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July 14, 2004

Via the Electronic Comments Filing System

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, ROOM TWB-204
Washington, DC 20554

**Re: Notice of Proposed Rulemaking In the Matter of IP-Enabled Services
WC Docket No. 04-36**

Dear Ms. Dortch:

Enclosed, please find Reply Comments being filed on behalf of the New Jersey Division of the Ratepayer Advocate in response to the above-captioned Federal Communications Commission's Notice of Proposed Rulemaking.

Very truly yours,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: **A va-Marie Madeam**

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Assistant Deputy Ratepayer Advocate

Cc: Janice M. Myles (via electronic mail)
Qualex International, Portals II (via electronic mail)

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

Notice of Proposed Rulemaking:)
In the Matter of IP-Enabled Services)

WC Docket No. 04-36

**REPLY COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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**REPLY COMMENTS OF THE NEW JERSEY DIVISION OF THE RATEPAYER
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I. INTRODUCTION

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) submits these reply comments in response to comments filed by interested parties in the above-captioned proceeding. Numerous comments were filed by respective parties representing a wide range of interests. A majority of the commenters argued for the classification and subsequent regulation of Voice over Internet Protocol (“VoIP”) based on either the functionality or layers-based approach. While many commenters agree that the Commission should ensure that VoIP services and providers comply with many of the social programs developed by the Commission which include 911/E911 access, universal service, and disability access, many industry commenters suggest that the Commission should allow the industry to comply with the social programs on a voluntary basis instead of subjecting them to enforceable regulations. Many incumbent local exchange carriers (“ILECs”)

urged the Commission to require providers of VoIP services to compensate them for use of their networks, while state regulators expressed concern about the possibility that the Commission might preempt their authority over VoIP services.

In these reply comments the Ratepayer Advocate reiterates its position that VoIP services should be classified as a telecommunications or information service based on the functional capability of the service. Therefore VoIP services that holds itself out as a voice provider; originates or terminates calls on the Public Switched Telephone Network (“PSTN”); does not require customer premises equipment (CPE) different than that ordinarily employed to place a telephone call; utilizes North American Numbering Plan Administration (“NANPA”) resources; and transmits customer information without net change should be regulated as a telecommunications service under Title II. The Ratepayer Advocate further emphasizes the need for VoIP providers to contribute to universal service, pay access charges, and provide 911/E911 and disability access to consumers. The Ratepayer Advocate asserts that regulatory compliance with these social policy objectives is necessary because voluntary compliance will prove ineffective and mandatory compliance best serves the public interest. While many commenters argue that VoIP should not be subject to state regulation, the Ratepayer Advocate asserts that the Commission must not deprive states of their authority to regulate VoIP to the extent that the service originates or terminates on the intrastate PSTN.

II. THE AUTHORITY OF STATES TO REGULATE VoIP MUST BE PRESERVED

Though in disagreement with certain of its conclusions, the Ratepayer Advocate supports the call of Time Warner for assurance of a “stable regulatory framework for IP voice services.”¹ Similar

1/ See Comments of Time Warner, at 3.

to the Ratepayer Advocate’s recommendation, the Nebraska Public Service Commission advised the Commission to “give heavy consideration to the expectations of the end-user.”² The overwhelming changes that VoIP may bring to the industry argue for consideration of Time Warner’s recommendation to convene a Federal-state board to examine appropriate issues.³ A Federal-state board would permit state regulators, who are on the front-lines of customer expectations and experiences, to work closely with the Commission in developing rational policies that preserve state oversight over quality-of-service related issues.

The Ratepayer Advocate disagrees with pulver.com’s thesis that IP-based communications are not easily consistent with existing regulatory premises. This conclusion is incorrect because the instant proceeding has commenced for the primary purpose of gathering information that will lead to a fundamental and comprehensive approach to these emerging services. Advocates for or against regulation, will attempt to mold existing law around the new technology to suit their interests. The basis for this exercise, however, will be existing precedent and the policy underlying it. That is precisely the approach the Ratepayer Advocate has adopted in its analysis, building upon both the Stevens Report and historic telecommunications policy in determining that VoIP services that rely on the PSTN should be classified as a telecommunications service subject to Title II regulation.

The Ratepayer Advocate disagrees with PointOne’s call for the classification of all IP-enabled services as jurisdictionally interstate. PointOne argues that “increased costs and burden . . . could result from attempting to comply with 51 disparate, state-by-state regulatory regimes.”⁴ The Ratepayer

2/ Comments of the Nebraska Public Service Commission, at 2.

3/ Comments of Time Warner, at 5.

4/ Comments of PointOne, at 7.

Advocate's proposal to preserve state regulation which includes "quality of service" issues would not wreak undue hardship upon carriers, since it can be presumed that states' non-economic regulation of VoIP services would not be very different from regulation that is currently imposed on local operating divisions of Regional Bell Operating Companies ("RBOCs"). The Ratepayer Advocate proposes that such regulation would be based upon the principal point of subscriber's usage, much the way that a mobile phone that can be used across the Nation may be subject to taxes in the subscriber's home state. Similarly incorrect is Qwest's claim that state regulation of VoIP services would "disregard the character of the internet"⁵ because state regulation of intrastate calls, regardless of the fact that certain of the data associated with a call may cross state lines, is entirely consistent with existing regulation in that it addresses a call that originates and terminates in the state.

