

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

In the Matter of

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IP-Enabled Services

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WC Docket No. 04-36

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**REPLY COMMENTS OF MOTOROLA, INC.**

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The continued progress of these and other new IP-enabled products depends upon the regulatory approach the Commission adopts for IP-enabled services. Manufacturers, service providers and investors need regulatory certainty in order to continue deployment of these new services.

Industry needs immediate, decisive action by the Commission preempting state regulation of IP-enabled services. We simply cannot invest in the design, manufacture, distribution and promotion of IP-enabled products in a regulatory no man's land, unsure of whether or what state or federal regulations apply. Only with this regulatory clarity will IP-enabled products move from technology demonstrations to the homes of American consumers.

Because VoIP will be one of the first widely available IP-enabled services, it is especially important that the Commission quickly act to establish the proper regulatory framework. As Motorola discussed in its opening comments, to create the proper incentives for companies to develop innovative IP applications, the Commission should (1) preempt state regulation of VoIP immediately; (2) clarify the regulatory classification of VoIP services by the end of 2004; and (3) exclude private networks from any regulatory mandates that it applies to VoIP.

**I. IMMEDIATE FEDERAL PREEMPTION OF STATE REGULATION IS NECESSARY TO STOP THE GROWTH OF DISPARATE STATE REGULATION OF VOIP SERVICES**

**A. The Commission Has The Authority To Preempt State Regulation of VoIP**

Section 2(a) of the Communications Act gives the Commission exclusive jurisdiction over interstate communications.<sup>3</sup> The courts have affirmed this clear grant of exclusive authority: "questions concerning ... interstate communications service are to be governed solely by federal law and ... the states are precluded from acting in this area."<sup>4</sup> In its recent decision

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<sup>3</sup> 47 U.S.C. § 152(a).

<sup>4</sup> *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968).

regarding the VoIP service offered by pulver.com, the Commission reiterated that its authority over a service is exclusive unless that service is “purely intrastate” or it is “practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component.”<sup>5</sup> VoIP is not purely intrastate, nor is it possible to separate its interstate and intrastate components.

Unlike traditional circuit-switched networks, IP networks are not configured to identify the originating or terminating point of a data packet. Users of IP-enabled services can generally access the service from any point on the Internet, making it impossible to determine the geographic location of the parties initiating or receiving a call. As the Commission explained in its *pulver.com Order*, it is not practically possible to separate the interstate and intrastate components of IP-enabled services because IP addresses are portable and the “physical locations” of consumers using IP-enabled services can change.<sup>6</sup> In addition, because IP networks do not send data packets over set routes, it may be impossible to determine whether a data packet on an IP network has been transmitted on an intrastate or interstate basis.

The Supremacy Clause of Article VI of the Constitution gives Congress the power to preempt state law. Federal preemption is appropriate “when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law” and “where compliance with both federal and state law is in effect physically impossible.”<sup>7</sup> Moreover, a federal agency acting within the

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<sup>5</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27, ¶ 20 (Feb. 19, 2004) (“*pulver.com Order*”) (citing *California v. FCC*, 905 F.2d 1217 (1990)).

<sup>6</sup> *Pulver.com Order*, ¶ 20.

<sup>7</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 381 (1986).

scope of its congressionally delegated authority may also preempt state regulation.<sup>8</sup> Here, the Commission has authority to preempt state regulation of VoIP under both theories of federal preemption.

Motorola believes that the Commission has exclusive jurisdiction over VoIP services because any intrastate components of the service cannot be separated out from the largely interstate nature of the service. In their recent addresses at the Supercomm conference, both Chairman Powell and Commissioner Abernathy also indicated their belief that VoIP is an interstate service that should be under the FCC's jurisdiction. Commissioner Abernathy said, "I believe that IP-enabled services are inherently interstate, in light of the network architecture and technical characteristics – indeed, digital bits do not heed *national* boundaries, let alone *state* boundaries."<sup>9</sup> As Commissioner Abernathy points out, IP-enabled services do not heed even national boundaries – and there is a real danger that global leadership in IP-enabled services will move out of the United States and beyond U.S. jurisdiction entirely unless the Commission establishes a single, minimally regulated set of rules for these services. The Commission should use its exclusive authority over interstate services and its authority to preempt inconsistent state regulation to preempt state regulation of VoIP.

