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

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

# REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.


Robert B. McKenna
Daphne E. Butler
Qwest Communications,
International, Inc.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2856

Roy E. Hoffinger
Elizabeth A. Woodcock
Perkins Coie LLP
Suite 700
1899 Wynkoop Street
Denver, CO 80202
(303) 291-2300

Counsel for

QWEST COMMUNICATIONS
INTERNATIONAL, INC.


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Qwest Communications International, Inc. ("Qwest") respectfully submits this reply to the comments of other parties, and in further response to the Commission's *Notice* in the above-captioned docket.[1]

In its opening comments, Qwest demonstrated that: (1) all IP-enabled services (including IP voice and other applications) are interstate "information services" under the Act and Commission precedent;[2] (2) the Commission should declare that the application to any IP-enabled service of state regulation is preempted, with the exception of regulations applicable to businesses generally; and (3) the Commission should exercise its ancillary jurisdiction under Title I to apply regulation to IP-enabled services and applications only where demonstrably necessary to achieve a "social policy" objective

[1] Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC O4-28, released March 10, 2004 ("*Notice*"). A list of the parties filing comments, and the abbreviations used for those parties herein, is attached hereto as Appendix 1. A list of abbreviations and acronyms used herein is attached as Appendix 2.

[2] Unless expressly stated otherwise, all references herein to IP-enabled services and applications means "services in which all telecommunications and information components originate in the Internet Protocol, in contrast to the 'IP in the middle' service that was the subject of the recent *AT&T Declaratory Ruling*." Qwest at i.

reflected in the Act, taking also into account any potential adverse impact on the development, cost of providing, and use of the targeted and other IP-enabled services and applications.

Although each of the matters described above is critically important, classification and jurisdiction are threshold, fundamental issues that should be resolved as promptly as possible and, if necessary, in advance of determinations as to whether and how the Commission should exercise its ancillary jurisdiction over an IP-enabled service or application. Resolution of those threshold issues will eliminate a substantial measure of the regulatory uncertainty that continues to constrain the deployment of broadband technology and development of advanced services. Indeed, a ruling by the Commission that IP-enabled services and applications, including VoIP, are interstate information services not subject to either state regulation or access charges will encourage providers to accelerate their implementation plans.

## INTRODUCTION AND SUMMARY

Earlier this year, Chairman Powell anticipated and delivered a compelling response to arguments that IP-enabled services, including in particular voice applications, should be classified as "telecommunications services," and subjected to legacy regulations adopted and enforced by fifty-two independent federal and state commissions. Specifically with regard to VoIP, the Chairman stated:

> We cannot contort the character of the Internet to suit our familiar notions of regulation. Do not dumb down the genius of the net to match the limited vision of a regulator. The Internet has characters and attributes that should be recognized and accepted, not ignored or brushed aside as inconvenient or irrelevant. To regulate the Internet in the image of a familiar phone service is to destroy its inherent character and potential. Governments are almost always about geography, jurisdiction and

> centralized control. The Internet is unhindered by geography, dismissive of jurisdiction, and decentralizes control.[3]

The comments in this proceeding confirm the accuracy of these predictions, and the absence of any legitimate legal or policy basis to subject any true IP-enabled service or application to economic regulations at either the federal or state level, and to any state regulations at all other than those generally applicable to all businesses.

In particular, the comments confirm that all IP-enabled services, including all true IP voice applications, are properly classified under the Act and Commission precedent as "information services." Preliminarily, all such services offer the capability to "transform" information sent to IP networks through a net protocol conversion, enabling communications between "disparate terminals," which has the been the hallmark of "enhanced" (*i.e.*, "information") services since the Commission first distinguished them from "basic" (*i.e.*, "telecommunications") services.

More fundamentally, IP-enabled services, including VoIP and all other IP voice applications, offer features and functions unavailable through "traditional telephony" that qualify them as information services. Parties arguing that IP voice applications are "telecommunications services" do so by "ignor[ing] or [brush]ing aside" these features and functions "as inconvenient" or "irrelevant," solely to achieve desired regulatory consequences.[4] Ironically, however, judicial and commission precedent on "functional equivalence," the concept upon which these parties rely, require consideration of all

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[3] *Power to the People*, remarks of FCC Chairman Michael K. Powell, National Press Club (Jan. 14, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-242885A1.pdf ("Powell Remarks, Jan. 14, 2004"), at 7.

[4] Powell Remarks, Jan. 14, 2004, at 7.

features and functions offered to customers, and thus compel the conclusion that VoIP is not "like" any telecommunications service.

The comments likewise confirm that to the limited extent they are necessary, regulations should be adopted and enforced exclusively at the federal level. Indeed, state regulation of IP-enabled services, including voice applications, would both violate the "policy of the United States" that "the Internet and other interactive computer services be unfettered by federal and state regulation," 47 U.S.C. §230(b)(2), and stifle the broadband deployment and service innovation that Congress and the administration have sought thereby to promote, to the severe detriment of the economy and individual consumers. Providers, equipment manufacturers and a significant number of state regulators have confirmed that the characteristics and reach of IP networks and IP-enabled services render them "unhindered by geography [and] dismissive of jurisdiction," precluding a regime comprised of "dual" (actually, fifty-two) sets of different regulations purporting to address the same concerns, and potentially applying to the same communications.[5]

Even the continued threat of such a regime will result in the refusal of capital markets to make available the massive amount of funding required to achieve the ubiquitous broadband deployment so critical to the nation's economy and consumers' daily quality of life. Accordingly, as urged by Qwest and numerous other parties, the Commission should declare that, effectively immediately, all state regulation of IP-enabled services, including VoIP and other IP voice applications, is preempted, except for state regulations that are generally applicable to all businesses. The legal support for such a declaration is overwhelming. Those parties contending otherwise "ignore" or

[5] Powell Remarks, Jan. 14, 2004, at 7.

"brush aside" the controlling statutory provisions (*e.g.*, section 230(b)(2)), and rely instead on provisions that either have thereby been superseded (*e.g.*, section 2(b)), or are inapplicable (*e.g.*, section 253(b)) to IP-enabled services and applications.[6]

Importantly, classifying IP-enabled services and applications as information services, as required by the Act and Commission precedent, would not eliminate the authority of the Commission under Title I to impose regulation where demonstrably necessary to achieve important objectives reflected there or elsewhere in the Act. The Commission's authority in this regard is not questioned by any party that offers or plans to offer IP voice applications. The only parties contending otherwise are "rent seeking" (FERUP at 7) carriers that support the classification of IP voice applications as "telecommunications services" so that they may then subject their competitors to outdated asymmetric legacy regulatory schemes, or stifle the development of competing services by existing or new providers.[7] In all events, their analysis of statutory provisions and judicial precedent relevant to ancillary jurisdiction has already been refuted in the opening comments of Qwest, SBC and others.

Although the Commission's ancillary jurisdiction over IP-enabled and other information services cannot seriously be questioned, the vast majority of parties filing comments urge the Commission to refrain, consistent with section 230(b)(2), from issuing regulatory mandates under Title I or otherwise unless and until it is proven that market forces and industry initiatives have not sufficiently addressed the concerns that

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[6] Because the Commission's preemptive authority is so clear, it is unnecessary to address the extent to which section 230(b)(2) preempts state regulation independent of a Commission order.

[7] *See* TW Telecom at 36-41 (urging the Commission to classify VoIP services as telecommunications services and exercise broad forbearance powers only as to non-dominant providers); Sprint at 1, 19-20 (same).

such mandates would address. Such proof would include a showing that the incremental gains to be achieved by the proposed regulation would outweigh the costs, including the costs of compliance by carriers and administration by regulators, all of which would ultimately be borne by consumers, in addition to other costs, such as interference with deployment and development of new technologies and services. There is scant evidence to date that any regulation of IP-enabled services is truly necessary.

In particular, the comments demonstrate that there is no need for any type of "economic" regulation, and that "social policy" objectives such as access to emergency services, and disabilities access, can best be accomplished by means other than prescriptive regulatory mandates. Nearly all providers and equipment manufacturers agree that economic regulation of IP-enabled services and applications, including regulations addressed to market entry and exit, rates, service quality and customer service, are unnecessary in light of competitive market conditions, and would be counterproductive. A customer dissatisfied with its provider's rates, service quality or customer service may switch to a different provider. Regulation thus serves merely to increase costs that are passed on to consumers (and potentially to create competitive advantages and disadvantages based on asymmetric regulation).

Economic regulation of either the underlying transmission services or facilities used to provide IP-enabled services and applications is at least equally unwarranted as regulation of the services and applications themselves. Such regulation has been adopted in the past only when providers of information services had no choice but to use the transmission services and facilities of incumbent monopolies that indisputably no longer exist. AT&T, MCI and other proponents of heavy-handed regulation of broadband

networks have failed to present evidence, much less "clear and compelling evidence," that broadband platform competition, customer demand and other market forces are insufficient to address any of the purported concerns about which they speculate.[8] In contrast to the complete absence of any offsetting benefits that it would produce, the application to broadband networks of TELRIC pricing requirements and other regulatory mandates would have a devastating impact on the incentives to make the investment required to increase deployment of established and new broadband platforms. "Investment-friendly treatment of broadband network owners" is thus imperative.[9]

In sum, the record in this proceeding, when viewed together with experience in numerous communications contexts, provides more than ample support for the conclusion that regulation of IP-enabled networks, services and applications will ultimately harm consumers in numerous and significant ways, with no offsetting benefits: "[w]herever calls for heavy-handed regulation have been beaten back – in the wireless sector, in the broadband arena, and in the information services marketplace – consumers have enjoyed a high degree of innovation, good service quality, generally declining prices, and a choice of providers."[10] If the Commission remains mindful of that experience, it will reach the correct conclusions in this proceeding.