In the event the Commission decides to classify any part of VoIP services interstate in nature, the Ratepayer Advocate maintains its position that VoIP providers who are also providers of local exchange, interexchange, and cable services must be subject to appropriate non-structural safeguards in the form of separate affiliate requirements in order to prevent these multi-service VoIP providers from engaging in ant-competitive conduct.

III. THE COMMISSION SHOULD CLASSIFY VoIP BASED ON THE FUNCTIONALITY OF THE SERVICE

The Ratepayer Advocate stated in its initial comments and many parties agree that the classification and consequent regulation of VoIP services should depend on its technical functionality

5/ Comments of Qwest, at 27.

and capabilities.⁶ Other commenters propose that the Commission should classify and regulate VoIP based on a “layers” approach. The “layers” approach would dissect VoIP services and examine whether each piece-part of the service should (or should not) be regulated.

The Ratepayer Advocate is wary of the “layers” approach that is proposed by certain of the commenters.⁷ The Ratepayer Advocate submits that a layered approach could conflict with assuring consumer protection in the sale and provision of the total product. As set forth in its initial comments, the Ratepayer Advocate supports a regulatory approach that ensures consumer protection for services that are marketed as a substitute for POTS, and which feature, *inter alia*, elements of traditional POTS service, including interaction with the PSTN and use of NANPA numbers. Were the Commission to regulate only a single layer of VoIP service (assuming, for this argument, that the particular VoIP service meets Stevens Report-type qualifications), failure of other layers would result in, quite literally, a breakdown in communications. This is particularly relevant where a consumer subscribes to a VoIP service and receives the entire telecommunications service from a single provider. A consumer taking a POTS-substitute from Company X will likely view the service as a single, comprehensive unit, as opposed to a consumer who purchases pipeline access from one company, and software and hardware from another. In the latter instance, a customer may well discern the schism between transmission components and applications, whereas a consumer subscribing to a NANPA-using, PSTN-touching, POTS-like service may well expect traditional

6/ Comments of the Ratepayer Advocate, at 5; *see also* Comments of Time Warner, at 18-22; Comments of the Illinois Citizens Utility Board, at 2, 7-8; Comments of NARUC, at 4-7; Comments of Nebraska Public Service Commission, at 9; Comments of NASUCA, at 4-9; Comments of the New York State Department of Public Service (NYDPS), AT 4-6; Comments of the Vermont Public Service Board, at 5-9.

7/ *See*, Comments of the Arizona Corporation Commission, at 6; Comments of pulver.com, at 13; Comments of MCI, at 6; Comments of Point One, at 18-23; Comments of 8x8, Inc. at 8-10.

regulatory protection and benefits. The criteria set forth in the Stevens Report, subject to technical feasibility, offer a rational and logical regulatory approach that is consistent with the preservation and perpetuation of consumer interests. No valid argument has been advanced to change or deviate from this sound policy. The Ratepayer Advocate submits that consumer interests will not be served best by “market driven solutions to social imperatives.”⁸ The Commission lacks support to change course at this time.

Time Warner recognizes wisely that “although voice calls carried by certain VoIP providers undergo a net protocol conversion during transmission, it is hard to see how this fact renders such calls information services rather than telecommunications services.”⁹ As Time Warner noted, voice traffic among and between cell phones is often converted to numerous types of transmission technologies, yet these services have never been classified as information services.¹⁰ This approach is consistent with the Ratepayer Advocate’s initial comments calling for a functionality-based approach that is consistent with consumer expectations.

IV. VoIP PROVIDERS WHO USE THE PSTN MUST PAY ACCESS CHARGES

The Ratepayer Advocate proposed a non-economic regulatory paradigm for certain VoIP services, but recommended that the underlying assumptions of telecommunications services be preserved, such that access charges and contributions to universal service obligations be ensured. This

8/ See Comments of PointOne, at 26. See, also, Comments of Qwest, at 42. The Ratepayer Advocate disagrees, and submits that the provision of emergency services are not best served by the free market alone.

9/ Comments of Time Warner, at 25.