#### **B. Swift Action Is Required To Prevent A Patchwork Of State VoIP Regulations**

Since comments were filed in this proceeding on May 28, 2004, another state has decided to impose legacy common carrier regulations on VoIP service, continuing a trend that threatens to undermine the promise of VoIP. On June 11, 2004, the Washington Utilities and

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<sup>8</sup> See *Fed. Savs. & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

<sup>9</sup> "Promoting the Broadband Future," Keynote Address of Commissioner Kathleen Q. Abernathy, Supercomm Conference, June 22, 2004 (as prepared for delivery) (emphasis in original).

Transportation Commission (“WUTC”) ruled that the VoIP service provided by LocalDial is subject to state regulation as a telecommunications service.<sup>10</sup> The WUTC found that LocalDial offers interexchange voice telephone service despite the protocol conversions that occur when LocalDial routes calls over the Internet. The WUTC ordered LocalDial to apply for a state interexchange carrier certificate. This decision is further evidence that a confused mess of state VoIP regulations, which take a more regulatory approach to VoIP than the Commission has signaled it is likely to adopt, is developing rapidly.

Motorola has expressed its concern that state regulatory efforts and policies inconsistent with federal policies may undermine the promise of VoIP.<sup>11</sup> VoIP is a nascent service, and multiple and potentially conflicting layers of state and federal regulation could well foreclose future investment in VoIP and limit further commercial deployment of the service. Because many VoIP service and equipment providers operate on a multi-state or national basis, the prospect of various states addressing and resolving these important regulatory issues in different and inconsistent ways is likely to undermine severely the ability of new and potential VoIP providers to raise capital, plan systems, and compete effectively.<sup>12</sup> Preemption will provide the unified set of rules necessary for this industry to develop.

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<sup>10</sup> *Washington Exchange Carrier Association, et al. v. LocalDial Corporation*, Final Order Granting Motions for Summary Determination, Docket No. UT-031472, Order No. 08 (June 11, 2004). As Motorola noted in its initial comments, New York has concluded that Vonage, a VoIP service provider, is a telephone corporation under New York law and therefore subject to regulation. Motorola Comments at 6. California is investigating whether VoIP should be subject to a number of common carrier regulations, and has tentatively concluded that when VoIP is interconnected with the PSTN, it should be considered a public utility. *Id.* at 5. Michigan has also begun an investigation into the “proper degree” of VoIP regulation. *Id.* at 5-6.

<sup>11</sup> Motorola Comments at 4-7.

<sup>12</sup> See Comments of BellSouth Corporation, WC Dkt. No. 04-36, at 11-14 (filed May 28, 2004); Comments of Cablevision Systems Corp., WC Dkt. No. 04-36, at 12 (filed May 28, 2004); Joint Comments of Dialpad, ICG, Qovia, and Voicepulse, WC Dkt. No. 04-36, at 8-9 (filed May 28, 2004); Comments of Verizon, WC Dkt. No. 04-36, at 31-39 (filed May 28, 2004).

Motorola's position is supported by the recent comments of Chairman Powell and Commissioner Abernathy at the Supercomm 2004 Conference. In a question-and-answer session, Chairman Powell said he believes that states that are trying to apply traditional telecom regulations to VoIP providers are "making a mistake, a very grave mistake," which potentially could harm consumers and the industry.<sup>13</sup> Similarly, Commissioner Abernathy noted, "if service providers were subject to a patchwork of disparate rules from state to state, that would impede national and regional entry strategies, and as a result would deny important benefits to consumers."<sup>14</sup>

In order to avoid the imposition of inconsistent state regulation, Motorola again urges the Commission to take expeditious action to preempt state regulation of IP-enabled services. As several commenters have asserted, the FCC should decide certain discrete, central issues introduced in this proceeding individually, so as to provide necessary federal guidance more quickly.<sup>15</sup> Comcast, for example, urges the Commission to narrow its focus to a subset of issues capable of, and requiring, prompt disposition.<sup>16</sup> Motorola believes that preemption is one of the issues that requires swift action prior to adoption of decisions on the numerous other issues raised in this proceeding.

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<sup>13</sup> Donny Jackson, "FCC Commissioners Say States Should Leave VoIP Alone," *Telephony Online*, June 23, 2004, available at [http://telephonyonline.com/ar/telecom\\_fcc\\_commissioners\\_say/](http://telephonyonline.com/ar/telecom_fcc_commissioners_say/).

