

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matters of)

IP-Enabled Services)

WC Docket No. 04-36

Petition of SBC Communications Inc. for)
Forbearance from the Application of Title II)
Common Carrier Regulation to IP Platform)
Services)

WC Docket No. 04-29

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Pursuant to 47 C.F.R. §§ 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, and the Commission's Public Notice, DA 04-888, released March 29, 2004, AT&T Corp. ("AT&T") submits these reply comments on the Commission's IP-Enabled Services NPRM and SBC's Petition for Forbearance for IP Platform Service.

INTRODUCTION AND SUMMARY

There is substantial agreement on many of the central issues in these proceedings. The vast majority of commenters agree that the Commission should: (1) classify most, if not all, VoIP services as information services; (2) assert jurisdiction over VoIP services and preempt state rate and entry regulation of such services; (3) work with the industry to develop standards and protocols for E911 for VoIP; (4) require VoIP providers to comply with standards for access for persons with disabilities for the voice component; and (5) adopt fundamental reform of the universal service system in a way that requires VoIP providers to contribute to universal service on a nondiscriminatory and competitively neutral basis. As the comments confirm, the

Commission should ensure that nascent VoIP services are not subjected to unnecessary economic regulation, but that important social obligations are preserved in the IP-enabled environment.

VoIP services fall squarely within the statutory definition of information services. VoIP services, such as the AT&T CallVantage service, indisputably include the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” and therefore are “information services.”¹ Further, these services include protocol conversion functionalities that allow IP-enabled calls to be converted to TDM format and completed to ordinary telephones over the PSTN. The Commission has consistently and repeatedly held that “an end-to-end protocol conversion service that enables an end-user to send information in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information” and is, therefore, an “information service.”²

Information service classification will not, as some worry, mean that legitimate state interests are ignored or that state commissions will no longer play an important role in an IP-enabled environment. The social regulations that are the heart of the states’ concerns can be fully accommodated within the information service framework. The Commission has ample Title I authority to extend appropriate E911, disability access, and universal service requirements to VoIP – at the appropriate times and with proper recognition of the need for continued industry development work that will tailor E911 and disability access solutions to VoIP’s unique attributes and bring VoIP service providers within the universal service contribution scheme as

¹ 47 U.S.C. § 153(20).

² *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 104 (1997); *BOC Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶ 51 (1995); *Computer III Phase II Order*, 2 FCC Rcd. 3072, ¶¶ 64-71 (1987).

one component of forthcoming comprehensive reform of the existing system. And while the Commission can and should preempt state rate and entry regulation of interstate VoIP services, state commissions will, as detailed below, continue to play a vital role in other areas.

Predictably, the Bells want to be subsidized by VoIP providers and continue to ask the Commission to hobble VoIP through the application of legacy access charges. Although the Bells concede – indeed, argue vigorously – that VoIP services are information services, they advance tortured interpretations of the Commission’s rules and orders to argue that the ESP exemption does not apply to VoIP traffic. The Commission should reject these arguments and make clear that VoIP providers are exempt from all legacy access charges.

Given the clear application of the existing ESP exemption to VoIP services, the Bells’ policy arguments are irrelevant. But these policy arguments are also baseless. The business line and reciprocal compensation that the Bells earn from terminating VoIP calls is fully compensatory – indeed, 47 U.S.C. § 252(d)(3) requires that the reciprocal compensation established by the states be “just and reasonable.” Moreover, contrary to the Bells’ suggestions, continuing to exempt VoIP services from access charges would merely maintain that *status quo* pending intercarrier compensation reform.

In contrast, applying access charges to VoIP service can only serve to impede the deployment of this new technology. The enormous rents contained in existing access charges are no different than any business tax; they must ultimately be borne by consumers. In this case, the tax would come with a particularly unwelcome social cost. Bloated access charges would diminish demand for VoIP services and threaten the efficient deployment of VoIP services.

Allowing the Bells to impose access charges on VoIP services would also undermine any remaining incentives the Bells have to participate in intercarrier compensation reform. The Bells

will only have strong incentives to participate to the extent that they believe that their days of collecting access charges are numbered because of the emergence of VoIP and other IP-enabled services. If the Commission signals to the Bells that they have a reasonable expectation of imposing access charges on these services, the Bells will simply dig in their heels and seek to preserve the *status quo* as long as possible – and, indeed, some of the Bells have abandoned industry intercarrier compensation reform negotiations since the Commission’s Docket No. 02-361 decision that an AT&T IP-based service is prospectively subject to access charges.

The Bells also strive to blur and erase the important distinction between the VoIP applications layer, which is characterized by abundant competition and requires no economic regulation, and the network layer, which is characterized by monopoly and duopoly. The Bells have powerful incentives to use their control of last-mile facilities to impede VoIP competition that threatens their local telephone monopolies. The Bells’ contrived “fact report” notwithstanding, there are not alternatives to the Bells’ last-mile broadband networks sufficient to constrain the Bells from acting on their incentives to foreclose VoIP competition. In contrast, the cable companies – which do not own voice communication monopolies threatened by VoIP – have generally indicated that they will allow consumers to reach the VoIP applications of their own choosing, and have even begun offering Internet service providers access to their broadband networks.

Given the Bells’ incentives and past anticompetitive behavior, many commenters agree that certain safeguards remain necessary to protect competition at the applications level. Entities providing broadband access should not be permitted to impede access to the Internet content of another applications provider, except where such access would threaten the integrity of the

network or where required by law.³ This would include both outright blocking of access to IP addresses, websites or applications platforms used by rival service providers as well as more subtle forms of discrimination, such as giving preferential access to affiliated IP applications or degrading access to rival applications. Broadband service also should not be denied to consumers who do not purchase from the network owner telephone service, VoIP, or another IP-based application. The objective is not new structural regulations such as the type of “forced access” regulation of cable operators that the Commission rejected in the *Cable Modem Declaratory Order*. Rather, the goal should be to avoid particular anticompetitive practices that would abuse network level market power to impede applications level competition.

Finally, given the Bells’ unique incentives and abilities to harm nascent IP competition, the Commission should firmly reject SBC’s petition for forbearance and the Bells’ general pleas for across-the-board elimination of existing regulation designed to ameliorate Bell market power. Specifically, the Commission should deny the Bells’ requests that the Commission: (1) forbear from applying all Title II regulation to basic IP transmission services; (2) declare the Bells “non-dominant” with respect to all IP-based services; and (3) eliminate applicability of the *Computer Inquiries* rules to IP-based services.

I. MOST VOIP SERVICES ARE INFORMATION SERVICES AND SHOULD NOT, IN ANY EVENT, BE SUBJECT TO LEGACY ACCESS CHARGES.

Most commenters recognize that most VoIP services fall squarely within the Act’s “information services” definition.⁴ Notwithstanding the plain statutory language and controlling Commission precedent, however, a number of state commissions and consumer advocates urge

³ See, e.g., AT&T at 54; CompTel/ASCENT at 12; Enterprise Commun. Ass’n at 9; Microsoft at 22; MCI at 16; Vonage at 13.

⁴ 47 U.S.C. § 153(20).

the Commission to rule that VoIP services are telecommunications services, largely out of concerns that many social obligations like E911 and universal service will not be required if VoIP services are appropriately classified as information services.⁵ Those concerns are misplaced: as explained below, the Commission has ample authority to impose such core social obligations on VoIP providers under the information services framework.

As information services, VoIP services are – and should remain – exempt from legacy access charges under the ESP exemption. Many commenters, including one of the Bells (Qwest) and a state commission (Illinois Commerce Commission), agree that saddling VoIP services with legacy access charges would serve no purpose and would undercut VoIP development. Verizon, SBC and BellSouth agree that VoIP services are information services and that unnecessary regulation will impede VoIP deployment, but, in a naked effort to expand their regulatory entitlements and to maximize their access charge windfalls, insist that the ESP exemption does not apply to VoIP calls that terminate on the PSTN. Decades of Commission precedent (and sound policy) foreclose these Bells' arguments.

A. Most VoIP Services Are Information Services.

Most VoIP services, including AT&T CallVantage service, are information services.⁶ That conclusion is compelled by the plain statutory language, because these VoIP services indisputably include the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁷

⁵ See, e.g., NARUC at 2; Minnesota at 3-4; Vermont at 22-28.

⁶ See, e.g., BellSouth at 27 (conceding that AT&T CallVantage service is an information service); see also SBC at 33-38; Qwest at 14-24; BellSouth at 26-29; VON Coalition at 19-21; Alcatel at 14; 8x8 at 16-19; Global Crossing at 5-8; Net2Phone at 3-12; Pulver at 26-28; Covad at 15-17; Cablevision at 8-10; Vonage at 25-28.

⁷ 47 U.S.C. § 153(20).

Here, it is useful to begin with the consensus view that the Commission properly classified pulver.com's computer-to-computer Free World Dialup ("FWD") service as an information service.⁸ For purposes of classification, services like AT&T's CallVantage service and similar broadband-based phone-to-phone VOIP services share many of the characteristics that led the Commission to classify the FWD service as an information service. Like FWD, AT&T CallVantage service is a "bring your own broadband" service; the end-user must first obtain broadband service *elsewhere*, from a local carrier (either DSL or cable modem). Once the end-user has a broadband connection, the end-user uses specialized CPE to communicate with AT&T much as she would with any website. AT&T allows the end-user to interact with a wealth of stored information about the end-user's calls, and also allows the end-user to manipulate that information and structure calls in various ways. AT&T facilitates the routing and completion of the end-user's calls as part of an integrated service that is complementary to and may be used simultaneously with other end-user computer information functions, such as sending e-mails, sharing documents, and other functions. As VoIP continues to develop, the voice applications will be increasingly integrated with these and other features. Like FWD, AT&T CallVantage service facilitates "peer-to-peer" communications between end-users that have established broadband connections to the Internet. And the fact that the service "happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, telecommunications service."⁹

⁸ See *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, ¶¶ 16-18 (Feb. 19, 2004) ("*Pulver Order*").

⁹ *Pulver Order* ¶ 12.

Moreover, the end-user interacts with stored data and other computing functions, which allow the end-user to use specialized CPE (and a computer) to manipulate data and the nature of calls and to perform other information service functions. Like FWD, AT&T CallVantage service therefore allows end-users to “acquire,” “store,” “utilize,” and “process” information. Specifically, the service offers the capability to process information about IP addresses for the completion of calls, store end-user information, and provide access to voicemail – all of which the Commission expressly found cause a VoIP service to constitute an information service.¹⁰

Of course, AT&T CallVantage service also provides information service functionalities that FWD does not. In addition to facilitating communications with others connected to the Internet via a broadband connection, AT&T’s service includes protocol conversion that allows IP-enabled calls to be converted to TDM format and completed to ordinary telephones over the PSTN. The Commission has consistently and repeatedly held that “an end-to-end protocol conversion service that enables an end-user to send information in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information.”¹¹

Contrary to the suggestion of some commenters,¹² VoIP calls completed on the PSTN do involve a net protocol conversion. The Commission has consistently held that whether a net protocol change has occurred is measured “between the point where a customer’s data enters the

¹⁰ See *id.* ¶ 11.

¹¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 104; see also *BOC Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶ 51 (1995); *Computer III Phase II Order*, 2 FCC Rcd. 3072, ¶¶ 64-71 (1987).