10/ *Id.*

vision of Title II regulation is supported by Time Warner, which notes that if VoIP were categorized as a Title I service, it might not be subject to universal service contributions.¹¹ Time Warner echoes the Ratepayer Advocate's call for VoIP contributions to inter-carrier compensation but, like other parties, notes the need to reform the access charge regime.¹² The Arizona Corporation Commission calls for some type of contribution mechanism, starting with contributions from VoIP providers who "will utilize and therefore need to support PSTN resources."¹³ The Arizona Corporation Commission also states that if the Commission decides to not impose contribution requirements on VoIP providers, the underlying network entities must contribute.¹⁴

Indeed, pulver.com recognizes the integral participation of "bottleneck local facilities" that underlies¹⁵ various telecommunications traffic, including DSL-based, wireless, and cable modem. The Ratepayer Advocate submits that continuing technological advancement may cause a sufficient migration from copper-based POTS to other services, thereby endangering the welfare of the PSTN. Yet, it is precisely the PSTN that provides the backbone for all of these services. As MCI stated with regard to access charges, "[t]o the extent IP-enabled services increase the pressure for needed reform, so much the better."¹⁶ AT&T provided similar comment, stating that "[t]he access charge system has long outlived its usefulness"¹⁷ The Ratepayer Advocate agrees that access charge

11/ *Id.* at 29.

12/ *Id.* at 41. *See, also*, Comments of Vonage, at 45.

13/ Comments of the Arizona Corporation Commission, at 18.

14/ *Id.*

15/ Comments of pulver.com, at 12, 18.

16/ Comments of MCI, at 5.

17/ Comments of AT&T, at 22.

reform may be appropriate – but, AT&T’s assessment that “it makes no sense to require VoIP providers to subsidize the very local exchange carriers against whom they will be directly competing”¹⁸ does not seem to account for the fact that the PSTN underlies the VoIP capability.

V. VoIP PROVIDERS THAT UTILIZE THE PUBLIC SWITCHED TELEPHONE NETWORK (“PSTN”) MUST PROVIDE RELIABLE ACCESS TO 911/E911 AS SOON AS POSSIBLE

While many of the commenters do not dispute the fact that customer access to emergency services is a vital public policy consideration that must be carefully addressed in the context of IP-enabled services, many believe that VoIP providers should be afforded more time to adequately address 911/E911 issues including funding, technical solutions, and deployment.¹⁹ Furthermore, some commenters suggest that industry cooperation in lieu of government regulation will lead to the development of 911/E911 services that are more reliable and provide more information to emergency responders.²⁰

The Ratepayer Advocate while cognizant that VoIP could lead to major improvements in telecommunications capabilities, including those of public safety agencies, still maintain that the Commission must subject those VoIP providers to 911/E911 regulations based on whether the VoIP service : (1) is the functional equivalent to traditional telephony; (2) can be substituted for traditional

18/ *Id.* at 24.

19/ Comments of Vonage, at 37; Comments of AT&T, at 28; Comments of pulver.com, at 45-46; Comments of Verizon, at 51.

20/ Comments of Covad,at 24-26; Comments of Qwest,at 42-44; Comments of Voice on the Net (VON), at 24-25; Comments of BellSouth,at 50; Comments of Vonage, at 37; Comments of Covad, at 24-26; Comments of Net2Phone, at 23.

telephony; and (c) interconnects with the PSTN and uses the North American Numbering Plan (“NANP”). Any VoIP service with these characteristics must be expected to provide consumers reliable access to emergency services as soon as possible. As articulated in our initial comments, the rapid pace at which major companies in the telecommunications and cable TV industries are offering or are planning to offer Internet-based voice telephone service on either a regional or national scale, compels the Commission to adopt mandatory requirements for VoIP providers who satisfy the aforementioned criteria to offer 911/E911 functionality to all of their customers in an expedited manner.

Many parties characterize VoIP as a technology in its infant stages and assert that any type of 911/E911 regulation at this time will stunt its technical and market development.²¹ The Ratepayer Advocate and other parties disagree because this is precisely the time when the 911/E911 regulation of VoIP is most appropriate: before the technology develops to a point where “retrofitting” and “reprogramming “ to provide E911 becomes a major impediment as was the case with wireless E911.²² Moreover, enhanced 911 solutions must be addressed by the Commission in the initial stages of VoIP because public safety access has historically been neglected in development of new services and products. The Commission must therefore act with deliberate speed to prevent future 911/E911 implementation problems for VoIP services by requiring VoIP providers who utilize the PSTN to possess 911/E911 capabilities.

21/ Comments of DialPad, ICG, Qovia and Voicepulse at 21; Comments of Comp Tel/Ascent, at 18-19; Comments of Nuvio, at 9-11.

22/ Comments of APCO, at 3; Comments of King County E911 Program, at 11-12.

Many ILECs, CLECs, facilities-based and non-facilities based VoIP providers assert that the Commission should look to the voluntary agreements by industry participants for guidance in technical and operational solutions for the provision of 911/E911 by VoIP providers. However, the Ratepayer Advocate submits that voluntary efforts by industry participants in devising solutions to provide VoIP subscribers with basic 911 service and enhanced 911 functionality is simply not enough to protect the public interest. The public safety implications of VoIP's failed 911 service offering compels direct and immediate action through regulation by the Commission in achieving its public policy goal of maintaining access to emergency services for all consumers. As the Ratepayer Advocate previously stated in its initial comments, the Commission must not rely on the non-binding nature of voluntary agreements to spur deployment of IP-enabled E911 services.

