a limited saving clause that merely preserves pre-existing state regulations that would otherwise be prohibited under Section 253(a) as

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<sup>41</sup> See 47 U.S.C. § 230(b).

<sup>42</sup> See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order On Reconsideration, 88 F.C.C.2d 512, 541 ¶ 83, n.34 (1980) (“*Computer II*”).

<sup>43</sup> See, e.g., Nebraska Public Service Commission Comments at 5; New York Public Service Commission Comments at 6-11; Vermont Public Service Board Comments at 30-33.

<sup>44</sup> See, e.g., People’s Counsel for the District of Columbia Comments at 8-9; NASUCA Comments at 38-46.

<sup>45</sup> See, e.g., Local Government Comments at 27-29; City and County of San Francisco Comments at 13.

<sup>46</sup> See, e.g., CenturyTel Comments at 28-29; ICORE Companies Comments at 7-9.

<sup>47</sup> 47 U.S.C. § 253(b).

<sup>48</sup> See, e.g., Public Utilities Commission of Ohio Comments at 23; Nebraska Public Service Commission Comments at 7.

impermissible barriers to entry.<sup>49</sup> Further, the Commission has explained “the regulatory authority that Section 253(b) reserves to the states ... is ... subject to preemption when it is exercised in a manner that conflicts with the pro-competitive and other goals of the Act.”<sup>50</sup> The FCC has already concluded in the *Pulver Order* that state economic regulation of IP-enabled services like Free World Dial-Up (“FWD”) would not benefit the public because “the burdens upon interstate commerce would be significant.”<sup>51</sup> Hence, state commission regulation of IP-enabled services will not survive federal preemption simply because the state asserts that its regulation “relate[s] directly or indirectly to preserving universal service, public welfare, service quality and consumer safeguards.”<sup>52</sup>

**C. The Commission Should Address the Jurisdictional Issues Associated with IP-Enabled Services on an Expedited Basis.**

Some commenters blithely assert that subjecting providers of IP-enabled services to state regulation will not stifle the deployment of these services.<sup>53</sup> But that is not the case. Many providers of IP-enabled services describe the significant burdens of complying with state certification, tariffing, reporting, and other requirements in their comments. On a very basic

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<sup>49</sup> See 47 U.S.C. § 253; see also *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21724 (¶ 50) (1999) (explaining that Section 253(b) permits state or local regulation notwithstanding federal preemption under Sections 253(a) and 253(d), but only when the “state or local requirements ... are ‘competitively neutral’ and ‘necessary’ to achieve the public interest objective enumerated in section 253(b)”).

<sup>50</sup> *Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.; Joint Order for Expedited Ruling Preempting South Dakota Law*, Memorandum Opinion and Order, 17 FCC Rcd 16916, 16929-30 (¶ 29) (2002).

<sup>51</sup> *Pulver Order* at ¶ 24.

<sup>52</sup> Public Utilities Commission of Ohio Comments at 23.

<sup>53</sup> See, e.g., Virginia Corporation Commission Comments at 14; ICORE Companies Comments at 7-8 (arguing that state commissions should hold VoIP providers to the same service standards, tariff requirements, emergency procedures, and social obligations as ILECs); Utah Division of Public Utilities Comments at 5-9 (asserting providers of IP-enabled services should obtain state CPCNs, comply with service quality rules, provide access to 911, and comply with other regulations applicable to providers of telecommunications services).

level, “[p]ermitting state-by-state regulation of IP-enabled services would be extremely burdensome and would inevitably chill investment and slow deployment of those services.”<sup>54</sup>

For instance, “a small company like 8x8, with fewer than 100 employees, would be unnecessarily slowed by such regulation ... and would be unable to continue to competitively serve a global market with innovative, emerging IP-enabled voice and video services.”<sup>55</sup>