¹² See, e.g., Virginia at 5; New York Dept. Pub. Svc. at 4.

public switched network and the point where it leaves the network” – *i.e.*, the demarcation points which by definition exclude CPE.¹³

Although a number of parties argue that VoIP services are telecommunications services, all of these parties simply ignore these information service functions and seek to isolate the voice application embedded within these integrated services.¹⁴ Indeed, many of these parties effectively invent their own tests for whether a service is a telecommunications service, all of which reduce to extra-statutory criteria that would classify a VoIP service as a telecommunications service if it offers a voice capability that is a substitute for POTS, uses NANP numbers, and is interconnected with the PSTN.¹⁵

But the statutory definitions do not turn on whether a service is a substitute for POTS, or uses NANP numbers, or is connected to the PSTN. Rather, the question is simply whether the service offers the capability of “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁶ AT&T CallVantage and other VoIP services unquestionably do.¹⁷

¹³ *Independent Data Communications Manufacturers Association, Inc.*, 10 FCC Rcd. 13717, ¶ 10 (1995); 47 C.F.R. §§ 68.3, 69.2(cc); Vonage at 25-26; *see also Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, 95 F.C.C.2d 584, 590 (1983) (net protocol change measured by “outputs of the network”) (emphasis added). Nor is the protocol conversion in a VoIP call analogous to protocol conversions that may take place in a wireless call, as some commenters suggest. *See, e.g.*, Sprint at 15. Wireless protocol conversions fall within the long-recognized internetworking exception. *See Non-Accounting Safeguards Order* ¶ 106. By contrast, the protocol conversion in a VoIP call results in a *qualitative* change, because the conversion to IP allows a call to be converted into a mere voice application within a larger set of integrated enhanced functionalities offered by the VoIP provider. As Qwest notes, the Commission has long held that code and protocol conversions that “allow[] disparate terminals to communicate with one another” are “more appropriately associated with the provision of enhanced services.” *See* Qwest at 19-20 & n.72 (quoting *Computer II* ¶ 99) (emphasis added).

¹⁴ *See, e.g.*, Sprint at 7-19; Time Warner Telecom at 16-36; NASUCA at 9-22; California at 18-29; New York Dept. Pub. Svc. at 4-6; Ohio at 7-17.

¹⁵ *See, e.g.*, Ohio at 9-10; Frontier at 2.

¹⁶ 47 U.S.C. § 153(20).

¹⁷ *See, e.g., Pulver Order* ¶ 12 (“to find that [FWD is a telecommunications service] would . . . ignore the
(continued . . .)

Even aside from the dispositive statutory language, none of these considerations is relevant under Commission precedent. The mere fact that a service is a substitute for telecommunications service is clearly irrelevant; the Commission found Pulver's FWD to be an information service even though it "happen[ed] to facilitate a direct disintermediated voice communication" that was clearly a substitute for traditional telephone service.¹⁸ Nor is a connection to the PSTN determinative; most information services are connected to and provided over the PSTN, which is why it was necessary to adopt an enhanced service exemption from access charges. And countless information service providers make use of NANP numbers, which allow the public to dial a traditional telephone number to access their services.¹⁹

A few commenters direct the Commission to its discussion of phone-to-phone VoIP services in the *Stevens Report*, but the referenced passages only confirm that most VoIP services must be classified as information services. In the *Stevens Report*, the Commission suggested that a phone-to-phone Internet-based service might be a telecommunications services if the service provider: (1) holds itself out as providing voice telephony or facsimile transmission service; (2) does not require specialized CPE; (3) permits calls using NANP numbers; and (4) transmits customer information without change in form or content. Most VoIP services (including AT&T CallVantage service) do not satisfy the second or fourth criteria, because they require specialized CPE and offer the capability to change the form and content of the information supplied.

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[information service] capabilities described above that FWD makes available to its members").

¹⁸ *Pulver Order* ¶ 12; see also *Computer II*, 77 F.C.C.2d 384, ¶ 130 (1980) ("some enhanced services are not dramatically dissimilar from basic services").

¹⁹ E.g., See *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 20 (1987) ("*Talking Yellow Pages Order*") (service where the public dials a local NANP number and hears advertisements is an information service); see also *Computer II*, 77 F.C.C.2d 384, ¶ 109 ("there are literally thousands of unregulated computer service vendors offering competing services connected to the interstate telecommunications network").

Both the Act and Commission precedent make clear that a service can be classified a telecommunications service *only* if it provides nothing more than pure transmission of the end-user's information; if the service includes *any* enhancement, it is an information service. Today's VoIP services provide much more than pure transmission. Indeed, many VoIP end-users have obtained telecommunications separately elsewhere, and their interaction with the VoIP provider includes generating, exchanging and manipulating a wide variety of stored information. From the end-user's perspective, voice is merely one application that is seamlessly integrated into a much broader array of enhanced functionalities. Accordingly, VoIP services are classic enhanced, or information, services.²⁰

Even if true, assertions that consumers use VoIP services "primarily" for basic voice communications and often do not make use of the enhanced functionalities of these services could not support a ruling that VoIP services are telecommunications services. It is well-settled that a service is an information service as long as it *offers* the capabilities to acquire, store, and manipulate information, even if an end-user does not always (or ever) use those capabilities. For example, the Commission has held that the various capabilities inherent in Internet access service are not to be treated as separate services; rather, Internet access service is an information service regardless of whether the end-user is actually using the information service capabilities.²¹ As

²⁰ See, e.g., *Computer II*, 77 F.C.C.2d 384, ¶ 97 (1980) ("*Computer II*") ("[a]n enhanced service is any offering over the telecommunications network that is more than a basic transmission service"). As a number of commenters note, this integrated set of services traverse the network in an undifferentiated bit stream and even the network cannot distinguish whether particular packets contain voice communication or other functionalities interrelated with that voice communication. See, e.g., Qwest at 10-11, 24; VON Coalition at 20; SBC at 37.

²¹ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶¶ 78-79 (1998) ("*Stevens Report*") (Internet access is an information service even though subscriber "may not exploit [the information service features] of the service"). Similarly, in the *Cable Modem Declaratory Order*, the Commission held that cable modem service is an information service solely on the basis that it merely offers its subscribers certain capabilities, such as functions that allow its subscribers to create their

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BellSouth notes (at 28), “the inclusion of enhanced functionalities as an integral part of [a VoIP] service means that the entire service is an information service.”²²

In short, most VoIP services are plainly information services and claims to the contrary by state commissions and consumer advocates are not legally sustainable. Moreover, the policy rationale behind these claims – that appropriate social regulation is possible only with a telecommunications service classification – is wrong. As a wide spectrum of commenters agree, and as AT&T explains in greater detail below, the Commission can fashion an appropriate regulatory framework that fully addresses E911, disability access and universal service concerns under an information services classification. *See infra*, Section II.A.

B. VoIP Services Should Not Be Saddled With Legacy Access Charges.

A wide variety of commenters, including new entrant VoIP providers, ILECs and state commissions, recognize that the imposition of legacy access charges on VoIP services would radically increase the cost of providing VoIP and would therefore create a serious drag on the development of these important services.²³ The *status quo* is that VoIP providers obtain PRIs or

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own websites. *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 38 & n.153 (2002) (“*Cable Modem Declaratory Order*”), *aff’d in relevant part*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). *See also id.* ¶ 35 (statutory definition of information service “rests on the function that is made available”). In any given session, a cable modem subscriber may not use these capabilities at all, but the fact that the capabilities are *offered* to the subscriber as part of the service makes it an information service.

²² *See also* Qwest at 22-23; MCI at 22-23.

²³ For two decades, the Commission has recognized that the “access charge system contains non-cost-based rates and inefficient rate structures,” and “[m]aintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry.” *Access Charge Reform, et al.*, First Report and Order, 12 FCC Rcd. 15982, ¶¶ 344-45 (1997) (“*Access Reform Order*”). *See also id.* ¶ 344 (“[w]e think it possible that had access charges applied to ISPs over the last 14 years, the pace of development of the Internet and other services would not have been so rapid”); *Pulver Order* ¶ 19 (permitting Pulver to offer its IP-based service free of any access charges “will facilitate the further

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other local lines and pay cost-based (and fully compensatory) reciprocal compensation to complete VoIP calls on the PSTN. With fundamental intercarrier compensation reform pending, it is especially important that the Commission not change course and suddenly impose outdated legacy access charges on VoIP services.

The AT&T CallVantage service and other VoIP services are subject to the “ESP exemption” from access charges under existing law. In the face of Bell claims to the contrary, however, the Commission should expressly clarify in this proceeding that legacy access charges should not be imposed on *any* VoIP services. At a minimum, the Commission should reject the Bells’ baseless attempts to argue that the ESP exemption does not apply to VoIP services that are information services.

And even aside from legal and policy barriers, subjecting VoIP services to access charges would be enormously impractical. As Level 3 explains (at 4-6) – and as the Bells agree – it is often impossible for a VoIP provider to determine the endpoints of any given VoIP call, given the nomadic nature of VoIP CPE. Accordingly, if the Commission were to determine that access charges should apply to some VoIP calls, it would be impossible to tell whether a particular call should be subject to intrastate or interstate access charges – or, indeed, whether it was, in fact, local and properly subject to no access charges at all. Any requirement that VoIP providers pay access charges would force VoIP providers to establish wasteful alternative interconnection arrangements, Level 3 at 5-6, even as the Commission is poised to adopt fundamental intercarrier compensation reform that should phase out access charges altogether.²⁴

(. . . continued)

development of [that service] and Internet applications like it and these offerings, in turn, will encourage more consumers to demand broadband service”).

²⁴ For these reasons, the Commission should expeditiously grant Level 3’s pending petition for
(continued . . .)

Because imposing access charges would have such a negative impact, even some ILECs and state commissions recognize that the Commission should exempt VoIP services from these legacy regulations. Qwest, for example, states that “pending adoption of new regulations in its separate docket, [VoIP providers] may, under the ‘ESP exemption’ purchase local service from an ISP POP within the local exchange, regardless of the point at which the subscriber originated the communication, and are not subject to access charges.”²⁵ The Illinois Commerce Commission recommends that “all traffic utilizing VoIP based applications that traverse or utilize the PSTN be subject to – at *most* – cost-based intercarrier compensation.”²⁶

The remaining Bells (SBC, Verizon, and BellSouth), however, argue at length that, although VoIP services are information services, the ESP exemption does *not* apply and that VoIP providers should pay access charges on *every* VoIP call completed on the PSTN.²⁷ These self-serving arguments to expand historical regulatory entitlements fundamentally mischaracterize the ESP exemption. As AT&T has explained, the Commission’s rules classify ESPs as “end users” for purposes of the access charge rules.²⁸ “End users” are entitled to purchase local business lines (which includes payment of end-user interstate access charges, such as the Subscriber Line Charge).²⁹ Accordingly, ESPs are not subject to a “baseline requirement

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forbearance, which would clarify that IP-based traffic originated or terminated on the PSTN is exempt from access charges. See *Level 3 Communications, LLC, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5*, WC Docket No. 03-266, Comments of AT&T Corp. (filed March 1, 2004).

²⁵ Qwest at 41-42 (Commission should also “confirm that LECs are required, at the request of the IP provider, to originate and terminate IP voice communications via local services such as ISDN-PRI”).

²⁶ Illinois at 9-13.

²⁷ See SBC at 68-81; Verizon at 43-47; BellSouth at 43-48.

²⁸ 47 C.F.R. § 69.2(m).