The National Emergency Numbering Association ("NENA"), a major participant in these voluntary efforts, acknowledged the need for 911/E911 regulation of VoIP services by the Commission:

[W]e consider it likely that carefully defined, *minimum regulatory specification will be desirable in order to see that the needs of E9-1-1 are met steadfastly and reliably across the predictable proliferation of services*. . . . However, it also means that some direction and monitoring functions are needed to see that this happens on a consistent and 'best efforts' basis across the myriad of opportunities. This direction is best set before the fact, rather than reactively. Directive influence is the key, and *the FCC is best positioned to coordinate the process of industry and public safety collaboration*.²³

The United States Telecom Association ("USTA") also voiced its view that the Commission should exercise its authority to require industry to develop 911 standards for IP-enabled services in addition

23/ Comments of NENA, at 4. (emphasis added).

to developing enforcement mechanisms to ensure that IP-enabled service providers comply with those standards.²⁴

There is no doubt that collaborative efforts will enhance the development of E911 service for VoIP, and the voluntary standards developed by NENA and other industry participants play an important role in the provision of 911/E911 service. However as articulated by the King County E911 Program, these voluntary efforts must be conducted “within the framework of service requirements defined by the Commission, so that all parties are motivated to work towards effective solutions as quickly as possible.”²⁵ Albeit the good intentions of these voluntary efforts, the Ratepayer Advocate and other commenters submit that regulation is necessary to ensure that all VoIP providers comply and provide the public with the same access to emergency services. And as accurately stated by the Association of Public Safety Communications Officials-International, Inc. (“APCO”), [w]hen public safety is at risk, mere voluntary guidelines are insufficient.”²⁶

Another method of circumventing or delaying the implementation of E911 by VoIP providers is the practice of warning customers of the limited 911/E911 ability of the VoIP service at the time of purchase. Some VoIP providers believe that this type of disclaimer or warning is sufficient to protect the public interest. For example, MCI recommends that the Commission forego imposing detailed 911 regulations for IP-enabled services at the present time, and should instead require VoIP providers to inform consumers of the emergency services offered with their service.²⁷ The Ratepayer Advocate

24/ Comments of USTA, at 40.

25/ Comments of the King County E911 Program, at 10-11.

26/ Comments of APCO, at 8.

27/ Comments of MCI, at 4-5.

submits, and other parties agree that these types of consumer warning are glaringly inadequate to protect the public safety. The fact remains that in an emergency situation these warnings are meaningless because an individual who picks up a phone and dials 911 expects to be immediately connected to emergency personnel. In its comments, APCO described situations in which a warning is not a viable alternative to E911 regulation:

The individual purchasing the VoIP service may not be the same person, who, months or years later, picks up a telephone device using VoIP service to call 9-1-1. In a residential setting, the person attempting to make the 9-1-1 call could be a child of an injured parent or caretaker, a neighbor unfamiliar with the limitations of the homeowner's VoIP telephone, or even the original purchaser who, in the heat of an emergency, forgets the 9-1-1 disclaimer that they may or may not have read when acquiring the service. In a business setting, the VoIP/9-1-1 call is likely to be placed by an employee, contractor, or customer who had no role in selecting the non-compliant VoIP service.²⁸

The Ratepayer Advocate submits that the safety of our nation's consumers should not be left to voluntary agreements or to disclaimers, and the Commission in its regulatory capacity should ensure that VoIP providers who rely on the PSTN or use NANP resources are technologically and operationally capable of ensuring their customers are able to call 911 and have their calls correctly routed to the appropriate PSAP with location and call-back information. As more consumers opt for VoIP because of its lower cost, the Commission must also ensure that VoIP provides E911 functionality to its customers in an expeditious manner.

^{28/} Comments of APCO, at 8.

VI. THE COMMISSION SHOULD HEED THE RECOMMENDATIONS OF COMMENTERS AND REQUIRE VoIP PROVIDERS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND

Several commenters were very vocal on the issue of whether VoIP providers should be required to contribute to the Universal Service Fund. The prevailing view was that exemption of VoIP providers from USF contributions could have significant impacts on the long term viability of the federal universal service support mechanism once phone traffic migrates from circuit switched networks to IP-based networks.²⁹ Furthermore, failure to require VoIP providers to contribute to universal service will provide them with an unfair cost advantage relative to all other carriers who are required to contribute to the USF. BellSouth, SBC, CenturyTel, and the National Exchange Carrier Association (“NECA”) recommend that the Commission can prevent this occurrence by requiring (at a minimum) all VoIP providers that make use of the PSTN or NANP resources to contribute to federal universal service programs.³⁰ Verizon, however recommends that the Commission impose the same universal service obligations on VoIP providers, whether or not those services are classified as telecommunications services or information services.³¹ The commenters uniformly cite to Section 254(d) of the Act as the source of the Commission’s authority to impose universal service obligations on all VoIP providers.

29/ Comments of Verizon, at 55; Comments of Bell South, at 48; Comments of Qwest, at 47; Comments of SBC, at 112.