Even more troubling is the fact that an IP-enabled service provider’s inability to comply with the regulatory requirements imposed by a single state commission could force it to discontinue its service throughout the Nation.<sup>56</sup> Because telephone numbers associated with IP-enabled services are not geographically based, there is no means for the IP-enabled service provider to prevent an end user from using the service in a single state. Vonage faced this problem in Minnesota, where it is unable to comply with the rules imposed by the Minnesota Public Utilities Commission.<sup>57</sup>

Absent a permanent injunction issued by the United States District Court for Minnesota, “Vonage would arguably have had to discontinue its service throughout the entire United States in order to comply with MN PUC requirements.”<sup>58</sup>

Cisco therefore agrees with those commenters that urge the Commission to address the jurisdictional issues associated with IP-enabled services before resolving the myriad other issues in this proceeding.<sup>59</sup> Some states are rapidly moving to exert jurisdiction over IP-enabled services, despite a federal district court decision finding that such services are interstate,

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<sup>54</sup> Verizon Comments at 38.

<sup>55</sup> 8x8, Inc. Comments at 15.

<sup>56</sup> See Vonage Comments at 22.

<sup>57</sup> See *id.* at 21.

<sup>58</sup> *Id.* at 22.

<sup>59</sup> See, e.g., 8x8, Inc. Comments at 10-11; Vonage Comments at 14.

“information services” subject to the exclusive jurisdiction of the FCC.<sup>60</sup> Since the Commission issued the *NPRM*, the New York Public Service Commission has determined that Vonage is a “telephone corporation” under New York state law and, therefore, subject to the state’s regulatory oversight.<sup>61</sup> Likewise, the Washington Utilities and Transportation Commission recently concluded that LocalDial is a “telecommunications company doing business in Washington” and thus should be regulated in the same manner as other interexchange carriers that provide functionally identical services.<sup>62</sup> But in response to the Washington commission’s decision, LocalDial ceased providing all VoIP services in *all* states because “it’s not possible for the company to comply with the commission's order and continue to stay in business.”<sup>63</sup> Absent immediate intervention by this Commission, “there is a very real danger that piecemeal and varied regulation by the states of IP-enabled applications [will] undermine the national policies promoting the growth of the Internet and advanced information services.”<sup>64</sup>

## **II. THE COMMISSION’S JURISDICTION OVER IP-ENABLED APPLICATIONS AND SERVICES IS LIMITED, AND REGULATION SHOULD BE EVEN MORE LIMITED**

In its Comments, Cisco encouraged the Commission to consider the limits on its authority over IP-enabled applications services, not just the authority it may exercise.<sup>65</sup> First, Cisco noted that the Commission probably does not have jurisdiction over IP-enabled applications, and in particular software, because the Commission’s authority only extends to “communication by

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<sup>60</sup> See *Vonage Holdings Corp. v. Minnesota Pub. Util. 's Comm'n*, 290 F.Supp.2d 993 (D. Minn. 2003).

<sup>61</sup> See *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision 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, Case 03-C-1285, at 9-15 (May 21, 2004).

<sup>62</sup> *Washington Exchange Carriers Ass'n, et. al. v. Local Dial Corp.*, Final Order Granting Motions for Summary Determination, Docket No. UT-031472 at 3 (June 11, 2004).

<sup>63</sup> “LocalDial to cease providing VoIP services,” TR State News Wire, June 24, 2004.

<sup>64</sup> CompTel/ASCENT Comments at 5.

<sup>65</sup> See Cisco Comments at 12-18.

wire and radio.”<sup>66</sup> Second, Cisco pointed out that IP-enabled services are generally “information services” under the 1996 Act, and therefore subject to only limited regulation. Finally, Cisco urged the Commission to forbear from unnecessary common carrier regulation even if the Commission determines that it has Title II jurisdiction over some IP-enabled services.

