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## Summary

The members of BSPA are facilities-based providers of competitive broadband networks in communities across the country, and they are pioneers in the provision of digital voice, data and video services. However, BSPA is concerned about VOIP being understood as something that it is not. Using the terms “IP” and “Internet” should not automatically transform voice service from telecommunications into something that it is not, in order to create opportunities for regulatory arbitrage. The FCC has already rejected that approach in the *AT&T VOIP Declaratory Order*, and it should do the same here.

In this proceeding, the Commission should rely on two core principles. First, less regulation is generally better than more, and that regulation should only be enacted when necessary to protect consumers, or to promote competition. Second, where regulation is necessary, competitors in a service market generally should be regulated in a similar, technology-neutral, manner. This regulatory parity generally encourages efficient and rational investment by competitors, and the absence of regulatory parity is destructive to telecommunications markets and thus to consumers. Application of these principles should result in IP-enabled voice services that are substitutes for “plain old telephone service” (“POTS”) being regulated as telecommunications under Title II, but with a light touch manner similar to the current regulation of CLECs. IP voice services that are a substitute for POTS are those that use NANP numbers, charge the subscriber for service, and originate or terminate calls on the PSTN. Such IP voice services would have the obligations and rights of non-dominant telecommunications carriers. The obligations that must be fulfilled by such carriers would include paying access charges, contributing to universal service support mechanisms, and complying with “social obligations” such as CALEA, 911 service, and service to the disabled.

The record in this proceeding shows that IP is a technology not a service, and the use of IP technology to provide voice service should not by itself alter the technology-neutral application of statutory requirements and pre-existing FCC policies. The definition of “telecommunications” in the Act makes no regulatory distinction between analog and digital transmission technologies, or between different digital transmission technologies. Stripped of the hype, voice service provided with IP technology is essentially a transmission service, and the Commission cannot ignore its statutory mandate to treat that transmission service as a telecommunications service. Furthermore, in each of the major regulatory issues raised in this proceeding, the FCC has already stated a policy of technology neutrality: universal service, access charges, interconnection, CALEA, 911 and numbering resources. There is no basis in the Act or in the record of this proceeding for the Commission to act in a manner inconsistent with that policy.

Numerous arguments have been put forward to suggest that IP voice services are not telecommunications, but rather should be classified as an information service. These fatally flawed arguments include the following:

*“Applications” vs. “Services”, and Bundles of Services:* Some commenters suggest that IP-enabled voice transmissions are merely one “application” of a broader information service, and thus not properly regulated as a telecommunications service. At this time, the distinction between “voice applications” and “voice services” is a metaphysical one at best. There is no basis in the Communications Act for regulation based on the proposed applications/services distinction. Similarly, some commenters point to the fact that IP voice transmissions can be combined with other enhanced features such as e-mail, to suggest that the combined package constitutes an information service. However, the bundling of these features and functions with an IP voice telecommunications service does not transform the voice telecommunications service into something else, just as the bundling of traditional voice mail with POTS does not transform POTS into an information service.

*Section 230 of the Communications Act is Not Applicable Here:* Some commenters urge the Commission to misread Section 230(b)(2) of the Communications Act to support the false assertion that Congress opposes any regulation of the Internet, and thus that the Commission should regulate IP voice services as information services, if it regulates them at all. A fair reading of Section 230 in its entirety provides no substantive basis for such an assertion. The title of Section 230, the text of the entire section, and the legislative history show that the sole purpose of Section 230 is to limit regulation of the content of Internet access services. There is no mention of voice telephony or telecommunications in Section 230, and there is no evidence that Section 230 was intended even to apply to voice telephony or telecommunications services, much less to de-regulate such services. Unfortunately, the inaccurate view of Section 230 appears to have taken on the status of an “urban legend”: an incorrect statement that is recited so often, that people believe it must be true.