30/ Comments of Century Tel, at pp. 16-18 ; Comments of BellSouth, at 49 ; Comments of SBC, at 112; Comments of NECA , at 3.

31/ Comments of Verizon, at 60.

Not surprisingly, the VoIP providers who submitted comments had different opinions on whether they should be mandated to contribute to the USF. For example, Vonage and Skype submits that as non-facilities based VoIP providers they indirectly contribute to universal service because in order for them to provide its VoIP service they purchase telecommunications services from telecommunications carriers who are required to report the revenues as end-user sales.³² According to Vonage these sales are often assessed USF, and the telecommunications carrier charges Vonage a USF pass-through amount.³³ This argument is totally misplaced because the USF pass through fee supposedly charged to Vonage by the telecommunications carrier cannot be considered contribution to the USF, it is simply a cost of doing business with that particular telecommunications carrier. While Vonage has the option of avoiding payment of certain fees through its negotiation with the telecommunications carrier, that same carrier cannot avoid payments into the USF which is based on its revenues and mandated by the Commission. Vonage and other VoIP providers are essentially enjoying the benefits of a parasitic relationship in which it depends on the local networks to provide its services but does nothing to maintain that network. This practice cannot be allowed to continue. As previously stated by the Ratepayer Advocate, it is incumbent on the Commission in furtherance of the public interest, to require VoIP providers who provide telecommunications service to contribute to universal service because failure to do so would seriously disadvantage those carriers who are currently required to contribute to the USF.

32/ Comments of Vonage, at 47-51 ; Comments of Skype, at 5.

33/ Comments of Vonage, at 48.

Other commenters argued that the current universal service contribution system is in need of restructuring and until the Commission's Universal Service proceeding is complete, VoIP carriers should not be required to contribute to the current USF.³⁴ AT&T recommends that the Commission replace the current revenues-based system with a numbers/capacity-based system. Under AT&T's proposal, VoIP providers would be required to contribute to the Commission's universal service support mechanisms regardless of whether they are deemed telecommunications carriers or information service providers.³⁵ According to AT&T, a numbers/capacity based system would provide a solid foundation for the fund because the use of numbers is increasing.³⁶ The Ratepayer Advocate is aware that a proceeding is currently underway at the FCC to address the problem of the shrinking revenue base upon which the USF relies to fund its programs, and while we understand the need for reform of the current system, we do believe that in the interim, VoIP providers who rely on the PSTN or NANP resources should be required to contribute to the current USF. It may be a while before the new USF funding mechanism takes effect and VoIP providers should not be allowed to avoid contributing to the current USF while other carriers carry the burden during this transition period.

It is therefore appropriate and sound public policy that VoIP providers that rely on the PSTN or use NANP numbers must help fund universal service programs now, instead of sometime in the

34/ Comments of Net2Phone, at 26; Comments of Covad, at 30; Comments of DialPad, ICG, Qovia, and Voicepulse, at 21-22.

35/ Comments of AT&T, at 38.

36/ *Id.*

future. Any other outcome would do an injustice to funding for universal service's needy recipients, and is otherwise inconsistent with the public interest.

VII. THE COMMISSION MUST ENSURE THAT THE NEEDS OF THE DISABLED COMMUNITY ARE NOT IGNORED AND MUST THEREFORE FOSTER ACCESSIBILITY FOR THE DISABLED THROUGH IMPLEMENTATION OF REGULATIONS

The Commission's call for assistance in deciphering what kind of animal VoIP is and to what extent it should be regulated yielded the general consensus that VoIP and other IP-enabled services and devices will provide far greater public safety, disability access and other public interest benefits and capabilities than traditional telephony services and devices heretofore. The majority of the commenters urge the Commission to extend the application of Sections 255 and 251(a)(2) of the Telecommunications Communications Act ("Act") to VoIP and other IP-enabled services for the benefit of the disabled community and consumers in general.³⁷

However, there are some in the industry, such as 8x8, Inc., Vonage Holding Corp., Qwest International Communications, Inc., ("Qwest"), who argue that the Commission should not limit VoIP or IP-enabled communications technologies and their deployment by requiring compliance with "legacy" regulations, such as the mandates under Sections 255 and 251(a)(2) of the Act,³⁸ and further

37/ Comments of Sprint, at 25-26; Comments of AT&T, at 33-36; Comments of Verizon, at 47; Comments of AFB, at 3-6; Comments of CSD, at 2-4, 13; Comments of TDI, at 6-7; Comments of Avaya, at 2-3; Comments of RERC, at 3-7.