**A. The Commission Lacks Authority Over End-User Applications.**

As Cisco explained in its Comments, the Commission’s implied view of its authority over the Internet is both troubling and incorrect.<sup>67</sup> The Commission identified the subject of this proceeding as “IP-enabled services,” which it said included all “services and applications relying on the Internet protocol family.”<sup>68</sup> Yet the Commission probably cannot regulate pure “applications” to the extent that “applications” includes end-user software. Such software does not constitute “communication by wire or radio,” the broadest possible articulation of the Commission’s authority under the Communications Act.<sup>69</sup> Further, Cisco believes the Communications Act requires that there be a *service* as a prerequisite to regulation, and a “service” requires a *service provider* of some sort. The Commission probably cannot regulate end-user software standing alone, however it is used.

For this reason, the Commission must reject the overly broad definitions of IP-enabled services suggested by some. One commenter, for example, would have the Commission “refine its definition of the class of unregulated ‘IP-enabled services’ to consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and *applications* provided over an IP platform that enable an end user to send or receive a

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<sup>66</sup> 47 U.S.C. § 152(1).

<sup>67</sup> See Cisco Comments at 13-14.

<sup>68</sup> NPRM at ¶ 1 n.1.

<sup>69</sup> See 47 U.S.C. § 151.

communication in IP format.”<sup>70</sup> This definition does not distinguish between those “applications” that are end-user software, as opposed to software utilized by a service provider to provide its services.

While Cisco generally agrees with this and other commenters that a “rational, unregulatory framework” is necessary for the “future development of IP-based communications ... at *both* the service and facility levels,”<sup>71</sup> Cisco also believes that an overly broad definition of IP-enabled services could result in the opposite outcome. If adopted, an expansive definition could inadvertently extend regulation to simple end-user software that is beyond the Commission’s jurisdiction in the 1996 Act. This is the case regardless of whether the Commission defines IP-enabled services as “telecommunications services” or “information services,” because such end-user software applications are not included within the scope of either definition today.

**B. Most IP-Enabled Services Are “Information Services” Subject to Little or No Regulation.**

As Cisco explained in its Comments, IP-enabled services are “information services” subject only to very limited regulation by the Commission.<sup>72</sup> Many commenters agree. The 1996 Act distinguishes “information services,” which offer the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,”<sup>73</sup> from “telecommunications,” which involves the “transmission, between or among points specified by the user, of information of the user’s

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<sup>70</sup> SBC Comments at 21; *see also* Global Crossing Comments at 7; BellSouth Comments at 7; Verizon Comments at 32.

<sup>71</sup> SBC Comments at 22-23.

<sup>72</sup> *See* Cisco Comments at 14-17.

<sup>73</sup> 47 U.S.C. § 153(20).

choosing, without change in the form or content of the information as sent and received.”<sup>74</sup> Only “telecommunications” offered for a fee to the public constitute “telecommunications services”<sup>75</sup> subject to the common carriage obligations of Title II.<sup>76</sup> Neither “information services” – nor “telecommunications” *not* offered to the public – are subject to such Title II regulation.

The Commission already has found that one IP-enabled service – Pulver’s Free World Dial-Up – qualifies as an “unregulated information service”<sup>77</sup> since it “stores” member information and messages, provides members with passwords and other information they “utilize,” and “processes” information to determine whether the other end-user with whom a member wants to communicate is online and available.<sup>78</sup> Cisco and other commenters believe that the Commission’s conclusion about FWD is applicable to other IP-enabled services.

Just like FWD, many other IP-enabled services provide the capabilities associated with information services. AT&T, for example, offers an IP-enabled service with unique “e-features” including the ability to check voice mail from any phone or computer, the option of sending “talking” emails containing voice mail messages, a real-time call log, a “do not disturb” feature, personal conferencing, and a “locate me” feature that allows calls to be forwarded to five additional numbers. All of these features can be adjusted over the telephone or via the Internet.<sup>79</sup> VoIP-provider 8x8, Inc. provides customers with “full motion video in connection with voice transmission.”<sup>80</sup> Vonage enables its customers to “receive their voicemails *via* e-mail to an

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<sup>74</sup> 47 U.S.C. § 153(43).