*The “Layers” Approach Has Disingenuous Results:* Some parties urge the Commission to only regulate the provider of a “layer” of IP services if that provider has market power over that layer, which in effect applies only to entities that have physical control over the loop to the end user. These parties provide no evidence that the Communications Act allows the Commission to regulate based on “layers” rather than services. Furthermore, this “layers” approach appears to have the disingenuous effect of imposing regulation on facilities-based providers of local services, while leaving entities that lease or resell local services, such as the proponents of the layers theory, with no regulation. Such an approach is also inconsistent with the current regulation of resellers of traditional telephony service.



customers, including digital cable television, voice telephony, and high-speed data and Internet access.<sup>2</sup>

These companies compete directly with incumbent cable operators and local exchange carriers. They are the embodiment of the express federal goal of bringing facilities-based competition to the national markets for broadband video, telephony, and data services. That goal has been characterized as the major objective of the federal government's broadband policy,<sup>3</sup> the purpose of which is to bring lower prices, better service, and increased offerings to consumers in each of these areas.

Ten years ago, none of the members of the BSPA existed in the form they do today. Their creation was in direct response to the Telecommunications Act of 1996 – which brought down barriers to competition among telephone, cable, and data service providers – and to advances in technologies that made it possible to provide all of these services through “one wire.” While previous efforts to bring competition to these markets often failed, the ability to “bundle” services for consumers provides broadband companies the ability to generate multiple revenue streams from their facilities. It also provides these companies with a foundation to build platforms capable of deploying highly advanced, “next generation” services that cannot be deployed on existing legacy telephone and cable networks. Even though the members of BSPA have been

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<sup>2</sup> The members of the BSPA are: Everest Connections, Gemini Networks, Knology, RCN, Astound, Starpower Communications, Utilicom Networks, PrarieWave Communications, Black Hills Fibercom, and SureWest Communications.

<sup>3</sup> See, e.g., Written Testimony of FCC Chairman Michael Powell, House Commerce Subcommittee Hearing on FCC Fiscal Year 2005 Budget, March 31, 2004, at page 7, available at [www.fcc.gov/commissioners/powell/mkp\\_statements\\_2004.html](http://www.fcc.gov/commissioners/powell/mkp_statements_2004.html) (visited July 9, 2004).

pioneers in offering the triple-play bundle using traditional telephone technologies, they have a strong interest in promoting the success of digital services such as VOIP.

Although this “new breed” of communications competitors has existed for only a few years, they have already made great strides in developing their networks and giving consumers meaningful choice in the purchase of communications services.

Nevertheless, these companies face significant challenges. Included among them is uncertainty over whether regulation will allow full and fair competition to flourish. In reviewing the filings made by some parties in this and related dockets, BSPA is concerned about the development of a type of “mass hypnosis” regarding VOIP similar to the “irrational exuberance” which surrounded the “dot-com” boom. Just as in 1999 when people said “the Internet changes everything” to justify billion-dollar capitalizations for companies with no income, some parties today invoke the terms “IP” and “Internet” in an attempt to magically transform voice service from telecommunications into something that it is not, in order to create opportunities for regulatory arbitrage. Such arbitrage is unfair to competitors, and destructive to telecommunications markets and thus to consumers. The FCC has already rejected that approach in the *AT&T VOIP Declaratory Order*,<sup>4</sup> and it should do the same here.

In crafting regulations in this proceeding, the Commission should rely on the following core principles. First, BSPA believes that generally, less regulation is better than more, and that regulation should only be enacted when necessary to protect consumers, or to promote competition. Generally, regulating only where necessary

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<sup>4</sup> Order, Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, FCC 04-97 (released April 21, 2004) (“*AT&T VOIP Declaratory Order*”).

encourages investment in facilities that are responsive to customer demand. This approach allows the market to function at its best, and allows customers, rather than regulations, to determine the services and features that they want. Nevertheless, regulation of telecommunications service providers is necessary in some cases, not only to fulfill the explicit requirements of Title II of the Communications Act, but also to promote the following goals:

- *Protection of Consumers, and Other "Social Obligations"*: provision of 911 service; compliance with CALEA, TRS and access for the disabled; equitable contribution to federal and state universal service support mechanisms;
- *Promotion of Facilities-Based Competitive Markets*: access to pole attachments and conduits; access to numbering resources; and interconnection to the public switched telephone network ("PSTN").