²⁹ 47 C.F.R. § 69.5(a).

to pay [carrier] access charges,” as the Bells claim,³⁰ rather, the plain terms of the Commission’s current rules make clear that ESPs are end-users and thus always have the option of purchasing local retail services just like other end users, whenever such services can be practically used to provide the necessary access. The Commission has never recognized any other limitations on the ESP exemption.³¹

The Bells manufacture such a limitation by twisting various isolated statements in Commission orders. Their principal argument is that the ESP exemption does not apply to PSTN connections if the PSTN user is not the ESP’s customer.³² That is plainly wrong. In fact, some traditional ESP services used business lines to connect to end users that were not their customers. An ESP’s customer is often a third party – an advertiser or some other supplier of information (such as sports scores, weather, etc.). Such an ESP establishes local links so that the general public – who are not the ESP’s customers – can connect to the ESP’s service and receive information from the ESP’s customer (*e.g.*, the advertiser). The end-user callers pay nothing and have no commercial relationship with the ESP. It would be frivolous to suggest that these ESPs cannot assert the ESP exemption – and yet that is exactly what the Bells are suggesting.³³

The Bells’ other major claim – that the ESP exemption applies or should apply only where the PSTN is being used “differently” from traditional voice services – is equally

³⁰ SBC at 68.

³¹ See also ITAA at 13-15.

³² See SBC at 68-71; Verizon at 46-47; see also BellSouth at 46 n.150.

³³ See, *e.g.*, *Access Reform Order*, 12 FCC Rcd. 15982, ¶ 341 (1997) (“[i]n [1983], the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate *and terminate* interstate calls, ISPs should not be required to pay interstate access charges”) (emphasis added); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd. 4305, ¶ 2 (1987) (Commission had “initially intended to impose interstate access charges on enhanced service providers for the use of local exchange facilities to originate *and terminate* their interstate offerings”) (emphasis added)).

incorrect.³⁴ It has always been the case that IXC's and ESP's use the same network facilities to receive essentially the same service. Indeed, as the Bells themselves emphasize, ESP's are purchasing an access service no less than the IXC's are, and for that reason were originally required to pay carrier access charges for their connections.³⁵ Therefore, although the Bells make much of the Commission's statement in the *Notice* (§ 33) that "the cost of the PSTN should be borne equitably among those that use it in similar ways," the fact that different providers pay radically different rates for the same access service is an unavoidable – and decidedly pro-competitive – consequence of the ESP exemption itself.³⁶ That discrepancy cannot be eliminated until the Commission adopts comprehensive intercarrier compensation reform. *Pending* that reform, however, the Commission should *not* impose outdated, above-cost access charges on any VoIP services out of some misguided notion that such a regulatory requirement would somehow "rationalize" the access charge system. Rather, forcing VoIP providers to pay access charges would serve only to expand a bankrupt regulatory framework and impose substantial costs on VoIP that would needlessly retard the growth of these services.

The Commission must recognize that the Bells are trying to have it both ways. When the question is whether they should be regulated, they emphasize how radically different VoIP services are from traditional voice services.³⁷ But when the question is whether the ESP exemption applies to these conceded information services, the Bells suddenly claim that all that is involved is a traditional basic voice call. VoIP services are either information services or they

³⁴ See SBC at 72-73; Verizon at 46-47; BellSouth at 46-47.

³⁵ See, e.g., SBC at 69-70; Verizon at 45-46.

³⁶ This dichotomy has been acknowledged and upheld by the Eighth Circuit. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (upholding exemption "even where two sets of carriers seek to use the LEC network and facilities that might be 'technologically identical'"). See also *Illinois* at 12 ("these are issues implicating the entire intercarrier compensation system").

are not, and as the Bells concede, most VoIP services plainly are information services. Under the Commission's current rules, these VoIP services are therefore exempt from access charges.³⁸ Given the clear application of the existing ESP exemption to VoIP information services, the Bells' policy arguments are simply irrelevant. These policy arguments are baseless.

In particular, there is no basis for the Bells' half-hearted claims that reciprocal compensation would not be compensatory.³⁹ The rates for reciprocal compensation established by the states are "just and reasonable" pursuant to 47 U.S.C. § 252(d)(3) and fully compensatory; the Bells cannot seriously claim otherwise. Moreover, contrary to the Bells' suggestions, the Commission has always relied on the *combination* of access charges for IXCs and local charges for ESPs (not to mention myriad other Bell revenues) to cover the costs of the Bells' networks; continuing to exempt VoIP services from access charges would merely maintain that *status quo* pending intercarrier compensation reform.

In this regard, SBC's claim that access charges are necessary to avoid "disruption" pending intercarrier compensation reform has things exactly backwards.⁴⁰ The *status quo* is that VoIP providers rely today on the ESP exemption and do not pay access charges. Imposing

(... continued)

³⁷ See, e.g., SBC at 35, 37 (VoIP may "look like" voice service, but in fact is something very different).

³⁸ In that regard, SBC grossly misstates an argument AT&T made in a recent *ex parte* letter. See SBC at 71 (quoting Letter from David Lawson to Marlene Dortch, CC Docket No. 02-361, April 13, 2004). As the quoted passage indicates, AT&T was merely stating that if the Commission retreated from its prior statements that all phone-to-phone VoIP services are exempt from access charges, then VoIP providers would be able to take advantage of the ESP exemption only insofar as they are providing enhanced services. Here, however, SBC itself is at pains to emphasize that VoIP services *are* information services even if calls originate or terminate on the PSTN. SBC at 22. Because a VoIP provider is providing an enhanced service, it qualifies for the ESP exemption.

³⁹ See SBC at 74, 76; Verizon at 43-44.

⁴⁰ See SBC at 74.

access for the first time on VoIP would change the *status quo* and profoundly disrupt the development of *VoIP*, not the Bells' operations.

Equally important, permitting ILECs to assess access charges on VoIP providers would eliminate any incentive the Bells have to work toward comprehensive intercarrier compensation reform.⁴¹ As a matter of basic economics, any extension of access charge windfalls has the direct effect of decreasing the ILECs' incentives to agree to a rational intercarrier compensation regime. In contrast, it is only to the extent that the ILECs believe that VoIP services will ultimately eliminate access rents that they have any incentive to pursue intercarrier compensation reform.

The fact that several Bells have pulled out of the industry intercarrier compensation reform negotiations in the months since the Commission issued its declaratory ruling in Docket No. 02-361 that an AT&T VoIP service was prospectively subject to access charges serves only to underscore the Bells' incentives. For these reasons, and in order to ensure that the efficient development of IP-based services is not undermined or crippled by bloated access charges, the Commission should declare in this proceeding that all IP-based services, regardless of regulatory classification, will qualify for the ESP exemption pending final intercarrier compensation reform. At a minimum, the Commission should not weaken even further the Bells' incentives to participate in the intercarrier compensation reform process, and the Commission should promptly rule that all VoIP services that are information services are exempt from access charges.⁴²

⁴¹ Valor at 7-8.

⁴² SBC is correct in one respect: should the Commission determine that any VoIP service should be subject to legacy access charges, it should make clear that, since VoIP services are jurisdictionally interstate, under no circumstances would ILECs be permitted to assess *intrastate* access charges on VoIP services. See SBC at 77.

II. THE COMMISSION SHOULD APPLY ONLY LIGHT REGULATION TO THE VOIP APPLICATIONS LAYER AND SHOULD PREEMPT STATE RATE AND ENTRY REGULATION.

The vast majority of commenters recognize that the VoIP *applications* layer – retail services provided to end users – is vibrantly competitive and requires no rate or entry regulation.⁴³ Most commenters agree, however, that the Commission can and should impose certain minimal social obligations on VoIP service providers and device manufacturers. In particular, the commenters overwhelmingly agree that the Commission should: (1) work with the industry to develop comprehensive solutions to providing full E911 services over VoIP services; (2) extend its rules concerning access for persons with disabilities to the voice component of VoIP services and devices; and (3) include VoIP providers in the contribution base of the universal service system, as part of more fundamental reform.

The Commission has ample authority to extend E911, disability access, and universal service requirements to VoIP, even if the Commission correctly classifies such services as information services. Many commenters point out that the Commission's ancillary Title I jurisdiction is limited.⁴⁴ As explained below, however, with respect to E911, disability access, and universal service, there are specific statutory provisions in Title II or other sound bases for the Commission to utilize its ancillary jurisdiction to impose appropriate regulation.

Most commenters also recognize that the Commission can and should exercise its interstate jurisdiction over VoIP services and can and should preempt any state entry or rate regulation of such services. The fact that the Commission may exercise its jurisdiction over VoIP services that unquestionably include interstate communications does *not* mean, however,

⁴³ See, e.g., Covad at 1-2; Cablevision at 7-8; 8x8 at 31.

⁴⁴ See, e.g., Microsoft at 9-14; MCI at 24-35; Sprint at 27-41; *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

that the Commission has sweeping authority to preempt *all* state regulation of VoIP services. Preemption is appropriate where the Commission can demonstrate that state regulation would negate a valid federal policy (as would state rate or entry regulation of VoIP services). State commissions will continue to exercise an important oversight role and, as detailed below, the proffered legal bases for blanket preemption of all state VoIP regulation are without merit.

A. The Commission Has Ample Authority To Impose Appropriate Social Regulations on VoIP Service Providers And Device Manufacturers.

1. E911.

There is an overwhelming consensus that the Commission should work with the industry to find a way for E911 capabilities to be offered in conjunction with VoIP services.⁴⁵ At the same time, virtually all commenters recognize that full E911 capabilities for all flavors of VoIP services are not feasible today, and that the Commission has an important role to play in ensuring that the industry and standards-setting bodies develop workable solutions and nationally uniform standards. Once solutions have been developed, the Commission can and should require all VoIP providers to implement and offer such E911 capabilities.

The Commission has previously found that it has broad authority to adopt E911 requirements for communications services under Title I, under both sections 1 and 2 of the Act (47 U.S.C. §§ 151-52).⁴⁶ In addition, the Wireless Communications and Public Safety Act of 1999 expressly authorizes the Commission to designate 911 as the emergency number for “wireline and wireless telephone services.”⁴⁷ The Commission has held that these statutes

⁴⁵ *E.g.*, SBC at 94-104; Avaya at 17; Pac-West Telecomm at 25-26; BellSouth at 50; MCI at 37-38; Verizon at 51-53; Vonage at 43; Qwest at 42-45; 8x8 at 20-23; Level 3 at 36-38.

⁴⁶ *See, e.g., Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 18676, ¶ 16 (1996).

⁴⁷ 47 U.S.C. § 251(e)(3).

authorize the Commission to “apply 911 requirements to wireline services, commercial mobile services, and those services that offer *substantially similar* wireline and wireless alternatives.”⁴⁸ The Commission can rely on this authority to apply E911 requirements to VoIP services.⁴⁹

As many commenters note, the industry has been working voluntarily with NENA and industry standards-setting bodies to develop E911 solutions for VoIP, and much progress has already been made.⁵⁰ As NENA explains, the agreements that have already been reached between NENA and the industry “reflect[] NENA’s current view that industry and public safety cooperative consensus is the best initial means of determining how E911 requirements should be identified.”⁵¹ Once the industry develops solutions, E911 over VoIP will likely offer many capabilities that would be impossible in traditional telephony networks – such as two-way video capabilities that would allow a caller to send video to the PSAP and that would allow the PSAP to send video instructions to a caller. *See, e.g.*, Microsoft at 21; SBC at 103-04; Level 3 at 38. But the industry must have the time and freedom to develop these capabilities in the most efficient and robust forms. The Commission should continue to work with the industry to ensure the development of national standards and to “avoid the potential proliferation of multiple incompatible standards, which would substantially increase the cost, complexity, and timeframe of IP-enabled 911 deployment.”⁵²

⁴⁸ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 25340, ¶ 16 (2003) (emphasis added) (“*E911 Scope Order*”).