38/ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications equipment and Customer Premises Equipment by Persons with Disabilities, Report and Order* 16 FCC Rcd 6417, ¶ 1(1999); 47 U.S.C. 255 and 251.

state that regulatory measures are unnecessary and could be counterproductive.³⁹ While historically our nation has been built on notions of *laissez-faire*, free market concepts and market forces, and while these concepts are innate to our society and are necessary in providing an initial fertile soil for any innovative advancement, the Commission must recognize that market forces alone have proven to be inefficient and ineffective in providing telecommunications services to a large sector of our society. The Commission must therefore pay careful attention to the comments filed by such associations as The American Foundation for the Blind (“AFB”), The Communication Service for the Deaf, Inc. (“CSD”), the Telecommunications for the Deaf, Inc. (“TDF”), Rehabilitation Engineering Research Center (“RERC”), and Avaya,⁴⁰ asserting that market-forces have failed to adequately meet the needs of the disabled community *vis a vis* telecommunications services and IP-enabled services. These commenters further state that market forces and competition have effectively disenfranchised the disabled community, which is ironically the “class” of individuals which most stand to benefit from telecommunications and IP-enabled services in providing the disabled community a better quality of life.

Among others Avaya indicates that for a number of years, service providers and equipment manufacturers have been offering IP-enabled services, particularly to enterprise customers. It was the unfettered and unregulated arena which permitted a steady improvement in the quality and range of service features available in an IP-enabled system. However, industry experts advise that the deployment of VoIP is now at a critical juncture, and promises to be both “transformative” and

39/ See Comments of Qwest, at 44-46.

40/ See *infra* fn. 42.

“revolutionary,” with mass-market consumers poised to migrate to VoIP services on a massive scale.⁴¹ Equipment manufacturers such as Avaya recommend that the Commission subject all forms of VoIP and IP-enabled services to the same regulations, including public policy obligations such as access for persons with disabilities, and E911 in order to create a regulatory environment that encourages innovative IP-enabled services that will compete on the merits.⁴² It appears, that given their prior history with the telecommunications industry there is a growing concern among the disabled community that companies now building the most advanced products and networks, especially those based on packet switching, will not take the steps required to make those network features and products fully accessible.⁴³ Section 255(b), (c) of the Act, requires manufacturers and telecommunications carriers to implement “readily achievable” measures to provide access to individuals with disabilities. Industry experts maintain that, while it may not be appropriate to mandate immediate compliance, it is imperative that the Commission take a leadership role at this juncture to ensure that companies provide “readily achievable” public policy measures to VoIP consumers as market factors alone are not enough to ensure that manufacturers and service providers will look for and implement “readily achievable “ measures to make VoIP services more accessible to the disabled community.⁴⁴

In addition, to ensuring that VoIP and other IP-enabled services be accessible to persons with disabilities, there are concerns that equipment manufacturers and service providers may limit or deter

41/ See Comments of Avaya, at 3.

42/ *Id.* at 4.

43/ Comments of AFB, at 2

44/ See Comments of Avaya, at 7, 14.

the rapid deployment of these services to the disabled community through the ruse of “additional expense.” While the Act requires manufacturers and service providers to implement accessibility measures that are “readily achievable,” the Act requires implementation of *only those accessibility measures* which can be deployed with little additional expense. Again, industry experts such as Avaya assert that while adapting existing accessibility devices for use with VoIP services present engineering challenges, these are not insurmountable.⁴⁵ Avaya gives as an example their TTY-on-VoIP solution, which uses a mechanism originally to transmit touch-tones. Avaya explains that this style of engineering “piggy backs” onto existing capabilities to provide “achievable” benefits at no additional charge because all of the solutions make use of capabilities that already existed in Avaya’s systems.⁴⁶

It is imperative that the Commission recognize that not all manufacturers and service providers will be focused on providing accessibility solutions. As the Commission is undoubtedly aware, there is an increasing disabled population,⁴⁷ however, they represent only a small portion of the market and cannot successfully exert sufficient consumer demand to induce manufacturers to spend additional resources to develop accessible technology. Moreover, individuals with disabilities on the average have less purchasing power than the average consumer, making it even more difficult to propel market forces to consider their needs in manufacturing and deploying VoIP equipment and services. Absent

45/ Comments of Avaya, at 15; Comments of RERC, at 16-17.

46/ Comments of Avaya at 14-15; Comments of RERC, at 24.

47/ There are 56 million people in the United States with disabilities and this number is increasing as our population grows older. See U.S. Department of Commerce, Bureau of Census :(Years 1990-2050). The Commission is cognizant of this fact, having found that the percentage of persons affected by functional limitations increases with age, that 34.2% of those aged 55-64 experience some functional limitation and that by the year 2050, 35% of our population will be over the age of 55. See *FCC Disability Access Order*, 16 FCC Rcd 6419.

government guidance and mandates, the disabled community will be relegated to disenfranchisement and second-class citizenry where telecommunications and IP-enabled services are concerned. As industry experts points out, lack of leadership from the Commission on this matter may result in lack of attention by the people without disabilities when designing, purchasing, and installing information, telecommunications and IP-enabled services.⁴⁸ The Trace Center has already heard from some in the industry who stated that the industry cannot or will not move forward with VoIP access implementations until it is clear that their companies either have some advantage, or at the very least will not be at a disadvantage by implementing access capabilities while competitors are doing something else.⁴⁹ The Commission must take a leadership role and implement the mandates of Section 255 to ensure a level playing field among industry providers where technology and services may flourish and be accessible by all.