Where regulation is necessary, BSPA believes that generally, competitors in a service market should be regulated in a similar, technology-neutral, manner. Regulatory parity generally encourages efficient and rational investment by competitors. The absence of regulatory parity creates harmful distortions of service markets, by encouraging the construction of facilities and the provision of services based on artificial regulatory distinctions in pricing, *i.e.*, regulatory arbitrage. In enacting regulations for IP-enabled voice services, the Commission must place a high priority on preventing arbitrage. As FCC Chairman Powell has stated in Congressional testimony:

With each passing day, month and year the regulatory arbitrage bubble continues to expand ever more perilously ... and it is sure to eventually pop, like dot-coms of old. In the meantime, facilities-based investment and competition will take a back seat to regulatory

arbitrage to the detriment of every local telecommunications consumer.<sup>5</sup>

As discussed further below, the principles of competitive parity and technology neutrality should result in IP-enabled voice services that are substitutes for “plain old telephone service” (“POTS”) being regulated in a manner similar to the current regulation of CLECs. In addition, however, the application of these principles would also include avoiding the creation of disparities, between IP-enabled multichannel video service providers and video service providers using other technologies, in access to infrastructure such as pole attachments and rights-of-way, and in assessment of fees by municipalities.<sup>6</sup> One result of this proceeding should be that video service providers, regardless of the technology they use, should be subject to the same cost components that affect prices paid by end users. BSPA is concerned that the Commission might take an action, such as finding that all IP-enabled services are information services, that could result in non-IP-enabled video providers paying higher rates for pole attachments than IP-enabled providers.<sup>7</sup> Similarly, such a finding could result in non-IP

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<sup>5</sup> Written Statement of Chairman M. Powell, before the House Subcommittee on Telecommunications and the Internet, “Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission,” (February 26, 2003) at page 16, available at [www.fcc.gov/commissioners/powell/mkp\\_statements\\_2003.html](http://www.fcc.gov/commissioners/powell/mkp_statements_2003.html) (visited July 9, 2004).

<sup>6</sup> For example, Section 1.1409(e)(2) of the Commission’s rules sets forth the two different rates for pole attachments. Providers of “cable service” pay a lower rate for attachments than providers of “telecommunications service” and providers of combined telecommunications and cable service. Rights-of-way are regulated by state statutes and municipal ordinances. Broadband providers in some states (such as Kansas) have been required to obtain both cable and telecommunications franchises, and have been required to remit franchise fees on revenues generated by both telecommunications and cable services.

<sup>7</sup> Cf. Comments of Time Warner, Inc. at pages 17-21.

enabled service providers having to pay telecommunications franchise fees in some states, while IP-enabled providers could claim exemption from paying such franchise fees.

In sum, in this proceeding the Commission should base its actions on regulating only when necessary to protect consumers and promote competition, yet doing so in a technology-neutral manner that promotes regulatory parity. Such principles should result in the regulation of IP-voice services in a manner similar to the current regulation of CLECs.

**II. IP is a Technology Not a Service, and the Use of IP Technology to Provide Voice Service Should Not by Itself Alter the Technology-Neutral Application of Statutory Requirements and Regulatory Principles.**

The record in this proceeding demonstrates that IP is a technology, not a service. There is no basis in the Communications Act or in long-standing Commission policies for altering the regulation of voice telecommunications services merely because they use this new transmission technology. Rather, the Commission must act in a manner consistent with the technology-neutral goals of the Act, and technology-neutral policies previously established by the Commission in each the major areas of regulatory inquiry in this proceeding: universal service, access charges, interconnection, CALEA, E911 and numbering resources.

**A. Key Statutory Goals and FCC Policies are Technology-Neutral.**

The technologies used for transmission of voice and data have evolved radically on numerous occasions over the last 100 years. As noted in the Comments of the State of California, transmission technologies have evolved from analog Frequency

Division Multiplexing to digital Time Division Multiplexing (“TDM”).<sup>8</sup> At the same time, manual switches have been replaced by circuit-based technologies, including frame-relay and Asynchronous Transfer Mode. Now, IP-based technologies are rapidly replacing prior digital technologies. However, as noted by the State of California, “Internet Protocol itself is not a service, but a means of transmitting a service, like earlier generation protocols such as TDM and single dedicated circuits to deliver voice grade telephony ....”<sup>9</sup> Accordingly, the Commission must ignore the misplaced attempts in this proceeding to argue that a new telecommunications technology inherently creates a new service. Such attempts are inconsistent with the technology-neutral nature of the Communications Act, and with Commission policies supporting technology neutrality.