<sup>14</sup> Abernathy Supercomm Address, *supra*, note 11.

<sup>15</sup> *See* Comments of AT&T Corp., WC Dkt. No. 04-36, at 48 (filed May 28, 2004) ("[T]he Commission would increase regulatory certainty and support development of IP-enabled applications by making formal preemption decisions now, rather than deferring the issue to future proceedings.").

<sup>16</sup> Comments of Comcast Corporation, WC Docket No. 04-36, at 2-3 (filed May 28, 2004).

## **II. THE COMMISSION SHOULD CLARIFY THE REGULATORY CLASSIFICATION OF VOIP SERVICES BY YEAR END**

Whether the Commission decides that VoIP services should be classified as telecommunications services, information services, or something in between, a decision about the appropriate regulatory classification of VoIP services should be made as quickly as possible – no later than the end of this year – to provide regulatory certainty for the nascent VoIP industry. VoIP has been able to emerge to date under the Commission’s deregulatory approach. However, the threat of uncertain, let alone increased, regulation discourages consumers, manufacturers and providers of VoIP services from fully embracing this technology. Resolving this key issue would spur investment in and development of these promising services.<sup>17</sup>

## **III. THE RECORD SUPPORTS EXCLUSION OF PRIVATE NETWORKS FROM ANY REGULATORY MANDATES APPLIED TO VOIP**

Notwithstanding the Commission’s decision as to whether to impose regulation on IP-enabled services in general, private networks should remain free from most regulatory mandates. The Commission should make clear that it is not considering imposing any new regulations on private networks based on the type of application transmitted over the network. As Motorola explained in its comments,<sup>18</sup> unlike common carriers, private networks do not have an impact on the public substantial enough to merit government regulation.<sup>19</sup> Moreover, the significant monetary and compliance burdens of additional regulation may be unbearable for smaller private networks. Private networks, such as police, fire, and other public safety systems, utility companies, private dispatch services, telematics membership services, and other enterprise-

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<sup>17</sup> Motorola Comments at 7-10.

<sup>18</sup> Motorola Comments at 12-14.

<sup>19</sup> See 47 U.S.C. § 153(44); 47 U.S.C. §153(10).

owned and operated networks, must continue to be exempt from the Title II obligations that apply to common carriers.

Other commenters support Motorola's position that most regulation is not appropriate for VoIP services provided over private networks. The Ad Hoc Telecommunications Users Committee urges the Commission to forebear from regulating IP-enabled applications deployed by enterprise customers via private line services.<sup>20</sup> Ad Hoc argues that installation and use of an IP-enabled application on a private line circuit does not constitute telecommunications for purposes of regulation under Title II.

Similarly, Verisign calls on the Commission not to regulate private IP-enabled signaling and directory services, finding that none of the six criteria for categorizing IP-enabled services suggested by the FCC in the NPRM are relevant to private services.<sup>21</sup> As a result, the company concludes that "it is not apparent that any regulatory framework is needed for private implementations or service."<sup>22</sup> The Texas Department of Information Resources ("Texas DIR") agrees, asserting that "private networks are not common carriers, and end-users of such networks do not have the same expectations regarding the use of IP-based services as the general public may have when considering, for example, substituting VoIP service for traditional telephone service."<sup>23</sup> Motorola shares the concern of this commenter that "Commission efforts to regulate IP-enabled services may inadvertently extend to cover private networks."<sup>24</sup> Therefore, the

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<sup>20</sup> Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 04-36, 2-5 (filed May 28, 2004) ("Ad Hoc Comments").

<sup>21</sup> Comments of Verisign, Inc., WC Dkt. No. 04-36, at 6-8 (filed May 28, 2004).

<sup>22</sup> *Id.* at 8.

<sup>23</sup> Comments of the Texas Department of Information Resources, WC Docket No. 04-36, at 6 (filed May 28, 2004) ("Texas DIR Comments").

<sup>24</sup> *Id.* at 5.

Commission should make clear that private networks are excluded from any regulations it might apply to public VoIP offerings.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should preempt state regulation of IP-enabled services immediately and resolve the regulatory classification issue by the end of this year. The FCC should also continue its light regulatory touch for IP-enabled services and, in any event, decline to impose regulatory mandates on private networks.

Respectfully Submitted,

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