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[8] Remarks of FCC Chairman Michael K. Powell, National Assoc. of Regulatory Comm'rs (Mar. 10, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf ("Powell Remarks, Mar. 10, 2004"), at 3.

[9] *Guiding Principles For the Age of Convergence*, remarks of FCC Commissioner Kathy Q. Abernathy, FCBA Annual Meeting (June 24, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248813A1.pdf ("Abernathy Remarks, June 24, 2004"), at 4-5.

[10] *Id*. at 6.

## I. THE COMMENTS DEMONSTRATE OVERWHELMINGLY THAT ALL IP-ENABLED SERVICES AND APPLICATIONS, INCLUDING IP VOICE APPLICATIONS, ARE "INFORMATION SERVICES."

Qwest and other parties have demonstrated that IP-enabled services and applications, including IP voice applications, offer users the capabilities specified in the Act's definition of, and are thus properly classified as, information services.[11] Indeed, parties supporting the classification of VoIP as a "telecommunications service" describe no offering that exists today, or is likely to exist in the future. Because they choose regulation over deregulation, these parties include in their analyses only those capabilities that make IP-enabled services seem "like" traditional telephony, and ignore other capabilities that are part and parcel of what providers offer and subscribers receive. Stated another way, these parties "ignore" or "brush aside" all attributes of IP voice applications that do not fit their desired classification.[12] This "analysis" is little different than concluding that a "car is the same as a tire" after considering only its tires, and ignoring its engine, transmission and body. It is moreover, plainly inconsistent with the Commission's decisions on the distinction between a telecommunications service and an information service, and its decisions applying the "functional equivalence" concept upon

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[11] *See e.g.*, Qwest at 19 ("[a]ll IP-enabled services convert information from one form to another, process, retrieve, and store information, add protocol information, process protocols, and perform myriad other functions that constitute information services, including facilitating subscriber interaction with stored information"); SBC at 34 ("[u]se of an IP platform to provide a service that originates or terminates in IP, unlike use of PSTN …, directly offers 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information'"); NCTA at 8 ("[a]ll IP-enabled services … offer the capability for retrieving, using, storing and interacting with information via telecommunications"). The validity of this conclusion does not depend on whether the service is transmitted over the provider's own facilities, or those of a third party. *See, e.g.,* AT&T at 18-19; Pulver at 24. It would make no sense to adopt different classifications depending on the owner of the underlying transmission facilities, in light of the fact that IP-enabled services and applications offered by Qwest and other providers may be used with broadband connections offered by third parties. Indeed, one of the attractive features of IP-enabled services and applications is that the subscriber may use them at any location worldwide at which a broadband connection is available.

[12] Powell Remarks, Jan. 14, 2004, at 7.

which the proponents of classifying VoIP as a telecommunications service rely, as explained *infra*.

Properly understood, VoIP "is simply an *application* that is provided over a broadband network."[13] These applications, which are continuously increasing in number and diversity, include e-mail, instant messaging, web surfing, streaming video, "gaming" and more. A user may thus simultaneously be speaking to a relative, composing an e-mail message to a business associate, playing chess with a distant opponent and downloading information from a web site. Such a user would be launching over the Internet commingled and indistinguishable packets carrying payloads for each such application. Nothing in the Act requires or permits the isolation for purposes of regulatory classification of one of many technologically indistinguishable applications provided over "a seamless communications infrastructure."[14] Indeed, doing so could have grave, albeit unintended consequences on other applications, and prevent IP networks from reaching their full potential.

Even if it were appropriate to consider them in isolation – which it is not -- the comments demonstrate that IP voice applications can do "so very much more" than "set up" and provide "pure transmission" for communications between two points.[15] True IP-

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[13] *VOIP: The Opportunity and Challenges Ahead*, remarks of FCC Commissioner Kathy Q. Abernathy, Michigan State University (Feb 19, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244127A1.pdf, at 2 (emphasis added); accord, Powell Remarks, Jan. 14, 2004, at 4; ME PUC at 4-5 ("voice is becoming merely one application of communications and information services technology").

[14] Powell Remarks, Mar. 10, 2004, at 2. *See also* SBC at 35 ("voice is just one of countless applications that will offered as part of IP-enabled services").

[15] Powell Remarks, Jan. 14, 2004, at 4; Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC2d 384, ¶ 90 (1980) ("*Computer II Final Decision*"). *See also* Comcast at 12-13 (listing examples of VoIP's "features, functions and capabilities that go well beyond those available with traditional circuit-switched telephone services"); Cablevision at 2 ("VoIP services … already combine voice and data in ways that go far beyond

enabled voice applications offer to subscribers an abundance of features and functions by virtue of their use of the IP format and data processing capabilities, as described in the comments of Qwest and other parties, and summarized above. As Verizon explains, for example, "in VoIP offerings, disparate capabilities such as voice mail, web collaboration, instant messaging, calendar conferencing, basic voice and custom calling features are all provided on an integrated basis via servers in an IP network."[16] Through the "fusing of computing power and communications," "internet voice" has become an "information and communication management tool" that includes an array of "information retrieval and processing capabilities" that qualifies it as an information service under the Act.[17]

The parties' urging the Commission to classify IP voice applications as telecommunications services simply "ignore" or brush aside" these facts as

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the functionality offered by traditional telephony services"); AT&T at 12 (listing "unique" features available through AT&T's new "CallAdvantage" service "not available with POTS" or the service that was the subject of the *AT&T Declaratory Ruling*); Qwest at 18-19 (same).

[16] Joint Declaration of Marilyn H. O'Connell, Eric J. Bruno, and Stuart D. Elby, attached as Exhibit A to Verizon, ¶ 29. *See also* Powell Remarks, Mar. 10, 2004, at 2 ("VoIP applications deliver voice mail as an MP3 File in your email box, on your palm pilot, and voice can be transcribed to text and vice versa"). These capabilities are not "adjunct to basic" services, as some commenters contend or imply. *See, e.g.*, TW Telecom at 23-25. Adjunct to basic services involve the use of customer interaction with stored information for the purpose of "facilitating establishment of a transmission path over which a telephone call may be completed." *See* Order*, North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commissions Rules Regarding Centrex, Enhanced Services, and Customer Premises Equipment*, FCC 85-28, 101 FCC.2d 349, ¶ 26 (May 29, 1985). "Call forwarding," for example, is an adjunct to basic service because allowing a customer to reroute calls to another number does not materially change the nature of a telephone call placed to that customer – she still "gets ordinary, basic telephone service." *Id*. ¶ 27. In contrast, voice mailbox capabilities are "enhanced," not "adjunct to basic," because they provide the customer with the use of a storage facility into which messages may be placed for later retrieval. *Id*. IP voice applications include not only storage of voice messages, but also an array of other capabilities that involve customer interaction with stored and other information.

[17] Powell Remarks, Jan. 14, 2004, at 4 ("internet voice can be readily integrated with other computing systems" to provide enhanced capabilities); SBC at 34 (IP voice applications "provide an information and communications management tool -- a means of fusing computing power and communications"); MCI at 22 ("IP based voice applications already include information retrieval and processing capabilities"), citing *Notice* ¶ 18; NCTA at 46 (providing examples of capabilities for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" offered by VoIP).

"inconvenient" and thus "irrelevant" to their preferred outcome, and limit their analyses to real-time, two way voice capabilities.[18] The California, Iowa and other commissions appear to be arguing that if a universe could be created in which two-way real-time voice capabilities could be separated from all other capabilities offered by IP voice applications in particular and other IP applications in general, the voice capability would be just "like" traditional telephony that uses different technology. That postulate, however, does not exist in the real world. Neither the Act nor Commission precedent, moreover, supports their myopic analyses.

Unlike traditional telephony, the real-time, two-way voice capabilities included in IP-enabled services are inseparable from the communication management capabilities that distinguish VoIP from traditional telephony, and are an indispensable and inseparable part of IP services actually offered to and purchased by customers. Indeed, IP voice applications are marketed as an additional reason for customers to purchase, or enhance the value of, their broadband service, and not merely as a replacement for basic telephony.[19]

The Commission's precedents plainly foreclose analyses that consider only the characteristics that particular services or applications appear to have in common. Beginning with the Commission's *Computer Inquiry* proceeding and continuing through the release of the *AT&T Declaratory Ruling*, the Commission has consistently declined to classify offerings that included enhanced functionality based on some similarity between

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[18] Powell Remarks, Jan. 14, 2004, at 7.

[19] *See generally New Technologies*, Communications Daily, WL60706482, at 1 (June 30, 2004) (stating that most consumers who consider subscribing to VoIP are "technophiles"); Data Memo – PEW Internet Project and New Millennium Research Council, PEW Internet & American Life Project (June

the offerings and basic transmission services. In particular, the Commission acknowledged in its *Computer II Final Decision* that "some enhanced services may do some of the things that regulated communications services did in the past,"[20] and that "some enhanced services are not dramatically different from basic services or dramatically different from communications."[21] It nevertheless held that services offering capabilities through data processing would be classified as "enhanced" and not subjected to regulation under Title II of the Act, "no matter how extensive their communications components."[22]

In its 1998 Report to Congress, the Commission reiterated that if a user can receive enhanced functionality, the service is an information service,"[23] even if "an inseparable part of that service transmits information supplied or received by the user."[24] Stated another way, "[a]n offering that constitutes a single service from the end user's standpoint is not subject to common carrier regulation simply by virtue of the fact that it involves telecommunications components."[25]

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2004), available at http://www.pewinternet.org/pdfs/PIP_VOIP_DataMemo.pdf, at 2 (reporting results of survey indicating that most consumers who have heard of VoIP are "long time Internet users").