The Commission has an opportunity to develop clear guidelines for VoIP and IP-enabled services which would ensure that these services reach a historically forgotten class of individuals. The Commission must therefore act before such services become completely ubiquitous in the telecommunications industry. The Ratepayer Advocate urges the Commission to forge a regulatory framework to ensure that all individuals including those with disabilities have equal access to and enjoy the benefits available through this new telecommunications technology.

48/ See Comments of Avaya, at p. 16; Comments of RERC, at 18-22; Comments of CSD, at 10-13; Comments of AFB, at 3-4.

49/ Gregg C. Vanderheiden, Professor of Industrial Engineering, University of Wisconsin and Director, Trace R&D Center, Madison, Wisconsin, *Access to voice-over-internet protocol ("VoIP")*, (2003) ("*Trace Report*").

VIII. THE COMMISSION MUST ENSURE THAT CPNI REQUIREMENTS AND OTHER CONSUMER PROTECTIONS ARE EXTENDED TO VoIP AND OTHER IP-ENABLED SERVICES FOR THE SAFETY OF CONSUMERS

Although some commentators urge the Commission to forego implementation of customer proprietary network information (“CPNI”) protections as afforded under §222 of the Act,⁵⁰ the Ratepayer Advocate strongly urges the Commission to continue to apply these basic and necessary consumer protections to VoIP and other IP-enabled services. The industry provider 8x8, Inc., observes that many of the deceptive practices in the telecommunications industry that require regulatory solutions are not present in VoIP and other IP-enabled services. To illustrate their point 8x8, Inc., cites to the practice called “slamming.” Because a VoIP service cannot be established without the new carrier shipping an end user device to the customer, and obtaining authorization to charge the user’s credit card, before the shipment takes place, at present “slamming” will not occur under a VoIP scenario.⁵¹ Similarly, 8x8, Inc, states that it provides its customers with a privacy policy and that other providers may do so as well. In connection with 8x8’s proposition that providers will provide consumer protections, Voice on the Net Coalition (“VON”), states that Title II obligations intended to protect consumers, such as CNPI rules are unnecessary for providers of VoIP and other IP-enabled services, as providers must provide these basic types of protections to their customers in order to attract or retain customers.⁵² Lastly, an argument is made that existing general

50/ *Implementation of Section 222 of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996*, 47 U.S.C. §222.

51/ *See* Comments of 8x8, Inc., at 30.

52/ *Comments of Voice on the Net (VON) Coalition*, at 29.

purpose consumer protection statutes will offer consumer sufficient protections against deceptive industry practices and privacy violations.⁵³

The Commission must be cognizant that in spite of existing state and federal “general purpose” consumer protection statutes and CPNI protections afforded consumers under §222 of the Act, current national media news coverage supported by government statistics obtained from the Federal Trade Commission (“FTC”) indicates that consumers are still susceptible to privacy violations, among which the biggest culprits have been deceptive billing practices, and identity theft.⁵⁴ Moreover, as an industry provider suggests, IP network services are more loosely defined than traditional telephony service and therefore much more susceptible to spoofing, masquerading, pretending, searching, stalking and spying.⁵⁵ The Ratepayer Advocate recommends that, in addition to implementation of Section 222 protections, the Commission should promulgate new rules to ensure that VoIP-enabled networks are secure, that identity is verifiable, and that privacy is guaranteed. An expanded regulatory framework would be consistent with Chairman Powell’s vision of four telecommunications freedoms which he address at the National Association of Regulatory Utility Commissioners (“NARUC”) meeting which was held in Washington, D.C. in March of this year.⁵⁶

53/ *Id.* at pp. 29-31.

54/ *See Federal Trade Commission Statistics on Identity Theft and Deceptive Practices (Reports and Complaints)* at www.ftc.gov.

55/ Comments of Avaya, at p. 22.

56/ NARUC Meeting, March 10, 2004, Speech by Chairman Michael Powell, *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DCO-244737A1.pdf.

Particularly in the area of consumer protection and privacy, the Commission should also acknowledge the need to include state regulation of VoIP and other IP-enabled services and providers. As the AFB states in its comments to the Commission, states traditionally have had a preeminent role in protecting consumers in the area of telecommunications services against industry abuse such as deceptive billing practices and unfair rate increases. All of the interests protected by these regulations apply equally to VoIP and IP-enabled services. To wit, absent guidance from the Commission, some state utility commissions such as the Vermont Public Service Board and the California Public Utilities Commission, have already adopted consumer rights for the further protection of telecommunications customers.⁵⁷ The Ratepayer Advocate recommends that the Commission continue to provide at a minimum the basic protections afforded consumers under Sections 214, 222, 226 and 258 of the Act, and encourages the Commission to consider expanding these protections to address new consumer protection concerns which may arise through deployment of VoIP and IP-enabled services to telecommunications customers.

There is a deep underlying logic to government regulation of networked communications, from which VoIP and other IP-enabled services should not be exempted. The Ratepayer Advocate recommends that the Commission exercise extreme caution and not abandon these necessary and enduring rules designed to protect the public interest.