The definition of “telecommunications” in the Communications Act is “...the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received.”<sup>10</sup> There is nothing in this seminal definition that makes a regulatory distinction between analog and digital transmission technologies, or between different digital transmission technologies. Stripped of the hype, voice service provided with IP technology is essentially a transmission service, and the Commission cannot ignore its statutory mandate to treat that transmission service as a telecommunications service.

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<sup>8</sup> Comments of the People of the State of California and the California Public Utilities Commission (hereinafter “Comments of California”) at page 6.

<sup>9</sup> *Id.* at page 8.

<sup>10</sup> 47 U.S.C. 153(43).

The principle of technology-neutrality is present not only in the Act's definition of "telecommunications," but elsewhere. For example, in enacting universal service regulations based on the principles in Section 254(b) of the Act, the Commission inferred the principle of competitive neutrality, which requires that universal support mechanisms "neither unfairly favor nor disfavor one technology over another."<sup>11</sup> The Commission found that technological neutrality is part of the concept of competitive neutrality, and that such neutrality "will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development."<sup>12</sup> Similarly, in addressing interconnection issues, the Commission found that exempting xDSL-based advanced services from the requirements of Section 251(c) of the Act would be "at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets."<sup>13</sup> Consistent with these findings, the Commission has already established a policy of technology neutrality in proceedings

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<sup>11</sup> In the Matter of Federal-State Board on Universal Service, 12 FCC Rcd 8776, 8801 (1996)(*Universal Service R&O*).

<sup>12</sup> *Id.* at page 8802. The Commission took a similar approach in a proceeding on jurisdictional separations and DEM weighting rules, stating that "[e]fficient investment and operation requires that assistance be delivered on a basis that is technology-neutral, in order to avoid encouraging investment in specific types of facilities or technologies when other means could deliver local services at lower costs." In the Matter of Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Notice of Proposed Rulemaking, 10 FCC Rcd 12309, 12314 (1995).

<sup>13</sup> In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 FCC Rcd 385, 390 (1999).

covering other key issues, such as numbering resources, CALEA, and 911.<sup>14</sup> Most recently, the Commission used the principle of technology neutrality in addressing the claim that use of IP technology should eliminate the obligation to pay access charges to terminating carriers. In denying AT&T's petition, the Commission stated that "we see no benefit in promoting one party's use of a specific technology to engage in arbitrage ...." *AT&T VOIP Declaratory Order* at para. 17.

In sum, in each of the major regulatory issues raised in this proceeding, the FCC has already stated a policy of technology neutrality: universal service, access charges, interconnection, CALEA, 911 and numbering resources. There is no basis in the Act or in the record of this proceeding for the Commission to act in a manner inconsistent with that policy.<sup>15</sup>

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<sup>14</sup> See, e.g., In the Matter of Administration of the North American Numbering Plan, 11 FCC Rcd 2588, 2596 (1995) ("Administration of the NANP should not unduly favor one technology over another."); In the Matter of Communications Assistance for Law Enforcement Act, 15 FCC Rcd 7105, 7120 (1999) ("CALEA, like the Communications Act, is technology neutral."); In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Request of King County, Washington, Order on Remand, 17 FCC Rcd 14789, 14794-95 (2002) ("The Commission has strenuously avoided solutions that are other than technology-neutral in crafting regulatory requirements for E911 implementation.").

<sup>15</sup> Another area where the Commission should consider the policies of competitive and technology-neutrality in the context of IP-enabled services is pole attachments. As the Commission well knows, the classification of a service as "telecommunications" or as a "cable service" has a significant impact on the price paid by the service provider seeking pole attachments. BSPA's members compete with incumbent cable TV operators in the provision of multichannel video services as well as in voice services. The principle of competitive-neutrality suggests that competitors need to pay similar costs for comparable services, if the competitive market is to operate effectively. BSPA notes that the growing use of IP-enabled networks to deliver both telecommunications services and multichannel video services over one wire may raise new issues regarding charges for pole attachments, and the Commission may want to inquire into such issues in the future.