20 *Computer II Final Decision* ¶ 132.

21 *Id*. ¶ 130.

22 Report to Congress, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501, ¶ 27 (April 10, 1998) ("*Stevens Report"*), *citing Computer II Final Order* ¶ 114.

23 *Id.* ¶ 59

24 *Id*. ¶ 56.

25 *Id*. ¶ 58. The Commission holdings that the addition by carriers of enhanced services or features (*e.g.*, voice mail) to their offerings of "traditional telephony" service does not warrant change to classification of the latter are readily distinguishable. Among other things, IP voice is not the underlying service to which enhanced capabilities have been added, but is an application that is added to other capabilities available with IP-enabled services. More specifically, end users purchase voice capability (and the ability to manage their communications) as one of many uses of their broadband connection, and the "market" comprises the full panoply of IP applications, including e-mail, instant messaging, electronic data

Similarly, the "functional equivalence" test, invoked by virtually all proponents of classifying IP voice applications as telecommunications services,[26] properly applied, refutes rather than supports their myopic analyses. Commission precedent establishes that the functional equivalence inquiry considers *all* aspects of the services being compared (other than price), not merely alleged similarities. As the Commission has explained in applying the functional equivalence test:

> once all services are stripped to the core, and all options and features such as operator-assist features, unique address coding, geographic and number restrictions and the like are ignored, essentially all voice message services might appear to be like one another. *Differences between services with respect to features, operating characteristics and service options cannot be ignored.* Rather, they must be examined in light of their material relevance or practical significance to customers.[27]

When the "features, operating characteristics and service options" of IP-enabled services and IP voice applications are considered, as they must be, it is clear beyond peradventure that neither VoIP nor any other IP-enabled application is "functionally equivalent" to traditional telephony or any other telecommunications service.

Finally, true IP voice applications include a net protocol conversion allowing subscribers to interface with the PSTN, which has traditionally been a hallmark of information services under Commission precedent.[28] The arguments that net protocol

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transfer, data manipulating and processing, retrieving information from websites, etc. By contrast, in the cases cited by the opposing parties, the enhancements were simply added to pre-existing telephone service. Under the *Computer Inquiry* rules, which govern circuit telephony, the basic service remained basic and the enhancements were analyzed independently.

[26] *See, e.g.*, Sprint at 14-15; CA PUC at 14; ACC at 3-9; UT DPU at 3; Rural Carriers at 4; CUB at 8; NASUCA at 2; NARUC at 4-7.

[27] *MCI v. AT&T*, FCC 92-201, 7 FCC Rcd 3047, ¶ 11 (May 15, 1992) (emphasis added), *vacated and remanded on other grounds by MCI v. FCC*, 10 F.3d 842 (D.C.Cir. 1993).

[28] SBC at 35 and n.77. *See also* Qwest at n.81 (explaining that through a net protocol conversion, Qwest's service allows communications with "disparate terminals"), *citing Computer II Final Decision,*

conversions" are irrelevant to the classification of IP voice applications mischaracterize the Act's definitions, the protocol conversions that IP communications undergo, and Commission precedent, as explained below.

First, there is no merit to the claim that Congress excluded consideration of protocol conversions through its definition of information service in the 1996 Act, as some parties assert.[29] To the contrary, because a net protocol conversion effects a "transformation" of information, the concept has been included expressly within the statutory definition.[30] Second, the Commission did not in the *AT&T Declaratory Ruling* deem net protocol conversions to be irrelevant to the classification of a service, as contended by other parties.[31] Rather, the Commission there limited its decision to communications that entered and exited the network in the same protocol, and thus underwent no "net" conversion, fitting precisely the long-standing definition of "basic" service established in the *Computer Inquiry* proceeding.[32] Third, and as a related matter, claims that the protocol conversions that occur with IP voice applications such as those

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77FCC2d 382, ¶ 99; AT&T at 19-20 (noting that Commission has repeatedly recognized that services that include a net protocol conversion are "information services").

29 Sprint at 14, TW Telecom at 26.

30 *See* 47 U.S.C. § 153(20) ("Information service means the offering of a capability for . . . transforming . . . information"); *Vonage Holdings Corp. v. MPUC*, 290 F.Supp.2d 993, 1000 (D. Minn. 2003) ("a net change in form and content occurs when Vonage's customers" originate communications to users connected to the PSTN, as "the information transmitted over the Internet is converted from IP into a format compatible with the PSTN").

31 *E.g.*, CA PUC at 26. Nor does the possibility that net protocol conversions may occur in connection with certain wireless calls mean that they cannot be relevant to the classification of a service, as suggested by TW Telecom at 25. Congress specifically declared that wireless service would be treated as a "common carrier" service, thus eliminating any need to consider the classification of the service. See 47 U.S.C. § 332(c)(1)(A). Congress chose a different scheme for wireline communications based on the Commission's classification of services as either telecommunications or information, defining the latter to include the capability of "transforming" information such as through a protocol conversion.

32 *AT&T Declaratory Ruling* ¶ 4.

offered by Qwest are not "net" conversions are simply incorrect.[33] Subscribers to Qwest's offering send through their CPE information to the network in IP format, and Qwest performs only one conversion (IP to TDM), thereby allowing its subscribers to communicate with PSTN subscribers. To determine the existence of a "net" protocol conversion, the Commission looks at whether the "outputs of the network" differ from the inputs, which is the case with true VoIP applications.[34] That is, the parties to the voice communication are communicating with the network(s) in different protocols.

Finally, net protocol conversions that occur with IP voice applications are not the kind of "computer processing application" relating to "management" of a telecommunications system or service that the Commission and Congress have excluded from consideration in the classification inquiry. The conversions falling within the "telecommunications management" exception do no more than facilitate the provision of a basic service (*i.e.*, pure transmission).[35] IP-enabled services, including IP voice applications and the protocol conversions they involve, "do so very much more," as described above.[36]

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[33] *E.g.*, NY DPS at 4.

[34] Order, *Communications Protocols Under Section 64.072 of the Commissions Rules and Regulations*, Docket No. 83-510, 95 FCC2d 584, 590 (Nov. 21, 1983) ("*Communication Protocols*").

[35] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections of 271 and 272 of the Telecommunications Act of 1934, as Amended,* CC Docket No. 96-149, 11 FCC Rcd 21,905, ¶ 107 (Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

[36] *See* Powell Remarks, Jan. 14, 2004, at 4. None of the three categories of protocol processing discussed in the *Computer Inquiry* proceeding and then in the *Non-Accounting Safeguards Order* (¶ 106), and encompassed within the telecommunications management exception describe accurately the protocol conversions that IP voice communications undergo. The first category, "involving communications between an end user and the network itself," expressly excludes conversions, involving communications "between or among users" (*id.*), such as those that occur during a call between a VoIP subscriber and a PSTN subscriber. The second category, conversions required "to maintain compatibility between existing CPE" and "a new basic network technology" (*id.*), is inapplicable because (1) IP is not a "basic" network

There is likewise no merit to the claims of some parties that classifying IP voice applications as "information services" would disregard Congress' directive that a service offering only pure transmission capability be classified as a telecommunication service "regardless of the facilities used."[37] *See* 47 U.S.C. § 152(46). IP-enabled services and applications are correctly classified as information services because they offer the capabilities included in section 153(20). The purpose of the "regardless of the facilities used" language of 153(46) is to ensure that services that do not offer these capabilities, but are instead limited to "pure transmission," are classified as telecommunications services, regardless whether transmission is provided by telephone, cable or other networks. That is the most logical if not the only way to harmonize the definitions of "telecommunications service" and "information service."

In the end, therefore, parties urging the Commission to classify IP-enabled services and applications as telecommunications services fall back on two policy arguments. In particular, they contend that incorrectly classifying IP-enabled services and applications as telecommunications services is necessary to advance universal service and other important "social policy" objectives reflected in the Act,[38] and to ensure "regulatory parity" with traditional telephony.[39] These arguments are wrong or misplaced.

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technology, and (2) the VoIP subscriber's CPE is not "incompatible" with the network technology used by the VoIP provider. The third category, involving "conversions taking place solely within the carrier's network" (*id*.) are not "net" protocol conversions, as explained in the preceding paragraph.

37 *E.g.*, Sprint at 14-15; NASUCA at 10-14; MO PUC at 6-7.

38 *E.g.*, TW Telecom at 16-17, 28; CA PUC at 1; ACC at 19; NE PSC at 7-8.

39 *E.g.*, CA PUC at 29-30.

To the extent that market forces cannot achieve social policy objectives, the Commission may adopt appropriately tailored regulations pursuant to its ancillary jurisdiction under Title I, as explained in Qwest's opening comments. No commenting party that provides or is planning to provide IP-enabled services that include IP voice applications, and thus the parties that would be subject to regulation that the Commission might adopt under Title I, disputes the Commission's authority in this regard. Many of these parties expressly support the tentative conclusion in the *Notice* that the Commission could use its ancillary jurisdiction under Title I to apply regulations to IP voice applications if necessary to achieve social policy objectives.[40] Tellingly, the only parties to argue otherwise are telecommunications carriers seeking to intimidate the Commission into classifying IP-enabled services and applications so as to subject them to economic regulation. Their analysis, however, has been anticipated and thoroughly refuted by SBC.[41]

As for "regulatory parity," Qwest agrees that legacy regulation of traditional telephony is decreasingly justified as competition, including that offered by IP-enabled services, intensifies. However, regulatory parity neither requires nor warrants classifying true IP-enabled services, including voice applications, as "telecommunications services." Changes to legacy regulation historically fail to keep pace with market and technological developments. For that reason alone, it makes no sense to hamstring new and evolving

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[40] *See e.g.*, Qwest at 36-40; SBC at 48-57; AT&T at 35-36; MCI at 34.