<sup>75</sup> 47 U.S.C. § 153(46).

<sup>76</sup> *See, e.g., Pulver Order* at ¶ 10.

<sup>77</sup> *Id.* at ¶ 1.

<sup>78</sup> *See id.* at ¶ 11.

<sup>79</sup> *See* AT&T Comments at 12.

<sup>80</sup> 8x8, Inc. Comments at 5.

Internet enabled device of their choice; ... utilize their device at any location that has a high-speed Internet connection; and ... manage their account through the World Wide Web.”<sup>81</sup>

Cisco therefore concurs with several commenters that the vast majority of IP-enabled services are properly classified as “information services” not subject to regulation under Title II.<sup>82</sup> As the record illustrates, IP networks inherently offer end users the capability to store, utilize, acquire, and process information.<sup>83</sup> Accordingly, the Commission should classify an IP-enabled service as an “information service” when it has the “*capability* for generating, acquiring, storing, transforming, processing, utilizing, or making available information via telecommunications,” ... *whether or not* that capability is utilized by the customer during each communication.”<sup>84</sup>

By contrast, the Commission should avoid trying to classify specific IP-enabled services based on their functionality from the end user’s perspective.<sup>85</sup> As Vonage explains, “IP-enabled applications and the networks used to deliver them are developing at a dizzying pace. Any attempt by the Commission to classify and regulate each set of applications that meet certain criteria is doomed to failure both because of the time it takes for a regulatory body to make

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<sup>81</sup> Vonage Comments at 1-2.

<sup>82</sup> *See, e.g.*, Qwest Comments at 14-24; MCI Comments at 21-24; CompTel/ASCENT Comments at 5-10; Cablevision Systems Comments at 7-9; 8x8, Inc. Comments at 10-15; Net2Phone Comments at 3-12.

<sup>83</sup> *See, e.g.*, Qwest Comments at 21; BellSouth Comments at 27; SBC Comments at 34.

<sup>84</sup> CompTel/ASCENT Comments at 9; *see also* Qwest Comments at 22-23 (“If the end user can receive enhanced functionality, the service is an information service. Further, the fact that a particular end user may not use all of the functions offered by a service is not relevant to its classification. Rather, the critical inquiry is whether the end user *can receive* enhanced functionality.”); AT&T Comments at 21.

<sup>85</sup> *See, e.g.*, CenturyTel Comments at 5, 8; OPASTCO Comments at 6-7; ICORE Companies Comments at 2-7; New York Public Service Commission Comments at 4-6; Public Utilities Commission of Ohio Comments at 9-17; NARUC Comments 4-5; Nebraska Public Utilities Commission Comments at 5-6; Utah Division of Public Utilities Comments at 3; Citizen’s Utility Board Comments at 8.

factually-intensive decisions and because of the ability of network and software designers to create new architectures and applications that take advantage of ‘old’ rules.”<sup>86</sup>

Several commenters also support Cisco’s view that, to the extent that they are classified as “information services” under the 1996 Act, the Commission lacks general jurisdiction over IP-enabled services.<sup>87</sup> Cisco previously explained that the Commission’s ancillary jurisdiction under Title I is limited to that “necessary” to the implementation of specific statutory directives.<sup>88</sup> Moreover, under judicial precedent, the Commission’s ancillary jurisdiction does not permit the imposition of common-carrier style regulation on non-Title II services.<sup>89</sup> Cisco therefore agrees with Time Warner that “common carrier obligations (*i.e.*, Title II obligations) arguably cannot be imposed under ancillary jurisdiction concepts on a carrier where its activities fall within a statutory classification other than telecommunications service,” such as “an information service or possibly even ... a ‘Title I’ service.”<sup>90</sup> Indeed, “Any attempt broadly to regulate IP-enabled services would clearly cross th[e] limits” of the Commission’s jurisdiction because “[r]egulating ... IP-enabled services generally obviously is not necessary to protect the Commission’s jurisdiction” over IP-enabled services, of which there is none.<sup>91</sup> This is particularly true where, as here, there is clear statutory evidence that regulation would be inconsistent with Congressional intent. Congress has mandated that Internet-based industry

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<sup>86</sup> Vonage Comments at 6-7; *see also* Qwest Comments at 17.