B. Claims That Use of IP Technology Requires the Commission to Treat VOIP as an Information Service, are Flawed.

As shown above, the definition of “telecommunications” in the Act is technology neutral (as are the relevant Commission policies). If a voice service meets the definition of telecommunications, it does so regardless of the transmission technology. Nevertheless, numerous arguments have been made by some commenters suggesting that the use of IP technology inherently creates a service that is not telecommunications, but rather should be classified as an information service. See, e.g., Comments of MCI, Inc. at pages 6-13, 20-24. As discussed below, these arguments are fatally flawed.

*1. Use of Protocol Conversion in IP Voice Services*

Some parties claim that use of IP technology results in protocol conversion that takes the transmission of a telephone call out of the category of telecommunications and puts it into the category of information service. See, e.g., Comments of Vonage Holdings Corp. (“VHC”) at pages 25-26, Comments of MCI at page 21. However, as noted by other commenters in this proceeding,<sup>16</sup> the Commission recently rejected this sort of argument in its *AT&T VOIP Declaratory Order*. In that *Order*, the Commission noted that the protocol conversion used by AT&T to provide PSTN-to-PSTN calls is a type of “internetworking” conversion, which is among the types of protocol conversion that the Commission has found to be an indicia of telecommunications, rather than of

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<sup>16</sup> See, e.g., Comments of CenturyTel, Inc. at pages 6-7.

information services.<sup>17</sup> The Commission should follow the same approach in this proceeding, at least as applied to voice services that are a substitute for POTS from the perspective of the end user.<sup>18</sup> Under established precedent, certain forms of protocol conversion do not change a voice transmission from telecommunications to information service, regardless of whether that transmission is in IP format or not.

2. *The Use of IP Technology is Not “Radically Different.”*

Other arguments regarding the relevance of IP technology are also flawed. For example, the claim that there is something “radically different” about the Internet or packet-switched networks for purposes of regulatory categories,<sup>19</sup> is exaggerated. Rather, the public Internet still includes much of the “legacy” network that previously used circuit switching for POTS. As noted in Comments of California at pages 27-28, “[v]oice-grade telephony services using TDM protocol and voice-grade telephony services using IP, when offered to the public, co-exist on the same physical facilities or infrastructure....”<sup>20</sup>

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<sup>17</sup> AT&T VOIP Declaratory Order at note 13, *citing Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 FCC Rcd 21905, 21956 (1996). *See also, In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998)(“*Stevens Report*”) at note 188 (real-time voice transmission service involves no net change in form or content, in spite of routing and conversion within the network).

<sup>18</sup> See Section III *infra*.

<sup>19</sup> Comments of Qwest at pages 6-9.

<sup>20</sup> Similarly unpersuasive is the statement of Qwest (Comments at page 10) regarding the relevance of the fact that “simultaneous streams” of video, voice and data can be transmitted using IP transmission, and the assertion of MCI (Comments at page 7) that the provision and convergence of multiple IP services in one line “revolutionizes” telecommunications. These statements are not justified because the same can said of traditional voice, video and data services provided over a single copper wire with DSL technology.

### 3. “Applications” vs. “Services”, and Bundles of Services

In any case, the Commission must keep its focus on the fact that this proceeding is looking at the regulation of services over a network, not the network itself. However, some commenters suggest that IP-enabled voice transmissions are merely one “application” of a broader information service, and thus not properly regulated as a telecommunications service. Comments of MCI at page 10 and 14, Comments of Net2Phone, Inc. at page 10. It appears to BSPA that at this time, the distinction between “voice applications” and “voice services” is a metaphysical one at best.<sup>21</sup> Furthermore, there is no basis in the Communications Act for the proposed applications/services distinction, and the Commission cannot use such a distinction to ignore its obligations under the Communications Act.