[41] SBC at 52-57. In addition to misreading judicial precedent regarding the scope of the Commission's ancillary jurisdiction, Sprint relies heavily (Sprint at 30-32) on the maxim "*expressio unius*" to argue that provisions in the Act that mention only "telecommunication service" necessarily prohibit the application of the same or similar requirements to information services. Sprint is wrong. The courts have held that the maxim "has little force in the administrative setting." *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996), *citing* Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 694 (D.C. Cir. 1991), *quoting Chevron v. NRDC*, 467 U.S. 837, 842 (1984).

services and applications with outdated and irrational regulatory schemes. That is especially true with respect to IP-enabled services, including voice applications, which are so critical to both the nation's economy and consumers' quality of life.

Legitimate concerns about regulatory parity are best addressed by deregulating traditional telephony. Federal statutory tools exist for the FCC to do just that,[42] and states are always free to deregulate the intrastate components of traditional telephony. Any lingering doubt that traditional telephony is today subject to sufficient competition to warrant its deregulation should be foreclosed by the competitive forces that will continue to intensify if IP-enabled services are subject to a national, uniform and deregulatory approach. In all events, while deregulation of traditional telephony should be a priority, such deregulation cannot reasonably be achieved by applying to IP-enabled services the existing (and increasingly unjustified) regulations to which traditional telephony is subject.

## II. THE COMMENTS UNDERSCORE THE NEED FOR A PROMPT RULING BY THE COMMISSION THAT ALL STATE REGULATION OF IP-ENABLED SERVICES AND APPLICATIONS IS PREEMPTED, EXCEPT FOR LAWS AND REGULATIONS APPLICABLE TO BUSINESSES GENERALLY.

### A. Substantial Harm Would be Inflicted Upon the Economy and Consumers by State Regulation of IP-Enabled Services and Applications, With No Offsetting Benefits.

Virtually all providers and equipment manufacturers agree that a national and uniform approach to regulation is critical to the expansion of broadband deployment and the further development of IP-enabled services and applications.[43] The consensus of

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[42] 47 U.S.C. § 160 (1996).

[43] *See*, e.g., *Qwest* at 5, 28-36; SBC at 5, 43-47; Verizon at 31-42; BellSouth at 32-36; CompTel at 3-5, 19; Vonage at 14; PointOne at 7, 11-12; Motorola at 4-7; Nortel at 13-14.

these parties is based not only on legal analysis, but also on the recognition that balkanized regulation of the global Internet would damage immensely the ability of the United States to develop and use critical information technology infrastructure. It is a truism that technology changes much more quickly than regulation. The impact of a failure by the Commission to broadly preempt state regulation would be to magnify enormously the resulting distortion.

Significantly, FERUP and the nine individual state commissioners who signed its comments agree that "[s]ound public policy argues strongly that any regulation of IP-enabled services such as VoIP occur uniformly," and "at the national level." FERUP at 7. Indeed, it would be neither consistent with the mandate of Congress that the Internet and interactive computer services be "unfettered" by regulation, 47 U.S.C. § 230(b)(2), nor sound policy, to require IP-enabled services and applications to "bear the heavy transaction costs of having to deal with over 51 regulatory commissions, both state and federal, and the thousands of pages of rules."[44] Even seemingly non-intrusive regulation "can weigh down innovation with forms and filings and drain capital by adding significantly to the costs of the service."[45]

As considerable as they may be, the "heavy transaction costs" – ultimately borne by consumers – of having to deal with thousands of pages of substantive rules and procedures adopted and administered by fifty-two regulatory commissions represent just the tip of the iceberg when discussing the harms that would be inflicted on consumers and the economy by balkanized regulation of IP-enabled services and applications. The

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[44] Powell Remarks, Jan. 14, 2004, at 5.

[45] *Id*. at 7.

reach of the Internet and use of the Internet Protocol are national and international. Providers are thus making and planning to make national and international offerings, supported by national and international marketing strategies and customer support. Balkanized regulations will increase the cost of and could even foreclose national and international offerings, and strategies and operations.[46]

Further, IP-enabled services and applications are "portable;" that is, customers may use them regardless of their geographical location. Indeed, it is not possible currently to identify and isolate a particular communication based on concepts such as jurisdiction or geography.[47] Thus, a provider that is unable either for technical or economic reasons to comply with one or more regulations of a particular state may be unable to offer its service or application anywhere. This would have been the case, for example, had Vonage not obtained injunctive relief against enforcement of regulations by state commissions for Minnesota and New York [48]

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[46] SBC at 45-47 ("state regulation of IP-enabled services … would affirmatively discourage innovation and investment"); Verizon at 38-39 ("state-by-state regulation [of IP-enabled services]… would inevitably chill investment and slow deployment of those services"); BellSouth at 32-34 (state regulation would result in a "wholly unworkable patchwork of potentially conflicting state requirements" resulting in "investment-sapping uncertainty"); Motorola at 4 (conflicting layers of regulation "could well foreclose future investment in VoIP and limit further commercial deployment of the service"). *See also* Abernathy Remarks, June 24, 2004, at 7-8 (explaining that "[r]egulations concerning contractual terms, billing practices, service quality, and the like force carriers to develop new systems and safeguards and inevitably engender litigation").

[47] *E.g.,* SBC at 31-32 ("it is still commercially infeasible to identify the physical location at the IP end" of an IP voice call); Verizon at 35 ("the physical location of the user of an IP-enabled service may bear no necessary relationship to the end user's identifying 'address'"); AT&T at 31-32 ("the network has no way of knowing where a caller is physically located" because "Internet addresses have no geographic location"); Vonage at 39 (Vonage "is currently unable to determine with certainty the geographic location of a caller").

[48] *See* Vonage at 18-20. Another infamous example of the potential for regulation to reach conduct beyond the regulator's jurisdiction is the ruling by a court in France that unless Yahoo developed and installed a blocking system, it would be subject to fines amounting to thousands of dollars per day for making available to subscribers, on servers located outside of France, information used to access auction sites for certain World War II memorabilia. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F.Supp.2d 1168 (N.D. Cal. 2001).

Moreover, the inability to differentiate commingled packets containing voice, data and video payloads, all of which may be launched over the Internet simultaneously by the subscriber,[49] heightens the concern that a single state's attempt to regulate IP voice or another application will effectively constrain the offering or use of different applications, perhaps even nationwide or worldwide.[50] For these reasons, even the mere prospect of a balkanized regulatory regime, and its impact on providers' abilities to market, support and deliver their services to consumers, will inevitably chill investment in both the deployment of broadband technology, and the development of IP-enabled services and applications. That would be inconsistent not only with section 230(b)(2), but also with the mandates of section 706 to "encourage the deployment" of "advanced telecommunications capability," and "remove barriers to infrastructure investment."[51]

Significantly, the decisions of state commissions asserting jurisdiction over IP-enabled services and applications and subjecting them to regulation contain no discussion of any of the technical and economic issues described above. The Minnesota commission, for example, refused even to conduct a hearing to determine whether it was technically feasible for Vonage to comply with that state's 911 regulations, and consider the impact on Vonage and consumers outside of Minnesota of an order prohibiting

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[49] *See, e.g.*, SBC at 30-31 (a data stream may at any given time containing voice, data, or video packets, or any combination thereof, which cannot be isolated); Verizon at 33-34 (there is no feasible way to track the contents of packets in a data stream). *See also Preserving the Public Interest In A Dynamic Telecommunications Industry*, remarks of FCC Commissioner David Adelstein, 2004 National Governors Assoc. Winter Meeting (Feb. 24, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244372A1.pdf, at 1 (voice, data and video "can all travel over the Internet as indistinguishable digital packets – you won't be able to tell if it's a phone call or a TV show").

[50] *See supra* note 48.

[51] 47 U.S.C. § 157(a), *codifying* section 706 of the 1996 Act.

Vonage from providing service. The recent order of the New York commission likewise fails to discuss the certainty that regulations by multiple states would increase costs, and the substantial possibility that its regulations could interfere with if not prevent the provision of interstate service not only to customers in New York, but in other states as well. The comments of NARUC and state commissions in this proceeding continue to refuse to acknowledge, much less address in any detail, concerns about the cumulative burdens of, and inconsistency threatened by, multiple state regulation of national, integrated IP-enabled services and applications. This persistent failure underscores the need for preemption, as discussed *infra*.

In contrast to the substantial damage that would be inflicted by balkanized regulation to the prospects for the rapid expansion of broadband deployment, and further development of IP-enabled services and applications, the proponents of state regulation have failed to demonstrate any offsetting benefits. In particular, these parties provide no support for their conclusory assertions that markets, no matter how competitive, cannot ensure that consumers will receive high quality, reliable service at reasonable prices, or that regulation is inherently better than market forces in protecting consumers. The Commission has repeatedly rejected similar arguments, and there is no basis for a different result here.[52]

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[52] *See e.g.,* First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982, ¶ 263 (May 16, 1997); Second Report on Reconsideration, *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket No. 96-91, 14 FCC Rcd 6004, ¶ 6 (Mar. 31, 1999); *see also Regulating Wireless: How Much and By Whom*, remarks of FCC Commissioner Kathy Q. Abernathy, AEI-Brooking Joint Center For Regulatory Studies (May 13, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247211A1.pdf ("Abernathy Remarks, May 13, 2004"), at 5 ("competitiveness of the market *forces* service providers to respond to their customers expectations" regarding service quality) (emphasis in original).