⁴⁹ *See, e.g.*, SBC at 95-97; Verizon at 54-55 (“in determining whether a service should be subject to 911 regulation, the Commission does not look to whether the a service is classified under Title I or Title II”).

⁵⁰ *See, e.g.*, SBC at 101 & n.240; Verizon at 53; Level 3 at 37; MCI at 37; Vonage at 42-44.

⁵¹ NENA at 2.

⁵² SBC at 101; *see also* NENA at 4 (“we are not asking, at this time, for a comparable regulatory mandate to plan early for 911 access, as long as sufficient progress can be made voluntarily”). *Accord* USTA at 41; MCI at 37-39; Missouri at 10; Motorola at 14-15; Vonage at 42-45. The Commission should reject
(continued . . .)

In this regard, it must be recognized that E911 solutions that take full advantage of IP-enabled networks' capabilities will require substantial upgrades to the nation's PSAPs.⁵³ As Vonage notes, "the existing 911/E911 network is extremely antiquated," and VoIP providers "are constrained . . . due to the limitation of the infrastructure itself."⁵⁴ VoIP providers can upgrade their own services to provide a wealth of capabilities, but consumers will not be able to take advantage of such capabilities if PSAPs' dependence on non-IP-enabled equipment prevents them from using the information or capabilities. Thus, as BellSouth notes (at 52), funding for the PSAPs is likely to become an issue, and the Commission must work with the industry (and Congress) to ensure that IP-enabled E911 capabilities can be fully realized.

2. Disability Access.

Because VoIP will, over time, become an important (and perhaps the dominant) medium of communications, the Commission should assert ancillary jurisdiction to extend the rules it has promulgated under § 255 to VoIP manufacturers and providers. Otherwise, "[a]s the telecommunications industry shifts toward VoIP and away from traditional switched access phone service, those who cannot gain access will be relegated to a lower class and will not enjoy the same benefits and advances as those who can gain access."⁵⁵

(. . . continued)

Arizona's suggestion (at 13-15) that VoIP providers should not be permitted to offer service until they can offer full E911 capabilities.

⁵³ See, e.g., BellSouth at 52 ("in the long run, in order for PSAPs to reap the new capabilities that VoIP can provide, they will need to retrofit their CPE to be IP-capable"); see also SBC at 104.

⁵⁴ See Vonage at 39 (citing Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services*, WT Docket No. 02-46, Public Notice, at ii (October 16, 2002)); Level 3 at 38 n.110.

⁵⁵ See, e.g., NASUCA at 66. See also SBC at 104-12; BellSouth at 53; Comcast at 8-9, 15; USTA at 38-39; Avaya at 13-17; NASUCA at 66; New York Atty. General at 7-8; Alcatel at 19; APT at 4-5; AFB at 4-5; Missouri at 11.

The Commission unquestionably has authority to impose disability access obligations on manufacturers of VoIP equipment, because they would qualify as manufacturers of “telecommunications equipment or customer premises equipment” within the meaning of 47 U.S.C. § 255(b), even to the extent they are manufacturing IP-enabled equipment.⁵⁶ The Commission also has authority to extend its existing disability access rules to the voice component of VoIP services under its ancillary Title I authority. Section 151 empowers the Commission to ensure access to communications “to *all* the people of the United States.”⁵⁷ The Commission has previously imposed such obligations on information services.⁵⁸ The Commission could similarly conclude here that persons with disabilities would not have effective access to wireline broadband services without access to the voice component of VoIP services.⁵⁹

The Commission should not adopt specific mandates, however.⁶⁰ Extending the existing rules to VoIP will require manufacturers and service providers constantly to assess at any “natural opportunity” whether new measures are readily achievable and can be implemented. Given the freedom to design solutions without specific government mandates, it is widely anticipated that the industry will develop a broad range of accessibility measures that will be far superior to existing measures in the context of traditional telephony. This is especially true of VoIP: because the intelligence in an IP-enabled network has been pushed to the edges of the network, there are exponentially greater opportunities for multiple vendors to design products

⁵⁶ See, e.g., *BellSouth* at 53; *SBC* at 107.

⁵⁷ *Computer & Communications Assn. v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

⁵⁸ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd. 6417, ¶¶ 43-70 (1999) (“*Disability Access Order*”).

⁵⁹ See, e.g., *USTA* at 38 (“[t]he Commission has the authority, and has exercised that authority in the past,” and the “public interest requires no less”).

⁶⁰ See, e.g., *PointOne* at 30-31.

that promise a wealth of innovative applications. The Commission can monitor these developments over time and mandate more specific measures if that becomes necessary.

3. Universal Service.

The comments confirm that VOIP providers should be included in the contribution base as a part of the desperately needed fundamental reform of the universal service contribution system.⁶¹ In the *Contribution Reform Proceeding*, AT&T offered a comprehensive proposal to replace the current revenues-based system with a new system in which contributions are based on telephone numbers and special access capacity, which AT&T again outlined in its initial comments in this proceeding.⁶² Because VoIP providers generally assign telephone numbers to customers, the numbers/capacity-based system proposed by AT&T would include VoIP providers.

The Commission should not, however, attempt to add VoIP services to its existing universal service mechanism in a piecemeal fashion. Doing so would place an undue burden on VoIP providers that would not be borne by other providers, and would impede further investment, deployment and adoption of VoIP services. Rather, the Commission should adopt the comprehensive plan proposed by AT&T for an appropriate, fair and comprehensive universal service system that would include VoIP providers in the contribution base.

Section 254(d) permits the Commission to include non-facilities-based VoIP providers in the contribution base, even if they are “information service” providers. That section permits the Commission to extend the contribution base to “providers of interstate telecommunications.”

⁶¹ See, e.g., BellSouth at 48-49; SBC at 113-16; Qwest at 47; Verizon at 56-62.

⁶² AT&T at 37-40.

Information services, by definition, are provided “via telecommunications.”⁶³ Accordingly, all information services have a telecommunications component, and thus all information service providers are “providers of interstate telecommunications” subject to the Commission’s permissive authority within the meaning of the third sentence of § 254(d).⁶⁴

4. Numbering.

The Commission should not amend its numbering rules to permit VoIP providers that are not certified telecommunications carriers to obtain numbers directly from the North American Numbering Plan Administrator (“NANPA”). *See* SBC at 82-89. Permitting VoIP providers to obtain numbers directly would necessarily require the Commission to fashion an alternative set of interconnection and compensation rules for such providers, which raises a host of complicated issues that are beyond the proper scope of this proceeding. There is no immediate need for the Commission to amend its rules; VoIP providers like Vonage have no trouble today obtaining numbers by partnering with LECs connected to the PSTN, and limiting the availability of numbers to certified telecommunications carriers continues to play an important role in braking number exhaust.

5. CALEA.

Application of the Communications Assistance for Law Enforcement Act (“CALEA”) to VoIP services is beyond the scope of this proceeding and currently is being addressed in a

⁶³ 47 U.S.C. § 153(20).

⁶⁴ Even if that were not true, the Commission could fill gaps in its § 254 authority by relying on its pre-1996 Act authority to create universal service systems under Title I. Non-facilities-based providers of VoIP services benefit from the ubiquity of the telecommunications network and therefore can equitably be required to pay into the fund to support the universal availability of that network. The D.C. Circuit upheld the Commission’s historical, pre-1996 universal service program under § 1 of the Act, *NARUC v. FCC*, 737 F.2d 1095, 1108 n.6 (D.C. Cir. 1984), and the Commission could use that authority here to include additional providers in the contribution base of its existing universal service program created under § 254.

separate Commission proceeding. A handful of parties nonetheless have addressed CALEA in this proceeding.⁶⁵ As the record in the CALEA proceeding makes clear, the issue is not whether VoIP providers will cooperate with law enforcement, but the extent to which additional Commission regulation of VoIP services pursuant to CALEA is authorized by Congress and necessary to serve that purpose.⁶⁶ Carrier obligations to cooperate with law enforcement flow primarily from separate federal mandates authorizing law enforcement officials “to conduct wiretaps,” which “extend[] to voice, data, fax, E-mail, and any other form of electronic communication.”⁶⁷ These federal mandates include Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Foreign Intelligence Surveillance Act of 1978, the Electronic Communications Privacy Act of 1986, and the USA Patriot Act of 2001.⁶⁸ Moreover, the Supreme Court has held that federal courts are authorized to compel, at the law enforcement’s request, “any assistance necessary to accomplish an electronic interception.”⁶⁹

Recognizing that CALEA obligations cannot, and should not, extend to VoIP,⁷⁰ therefore, does not mean that law enforcement could not obtain all necessary wiretap and other cooperation from VoIP providers; it means only that “these services and systems do not have to be designed

⁶⁵ See, e.g., DOJ at 2-17; DHLS at 15; Net2Phone at 23-24; Qwest at 48-50; Verizon at 48-53.

⁶⁶ See, e.g., Net2Phone at 23-24; Qwest at 48-50; Verizon at 48-53.

⁶⁷ H.R. Rep. 103-827(I) (Oct. 4, 1994), reprinted at 1994, U.S.C.C.A.N. 3489 (“*House Report*”) at 17,3497; see also 18 U.S.C. § 2511(2)(a)(ii) (authorizing providers of electronic communications services to conduct surveillance pursuant to lawful U.S. process).

⁶⁸ 18 U.S.C. §§ 2510 *et seq.*; 50 U.S.C. §§ 1801 *et seq.*; 18 U.S.C. §§ 2701 *et seq.*; Pub. L. 107-56, 115 Stat. 272 (2001). Congress clearly stated that the Patriot Act was not intended to amend CALEA or “impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance.” *Id.*, 115 Stat. 292, § 222.

⁶⁹ *United States v. New York Telephone*, 434 U.S. 159, 177 (1977).

⁷⁰ VoIP providers are providing “information services,” which are expressly exempt from CALEA. *House Report*, at 18,3498.

so as to comply with [CALEA's] capability requirements.”⁷¹ Thus, the issue here is not whether VoIP providers are required to, and will continue to, provide substantial assistance to law enforcement agencies, but whether the Commission should attempt to expand CALEA coverage to add additional requirements to VoIP offerings. The answer is no, at least not at this time.⁷² Congress expressly recognized that CALEA must be implemented in a manner that “avoid[s] impeding the development of new communications services and technologies.”⁷³ VoIP is still a new technology, and the Commission can, and should, avoid imposing unnecessary requirements on VoIP providers before such providers have had the opportunity to develop, on their own, appropriate systems for aiding law enforcement, recognizing in the meantime that law enforcement will continue to obtain all necessary wiretap and other cooperation from VoIP providers.

6. “Slamming,” CPNI and Other Consumer Protection Regulation.

Contrary to the suggestion of a few commenters,⁷⁴ the Commission should refrain from implementing additional unnecessary regulation on VoIP providers.⁷⁵ For example, the threat of “slamming” does not apply to VoIP services because a VoIP end-user’s service is tied to her telephone adapter. A would-be slammer would literally have to install a telephone adapter in an end-user’s residence. VoIP gives the end user absolute control over her service, and this control effectively ends the practice of slamming. Similarly, the Commission’s “truth-in-billing” rules are unnecessary for VoIP providers because VoIP providers are already subject to a host of

⁷¹ *House Report*, at 18,3498.

⁷² *See, e.g.*, Net2Phone at 23-24; Qwest at 48-50; Verizon at 48-53.

⁷³ *House Report* at 13,3493.

⁷⁴ *See, e.g.*, Time Warner at 31-36; USTA at 42.