In an argument that is related to the “merely one application” argument, some commenters point to the fact that IP voice transmissions can be combined with “data in new innovative ways, going far beyond the functionality offered by POTS.” Comments of Net2Phone at pages 10-11. Qwest notes that IP voice may be bundled with services such as e-mail, and that IP voice services can be programmed to “find” a subscriber in different locations. Comments at page 11. But these functionalities appear to be no

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<sup>21</sup> VHC has made similarly flawed assertions regarding its Vonage IP voice service. According to trade press reports, in a letter to the California PUC, VHC attempted to avoid classification as a telecommunications carrier by stating that the Vonage service “involves the transmission of audio information.” TRDaily, October 22, 2003, found at <http://www.tr.com/online/trd/2003/td102203/index.htm>. VHC has thus apparently conceded that Vonage service is a transmission service. Of course, transmission of information is the core of telecommunications services. The description of voices as “audio information,” while creative, is irrelevant: any digital transmission of voices on a telephone or cellular phone call could be described as the transmission of “audio information,” but that does not transform a telephone call into a different service.

more than advanced vertical features, or information services bundled with voice services. The bundling of these features and services with an IP voice telecommunications service does not transform the voice telecommunications service into something else, just as the bundling of traditional voice mail with POTS does not transform POTS into an information service.<sup>22</sup>

4. *Section 230 of the Communications Act is Not Applicable Here.*

One of the greatest barriers to the rational regulation of IP voice services is the misinterpretation of Section 230(b)(2) of the Communications Act. This misinterpretation of the Act is used to support the incorrect assertion that Congress opposes any regulation of the Internet, and thus that the Commission should regulate IP voice services as information services, if it regulates them at all. See, e.g., Comments of VHC at page 34. A fair reading of Section 230 shows that it provides no substantive basis for such an assertion, and that it is not applicable in this policy debate.

Section 230(b)(2) of the Communications Act states that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” This language has been reflexively recited by numerous parties in this and related proceedings to justify assertions that the Commission should not regulate IP voice services as telecommunications (or not regulate them at all). Use of Section

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<sup>22</sup> See, e.g., *Stevens Report*, 13 FCC Rcd 11501 at para. 60 (“It is plain ... that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with [an information service] like voice mail.”).

230(b)(2) for this purpose requires the reader to ignore both the language of subsection (b)(2), and the broader language and purpose of Section 230.

A fair reading of Section 230 requires review first of the title of that statutory section: "Protection for Private Blocking and Screening of Offensive Material". That title alone reveals that the sole purpose of Section 230 is to limit regulation of the content of Internet access services. That revelation is confirmed when one reviews the only affirmative legislative action taken in Section 230: Section 230(c) requires that (1) no provider of an interactive computer service<sup>23</sup> shall be treated as the publisher or speaker of any information provided by another information content provider and (2) that no provider of an interactive computer service shall be held liable for attempting to restrict access to obscene or otherwise objectionable materials. There is no mention of voice telephony or telecommunications services or service providers in Section 230(c). There is no evidence that Section 230 was intended even to apply to voice telephony or telecommunications services, much less to de-regulate such services. Rather, Section 230 was clearly and solely intended to limit regulation of the content of Internet access services.<sup>24</sup>

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<sup>23</sup> Section 230(e)(2) defines "interactive computer service" to be "any information service ... that provides or enables computer access... [including] access to the Internet...."

<sup>24</sup> This reading is further confirmed by a review of the legislative history of Section 230. Representative Cox, a sponsor of the amendment that added Section 230 to what became the Telecommunications Act of 1996, clearly stated in Parliamentary Inquiry that "[f]irst, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet...who takes steps to screen indecency and offensive material for their customers...Second it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet." (Emphasis added). 141 CONG. REC. H 8470 (1995) (Statement of Representative Cox). The Conference Report accompanying the 1996 Telecommunications Act clearly states that the specific purpose of Section 230 was to overrule Stratton-Oakmont v. Prodigy, a May 1995 case which held an Internet service provider liable for content that was not its own, simply because it tried to restrict access to objectionable material and therefore exercised some level of control over the content. H.R. REP. NO. 104-458 at 194 (1996).

Once the overall context and purpose of Section 230 is understood, that purpose can be recognized even in the preliminary policy statement in Section 230(b)(2). That subsection seeks to preserve “interactive computer services” from content regulation, and when it refers to “the Internet,” it is referring to Internet access and content services.

Unfortunately, the citation of Section 230(b)(2) for the assertion that Congress opposed any regulation of the Internet, or that it did not want IP telephony to be regulated, appears to have taken on the status of an “urban legend”: an incorrect statement that is recited so often, that people believe it must be true. BSPA urges the Commission not to be fooled.