^{57/} See Comments of AFB, at 13, fn. 15; See California's Public Utilities Commission's "Consumers Bill of Rights," News Release Section on 5/27/04 at www.cpuc.com

IX. STATES' ABILITY TO FUND NECESSARY SERVICES INCLUDING 911, UNIVERSAL SERVICE, AND ACCESS FOR THE DISABLED WILL SUFFER IF STATES ARE NOT ALLOWED TO TAX VoIP

The Ratepayer Advocate expressed in its initial comments the importance of states not being deprived of their ability to tax VoIP services because the revenues derived from taxing telecommunications services assist in the funding of 911, universal service, and access for the disabled. Furthermore as more consumers switch from PSTN-based services to IP-based services, state revenues will decrease while the need for essential social services will continue to increase. States and local governments stand to lose approximately 10 billion in revenue resulting from the inability to collect transaction taxes which include gross receipts taxes, sales and use taxes, 911 fees, state universal service fund fees, and other taxes that are levied on telecommunications transactions.

Several parties expressed concern that states will be denied critical funding for emergency services if they are not allowed to levy 911 taxes on VoIP services.⁵⁸ As it currently stands PSAP operations and E911 systems are largely funded through 911 taxes on telecommunications services. Local governments such as King County in Washington State are encountering funding problems as they attempt to establish a path for VoIP 911 calls to reach PSAPs as quickly as other 911 calls by adding network components to the E911 system.⁵⁹ Additional funding is needed to pay for the enhancements to the E911 network as well as for increased staffing at PSAP locations to answer VoIP calls which are often more difficult to handle due to lack of any call-back or location

58/ Comments of APCO, at 9, Comments of the King County E911 Program, at 3-5; Comments of NENA, at 8; Comments of 911 Communications, Spokane Washington, at 2.

59/ Comments of King County E911 Program, at 3.

information.⁶⁰ At the present time funding for all the improvements to the King County E911 system to accommodate VoIP calls is derived from existing 911 taxes on wireline and wireless carriers, with no contribution from VoIP providers. This glaring disparity must be corrected and VoIP providers should not be allowed to encumber the E911 infrastructure without contributing to its maintenance and improvement. According to NENA, state and local governments “should not be preempted from considering equitable distribution of financial obligations among communication and information service providers offering 9-1-1 capability.”⁶¹

The Ratepayer Advocate urges the Commission to consider the serious consequences arising from asymmetrical tax policies as applied to telecommunications services versus VoIP services. A level playing field should exist for competing technologies so that real competition can be allowed to thrive. If VoIP services that utilize the PSTN are allowed to escape state taxation they will erode the revenue base that states and localities use to fund critical social services.

IX. CONCLUSION

The Ratepayer Advocate urges the Commission to recognize that states have a role in the regulation of VoIP services in order to protect the public interest. Consistent with state regulation of other voice services, VoIP carriers must contribute to federal and state universal service funds and intrastate access, and must meet state disability access, E911 and other public safety obligations. In particular, states must ensure that consumer protections apply equally to all providers of voice

^{60/} *Id.* at 4.

^{61/} Comments of NENA, at 8.

communications, regardless of the technology.

Respectfully Submitted,

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Table of Contents

I.	INTRODUCTION	1
II.	THE AUTHORITY OF STATES TO REGULATE VoIP MUST BE PRESERVED	2
III.	THE COMMISSION SHOULD CLASSIFY VoIP BASED ON THE FUNCTIONALITY OF THE SERVICE	4
IV.	VoIP PROVIDERS WHO USE THE PSTN MUST PAY ACCESS CHARGES	6
V.	VoIP PROVIDERS THAT UTILIZE THE PUBLIC SWITCHED TELEPHONE NETWORK (“PSTN”) MUST PROVIDE RELIABLE ACCESS TO 911/E911 AS SOON AS POSSIBLE	8
VI.	THE COMMISSION SHOULD HEED THE RECOMMENDATIONS OF COMMENTERS AND REQUIRE VoIP PROVIDERS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND	13
VII.	THE COMMISSION MUST ENSURE THAT THE NEEDS OF THE DISABLED COMMUNITY ARE NOT IGNORED AND MUST THEREFORE FOSTER ACCESSIBILITY FOR THE DISABLED THROUGH IMPLEMENTATION OF REGULATIONS	16
VIII.	THE COMMISSION MUST ENSURE THAT CPNI REQUIREMENTS AND OTHER CONSUMER PROTECTIONS ARE EXTENDED TO VoIP AND OTHER IP-ENABLED SERVICES FOR THE SAFETY OF CONSUMERS	21
IX.	STATES’ ABILITY TO FUND NECESSARY SERVICES INCLUDING 911, UNIVERSAL SERVICE, AND ACCESS FOR THE DISABLED WILL SUFFER IF STATES ARE NOT ALLOWED TO TAX VoIP	24
X.	CONCLUSION	25