<sup>87</sup> *See, e.g.*, Microsoft Comments at 8-14; Sprint Comments at 28-29; Time Warner Comments at 34-36.

<sup>88</sup> *See* Cisco Comments at 14.

<sup>89</sup> *See* Microsoft Comments at 11-12, *discussing Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

<sup>90</sup> Time Warner Comments at 35; *see also* Sprint Comments at 28.

<sup>91</sup> MCI Comments at 33.

should not to be subject to general regulation of any kind.<sup>92</sup> Thus, to the extent that an IP-enabled application or service is classified as an “information service” falling outside the scope of Title II, it likely is beyond the Commission’s jurisdiction.

**C. Even If Some IP-Enabled Services Are “Telecommunications,” Title II Common Carrier Regulation Is Neither Necessary Nor Required.**

Cisco continues to believe that the Commission should not impose *any* Title II regulation on IP-enabled applications and services because most (if not all) of these services are “information services” under the 1996 Act.<sup>93</sup> But even if the Commission classifies some small subset of IP-enabled voice services as “telecommunications services,” the Commission should not apply legacy economic regulation and should impose social regulation only where necessary and with a very light hand. This is because the existing Title II regulation was designed primarily to constrain the government-created monopoly forces that pervaded traditional wireline service. Such restraints are unnecessary in the competitive world of IP-enabled voice services.

Indeed, “subjecting any IP-enabled service to Title II common carrier regulation, even if it is found to fall within the statutory definition of a ‘telecommunications service,’ would be both unnecessary and inimical to the development of such services generally.”<sup>94</sup> Accordingly, Cisco believes the Commission can and should invoke its authority under Section 10 of the Communications Act to forbear from applying the full panoply of Title II regulation to IP-enabled telecommunications services.<sup>95</sup>

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<sup>92</sup> See 47 U.S.C. § 230(b) (stating that “it is the policy of the United States” that the Internet should be “unfettered by Federal or State regulation.”).

<sup>93</sup> See Cisco Comments at 17-18.

<sup>94</sup> SBC Comments at 38.

<sup>95</sup> See *id.*; Time Warner Comments at 36-38.

### **III. THE COMMISSION SHOULD REFRAIN FROM IMPOSING ECONOMIC AND SOCIAL REGULATION ON IP-ENABLED SERVICES EXCEPT WHERE TRULY NECESSARY**

The powerful competitive forces at work in the IP-enabled services market render almost all economic and social regulation unnecessary and counterproductive. Indeed, imposing regulation in these circumstances would generally “do much harm, and no good.”<sup>96</sup> Instead, Cisco (and many others) urge the Commission to take full advantage of the industry’s robust competition because “market forces will produce far better results than regulatory fiat.”<sup>97</sup> Of course, the benefits of competition – and the myriad choices it creates for consumers – do not extend to areas still subject to bottleneck control. For that reason, Cisco and numerous others recommended that the Commission monitor network access to ensure that facilities are sufficiently available to allow consumers access to the full range of IP-enabled services.

#### **A. The Commission Should Avoid All Legacy Economic Regulation Except Where Necessary to Ensure Consumer Choice.**

Commenters from every corner of the communications and high-tech industries agree with Cisco that most economic regulation has no place in the competitive world of IP-enabled services.<sup>98</sup> Even state regulators and related organizations agree that economic regulation of IP-enabled services “is not rational,”<sup>99</sup> and “there is no compelling rationale to apply” such regulation to the emerging IP-enabled services market.<sup>100</sup> Likewise, Bell Operating Companies explain that traditional economic regulation of IP-enabled services is “unnecessary[,] . . .