#### 5. MCI’s “Layers” Approach Has Disingenuous Results.

MCI has advocated a regulatory approach based on classifying different “layers” of IP network functions differently. Comments at pages 6-20. Under this theory, the Commission should recognize four layers of IP networks: a lowest physical layer associated with the transmission of bits over a physical medium; middle layers associated with organizing those bits into packets and managing the flow of those packets; and a top level layer that uses the packets in “applications such as voice transmission or email.” *Id.* at page 8. MCI urges the Commission to only regulate the provider of a “layer” if that provider has market power over that layer, which in effect, applies only to entities that have physical control over the loop to the end user. Providers of mere “applications” such as IP voice services, would not be regulated. *Id.* at pages 10-20.

MCI provides no evidence that the Communications Act allows the Commission to regulate based on “layers” rather than services. Furthermore, MCI’s “layers” approach appears to have the disingenuous effect of imposing regulation on facilities-based providers of local services, while leaving entities that lease or resell local services, such as MCI, with no regulation. This is not a deregulatory proposal; rather, it is an attempt to impose regulation only on MCI’s competitors. Moreover, MCI’s suggestion, that IP voice “application” providers need not be regulated since they do not control a bottleneck facility, is inconsistent with the current regulation of resellers of traditional telephony service.<sup>25</sup> While resellers of traditional telephony services are not subject to the regulations applicable to “dominant” carriers, they are still subject to other “non-dominant” regulations mandated by Title II of the Communications Act. MCI’s proposal would skew the market by creating a lack of regulatory parity between IP telephony resellers and traditional telephony resellers. This cannot be the result sought by the Commission.

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<sup>25</sup> BSPA recognizes that the “layers” theory may be a useful method for describing the operation of IP networks. However, as discussed above, it does not appear to be a valid method under the Communications Act for resolving the regulatory classification of an offering as a telecommunications service or an information service. Nevertheless, to the extent that the “layers” theory supports the use of regulation to minimize the impact on competition of the control of “bottlenecks,” BSPA notes that such bottlenecks can occur at the “content” level of IP-enabled services. As was noted above, BSPA’s members compete with incumbent cable TV operators in the provision of multichannel video services, and access to programming controlled by major cable MSOs is an ongoing area of concern for BSPA members. BSPA notes that the delivery of multichannel video services over IP-enabled networks may raise new issues regarding access to programming, and the Commission may want to inquire into such issues in the future.

### **III. IP Voice Services That are a Substitute for POTS From the Perspective of the End User, Should be Regulated In a Manner Similar to the Regulation of CLECs.**

As shown above, the requirements of the Communications Act, and policies of regulatory parity and technology neutrality, require the Commission to regulate certain IP voice services as telecommunications under Title II of the Communications Act. BSPA recognizes that voice transmissions can be merely tangential to an IP service such as Internet gaming, and BSPA does not advocate Title II regulation in such cases. However, the IP voice services described in comments to this and related proceedings generally appear to be telecommunications services marketed primarily as substitutes for POTS, with some additional features and functionalities. As was discussed above, merely bundling some vertical features with a primary voice transmission service does not convert that service into something else. Thus, consistent with the principle of regulatory parity, BSPA suggests that IP voice services that are a substitute for POTS, from the perspective of the end user, should be subject to some Title II regulation.<sup>26</sup> In recognition of the non-dominance of IP voice services, such regulation should be a “lighter touch” version of Title II, similar to the current regulation of CLECs. The record in this proceeding supports such an approach.

First, it is clear that the regulation of IP voice services should be based on the nature of that service from the perspective of the end user. The definition of “telecommunications” in Section 3 of the Communications Act emphasizes that it is an

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<sup>26</sup> Other commenters take similar approaches in establishing criteria for IP voice services that should be subject to Title II regulation. *See, e.g.*, Comments of Cox Communications, Inc. at page 18.

“offering to the public,” and thus it is the public’s participation and perspective that categorizes a transmission as telecommunications. Consistent with that approach, Chairman Powell stated in the *AT&T VOIP Declaratory Order* that “it is important to be guided by the perspective of consumers that are purchasing service, in determining how a service should be understood.”<sup>27</sup>

BSPA suggests the following criteria for categorizing the IP voice services that are substitutes for POTS, and thus should be regulated as Title II telecommunications services. Such IP voice services:

- Use NANP numbers;
- charge the subscriber for service; and
- originate or terminate calls on the PSTN.