These same Commission decisions provide the complete answer to the arguments that because of their "proximity" to consumers, state commissions are best positioned to receive and resolve customer complaints.[53] More specifically, in competitive markets such as that for IP-enabled services in general and IP voice applications in particular, consumers who are dissatisfied with the quality of service, rates or responsiveness of their provider can switch to a different provider.[54] Further, virtually every state has laws that are generally applicable to all businesses that prohibit fraudulent and deceptive practices, and address other matters of interest to consumers. No party supports the preemption of laws of general applicability, which provide to consumers an additional safeguard. As FERUP explains, "the competitive market" and "[e]xisting federal and state generic consumer protection laws are sufficient to address the vast majority of consumer protection issues."[55] There is thus no need for any "consumer protection" or other forms of "economic" regulation specific to IP-enabled services and applications, much less up to fifty-one different sets of communication-specific regulations adopted by state commissions.

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53 *E.g.*, ACC at 2; NE PSC at 2. *See also* UT DPU at 4 ("the PSC and affiliated agencies are much closer to customers"); MN PUC at 11 ("state commissions are in the forefront on issues paramount to consumer interests").

54 Abernathy Remarks, June 24, 2004, at 7 (noting that "providers compete not only on price, but also on service quality," and that customers have the ultimate response to inadequate service: they can switch to another provider")

55 FERUP at 17; *accord*, ME PUC at 2; Tate at 10 ("the competitive IP marketplace should provide adequate consumer protection"). Further, preemption would not prohibit state commissions from assisting consumers by identifying to them the employees or departments of providers responsible for resolving their complaints and concerns, as suggested by Commissioner Tate of the Tennessee Regulatory Authority (Tate at 11), or directing them to the agencies responsible for enforcement of generic consumer protection laws, if appropriate.

### B. The Commission's Authority to Preempt State Regulation of IP-Enabled Services and Applications is Beyond Serious Dispute

In addition to their unsupported policy arguments, proponents of state regulation of IP-enabled services and applications claim that Congress prescribed a system of "dual regulation" or "cooperative federalism" that mandates some form of prescriptive, regulatory role for state commissions, and precludes federal preemption.[56] These claims are wrong, as explained below.

Preliminarily, references to a "dual" regulatory scheme are inaccurate as well as legally irrelevant. By "dual" regulation, proponents of state regulation mean regulation by a federal agency plus *51 separate state agencies*. In no practical respect is this regulation by a "duality." The unfeasibility of a "cooperative federalism" approach to the regulation of IP-enabled services and applications is betrayed by the failure of its proponents to provide even a brief description of how it would work in practice. The proponents' comments leave open the possibility of either a regime in which the Commission makes advisory pronouncements which state commissions are then free to ignore, or broad rules that are susceptible to inconsistent interpretations and applications in accordance with each state's policy preferences. In either case, the result would be the very uncertainty and inconsistency, and endless litigation, that Congress empowered the Commission to avoid. *See* Qwest's Opening Comments at 28-33.

In all events, the claims that Congress has mandated state commission regulation of any IP-enabled service or applications are incorrect. The Commission has both the authority and duty to "execute and enforce" the "policy of the United States," codified at

[56] *E.g.,* CA PUC at 31-34; VA SCC Staff at 8; MN PUC at 10. The support of proponents for some role for state regulators under a "cooperative federalism" approach appears to reflect the recognition that the Internet is inherently not severable into interstate and intrastate components.

47 U.S.C. § 230(b)(2), by stating that IP-enabled services and applications shall be subject to a minimal set of regulations adopted and enforced at the federal level, and that all state regulations except those generally applicable to all businesses are preempted. *See* Qwest's Opening Comments at 28-31. Nearly every proponent of state commission regulation "ignores" completely section 230(b)(2).[57]

The New York commission "brushes away" section 230(b)(2), contending that "[w]hen read in context," it "addresses only regulation concerning content of speech," and not "states' application of traditional common carrier regulation." NY DPS at 7-8. The New York commission's argument is inconsistent with the Act's plain language, as well as with Commission and judicial decisions applying section 230(b)(2) to preempt state regulation unrelated to content. Specifically, section 230(b)(2) contains no language limiting its applicability to "content regulation." Indeed, the use of the terms "Internet" and "interactive computer services" indicates that the policy against regulation applies far more broadly. Thus, the Commission expressly relied on section 230(b)(2) in its *Pulver Declaratory Ruling* to preempt tariff and other state regulation of Pulver's FWD service. If, as the New York commission asserts, section 230(b)(2) speaks only to regulation of content, then it would not even have been mentioned in the Commission's decision. The Eighth Circuit likewise cited section 230(b) as support for the Commission's determination that ISPs were not subject to interstate access charges -- another determination that was not based on "content."[58]

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[57] *E.g.*, ACC; CA PUC; ICC; ME PUC; MN PUC; MO PSC; NE PSC; OH PUC; UT DPU; VA SCC Staff.

[58] *See SWBT v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998). *See also* Written Statement of Michael K. Powell on Voice over Internet Protocol Before the Committee on Commerce, Science and Transportation, United States Senate (February 24, 2004), available at

Moreover, federal district courts directly considering the issue have held expressly that preemption of non content-related state commission regulation of IP voice applications is not only consistent with, but is required by, section 230(b)(2).[59] By contrast, no commission or judicial decision, including the case cited by the New York commission, holds that the deregulatory mandate of section 230(b)(2) applies only to regulation that seeks to limit or govern "content."[60] Indeed, the only relevance to this proceeding of the decisions addressing the lawfulness under section 230(b)(2) of "content regulation" is their recognition that "the borderless world of the Internet" "highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed."[61] As explained in the comments of Qwest and other providers, that statement applies no less to other forms of regulation than to content regulation.[62]

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http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244231A1.pdf, at 2 (explaining that "the FCC has not generally moved to regulate" IP-enabled applications, including Internet voice, as a result in part "of our charge in section 230 of the Communications Act").

[59] *Vonage v. Minnesota Pub. Util. Comm'n*, 290 F.Supp.2d 993, 997 (D. Minn. 2003)

[60] *See* NY DPS at 7-8, *citing Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003), *cert. denied* 124 S.Ct. 2812 (2004). The issue before the court in *Batzel v. Smith* was whether the defendant website operator was a "provider or user of an interactive computer service" within the meaning of 47 U.S.C. § 230(c)(1), and is thereby immunized from liability for the posting of an allegedly defamatory e-mail message authored by a third party. Although that issue was resolved in favor of the defendant largely by section 230(c)(1), the court also cited section 230(b)(2) as additional support for its decision. More fundamentally, the fact that section 230 applies to "content" regulation does not mean that it does not also apply to regulation addressed to other matters. Because the applicability of section 230(b)(2) to regulations other than those addressed to content was not before it, the court in *Batzel v. Smith* did not discuss the issue.

[61] *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D. N.Y. 1997). *Id*. at 169 ("[t]ypically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet").

[62] Further, construing its "unfettered by regulation" mandate to addressed only "content" regulation would render section 230(b)(2) superfluous, as the First Amendment to the United States Constitution

The above-referenced Commission and judicial decisions applying section 230(b)(2) to traditional state commission regulations other than those addressed to "content" is consistent with the rejection by the Supreme Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), of an analogous "contextual" argument asserted to limit the Commission's jurisdiction. In particular, state commissions and other parties argued there that the last sentence of section 201(b), authorizing the Commission to "prescribe such rules as may be necessary in the public interest to carry out the provisions of this Act," should be limited to the "interstate" communications with which the remainder of section 201, including the other provisions of section 201(b), are concerned. 525 U.S. at 724-25. The Court rejected that argument: "[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252 added by the Telecommunications Act of 1996." *Id*. The Commission and the courts have likewise correctly construed 230(b)(2) "to mean what it says."

Section 230(b)(2) forecloses the arguments of proponents of state regulation based on other provisions of the Communications Act.[63] First, when Congress expressly asserts jurisdiction over a subject, as it has in section 230(b)(2), section 2(b)'s "rule of statutory construction," which excludes "intrastate" communications from the scope of the Act and the FCC's authority, is inapplicable.[64] Second, by its terms, section 601(c) of

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already constrains federal and state regulation of content. *United States v. American Libraries Ass'n*, *Inc.*, 539 U.S. 194 (2003).

[63] These include section 2(b) of the Communications Act of 1934, codified at 47 U.S.C. § 152(b), section 601(c) of the 1996 Act, codified at 47 U.S.C. § 152(c), and 47 U.S.C. § 253(b).

[64] *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 367. The limitations in Lousiana Public Service Commission and its progeny do not apply where, as here, Congress has expressly asserted jurisdiction and

the 1996 Act, headed "no implied effect," likewise does not apply where Congress has expressly asserted and delegated jurisdiction to the Commission. Finally, section 253(b), is not an independent grant of authority to state commissions, but rather provides only that "nothing in this section" is intended to limit state commission regulation in certain circumstances. Thus, by its terms, section 253(b) applies only to "this section" (*i.e.*, section 253), and not to other sections such as section 230. In sum, the provisions upon which the proponents of state regulation rely do not support their claims regarding jurisdiction, but rather evidence a scheme in which Congress was careful to exclude IP-enabled services and applications from otherwise permissible state regulation.

Finally, a number of parties have demonstrated that, independent of section 230(b)(2), federal preemption of state regulation of IP-enabled services and applications is warranted in light of their "inherently interstate" nature.[65] IP-enabled networks, services and applications are properly deemed "interstate" given their national and international reach and scope, the portability of subscribers, the ability of subscribers to launch simultaneously over the same network communications routed across state lines and destined for parties and servers located in multiple states and even nations, and the current inability of providers to identify the geographic locations of the "end points" of individual IP communications.[66]

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codified a national policy in the Communications Act. *See also Illinois Public Telecomm. A'ssn. v. FCC*, 117 F.3d 555, 563 (D.C. Cir. 1997).