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<sup>96</sup> Cisco Comments at 8.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 8-10.

<sup>99</sup> FERUP Comments at 10.

<sup>100</sup> Arizona Corporation Commission Comments at 12.

counterproductive,”<sup>101</sup> and “inimical to the development of such services generally.”<sup>102</sup> Rural providers, IP start-ups, and wide range of others agree.<sup>103</sup>

Legacy economic regulation was designed to address the distortions inherent in the monopoly conditions of the PSTN.<sup>104</sup> But almost all agree that “the competitive nature of the IP-enabled services market” renders economic regulation unnecessary and even harmful.<sup>105</sup> For instance, the National Cable & Telecommunications Association observes that market forces are “much more effective[]” than “prescriptive rules” in addressing traditional areas of economic regulation, such as the content of customers’ bills, permitted forms of payment, and call center operation.<sup>106</sup> In fact, according to ILEC commenters, imposing economic regulation in a competitive market “can be detrimental to consumers” because it “not only distorts markets, but also stunts innovation.”<sup>107</sup>

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<sup>101</sup> Qwest Comments at 40.

<sup>102</sup> SBC Comments at 38.

<sup>103</sup> *See, e.g.*, Cablevision Systems Corp. Comments at 13 (cable provider); CompTel/ASCENT Comments at 9-10 (CLEC trade association); Consumer Electronics Association Comments at 4 (consumer electronics trade association); Joint Comments of DialPad Communications, Inc., ICG Communications, Inc., Qovia, Inc., and VoicePulse Inc. at 18-20 (IP-enabled voice service providers); Information Technology Industry Council Comments at 5-6 (information technology trade association); Nuvo Corp. Comments at 13 (IP-enabled voice service providers); Telecom Consulting Associates Comments at 8 (rural LEC consulting company); VeriSign Comments at 3-4 (IP-enabled equipment manufacturer); Voice on the Net (VON) Coalition Comments at 28-29 (IP-enabled voice service trade association).

<sup>104</sup> *See, e.g.*, NCTA Comments at 19-20 (“Such requirements, developed to protect consumers from the monopoly utility in a single-provider environment, are unnecessary and inappropriate for competitive VoIP services.”); Nuvo Corp. Comments at 13; Joint Comments of Valor Telecommunications of Texas, L.P., and Iowa Telecommunications Services, Inc. at 10.

<sup>105</sup> Joint Comments of Valor Telecommunications of Texas, L.P., and Iowa Telecommunications Services, Inc. at 10; *see also* Qwest Comments at 40; NCTA Comments at 20 (“Such requirements often impose substantial burdens that are unwarranted in the case of competitive, facilities-based VoIP services.”); Net2Phone Comments at 20; Nuvo Corp. Comments at 13; TellMe Networks, Inc. Comments at 3-6.

<sup>106</sup> NCTA Comments at 20.

<sup>107</sup> Joint Comments of Valor Telecommunications of Texas, L.P., and Iowa Telecommunications Services, Inc. at 10; *see also* SBC Comments at 41 (“[N]ot only would regulation fail to afford consumers any additional protections, but it would in fact harm them by providing disincentives to continued innovation and thus limit the range of IP-enabled services that are available.”).