⁷⁵ *See, e.g.* AT&T at 40-42; CompTel at 18-19.

federal and state requirements that mandate truthful billing and ban deceptive practices. Nor is there any legitimate reason to saddle VoIP providers with the § 214 entry and exit requirements.

The CPNI requirements of § 222 do not apply to IP-enabled voice services, because that statute does not apply to information services.⁷⁶ Moreover, the Commission's principal concern under § 222 has always been the ability of carriers to use calling data to profile their customers and market other services to them. That concern is somewhat attenuated in the context of VoIP, because VoIP offerings tend to include a number of services. Moreover, given the competitive nature of VoIP services, market incentives should ensure that IP service providers use information properly.⁷⁷

B. The Commission Can And Should Clarify That ILECs Must Provide Nondiscriminatory Directory Listings For Competing VoIP Providers.

It is also vitally important that the Commission clarify that incumbent LECs must provide nondiscriminatory directory listings for competing VoIP providers. Such access is indisputably technically feasible. Although § 251(b)(3) limits a LEC's dialing parity and directory listing obligations to telecommunications services, the Commission has ample authority under its ancillary Title I jurisdiction to require incumbents to provide such nondiscriminatory access. Such access is necessary to maximize the value of legacy telecommunications services, because failure to include VoIP customers in directory listings would hinder the ability of telecommunications service end-users to make full use of those services to contact VoIP customers. *See, e.g., Comcast Appendix A at 2; NCTA at 21.*

⁷⁶ 47 U.S.C. § 222.

⁷⁷ *See, e.g., Pac-West Telecomm at 26-27; 8x8 at 29.* AT&T has subjected its AT&T CallVantage service to AT&T's Online Privacy Policy, which provides that AT&T "will not disclose your customer identifiable information to third parties who want to market products to you." Other provisions further restrict disclosures of individually identifiable customer information.

C. The Commission Has Jurisdiction Over VoIP Services, But The States Retain Authority In Key Areas.

AT&T previously demonstrated that the Commission clearly has jurisdiction over VoIP services based on the inherent interstate component of those services.⁷⁸ It is well-established that the FCC has authority to preempt state regulation where such regulation “negates the exercise by the FCC” of its lawful powers. *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989); *see also, e.g., Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (“*California II*”); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990) (“*California I*”); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). The Commission is empowered to preempt state regulation to the extent that “it can show that the state regulation negates a valid federal policy” and can do so “to the degree necessary to achieve it.” *NARUC*, 880 F.2d at 430-31 (emphasis omitted); *see also California II*, 39 F.3d at 931-32.

In the context of VoIP, the peculiar characteristics of VoIP services – *i.e.*, the inherently nomadic nature of such services and the fact that it is often impossible to identify the geographic endpoints of a VoIP call – would justify Commission preemption of certain aspects of state regulation of VoIP under these well-established precedents. In particular, the Commission should assert exclusive authority and preempt any state assertion of regulatory authority over rates and entry/exit for VoIP services at the applications layer, which would include preempting the imposition of any intrastate access charges. Otherwise, the assertion of state regulatory authority would frustrate the Commission’s ability to regulate the interstate aspects of VoIP and

⁷⁸ *See* AT&T at 42-43; *accord* Covad at 19-20; SBC at 26; Net2Phone at 12-14; PacWest Telecomm at 10-12; Cablevision at 11-13; BellSouth at 11; Verizon at 32-39; Vonage at 16-18; National Cable & Telecommunications Association at 34; 8x8 at 12.

would threaten to impose debilitating costs on VoIP providers that would fundamentally frustrate the Commission's federal policies promoting the development of IP-enabled services.⁷⁹

The state commenters generally concede that the Commission has the power to displace state regulation where it would negate federal policies,⁸⁰ but argue that the power cannot or should not be exercised. The New York PUC, for example, argues that it is "premature" to conclude that state regulation "will make it impossible for the Commission to regulate IP-enabled services."⁸¹ The record developed in this proceeding, however, ensures that it is not "premature" to preempt state rate and entry regulation, and as the Commission develops its policies related to E911 and disability access, it will not be premature to identify and preempt conflicting state policies. Separately, several commenters rely on Section 601(c)'s savings clause.⁸² That clause, however, addresses only the preemptive effect of the 1996 Act and resulting amendments to the Communications Act. The Commission's power to preempt conflicting state regulations, however, rests not on any such provision, but rather on its pre-existing power to regulate interstate communications. As long as the Commission abides by and applies the traditional test governing mixed jurisdiction services, the Commission has ample means available to it to advance the extensive federal interests implicated by VoIP services.

That does not mean that state commissions have no role in regulating VoIP. The statutory scheme envisions a "cooperative federalism," and states will still retain authority in many important areas. For example, state commissions will continue to apply and implement the

⁷⁹ See AT&T at 43-48.

⁸⁰ See, e.g., NYPUC at 9; NARUC at 3 n.8, 10. Indeed, certain state regulators have recognized that the need for uniform regulation of VoIP services requires extensive preemption of state regulation. See *State Regulators Urge FCC Preemption of VoIP Services*, Communications Daily, 4-5 (June 23, 2004) (statements of Cal. PUC Comm'r Susan Kennedy and Fla. PSC Comm'r Charles Davidson).

⁸¹ See NYPUC at 9.

interconnection and reciprocal compensation provisions of Sections 251-52 of the Act, and states' exercise of those powers should be conducted with due regard to their effect on VoIP services.⁸³ States' general powers to regulate a range of marketing and consumer protection matters – including those related to fraud, deception, discrimination, and other marketing abuses – will continue to apply to VoIP services. State development of universal service policies can and should continue to address issues presented by VoIP services to the extent that federal policies are not clearly undermined.⁸⁴ Although Commission action will be necessary to establish nationwide standards and requirements for E911, the states will nonetheless have a proper role to play in implementing and enforcing those national standards and rules. And states' undisputed power over traditional local telephone services, and particularly abuses in market power over those services at the network layer, may in certain cases extend to practices that involve the provision of VoIP services.

III. TO ENSURE COMPETITION AT THE APPLICATIONS LEVEL, CERTAIN MINIMAL CONDUCT SAFEGUARDS REMAIN NECESSARY AT THE NETWORK LEVEL.

Just as there is broad agreement that the Commission should only lightly regulate VoIP applications, the comments confirm that safeguards aimed at the “facilities layer” are necessary to ensure that those networks remain open to VoIP application providers. “[T]he future for IP enabled services will best be realized with a mix of suppliers and products integrating underlying layers of broadband transmission facilities with overlying layers of IP enabled services, as well as third party innovators offering stand alone IP enabled services riding above

(. . . continued)

⁸² See California and Cal. PUC at 32-33; NARUC at 11.

⁸³ 47 U.S.C. §§ 251-52.

⁸⁴ See, e.g., 47 U.S.C. § 254(b)(5), (f), (k).

separately obtained broadband transmission services.”⁸⁵ That means, “[r]egardless of the Commission’s classification of particular IP-enabled services themselves as telecommunications services or information services, the regulatory treatment of those services should be severed from the underlying telecommunications service on which they ride.”⁸⁶

Commenters appropriately urge the Commission to confirm that there is no IP-exception to the existing Commission policies and rules that prohibit discrimination by the Bells.⁸⁷ As the comments show, “[i]t is unquestionable that the open nature of the Internet is in large measure responsible for its explosive growth. As a result of that openness, developers of services and software, designers of websites, and commercial establishments of all kinds are able to succeed simply by appealing to customers – which has led to extraordinary innovation and investment, and to a wide array of new services for consumers.”⁸⁸

The Bells, however, seek to use the recent emergence of a competitive VoIP applications market as a basis for eliminating the network level safeguards that were necessary to achieve it.⁸⁹ It is basic economics that “as long as carriers that own the broadband transmission networks can exercise market power, they will exercise that market power by controlling downstream markets

⁸⁵ Covad at 5; *see also* Enterprise Commun. Ass’n at 7.

⁸⁶ ALTS at 3. *See also* Arizona at 8-9; Covad at 6-8; Cbeyond at 4-5; CompTel/ASCENT at 11-15; Earth Link at 2-3; Enterprise Commun. Ass’n at 8; MCI at 9-12; Microsoft at 7; Time Warner Telecom at 5-15; Vonage at 4-13.

⁸⁷ *See, e.g.*, Arizona at 8-9; Cbeyond at 4; CompTel/ASCENT at 12; Covad at 31-33; Communications Workers of Am. at 15-16; Enterprise Commun. Ass’n at 10-14; GCI at 11; Global Crossing at 15-16; Level 3 at 29; MCI at 11, 17-19; Vonage at 13; *see also* Time Warner Telecom at 15 (advocating additional regulatory protections); Z-Tel at 21-23 (same).

⁸⁸ Microsoft at 21; *see also* Commun. Workers of Am. at 15-16 (the Commission’s existing nondiscrimination policies have “contributed to the vibrant growth of . . . the Internet” and have allowed consumers to gain access to a “broad range of new services, content, and choice”).

⁸⁹ *See* BellSouth at 37-41, 59-62; SBC at 21-23, 36-42; USTA at 21-28; Verizon at 6-11, 19-31.

that depend on those transmission services.”⁹⁰ Although cable companies do not own voice communication monopolies that are threatened by VoIP, the Bells unquestionably do. Thus, because VoIP “threatens to strand the Bells’ core network” the Bells are powerfully “incented” to use their “control over . . . broadband transmission facilities” to “squeeze third party VoIP providers out of the market [or] raise their costs to make them uncompetitive.”⁹¹

For example, the Bells could, absent appropriate safeguards, simply deny rival VoIP providers access altogether or otherwise offer inferior access to rivals.⁹² They could also, absent appropriate safeguards, block competition by “ty[ing] [their] last-mile transmission service to use of [their] IP-enabled services that ride over that connection.”⁹³ In stark contrast – and vividly highlighting the Bells’ unique anticompetitive incentives – cable companies have generally committed to allowing their customers to reach whatever VoIP applications they wish without restriction. *See, e.g.*, *Communications Daily* (Dec. 19, 2003) (“NCTA Pres. Robert Sachs said the cable industry wouldn’t stand in the way of Vonage’s riding aboard cable modem lines to

⁹⁰ MCI at 3.

⁹¹ Covad at 9.

⁹² *See* CompTel/ASCENT at 12; Enterprise Commun. Ass’n at 6-10; Time Warner Telecom at 13-14; Vonage at 11; Z-Tel at 19; *see also* *LEC Classification Order*, 12 FCC Rcd 15756, ¶ 83 (1997) (even where there are multiple providers in a retail market, an entity controlling essential access facilities can exercise power in retail markets by using those facilities to “increas[e] its rivals’ costs or by restricting its rivals’ output”); *ITTA Forbearance Petition*, 14 FCC Rcd. 10816, ¶ 7 (1999) (incumbent LECs “have the ability and incentive to use their bottleneck facilities to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers”); *Ameritech-SBC Merger*, 14 FCC Rcd. 14712, ¶ 202 (1999) (“Because incumbent LECs . . . compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers”); *Computer II*, 77 F.C.C.2d 384, ¶ 219 (1980) (“The importance of the control of local facilities . . . cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance”).

⁹³ Level 3 at 28.

provide voice-over-Internet protocol (VoIP) service to cable's high-speed Internet customers.”).⁹⁴

The Bells acknowledge that the full deregulation of their “IP networks” that they seek here could not be appropriate unless and until they demonstrate that market forces alone are sufficient to constrain their unique incentives and ability to abuse their control of last-mile facilities.⁹⁵ That is a demanding showing that the Bells have not made and could not make.