[65] *E.g.,* BellSouth at 11-13; Vonage at 16-18; SBC at 26-33.

[66] *Id.*

None of the proponents of state commission regulation dispute any of these facts.[67] Instead, some proponents claim that the Commission should adopt or permit the use of some kind of proxy methodology by which subsets of calls are allocated to state commissions for regulatory purposes.[68] These claims are astonishing. At a minimum, they belie any suggestion that the proponents of state regulation are seeking to protect unspecified "local" interests, for no "proxy" methodology would identify the calls to which "local" interests would necessarily attach. In all events, the proponents of proxy methodologies identify no reason for their use in this context other than to facilitate the imposition of multiple layers of regulation. That would stand on its head the deregulatory policies of Congress and the Commission.

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[67] The sole exception is the California commission, which disputes only that providers are currently unable to determine the geographic end points of particular communications. CA PUC at 35-36. Other state commissions to expressly address the issue concede that providers lack this capability. *See e.g.*, VA SCC Staff at 12, MO PSC at 9. In all events, the California commission, which has not to the best of Qwest's knowledge has not conducted any evidentiary or other hearing on the matter, nor otherwise attempted to verify its claims, is mistaken. Identifying geographic endpoints of IP voice communications currently is not possible because (1) there is no reliable method for associating a geographic address with a particular customer router and its associated broadband connections; and (2) processes for tracking the information necessary to dynamically associate an IP voice call with the broadband connection used to access the Internet do not currently exist. In particular, there currently exists no method, such as one relying on accurate and comprehensive database(s), for matching a geographic address with a broadband connection, and then with an IP voice call. Thus, when a subscriber places an IP voice call from a London hotel room, there is no set of databases or indices that can dependably associate the broadband connection with the London hotel address. Establishing standards and processes for developing and populating data bases with comprehensive and accurate listings of the geographic locations of Internet routers around the world, along with appropriate access and security mechanisms, is a massive undertaking. Developing and implementing processes for maintaining such databases -- for example, to ensure that the database is updated when the London hotel installs a new router and ships the old one to its administrative offices in Dublin -- presents an even greater challenge. Once reliable information is available to associate broadband connections with geographic addresses, providers must develop and implement automated processes to consistently and accurately identify and track that information for each IP voice call. Thus, even if information was currently available to associate the broadband connection with the London hotel, IP voice providers currently are not capable of capturing that information. At least one of the IP voice providers claimed by the California commission to identify the geographic origin and destination denies such capability. *See Nuvio: Frequently Asked Questions -- Dialing and Connection Questions* (visited July 13, 2004) <http://www.nuvio.com/faqdialing.php> (advising that Nuvio customers will not be able to dial 911 from their Nuvio numbers because "911 Service is currently not supported"). The material cited by the California commission is insufficient to verify the scope and reliability of claims by other providers.

[68] *See*, *e.g.*, MN PUC at 11, VA SCC Staff at 12, MO PSC at 9.

### C. The Commission Should Include in its Order Preemptive Statements That Are Broad, Unequivocal and Immediate.

The comments underscore the urgent need for a declaration by the Commission that true IP-enabled services (including voice applications) are subject to its exclusive jurisdiction, and that state laws and regulation other than those applicable to businesses generally are preempted. This declaration should be issued as expeditiously as possible, even if the remaining issues addressed in the *Notice* remain under consideration. Further, the Commission's declaration should be framed in terms making clear that preemption is effective immediately, and is not merely predictive or advisory. Anything less would defeat the national policy that the Internet and other interactive computer services remain "unfettered" by regulation, and deny to the industry and consumers the certainty that Congress correctly understood to be so critical to development and deployment of broadband access and IP-enabled services and applications.

In particular, it is apparent from their comments in response to the *Notice* that state commissions, if left with the slightest opening, are poised to begin immediately applying a wide range of regulations to at least IP voice applications, if not other IP-enabled services. For example, the Missouri commission intends to apply to IP voice applications the "same requirements as [apply to] other providers of basic local telecommunications service, including … quality of service requirements [and] … tariff filing requirements." MO PSC at 18-19. The Ohio commission intends to enact and enforce any regulations it deems in its discretion necessary or desirable to "protect the public safety and welfare, ensure continued quality of telecommunications service, and safeguard rights of consumers." OH PUC at 23.

The comments of state commissions that appear not to be so open-ended as to potential subjects of regulation are no less troubling. The Utah commission confirms its intention to subject VoIP providers to detailed requirements with respect to "provisioning intervals," "performance monitoring" and "service quality" standards. UT DPU at 6. The Utah commission also intends to require VoIP providers to contribute funds to the state's "Poison Control Center." *Id*. at 8-9. Nebraska mentions its intent to enforce certification (*i.e.*, entry) and rate filing requirements. NE PSC at 3. California and Minnesota intend to enforce against IP voice providers substantive rate regulation that far exceeds tariff or other filing requirements. In particular, the California commission notes its requirement that regulated carriers offer service "without discrimination to end user customers" (CA PUC at 17-18), and the Minnesota commission confirms (MN PUC at 11) that it intends to apply to VoIP "economic or rate regulation" except that which, in Minnesota's view, is "undue."[69]

These comments underscore not merely the urgency of the situation, but also the need for the Commission's preemptive statements to be immediate, broad and unequivocal.[70] Anything else will invite the adoption of state regulations based on a

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[69] As noted above, the comments of these and other pro-regulation state commissions express no concern about the costs or technical feasibility of complying with their regulations alone, much less the burdens of complying with multiple and potential different requirements imposed by their counterparts in other states, and the possible impact of their regulations on interstate or international communications, or the citizens of other states and countries. To the contrary, the California and Minnesota commissions contend, incorrectly (*see infra* note 56), that Congress has specifically authorized them to adopt regulations that apply to interstate as well as to intrastate communications. *See* CA PUC at 32-33; MN PUC at 10.

[70] The Commission should exclude from its preemptive statements only state laws and regulations that are applicable to businesses generally. The Commission should reject the request of AT&T (AT&T at 45 n.37), which otherwise supports preemption, that the Commission not preempt state regulation of IP-enabled networks and facilities, and underlying transmission services. All of the reasons cited by AT&T in favor of preemption generally apply with at least equal force to state regulation of IP networks and facilities. In particular, the inability to sever intrastate and interstate services and communications makes regulation of IP networks and transmission services no less problematic than regulation of IP-enabled services and applications. Further, state regulation of IP networks, facilities and transmission services

narrow interpretation of the Commission's statements. This would serve only to engender further litigation, and deny the certainty necessary to accelerate the deployment of broadband technology and IP-enabled services and applications. The Commission should thus refrain from including language suggesting the federal preemption is limited to "economic," "common carrier" or "public utility" regulation, for such terms are inherently ambiguous, and their use will lead to further litigation regarding the Commission's meaning. Similarly, the Commission should not limit its preemptive statements to "inconsistent" regulations, as urged by some parties.[71] The use of the term "inconsistent" would be confusing and superfluous, as regulation addressed to the same concerns, and perhaps even to the same communications, by multiple, independent agencies is, by definition, "inconsistent" with the deregulatory policies codified in the Act.[72]

The Commission's statements should also be framed in a manner that makes clear that preemption of state regulation is effective immediately. Correspondingly, the Commission should not frame its preemptive statements in "predictive" (*e.g.*, state regulation would "likely" be preempted) or prospective terms. In an order affirmed by the Ninth Circuit, the Commission has expressly rejected arguments that it may not or should not preempt state regulation of enhanced services until states actually "impose

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would jeopardize seriously efforts to increase broadband deployment, which requires "very extensive and expensive upgrades." Powell Remarks, Jan. 14, 2004, at 14. If there is anything that would chill investment in broadband facilities, it is the possibility that state commissions could require facilities-based providers to make their IP networks and services available to competitors at rates based on TELRIC or any similar methodology.

71 *E.g.,* ICC at 7-8; AT&T at 43-44.

72 *E.g.,* Verizon at 39-41 (allowing states to regulation IP-enabled services "would be inconsistent with Congress's intent for a single, federal regulatory policy").

requirements.[73] Recent experience, moreover, confirms that no "signal" from the Commission, no matter how "strong" (FERUP at 6 n.1), about its deregulatory policies, or its intentions regarding preemption, will dissuade "rent seeking by both the states and regulated carriers." *Id*. at 7. That experience includes both the recent order of the New York commission attempting to subject IP voice applications to regulations applicable to telecommunications companies, and the requests of Covad and other parties that state commissions adopt the very same unbundling requirements rejected by the Commission in the *TRO,* notwithstanding the Commission's statement that such requirements, if adopted were "unlikely" to survive a preemption claim.[74]

Finally, the broad, unqualified and immediate preemption of state regulation sought by Qwest and other parties would in no way foreclose consideration of legitimate state and local concerns. There exist a wide variety of mechanisms for state commission input regarding the adoption and enforcement of national regulations for IP-enabled services and applications. These include participation in Commission proceedings through the filing of comments and the *ex parte* process, use of the Federal-State Joint

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[73] Report and Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571, ¶ 121 n.246 (Dec. 20, 1991), *aff'd, California v. FCC*, 39 F.3d 919 (9th Cir 1994). The portion of the D.C. Circuit's decision in *USTA II* addressed to the Commission's statement that state unbundling requirements similar to those that the Commission rejected would "likely" be preempted is not to the contrary. The court held only that it would not review the Commission's statement because it was merely predictive, and thus not "ripe" for review. The court did not state that the Commission could not preempt state regulations that had yet to be adopted. Indeed, the court expressly affirmed such action by the Commission in *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214-15 (DC Cir. 1982), *cert. denied, National Ass'n of Regulatory Util. Comm'rs v. FCC*, 461 U.S. 938 (1983). Further, the purpose of section 230(b)(2) is to encourage investment and innovation by eliminating, to the maximum extent consistent with other policies reflected in the Act, uncertainty created by the prospects of regulation. Immediate preemptive statements are well within the Commission's authority to execute and enforce the mandate of section 230(b)(2).