Market forces also obviate the need for consumer protection rules because “customers can choose from a wide variety of producers.”<sup>108</sup> If an IP-enabled service provider fails to meet expectations, “consumers can easily ‘vote with their feet’ . . . and choose a provider that offers better and more responsive service.”<sup>109</sup> Moreover, general consumer protection laws that safeguard consumers across all industries obviate the need for IP-specific regulations. “[E]ven if the market does not independently constrain [deceptive] conduct, the existing, generally applicable consumer protection regime provides sufficient security and recourse.”<sup>110</sup>

As Cisco and others make clear in their comments, however, the Commission must still ensure that consumers and IP-enabled service providers have access to networks.<sup>111</sup> Indeed, as AT&T observes, the *risk* of blocked access could lead “the capital markets [to stop] fund[ing] IP enabled services.”<sup>112</sup> In light of this risk, the Commission must ensure access for consumers and IP-enabled service providers.<sup>113</sup>

**B. The Commission Should Impose Social Obligations Only If Needed and Only on IP-Enabled Services that Are Substitutes for POTS.**

As Cisco has said, social policy regulation is generally unnecessary in the IP-enabled services market because competitive forces will “address such matters without prescriptive

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<sup>108</sup> 8x8, Inc. Comments at 29; *see also* Pac-West Telecomm Comments at 26-27; Net2Phone Comments at 20; Voice on the Net (VON) Coalition Comments at 28-29.

<sup>109</sup> SBC Comments at 123.

<sup>110</sup> *Id.*

<sup>111</sup> *See, e.g.*, Cisco Comments at 10; Comcast Corporation Comments at 7-11; Cox Communications Comments at 11-13; NCTA Comments at 21; ACN Communications Services, Inc. Comments at 2.

<sup>112</sup> AT&T Comments at 54.

<sup>113</sup> *See, e.g.*, GCI Comments at 11 ; Covad Communications Comments at 6-12; Avaya, Inc. Comments at 12; Consumer Electronics Association Comments at 6; Enterprise Communications Association Comments at 3-8; nexVortex, Inc. Comments at 7-9; pulver.com Comments at 11-13; Vonage Comments at 9-13; Global Crossing Comments at 7-8, 15-16; Sprint Comments at 19-20.

regulation.”<sup>114</sup> A host of other commenters agree.<sup>115</sup> Qwest notes that “market considerations” will drive IP-enabled service providers “to make 911 functionality available in connection with IP-enabled voice applications.”<sup>116</sup> Commenters from across the industry explain that prescribing social policy solutions via regulation could “stifle[]” the industry,<sup>117</sup> and “obstruct promising new directions of technological development.”<sup>118</sup> Moreover, as Motorola observes, “the imposition of specific regulations to effectuate these [social] policies is likely to . . . impede full realization” of the critical social needs at issue.<sup>119</sup>

The best argument against unnecessary social regulation is that the market is already responding.<sup>120</sup> With respect to emergency services, the National Emergency Number Association (“NENA”) and the Voice on the Net (VON) Coalition have been studying E911 compliance for months, and NENA plans to release proposed long-term IP E911 compliance

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<sup>114</sup> Cisco Comments at 11.

<sup>115</sup> *See, e.g.*, Information Technology Industry Council Comments at 5 (“[T]he marketplace and the development of new technologies and services can resolve the policy questions raised by VoIP.”); ACN Communications Services, Inc. Comments at 2; Alcatel Comments at 17 (“[A]dvancements in technology that have enabled high-quality IP voice service to become a consumer reality will also provide the technical solutions needed to achieve certain social benefits, such as emergency services and disabled access presently enjoyed on the PSTN.”); CompTel/ASCENT Comments at 17-19; Pac-West Telecomm Comments at 25-26; CTIA – The Wireless Association Comments at 11-12; Consumer Electronics Association Comments at 2, 6-7; Motorola, Inc. Comments at 14-15; 8x8, Inc. Comments at 21-23; Net2Phone Comments at 22-25; Nuvio Corp. Comments at 8-14; PointOne Comments at 26-33; pulver.com Comments at 45-49; Skype, Inc. Comments at 4-5; Voice on the Net (VON) Coalition Comments at 24-26; MCI Comments at 37-40.

<sup>116</sup> Qwest Comments at 43.

<sup>117</sup> Consumer Electronics Association Comments at 7.