The Bells rely entirely upon a “fact report,” prepared by their lawyers, that attempts to show – through a compilation of out-of-context news snippets, analyst reports, and undocumented “telephone conversations” with unnamed “customer service representatives” – that vibrant competition at the network level is (again) just around the corner.⁹⁶ The Bell Report, however, cannot change the real marketplace facts. In the vast majority of cases, there is a broadband duopoly or monopoly at the network level and, notwithstanding the Bells’ repeated contention that satellite, fixed wireless and other platforms are (now) on the verge of taking off, these alternative platforms simply have not proven to be viable substitutes and there is little likelihood that will change for the foreseeable future. Moreover, the costs to end-users of switching between rival broadband providers are substantial. *See infra* subpart A.

Regulation of the Bells’ last-mile facilities is necessary to prevent them from seeking to foreclose emerging VoIP competition, as are safeguards that avoid discrimination against unaffiliated IP applications and content, while otherwise giving broadband providers substantial

⁹⁴ *See also* Testimony of Robert Sachs, President NCTA, before House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet (July 21, 2003) (cable companies “have experimented with different business models,” and “all allow consumers to choose their own home page with unfettered access to any content on the Internet”).

⁹⁵ *See* BellSouth at 38-40; USTA at 23; Verizon at 14-15.

⁹⁶ Peter Huber & Evan Leo, *Competition in the Provision of Voice over IP and Other IP-Enabled Services* (May 28, 2004) (“Bell Report”).

flexibility over the scope and terms of their service offerings. *See infra* subpart B. At the same time, the Commission should also reject the Bells' sweeping request for elimination of core Title II regulation that applies to their basic transmission networks and services. *See infra* subpart C. In contrast, the Commission need not – and, indeed, should not – impose new “open access” requirements on cable companies that are the subject of GN Docket No. 00-185 and CS Docket No. 02-52.

A. The Bell Report Does Not Demonstrate Effective Competition At The Network Level For Mass Market Or Enterprise Network Services.

The Bell Report is largely devoted to proving a point that no one contests – that numerous entities are poised to offer IP-enabled services and that economic regulation of the applications layer is generally unnecessary.⁹⁷ But such competition at the application level says nothing about the need for economic regulation at the facilities level. To the extent that the Bells retain market power at the facilities level, that market power can be leveraged to impede VoIP competition at the applications level.

On that score, the Bell Report *confirms* the need for economic regulation of the facilities level, for the Bells plainly do not face fully effective competition in last-mile broadband transport markets. The Bell Report establishes that the Bells face, at most, duopoly competition for broadband Internet access services and in many cases that the Bells have a broadband monopoly. And with respect to enterprise services, the Bell Report focuses on the irrelevant point that the Bells are among several retail providers of enterprise services. On the relevant issue for assessing market power at the network level – whether there are alternative providers of

⁹⁷ *See* Bell Report at 1-25.

last-mile loop and transport facilities used to serve medium and large business locations – the Bell Report is noticeably silent.

1. Mass Market. The principal point of the Bell Report is that cable modem services are generally available where the Bells offer DSL service. But duopoly competition is patently inadequate to prevent the Bells from undertaking predatory practices against VoIP competitors seeking to undermine the Bells' local telephone monopolies. Enterprise Commun. Ass'n at 6-7. That is why "existing antitrust doctrine suggests that a merger to duopoly . . . faces a *strong presumption of illegality*."⁹⁸ "Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding."⁹⁹

The Bell Report tries to avoid the obvious economic implications of its own statistics by contending that the Bells cannot possibly exercise market power because, on a national basis, cable companies have more broadband customers than the Bells.¹⁰⁰ This is economic gobbledygook. Duopoly "competition" is problematic not just because the firm with the larger market share may exercise market power, but because there is a strong likelihood that *both* participants will have the incentive and ability to maintain prices above competitive levels rather than attempting ruthlessly to compete with the other, as they would need to do in a market with multiple competing firms. As the Supreme Court has explained, "firms in a concentrated market" can "in effect *share* monopoly power . . . by recognizing their shared economic interests

⁹⁸ *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002), (emphasis added). *Id.* (separate statement of Chairman Powell) (duopolies "inevitably result in less innovation and fewer benefits to consumers" which "is the antithesis of what the public interest demands").

⁹⁹ *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986). See also *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) ("Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly."); *United States v. Ivaco, Inc.* 704 F. Supp. 1409, 1428 n.18 (W.D. Mich. 1989) ("with only two firms in the market, the firms would be able to police cheating, or non-collusive pricing by their competitor.").

¹⁰⁰ Bell Report at A1.

and their interdependence with respect to price and output decisions.”¹⁰¹ And that is why the Commission has held that “both economic theory and empirical studies” indicate that “five or more relatively equally sized firms” are necessary to achieve a “level of market performance comparable to a fragmented, structurally competitive market.”¹⁰²

Alternatively, the Bells claim that existing duopoly competition must be considered effective, because they have all recently lowered their prices.¹⁰³ They can make this claim, however, only by ignoring recent price increases. SBC, for example, announced a sharp increase in its DSL prices in March 2004.¹⁰⁴ And contrary to Verizon’s claim that its rates have “plummeted,” Verizon, in *virtual unison* with BellSouth, followed SBC’s lead and announced a stiff price increase for its own DSL service.¹⁰⁵ In short, the most recent pricing evidence only confirms the existence of a “cozy duopoly.”¹⁰⁶ It is also notable that these most recent price

¹⁰¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added). See also *FTC v. Heinz*, 246 F.3d 708 at 725 (D.C. Cir. 2001) (“The creation of a durable duopoly affords both the opportunity and incentive for *both* firms to coordinate to increase prices.”); *PPG Indus.*, 628 F. Supp. at 885 n.9 (“The relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist.”).

¹⁰² *Mass Media Order*, 18 FCC Rcd. 13620, ¶ 289 (2003).

¹⁰³ See Bell Report at A6.

¹⁰⁴ See, e.g., David Burstein, *BellSouth and SBC Raise Prices, Slap Powell in the Face* (March 18, 2004) (http://www.isp-planet.com/cplanet/tech/2004/prime_letter_040324_better.html) (reporting SBC’s and BellSouth’s recent price increases); Merrill Lynch, *Everything over IP*, at 11 (March 12, 2004) (“We note that SBC raised prices on its entry-level DSL service (by \$3 to \$29.95) and said that it would not lower prices further.”).

¹⁰⁵ Matt Richtel, *Verizon to Add Internet Surcharge*, New York Times (Apr. 14, 2004); see also Jim Hu, *Stealth DSL Price Increases Loom*, Cnet news.com (Apr. 6, 2004) (http://news.com.com/2100-1034_3-5185215.html?tag=nefd.lede) (“Local phone companies advertising steep discounts for high-speed Internet access are beginning to assess new ‘regulatory’ fees that would effectively increase monthly costs by 10 percent or more for some customers.”); *id.* (“Mike Paxton, an analyst at In-Stat/MDR, said new fees are price hikes in regulatory clothing. ‘In this case, it sounds like they’re trying to blame the (price) increase on taxes and regulatory fees they were already paying,’ Paxton said. ‘The bottom line: No new regulations were put in place; they were paying (USF) and taxes before; they are still paying for it now, but the consumer is paying an extra several dollars per month.’”).

¹⁰⁶ See CIBC World Markets, *Accelerating Broadband Growth: Positive for Cable and RBOC Rivalry* (June 16, 2004), at 7 (DSL and cable companies have engaged in only “rational” competition).

hikes came after the Commission announced the end of line sharing obligations and that important source of intramodal competition.¹⁰⁷ Thus, the market place evidence, rather than “vindicat[ing]” the Bells’ position,¹⁰⁸ devastates it.

Of course, even the Bells’ duopoly premise is overstated. The Bells’ own data show that a significant percentage of households in the United States can only obtain DSL.¹⁰⁹ And while the Bell Report casually suggests that the number of customers that are likely to have only the option of Bell DSL service is likely to shrink in the future,¹¹⁰ the opposite is true.¹¹¹

The Bells’ duopoly story is even weaker in the context of small businesses.¹¹² The Bells continue to rely on outdated analyst projections that they know full well have proven incorrect. For example, while analysts in 2003 predicted that cable was poised to take off in the small business market, they have now concluded that these predictions were, to say the least, wildly

¹⁰⁷ Cf. Bell Report at A4.

¹⁰⁸ *Id.*

¹⁰⁹ See generally *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC (filed in WC Docket Nos. 01-338, 96-98, 02-33, 98-147, May 26, 2004); see also California at 10 (only 1 in 4 customers that have broadband access in California have a choice between DSL and cable).

¹¹⁰ Bell Report at A2.

¹¹¹ The Bells have in place local telephone facilities to serve virtually every customer in their service territory. In contrast, cable companies do not serve all rural areas and, thus, do not serve many households that the Bells currently serve. Further, cable companies have largely finished upgrading their cable systems, whereas the Bells have to date deployed DSL technology to about 60% to 70% of households in their territories. *Ex Parte* Letter from Dee May, Verizon to Marlene Dortch, FCC, at 9 (filed in WC Docket Nos. 01-337, 02-33, 98-10, 95-20, Nov. 13, 2003). These facts mean that, as the Bells continue to upgrade their networks, the Bells will increasingly serve homes that today have neither DSL nor cable service as an option. See *id.* (conservatively estimating this to be approximately 10% of customers in Verizon’s territory). This common sense is further confirmed by the fact that the Bells are now adding DSL customers at a faster rate than the cable companies – a trend that analysts predict will continue for the foreseeable future. See Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* (Mar. 10, 2004), at 2 (“We expect DSL to continue gaining incremental share of net subscriber additions vs. cable”); Credit Suisse First Boston, *The Broadband Battle: DSL Prepares to Overtake Cable Net Add Share* (April 20, 2004), at 1 (reporting that cable is losing share to DSL and that cable’s ARPU is deteriorating); Wachovia Securities, *North American Broadband Update* (June 1, 2004), at 4 (“DSL is growing faster than cable modem.”).

¹¹² Bell Report at A3-4.

optimistic. “We projected cable modem would surpass DSL in this [the small business] segment by year-end 2003. However, cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003.”¹¹³ As the Yankee Group now recognizes, “*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market.”¹¹⁴ These estimates are consistent with GCI’s evidence that, despite controlling an extensive cable network, it has no ability to reach approximately 50% of the businesses in its most urban market.¹¹⁵

The Bells’ emphasis on cable competition is nonetheless understandable. Although the Bells tout competition from satellite, fixed wireless, and broadband-over-power line, noticeably absent from the Bell Report is any hard data on the market shares enjoyed by these “alternatives.” The reality is that these alternative providers are not viewed today by consumers as serious alternatives to the Bells’ DSL service. Combined, these platforms have a *de minimis* share of broadband services that are *declining*.¹¹⁶ According to the FCC’s statistics, satellite/fixed wireless providers have seen their share of “high-speed” lines decline from 2.8% in 1999 to 1.3% in 2003,¹¹⁷ and their share of “advanced service” lines decrease from 0.7% in 1999 to 0.3% to 2003.¹¹⁸ BPL does not even have a measurable share.¹¹⁹

¹¹³ Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added).

¹¹⁴ *Id.* at 4 (emphasis added).

¹¹⁵ GCI at 13; *see also* Time Warner Telecom at 10.

¹¹⁶ *See, e.g., High Speed Services for Internet Access: Status as of December 31, 2003*, FCC Industry Analyst and Technology Division, Tables 1 - 4 (rel. June 2004).