[74] *See, e.g.*, *Petition of Covad Communications Co. for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corp.*, PUC Docket No. 04B-160T (MN PUC), filed April 6, 2004, at 15-16 (proposing that state commission require under state law the same obligation to unbundle fiber and other facilities rejected by the Commission in the *TRO*).

Board or similar organizations to make recommendations to the Commission or assist it with the development of relevant facts, and petitions to the Commission demonstrating good cause for individualized waivers permitting state commissions to impose different or additional requirements based on particular conditions creating special problems that render the federal resolution inadequate. The latter process has been endorsed specifically by the Supreme Court.[75] These mechanisms should be more than sufficient to address state and local interests, if any, warranting special attention.

* * * * *

In considering preemption of state regulation of IP-enabled services and applications, the Commission should recall how it addressed preemption of state regulation of wireless services, and the developments that ensued. When Congress adopted the 1993 Budget Act, and there were only two carriers providing wireless service in a given service area, it expressly authorized the Commission to permit state regulation of wireless rates and entry.[76] Numerous state commissions then petitioned the Commission to permit them to engage in such regulation, making the same arguments about the inadequacy of competition to protect consumers, their "local" knowledge, and their proximity to consumers, as the proponents of state regulation of IP voice applications are making in this proceeding. The Commission nevertheless rejected each

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[75] *See City of New York v. FCC*, 486 U.S. 57, 69 n.5 (1988). It is conceivable that the Commission could acquire through such a waiver process additional knowledge and experience regarding the feasibility and benefits, if any, of state as opposed to federal regulation of IP-enabled services and applications. Based on that knowledge and experience, the Commission could then decide if it is appropriate to exclude certain matters from the scope of its preemptive statements. This would be the jurisdictional version of "building up from a blank slate." Remarks of FCC Chairman Michael K. Powell, Technology Advisor Council Meeting (Oct. 20, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241750A1.pdf, at 2.

[76] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 47 U.S.C. § 332.

of the state commission petitions, thereby preempting state regulation.[77] In the ensuing decade, "the marketplace for wireless services was allowed to develop freely, and wireless consumers now enjoy unparalleled choice in calling plans, innovative services, and dramatically lower prices."[78] Indeed, federal preemption of state regulation of wireless service "ushered in a period of huge investment in wireless infrastructure, adding jobs and increasing productivity across the economy."[79] Consumers and the economy will reap even greater benefits if the Commission preempts state regulation of IP-enabled services and applications.

## III. THE COMMISSION SHOULD REJECT CLAIMS FOR REGULATION OF IP NETWORKS, INCLUDING TRANSMISSION SERVICES USED TO PROVIDE IP-ENABLED SERVICES AND APPLICATIONS.

While steadfastly opposing regulation of their IP networks, facilities, services and applications, an array of "rent-seeking" competing providers urge the Commission,[80] under the guise of a "layers" or other approach, to adopt various proposals to regulate

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77 *E.g.,* Order on Reconsideration, *Petition of the People of the State of California and the Pub. Util. Comm'n of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, FCC 95-345, PR Docket No. 94-105, 11 FCC Rcd 796, ¶ 8 (Aug. 8, 1995) (rejecting "view that any evidence of market imperfection is proof of a need for continued rate regulation, while all countervailing evidence is attributed to [state commission] regulatory oversight"); Report and Order, *Petition of New York State Pub. Service Comm'n to Extend Rate Regulation*, FCC 95-192, PR Docket No. 94-108, 10 FCC Rcd 8187, ¶ 22 (May, 19, 1995) ("reject[ing] a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions"); *see also* Report and Order, *Petition of the Connecticut Dept. Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, FCC 95-199, PR Docket No. 94-106, 10 FCC Rcd 7025 (May 19, 1995) (rejecting petition to permit state regulatory control); Report and Order on Reconsideration, *Petition of Arizona Corp. Comm'n, to Extend State Authority Over Rate and Entry Regulation of All CMRS*, FCC 95-190, PR Docket No. 94-104, 10 FCC Rcd 7824 (May 19, 1995) (same); Report and Order, *Petition on Behalf of the Louisiana Public Service Comm'n for Authority to Retain Existing Jurisdiction Over CMRS Offered Within the State of Louisiana*, FCC 95-191, PR Docket No. 94-107, 10 FCC Rcd 7898 (May 19, 1995) (same).

78 Abernathy Remarks, May 13, 2004, at 4.

79 *Id*. at 8.

80 *See* FERUP at 7. In this context, "rent seeking" is the practice of certain carriers of proposing or supporting regulation to advance their parochial interests at the expense of competitors or suppliers, and without true regard for the public interest.

those of other providers.[81] AT&T, for example, requests the Commission to adopt the very same requirement it vehemently opposed as "forced access" when it owned cable providers with "last mile" wireline connections to customers, and prohibit a "network provider" from "impeding access to the Internet content of another applications or service provider" ("net neutrality").[82] MCI urges the Commission to reconsider its decisions in the *TRO*, since affirmed by the Court of Appeals, not to require the unbundling of next generation fiber facilities and networks.[83] Other parties, joined by AT&T and MCI, urge the Commission to retain or expand the nondiscrimination and other requirements adopted in the *Computer Inquiry* proceeding, notwithstanding the Commission's refusal to apply those requirements to the leading providers of broadband connections, cable industry members.[84] Each of the proposals referenced above are premised on the erroneous claim that their targets enjoy market power over "bottleneck" facilities that, absent prescriptive regulation, would be used to block or impair access to competing IP-enabled services and applications, and ignore the harms that regulation would impose, as explained below.

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[81] The phrase "layers" approach is merely new jargon for age-old arguments favoring, *inter alia*, prohibitions or limits on vertical integration, purportedly to prevent "leveraging" of alleged market power into adjacent markets. Moreover, by limiting their proposals to regulate the "physical layer" to only select providers, the proponents of the "layers" approach are in fact urging regulation of providers, not networks or facilities.

[82] AT&T at 9. To avoid the appearance of hypocrisy, AT&T denies (at 52) that it is proposing a "forced access" requirement, but does not even attempt to explain how its proposal in this proceeding differs from those it characterized as "forced access" during local, state and federal proceedings triggered by its agreements to acquire the cable networks of TCI and MediaOne. Significantly, AT&T does not explain how its proposal differs from forced access. In fact, the only difference is that its proposal is even *more* regulatory, because in addition to requiring forced access, AT&T is also urging the Commission to adopt a regulation, superfluous in Qwest's view, mandating "net neutrality."

[83] MCI at 2-3, 14-15.

[84] AT&T at 48-53; MCI at 16-17; TW Telecom at 5-13; CompTel at 12.

The claims that broadband connections are a "monopoly" or a "bottleneck," and that providers have "market power," are foreclosed both by the already intense and growing competition among broadband platforms, and the absence of any showing that providers have engaged in the practices that the proposed regulations purport to address. In particular, as demonstrated in the study by Peter Huber and Evan Leo, an array of competing, high-speed, full-service digital platforms have been or are today being deployed.[85] These include cable modem (still by far the market leader, and which AT&T and MCI curiously omit from their analyses), DSL, Fiber to the Curb (and Home), Wi-Fi (and other wireless platforms), Satellite, and BPL.[86] Based on these facts, the investment community and the media, neither of which have any reason to support the advocacy of any particular industry segment, have observed that broadband competition "is Big Trouble for Telcos,"[87] setting the stage for a "Telecom Death Match."[88]

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[85] Competition in the Provision of Voice Over IP and Other IP-Enabled Services Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, *IP-Enabled Services*, WC Docket No. 04-36 (May 28, 2004) ("*Huber Report*") at Appendix A. *See also* Powell Remarks, Mar. 10, 2004, at 2.

[86] The suggestion that wireless and BPL platforms should not be considered because they are either too new, unproven or have yet to be deployed on a widespread basis are simply incorrect. Sprint, AT&T Wireless, Verizon Wireless and Cingular have announced plans to spend billions of dollars in the next several years to upgrade their networks to render them capable of providing wireless broadband Internet access. *See Sprint Boosting Speeds on Wi-Fi Network*, Associated Press, June 22, 2004 (noting Sprint's plan to upgrade its wireless data network at a cost of about $1 billion, and that "AT&T Wireless and Verizon Communications have each announced similar higher speed services in the last eight months"); Paul Taylor, *SBC Plans Fibre Optic Network*, Financial Times, June 22, 2004; (noting that Sprint and Cingular Wireless "gave details of their accelerated plans to roll out broadband wireless services"). Wireless broadband connections are already impacting the market. *See* Scott Cleland, John Freeman and Rudy Bacca, *Migration to Broadband is Big Trouble for Telcos*, Precursor, June 3, 2004 ("Migration to Broadband") . Similarly, "BPL is now a technologically viable 'third pipe' into most American homes for high speed service and telephony." *Id*.

[87] *Id*.

[88] *Telecom Death Match*, Barron's, June 21, 2004, at 25.