Regardless of the level of regulation imposed on such services, the Commission should treat all providers of such services similarly. Any other approach opens the door for regulatory arbitrage and violates the principle of competitive parity in the Act and the Commission’s existing policies. The reasonable approach would thus be to classify all IP voice services that meet the above criteria as Title II telecommunications services, and then regulate such services as non-dominant, in a manner similar to the current regulation of CLECs.<sup>28</sup>

Those IP voice services that are a substitute for POTS and are regulated as Title II telecommunications would have the obligations and rights of non-dominant

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<sup>27</sup> See also, *Stevens Report*, 13 FCC Rcd 11501 at para. 89.

<sup>28</sup> Other commenters in this proceeding have advocated a similar approach. See, e.g., Comments of Comments of Frontier and Citizens Telephone Companies, at page 8.

telecommunications carriers. The obligations that must be fulfilled by such carriers would include:

- contributing to universal service support mechanisms;
- paying access charges (or other forms of intercarrier compensation that may replace access charges in the future) when using another carrier's network to originate or terminate a call on the PSTN; and
- complying with "social obligations" such as CALEA, 911 service, and service to the disabled, with such obligations modified only where it is technically infeasible to comply in the same manner as non-IP carriers.

The benefits obtained by such providers for the status of non-dominant carrier would be those of other CLECs, such as access to numbering resources, and interconnection rights.

It is critical that providers of IP voice services that substitute for POTS comply with the requirements set forth above. By definition, such providers are relying on the PSTN at least in part for the provision of their service. The Commission has long recognized that the PSTN is a national asset, and as such it must be supported equitably by all parties that use it, through two means: contribution to universal service support mechanisms, and payment of access charges. In regards to universal service support, such support is critical to maintaining the breadth and reliability of the PSTN, and federal policy is based on the principle that all carriers that use the PSTN benefit from its maintenance. Furthermore, the principle of competitive neutrality provides that regardless of the technology, if a service provider uses the PSTN to transport, originate or terminate calls, it must contribute to the federal USF. As the Commission has stated:

...competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor

disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another.<sup>29</sup>

Similarly, providers of IP voice service that use other carriers to originate or terminate calls must compensate those carriers for use of their networks. Termination of an IP-enabled call generates the same costs as termination of calls in other formats. Entities that construct and operate networks must be allowed not only to recover their costs, but to earn a fair return for their stockholders on the capital investment made in the network. The Commission has recognized these cost recovery principles in the *AT&T VOIP Declaratory Order* (at para. 15) and in the *NPRM* (at para. 61), and there is nothing in the record that provides a basis for deviating from these principles. Indeed, while BSPA's members are facilities-based competitive service providers, a wide variety of other commenters support this approach, including cable operators,<sup>30</sup> state regulators,<sup>31</sup> as well as incumbent facilities-based carriers.<sup>32</sup>

The Title II light-touch/CLEC approach described above is consistent with the requirements of the Communications Act and Commission policies of regulatory parity and technology neutrality. This approach also best promotes fair facilities-based competition.

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<sup>29</sup> *Universal Service R&O*, 12 FCC Rcd at 8801.

<sup>30</sup> *See, e.g.*, Comments of Time Warner, Inc. at page 15.

<sup>31</sup> *See, e.g.*, Comments of California at page 30.

<sup>32</sup> *See, e.g.*, Comments of Independent Telephone & Telecommunications Alliance at pages 4-6.

#### **IV. Conclusion**

The requirements of the Communications Act, Commission policies of regulatory parity and technology neutrality, and the record in this proceeding, support treating most IP-enabled voice telephony services under a Title II regulatory approach, but with a “light-touch” manner similar to the current regulation of CLECs, as described above. BSPA urges the Commission to adopt this approach.

Respectfully submitted,

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July 14, 2004

## CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the *Comments of the Broadband Service Providers Association* was sent this 14<sup>th</sup> day of July, 2004, by hand and by e-mail where indicated and via United States First Class Mail, postage prepaid, to the following:

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