¹¹⁷ *Id.*, Chart 6.

¹¹⁸ *Id.*, Chart 7.

¹¹⁹ Independent analyst estimates corroborate the Commission’s numbers. Gartner, Inc., *U.S. Consumer Broadband Keeps Growing: Online Households Remain Steady* (Jan. 2, 2004), at 7 (In 2003 broadband
(continued . . .))

The Bell Report therefore resorts to speculating about how in the future these alternative platforms will become meaningful competitors.¹²⁰ As the Chairman has noted, the “ground is littered with failed predictions.”¹²¹ Until these platforms can be shown to be viable and ubiquitous alternatives to cable modem service and DSL service, they cannot be considered to place any real competitive constraints on the Bells’ DSL services.¹²²

The Bells cannot make this showing with respect to any of these modalities. Overall, “household Internet connectivity via satellite access” is *declining*.¹²³ High equipment and service costs will prevent satellite from competing head-to-head with DSL and cable for the foreseeable future.¹²⁴ The Bell Report acknowledges that satellite-based Internet services have been a failure with the leading provider declaring bankruptcy, but claims that as a result of the recent Hughes/News Corp. merger, News Corp. is poised to “work aggressively to ensure that broadband services to as many American consumers as possible.”¹²⁵ Prior to the issuance of the Bell Report, however, it was widely reported that News Corp. is abandoning the Spaceway project in light of the limited prospects for that service to be profitable.¹²⁶ And those few

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modalities other than DSL and cable altogether accounted for only 4% to 6% of the market share.); Stat/MDR, *Reaching Critical Mass: The US Broadband Market* (Mar. 2004), at 19 (estimating satellite broadband subscribers to be 310,000 at the end of 2003).

¹²⁰ Bell Report at A8-18.

¹²¹ See Powell Calls “Digital Migration” Critical to U.S. Competitiveness, *Communications Daily* (Apr. 14, 2004).

¹²² Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines* §§ 3.0-3.4 (rev. Apr. 8, 1997).

¹²³ Gartner, Inc., *U.S. Consumer Broadband Keeps Growing: Online Households Remain Steady* (Jan. 2, 2004), at 7.

¹²⁴ Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* (Mar. 10, 2004), at 11.

¹²⁵ Bell Report at A16.

¹²⁶ Andy Pasztor, *New Corp. Changes Satellite Plans, Ambition to Use Spaceway To Offer Broadband Service Fades Admit Profit Doubts*, *Wall St. J.*, A3 (May 28, 2004).

companies still proceeding with this technology – who are “hanging by a thread”¹²⁷ – “will ramp up slowly and target customers largely in rural areas, where it is more difficult for cable-television and telecommunications companies to lay down wires and compete.”¹²⁸

The Bells likewise acknowledge that fixed wireless services have to date been a bust,¹²⁹ but claim that a “renaissance” is on the way because of “improvement[s]” in the “underlying technology” used to provide fixed wireless services. WiMax may be superior to the technology initially relied upon by fixed wireless providers, but many hurdles remain before fixed wireless can be considered a price-constraining alternative to cable and DSL and, thus, “[wireless broadband] will have a limited impact on wireline carriers in the near term.”¹³⁰ For example, customer premise equipment for wireless currently costs three times as much as for cable or DSL.¹³¹ As a result, wireless’ promise, at least in the near term, lies primarily in “niche” markets.¹³² “[T]he majority of residential [wireless] subscribers are in areas not currently covered by cable modem or DSL services.”¹³³

For these reasons, projections of future subscriber numbers for satellite and fixed wireless are little better than today’s anemic levels. Analysts predict that by the end of 2007, satellite and fixed wireless will serve only 1.5% and 5.4% of broadband customers, respectively.¹³⁴ And, as

¹²⁷ Mark Beamen, *Satellite Network Infrastructure*, Faulkner Info. Servs. (2003).

¹²⁸ Andy Pasztor, *New Corp. Changes Satellite Plans, Ambition to Use Spaceway To Offer Broadband Service Fades Admit Profit Doubts*, Wall St. J., A3 (May 28, 2004).

¹²⁹ Bell Report at A12.

¹³⁰ Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004) at 5.

¹³¹ In-Stat/MDR, *Reaching Critical Mass: The US Broadband Market* (Mar. 2004) at 16.

¹³² Bear Stearns, *U.S. Wireline/Wireless Services* at 69.

¹³³ In-Stat/MDR, *Reaching Critical Mass* at 18.

¹³⁴ Gartner, Inc., *Consumer Telecommunications and Online Market: United States, 2002-2007* (Dec. 2003) at 3.

discussed above, the lion's share of their customer base is expected to come from customers residing in "areas not currently covered by cable modem or DSL services."¹³⁵

The Bells' claims with respect to broadband-over-power line ("BPL") and 3G wireless services are even weaker. As the Bells themselves concede, these services are not generally available on a commercial basis.¹³⁶ BPL is still at the trial stage and is still years away from being a full fledged competitor to DSL. The Southern companies – which together constitute a principal potential deployer of BPL – state that commercial deployment of BPL will not even commence until 2005, and, even then, BPL will generally be offered on a very limited basis.¹³⁷ And despite the Bells' suggestion that these trials establish the viability of BPL, the most telling result of the Manassas, Virginia trial was that the franchisee voluntarily gave up the business and the city is now attempting to find another company to replace it.¹³⁸ As a practical matter, technical issues remain before BPL can provide Internet access at speed, quality and cost comparable to DSL and cable, and analysts thus predict that BPL will not be viewed by consumers as a serious broadband alternative for years.¹³⁹

The notion that 3-G services will emerge as a serious, near-term competitor to the Bells' DSL service is also belied by the Bell Report, which shows that the access speeds provided by even the most "advanced" 3-G network are well below those provided by the typical cable modem or DSL service.¹⁴⁰ Consequently, 3-G will be obsolete before it is widely available.¹⁴¹

¹³⁵ In-Stat/MDR, *Reaching Critical Mass* at 18.

¹³⁶ See Bell Report at A13.

¹³⁷ Reply Comments of AT&T at 9 (filed in ET Docket No. 03-104, Aug. 20, 2003).

¹³⁸ <http://www.manassascity.org/documents/Purchasing/04B064.pdf>

¹³⁹ See In-Stat/MDR, *Reaching Critical Mass* at 22 (predicting 220,000 subscribers to BPL by 2008).

¹⁴⁰ Compare Bell Report at A18 with A5 (Table 2).

¹⁴¹ 3gnewsroom.com, *The Next Bout: 3G Versus BWA* (Sept. 30, 2003) ("It seems like almost every week we analyse [sic] an emerging wireless technology that is faster, cheaper, leaner and fitter and threatens to
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In fact, one report that the Bells cite as support for the emergence of strong 3-G broadband competition¹⁴² actually describes 3-G as “slow” and “expensive.”¹⁴³ Further, this technology has only been deployed in a handful of cities, as the Bell Report acknowledges, and only Verizon Wireless has “announced firm 3G plans,”¹⁴⁴ demonstrating reluctance on the part of most U.S. carriers to invest in 3-G.¹⁴⁵ This may be due to “the relative immaturity of 3G technology, consumer devices, applications, and marketing efforts.”¹⁴⁶

Finally, the Bell report is utterly silent with respect to the other key factor for assessing market power in this context: whether substantial switching costs exist in connection with changing mass market broadband services. The courts and antitrust agencies have repeatedly recognized that market power can be present where customers are effectively “locked in” to a product by high switching costs. As AT&T explained in its opening comments (at 49-50), switching costs in this context are relatively high. In contrast to changing long distance providers, which is a seamless operation that requires a subscriber to place a single phone call, switching broadband providers requires, *inter alia*, a significant expenditure of a subscriber’s time, subjects the subscriber to a potentially long period of service interruption, and often requires the subscriber to change e-mail addresses. Thus, even in relevant markets where there

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inflict some serious bodily harm on the aging third generation standard.”), http://www.3gnewsroom.com/3g_news/sep_03/news_3793.shtml. See also Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004), at 50 (“It is very possible that 3G will, in fact, offer speeds that are too low for many types of applications that users want (and can get over wired networks) such as interactive game-playing or streaming video.”).

¹⁴² Bell Report at A18.

¹⁴³ Merrill Lynch, *Everything Over IP: VoIP – and Beyond* (Mar. 12, 2004), at 41 tbl. 12.

¹⁴⁴ Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004), at 47.

¹⁴⁵ See *id.* at 54.

¹⁴⁶ *Id.* at 47.

are alternatives to the Bells' last-mile facilities, the fact that a Bell company may degrade access to IP content that its customers value will not necessarily induce customers to switch platforms.

2. Enterprise. According to the Bells, they cannot have market power in retail long distance services – including IP-based services – provided to enterprise customers because they control only a minority of the market.¹⁴⁷ What the Bells ignore, of course, is that they were historically excluded from these markets and, since being permitted to participate, have gained share at an unprecedented pace.

The reason for this, of course, is that the Bells have been able to leverage their control of last-mile loop and transport facilities necessary to serve enterprise business customers. Specifically, as AT&T explained in its Special Access Petition, AT&T and other enterprise service providers generally have no choice but the Bells for the last-mile “channel termination” facilities that are needed reach enterprise customers.¹⁴⁸ These are natural monopoly facilities that simply cannot be duplicated in most instances, and the Bells have abused their market power to price special access well above their own economic cost of using those facilities.¹⁴⁹

These conditions allow the Bells to exercise market power. Market power is ordinarily defined as the ability to “control prices” or “exclude competition.”¹⁵⁰ In this context, the Bells have the ability to “exclude competition” by price-squeezing their competitors. As the Commission has stated:

¹⁴⁷ Bell Report at A19.

¹⁴⁸ Petition for Rulemaking, at 25-28 (filed RM No. 10593, Oct. 15, 2002) (“AT&T Special Access Pet.”). Notably, in contrast to the Bells’ speculation about the deployment of competitive alternatives, Bell Report at A-20, AT&T demonstrated the limited existence of these alternatives with hard evidence attested under oath. AT&T Special Access Pet., Thomas Dec.

¹⁴⁹ AT&T Special Access Pet. at 28-31; *Triennial Review Order*, 18 FCC Rcd. 16798, ¶¶ 237-38, 302-05, 370-72 (2003).

¹⁵⁰ *United States v. E.I. duPont de Nemours & Co.*, 351, U.S. 377, 391 (1956).

Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.¹⁵¹

And it is only by ruthlessly exploiting their control over access pricing that the Bells have been able to make unprecedented gains in long distance markets.¹⁵² Unless constrained, they will be able to employ the same tactics for IP-enabled services.

B. Because Of The Bells' Powerful Incentives To Abuse Their Market Power, Certain Minimal Conduct Safeguards Remain Necessary To Protect Nascent VoIP Competition.

Given the existing high concentration at the network level and the Bells' unique and powerful incentives to abuse control of their last-mile facilities, most commenters agree that some safeguards are necessary to protect competition for IP applications. These safeguards, however, need not be overly intrusive. In particular, AT&T emphasizes that it is not calling for new structural regulations such as the type of "forced access" regulations for cable operators that the Commission rejected in the *Cable Modem Declaratory Order*. Rather, in addition to retaining existing economic regulations (*see infra* subpart C), the Commission should not permit particular anticompetitive practices that could impede emerging VoIP competition.

¹⁵¹ *Access Reform Order*, 12 FCC Rcd. 15982, ¶ 277 (1997).

¹⁵² AT&T Special Access Pet. at 23-25; Reply Comments of AT&T, at 43-47 (filed RM No. 10593, Jan. 23, 2003).