<sup>118</sup> Motorola, Inc. Comments at 14.

<sup>119</sup> *Id.*; *see also* Qwest Comments at 46 (explaining that “creative efforts” at meeting disability needs render “regulatory measures . . . unnecessary, and . . . counterproductive.”).

<sup>120</sup> *See, e.g.*, 8x8, Inc. Comments at 20 (“Competitive forces in the IP-enabled services market are already beginning to provide consumers with full access to emergency services without the need for regulatory intervention.”); Joint Comments of DialPad Communications, Inc., ICG Communications, Inc., Qovia, Inc., and VoicePulse Inc. at 20.

plans early next year.<sup>121</sup> And several IP-enabled voice providers (including a Qwest affiliate) already offer 911 solutions as a means of distinguishing themselves from their competition.<sup>122</sup>

As many commenters also observe, “[t]he IP-enabled services industry also has undertaken voluntary efforts to ensure that persons with disabilities are provided access to IP services.”<sup>123</sup> The Telecommunications Industry Association is conducting tests on Teletypewriters (“TTY”) and Telecommunications Device for the Deaf (“TDD”) equipment connected to IP networks.<sup>124</sup> And the VON Coalition describes an existing, Internet-based video relay service, which “offers callers options involving web cameras for sign language.”<sup>125</sup>

At least as a starting point, the Commission should refrain from imposing any social policy regulations and thereby permit the market to function. If the Commission determines at some point that regulation is necessary, it should avoid mandating particular solutions.<sup>126</sup> Rather, it should establish broad guidelines and oversee collaboration between the industry and other stakeholders, thereby “allow[ing] the industry flexibility in meeting those objectives.”<sup>127</sup>

Finally, to the extent the Commission determines that social policy regulations are necessary at all, it should apply them only to IP-enabled services that are functional substitutes

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<sup>121</sup> See NENA Comments at 7; Voice on the Net (VON) Coalition Comments at 24-25; see also Qwest Comments at 43.

<sup>122</sup> See, e.g., Joint Comments of DialPad Communications, Inc., ICG Communications, Inc., Qovia, Inc., and VoicePulse Inc. at 21 (describing ICG Communications’ emergency service, which converts VoIP communications to analog signals and delivers them to the appropriate PSAPs); Net2Phone Comments at 23; Qwest Comments at 43 (“Qwest Corporation (the local exchange company), has entered into a trial with King County to test and evaluate new ways of enabling 911 connectivity with VoIP providers.”); Vonage Comments at 37; 8x8, Inc. Comments at 21-22 (explaining that 8x8 intends to deploy E911 services to its subscribers as soon as possible, with a trial scheduled for the end of 2004).

<sup>123</sup> Voice on the Net (VON) Coalition Comments at 25.

<sup>124</sup> See Qwest Comments at 44-46.

<sup>125</sup> Voice on the Net (VON) Coalition Comments at 26.

<sup>126</sup> See Vonage Comments at 37-45.

<sup>127</sup> CTIA – The Wireless Association Comments at 11-12.

for POTS. As several commenters explain, there is no need to apply social regulations more broadly because consumers do not expect – and do not need – non-telephony substitutes to offer the same social services as the PSTN (and would not wish to pay for such services).<sup>128</sup>

### CONCLUSION

The Commission should preserve its – and Congress’s – long-standing policy of permitting the Internet to grow through minimum regulation. This policy has allowed IP-enabled technologies, applications, and services to flourish. Thus, the Commission should immediately clarify that its authority over IP-enabled services is exclusive but limited. In accordance with its limited authority, the Commission should ensure network access but eschew far-reaching regulation of the sort now imposed under Title II.

Respectfully submitted,

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<sup>128</sup> See, e.g., Arizona Corporation Commission Comments at 14; Illinois Commerce Commission Comments at 4; nexVortex, Inc. Comments at 3-4.