Most importantly, network owners should not impede access to the Internet content of another applications provider, except where such access would threaten the integrity of the network or where required by law.¹⁵³ In this regard, the Commission should not permit the outright blocking of access to particular IP addresses, websites or applications platforms used by rival service providers. However, as the commenters recognize, more subtle forms of discrimination can achieve the same result. “As an example, the technology that exists to enable network operators to recognize the data packets that move across their system and prioritize them. ILECs . . . could block or assign a lower priority to packets from competing IP-enabled service providers.”¹⁵⁴ Thus, the Commission should also not permit preferential access to affiliated IP applications or degraded access to rival IP applications. To the extent that “quality of service” routing is deployed that would give priority to voice packets in case of congestion, those capabilities should be made available to unaffiliated VoIP providers on a nondiscriminatory basis.

The Commission also should not permit network owners to deny broadband service to consumers that do not purchase an IP-enabled service or local telephone service from the network owner.¹⁵⁵ As the Commission is well aware, some of the Bells are attempting to entrench their local voice monopolies by refusing to sell broadband Internet access to any customer that does not purchase the Bells’ voice service. This practice impedes local competition because the Bells know full well that their DSL subscribers are often unwilling – or simply unable – to switch broadband service providers to obtain voice or VoIP services from

¹⁵³ See, e.g., AT&T at 54; CompTel/ASCENT at 12; Enterprise Commun. Ass’n at 9; Microsoft at 22; MCI at 16; Vonage at 13.

¹⁵⁴ Enterprise Commun. Ass’n at 9.

¹⁵⁵ AT&T at 55-58; Enterprise Commun. Ass’n at 13-14; Time Warner Telecom at 15; Vonage at 13.

another carrier. Absent regulation, the Bells would easily extend their current “tying” practices to require all DSL subscribers to also purchase the incumbent’s VoIP service. These practices would make it effectively impossible for rival VoIP providers to sell service to the Bells’ DSL customer base, for many of these customers would clearly be unwilling to pay both for the Bells’ local wireline service and/or VoIP services *and* a rival’s VoIP service. And, as noted, the Bells clearly have strong incentives to do so given the direct threat that VoIP poses to the local monopolies.¹⁵⁶ To prevent market power abuses of this kind, the Commission should not permit network owners to require subscribers to purchase any IP-enabled service or local telephone service as a condition of obtaining broadband Internet access service.

Of course, these targeted requirements would not prohibit legitimate bundling arrangements that offer broadband Internet access service and VoIP service (or any other IP-enabled service) together at a single price. Such bundling would be allowed so long as broadband service remained available on a stand-alone basis.

C. The Commission Should Reject The Bells’ Requests For Blanket “Forbearance” From Title II, Elimination Of *Computer Inquires* Obligations, And “Non-Dominant” Status.

Relatedly, the Bells request that the Commission eliminate fundamental economic regulation that currently governs their operations. Specifically, the Bells ask the Commission to (1) forbear from all Title II regulation that would apply to “IP-enabled platform” services; (2) declare that the Bells are “non-dominant” with respect to the provision of IP-enabled services; and (3) gut existing *Computer Inquiries* rules with respect to IP-enabled services. Each of these extraordinary requests should be denied.

¹⁵⁶ *Powell Says FCC Is Devising Ways To Deal With 15% Problem*, Communications Daily (May 5, 2004) (“If you’re a big incumbent and you sort of enjoy the competitive advantages of being the owner of that kind of service system, you, in my opinion, ought to be terrified [of VoIP]”).

1. SBC's Forbearance Petition Should Be Denied.

The other Bells jump on the SBC bandwagon and argue that the Commission should forbear from applying *all* Title II regulation to so-called "IP-platform services," which includes the last-mile facilities used to provide IP applications.¹⁵⁷ These Bells, however, add nothing to SBC's arguments, which AT&T and others refuted in their oppositions to SBC's Petition.¹⁵⁸

First, because the Commission has yet to identify the regulatory framework that will govern the various services at issue, it cannot conduct a meaningful analysis of the forbearance criteria based on specific market evidence.¹⁵⁹ *Second*, the forbearance relief SBC seeks is patently inappropriate because SBC concedes that if the Commission forbears from applying Title II regulations to the services at issue, it should reimpose many of the same or similar requirements under Title I. Under section 10 of the Communications Act, the Commission simply cannot deregulate now and ask questions later.¹⁶⁰ *Third*, SBC's across-the-board forbearance request is contrary to the express limits on the Commission's forbearance authority contained in section 271(d)(4) and section 10(d) of the Act, which foreclose significant portions

¹⁵⁷ See BellSouth at 59-62; Qwest at 38 n.128; SBC at 38-42; Verizon at 29-31; USTA at 22-25. Only SBC has filed a separate petition requesting forbearance. Petition of SBC Communications Inc. For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services (filed WC Docket No. 04-29, Feb. 5, 2004) ("Petition").

¹⁵⁸ See Opposition of AT&T Corp. (filed WC Docket No. 04-29, May 28, 2004) ("AT&T Forbearance Opp."); Opposition of the California Public Utilities Commission to SBC's Petition for Forbearance, WC Docket No. 04-29 (May 28, 2004); Comments of Cbeyond Communications, LLC, GlobalCom, Inc., and Mpower Communications Corp., WC Docket No. 04-29 (May 28, 2004); Opposition of EarthLink, Inc., WC Docket No. 04-29 (May 28, 2004); Opposition of MCI to SBC's Petition for Forbearance, WC Docket No. 04-29 (May 28, 2004); Comments of National Association of State Utility Consumer Advocates, WC Docket No. 04-29 (May 28, 2004); Comments of Sprint Corporation, WC Docket No. 04-29 (May 28, 2004); Comments of Time Warner Telecom, WC Docket No. 04-29 (May 28, 2004).

¹⁵⁹ *AT&T Forbearance Opp.* at 7-8.

¹⁶⁰ *Id.* at 8-12.

of the requested forbearance relief.¹⁶¹ The Bells simply have no answer to these arguments, each of which provides an independent basis to reject the Petition.

In any event, SBC and the other Bells have not remotely met their burden of proving that SBC's request satisfies the three fundamental prerequisites for forbearance: that the regulations at issue are unnecessary to protect competition, consumers and the public interest. Like SBC in its Petition, the Bells make only the barest attempts to meet this burden – each submitting a breezy few pages that do not *discuss* even a single Title II regulation or law and do not contain *any* discussion or evidence concerning the specific markets at issue. Instead, the Bells adhere to the party line that competition with respect to IP services is flourishing and that the benefits of competition, particularly as they impact investment incentives, outweigh the evils of regulation.¹⁶² As an initial matter, such cost/benefit balancing is foreclosed by section 10(a)'s plain language.¹⁶³ In any event, however, the Bells offer no market evidence in support of their bare assertions. This lack of empirical support is not surprising because, as demonstrated above, the Bells are the monopoly providers of the last-mile facilities that other carriers and ISPs must obtain to provide their services. Accordingly, the Bells' assertions are no more than wishful thinking with respect to basic transmission services and competition at the facilities level. Thus, the Commission has no basis to forbear from *each* and *every* Title II regulation, as SBC and the other Bells advocate.

¹⁶¹ *Id.* at 12-15.

¹⁶² *See, e.g.*, BellSouth at 61-62 (“the highly competitive market for IP platform services” is “the superior mechanism for protecting consumers from unreasonable pricing”); *id.* at 61 (“the potential for regulation to create and maintain distortions in investment should be minimized”); Verizon at 29 (“the provision of IP-enabled services is already highly competitive,” which “ensure[s] that rates are kept at reasonable levels”); *id.* at 30 (“regulation under Title II would harm consumers by undermining incentives for continued innovation”).

¹⁶³ *See* AT&T Forbearance Opp. at 17-18.

2. The Commission Should Not Declare The Bells “Non-Dominant” In The Provision Of IP Services.

For these same reasons, the Commission should reject arguments that the Bells are “non-dominant” with respect to IP services.¹⁶⁴ Non-dominant status is reserved for carriers “without market power.”¹⁶⁵ In order to make that showing, the Bells must demonstrate that there are numerous alternative providers of last-mile broadband services in each relevant, local geographic markets, that those alternatives have excess capacity, and that the costs of switching suppliers are relatively modest such that customers could vote with their feet in response to anticompetitive conduct.¹⁶⁶ As explained above, however, most relevant broadband transport markets are characterized by duopoly and substantial switching costs. Further, in many important markets – particularly, business markets and many less urban geographic markets – the Bells are the only entities that today possess last-mile facilities over which broadband transport services are provided. Nor can the Bells claim that entry barriers are low.¹⁶⁷ The Commission in the *Triennial Review Order* found that last mile broadband network facilities enjoy strong natural monopoly characteristics and cannot be readily duplicated.¹⁶⁸

3. The Commission Should Not Eliminate Existing *Computer Inquiries* Obligations For IP Services.

Finally, the Commission should not eliminate existing *Computer Inquiries* obligations.¹⁶⁹ As the *Notice* makes clear, “the Commission has proceedings pending before it concerning whether it should modify or eliminate the *Computer Inquiries* rules as they apply to wireline

¹⁶⁴ See BellSouth at 62; Verizon at 25-26.

¹⁶⁵ 11 FCC Rcd. 3271, ¶ 3 (1995); see also 47 C.F.R. § 61.3(q), (y).

¹⁶⁶ *AT&T Non-Dominance Order* ¶¶ 58, 59, 61, 63.

¹⁶⁷ *Id.* ¶ 61.

¹⁶⁸ *Triennial Review Order* ¶¶ 205-07.

¹⁶⁹ BellSouth at 37-41; USTA at 28-31; Verizon at 21-24.

facilities” and, thus, the Commission is “not seek[ing] to review those issues in this Notice.”¹⁷⁰ And with regard to the “limited” issue that is teed up in this proceeding – whether the Commission’s *Computer Inquiries* rules “appl[y]” in the IP-context, the answer is clearly yes. These rules were promulgated pursuant to the Commission’s Title I authority,¹⁷¹ and they apply to any “enhanced services” provided by facilities-based carriers.¹⁷² The applicability of the *Computer Inquiries* rules to VoIP is so obvious that the Bells do not even dispute it.¹⁷³

In all events, the Bells’ attempts to gut these rules should be rejected for the reasons explained above. The *Computer Inquiries* regime was enacted precisely to protect rival information services providers from anticompetitive conduct by entities such as the Bells that have network level market power through control of bottleneck last-mile facilities necessary to provide information services. By preserving those rules – which grant all information service providers equal access to broadband networks – the Commission can continue to encourage vibrant competition for IP applications that are provided over those broadband networks.¹⁷⁴

¹⁷⁰ Notice ¶ 73 n.217.

¹⁷¹ *Computer II* ¶¶ 119-38.

¹⁷² 47 C.F.R. § 64.702.

¹⁷³ See Verizon at 21 (arguing that the FCC should “refrain from applying any of the *Computer Inquiries* rules”); USTA at 31 (the Commission should “waiv[e]” the *Computer Inquiries* rules).

¹⁷⁴ *Accord*, Level 3 at 29 (“The Commission should resolve this problem here by determining that the *Computer II* separate offering requirements will continue to apply to facilities-based providers that have market power with respect to basic transmission component of that provider’s enhanced service offering.”).

CONCLUSION

The Commission should make the findings discussed above and in AT&T's opening comments.

Respectfully submitted,

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July 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2004, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 14, 2004
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/s/ Peter M. Andros

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