The absence of market power, or the incentives to exercise such power in any isolated pockets where it may still exist,[89] is highlighted by the failure of the proponents of regulation of broadband transmission facilities and services to identify any systemic abuse by network providers. To the contrary, AT&T concedes that cable modem providers have committed not to engage in the practices about which it speculates. What AT&T fails to mention is that Qwest has made the same commitment.[90] Qwest recognizes that such practices are not in the best interests of either consumers *or* providers. Qwest here underscores its position by committing to the four "Internet Freedoms" (*i.e.*, "the freedom to access content," "the freedom to use applications," "the freedom to attach personal devices," and the "freedom to obtain service plan information") as described by Chairman Powell.[91] Qwest has gone even further, as evidenced by its nationwide line sharing agreement with Covad.[92]

In sum, market forces and consumer demand have addressed the speculative concerns of the proponents of regulation of broadband networks, exactly as AT&T

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89 *See*, *e.g.*, *Preserving Internet Freedom: Guiding Principles For The Industry*, remarks of FCC Chairman Michael Powell, Silicon Flatirons Telecommunications Program (February 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf ("Powell Remarks, Feb. 8, 2004"), at 3 ("giving broadband consumers the access they want is not a matter of charity but simply good business. Network owners, ISPs, equipment makers, content and applications developers *all* benefit when consumers are empowered to get and do what they want") (emphasis in original); Joseph Farrell & Phillip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech 85, 100-04 (2003) (explaining that even a "platform monopolist" may have incentives to support use of their platforms by unaffiliated providers, to increase the use of and value offered by its platform).

90 *See* Letter from G. Lytle (Qwest) to Hon. M. Powell (FCC), September 30, 2003 ("convey[ing] Qwest's support for the High Tech Broadband Coalition's September 25, 2003 written ex parte, filed in CC Docket No. 02-33, setting forth "broadband connectivity principles").

91 Powell Remarks, Feb. 8, 2004, at 5.

92 *See also Migration to Broadband* (noting that Verizon offers "stand-alone" DSL service, and that other DSL providers are likely to do the same).

predicted they would in opposing "forced access" and other proposals six years ago, when broadband platform competition was nowhere near as robust as it is today:

> "Reliance on marketplace forces and the negotiation of commercial arrangements will lead to the adoption of the most efficient arrangements to allow cable subscribers to use the services of others without diminishing the incentives to make the investments necessary to accelerate widespread use of cable systems to offer facilities-based residential telephone competition."[93]

If "forced access" and other regulation of IP-networks was unnecessary six years ago, then, *a fortiori*, it is unnecessary today. That conclusion is confirmed by actual behavior in the market, as described above.

In contrast to the absence of any benefits that would be achieved, prescriptive regulation of broadband networks and transmission could seriously diminish broadband deployment. "So much of the ultimate promise of the connected society depends on saturating the country with broadband access."[94] That, in turn, depends on the making of very extensive and expensive upgrades" to existing networks, and investment in new networks.[95] Proposals to subject IP networks and facilities to prescriptive price regulation would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities."[96] Application of such regulations to incumbent LECs alone would place them

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[93] *See* Joint Reply Comments of AT&T & TCI, *Joint Application of AT&T Corp. and TCI, Inc., for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates and Subsidiaries*, CS Docket No. 98-178, at 40 (Nov. 13, 1998).

[94] Powell Remarks, Jan. 14, 2004, at 7.

[95] *Id.* at 8.

[96] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36, ¶ 292 (Aug. 21, 2003) ("*Triennial Review Order*"), *vacated in part, remanded in part, U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); Remarks of FCC Commissioner Kevin J.

at a serious competitive disadvantage relative to cable modem providers, the market leaders in broadband transmission, and further diminish the incentives and ability of ILECs to expand and complete their network upgrades.[97]

In no event should the Commission require facilities-based providers to lease or sell their broadband facilities and transmission services at wholesale rates determined under a methodology resembling TELRIC as it has been applied under the 1996 Act.[98] As explained by Commissioner Abernathy, "a requirement to unbundle next generation fiber loops at TELRIC rates destroys the incentive to invest."[99] There is no reason to believe that the impact on investment incentives would not be equally devastating if such a requirement were applied to broadband "transmission services" rather than broadband "facilities."[100] In the words of AT&T when it was about to acquire TCI, facilities-based providers must be permitted to "charge rates that recover the full value of the investments

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Martin, CompTel/ASCENT 2004 Spring Convention (February 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248688A1.pdf, at 1 (broadband deregulation "makes it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire").

97 *Promoting the Broadband Future*, remarks of FCC Commissioner Kathy Q. Abernathy, Supercomm Conference (June 22, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248688A1.pdf ("Abernathy Remarks, June 22, 2004"), at 3 ("part of cable's marketplace advantage . . . may reflect years of disparate regulatory treatment").

98 *See* Opening Comments of Qwest Comm. Int'l, *Review of the Commission Rules Regarding Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173 (Dec. 16, 2003); Reply Comments of Qwest Comm. Int'l, *Review of the Commission Rules Regarding Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173 (Jan. 28, 2004).

99 Abernathy Remarks, June 22, 2004, at 5; *see also id*. at 4 (noting that "in the wake of" the Commission's decision in the TRO not to require unbundled access to next generation fiber loop facilities, "several Bell companies and many smaller carriers have announced plans either to begin deploying or to step up their deployment of fiber to the home and other deep fiber architectures").

100 *Id*. at 8 ("while the Triennial Review tackled the critical question of unbundling obligations for broadband facilities, the FCC also must address the regulatory obligations attached to the provision of

[they make] and whatever costs [they] incur[] in providing that arrangement, including opportunity costs." Otherwise, the widespread deployment of broadband infrastructure that Congress, the Administration and the Commission have sought to encourage will never materialize.

## IV. THE COMMISSION SHOULD REAFFIRM IMMEDIATELY THAT TRUE IP-ENABLED SERVICES AND APPLICATIONS WHEN CONNECTING TO THE PSTN ARE NOT SUBJECT TO "CARRIER'S CARRIER" CHARGES.

The comments agree uniformly that intercarrier compensation must be reformed, and that this is a matter of some urgency. There is, however, a dispute regarding the applicability of access charges to IP voice communications that rely in part on the PSTN pending reform in the Commission's intercarrier compensation docket. But that issue is settled. Under the plain language of the Commission's rules (*i.e.*, the "ESP exemption"), an ISP POP is treated as if it were an end user for access charge purposes.[101] If the ISP POP and the end user customer calling the ISP or receiving the communication from the ISP are located in the same local exchange, then the communication is treated as a local call, and the ISP is entitled to purchase the same local access as is available to other users classified as end users. If, on the other hand, the ISP POP were not in the local exchange but connected to the local exchange via an IXC, then the connection between the IXC POP and the local exchange would be available only under the ILEC's exchange access tariffs.

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broadband *services*, including the extent to which nondiscrimination obligations exist") (emphasis in original).

[101] Treating an ISP POP as an end user for access charge purposes does not translate to similar treatment for the purpose of regulations unrelated to access charges.

This rule recognizes no exception for particular information services, such as true IP-enabled services and applications, including IP voice. The rule is based entirely on the definition of who must pay carrier's carrier charges under the Commission's rules—in a class that is expressly limited to carriers. While the rule can certainly be changed, an effort to expand the carrier's carrier charge application beyond the scope of carriers would take a modification, and cannot be accomplished through an interpretation. Moreover, excluding these services and applications would depart from the Commission's holding in the *Computer Inquiry* proceeding that "all enhanced services should be accorded the same regulatory treatment."[102] Indeed, had the Commission believed the rule to be as contended by Verizon and other parties, it would have decided the *AT&T Declaratory Ruling* on those grounds, rather than properly focusing on whether the service there at issue was an "information" service as opposed to a "telecommunications service." In sum, if changes to the ESP exemption are warranted, that is a matter properly addressed in the intercarrier compensation docket, not this one.

In all events, the arguments in favor of narrowing the ESP exemption to exclude IP voice applications misconstrue its history and nature. The rule is very simple—carriers pay carrier's carrier charges, all others do not.[103] If an entity connecting to the PSTN is not a carrier, it does not pay carrier's carrier charges. The broad scope of the exemption was emphasized by the fact that, when the Commission created the exemption, it did so as part of the solution to what was called the "leaky PBX" issue.[104] The FCC

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102 *Id*. ¶ 113.

103 47 CFR § 69.5(b).

104 Notice of Proposed Rulemaking, *Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, CC Docket No. 85-530, 2 FCC Rcd 7441,

determined that such devices, which included ESP equipment, would not be subject to carrier's carrier charges, but would pay a surcharge of $25 per month per DS0 equivalent channel when they purchased access to an IXC POP via an ILEC special access circuit.[105] The "leaky PBX" issue involved traffic going in both directions, and had little to do with whose customer was calling whom. It was based on the fact that it was not possible to separately identify local as opposed to long distance traffic. That is also true with respect to IP voice applications.[106]

Accordingly, the Commission should confirm forthwith, prior to adoption of reforms in its intercarrier compensation docket, that access charges do not apply to IP voice applications. The current uncertainty – unwarranted in Qwest's view -- has resulted in an environment whereby the applicability of particular compensation schemes is effectively left to the determination of individual providers.[107] Maintaining that anarchistic *status quo* for even a limited period would be inconsistent with the Commission's responsibilities and the public interest.

In addition, nearly every party agrees that the proper, long-term approach to access is via a carefully crafted intercarrier compensation structure. To the extent that the Commission plans to leave the current structure in place while it completes new

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¶ 2 (Dec. 18, 1987). The issue arose when PBX customers with interstate private lines connected to a PBX that would "leak" interstate traffic into the local exchange network. The amount of such leakage could not be determined.

105 *See id*.

106 The Commission subsequently confirmed that these "leaky PBXs" could include giant national private networks. *Id*.

107 In the unlikely event the Commission were to decide, in advance of intercarrier compensation reform, to narrow the ESP exemption so as to exclude IP voice communications, it should make clear that access charges apply regardless whether the traffic is routed directly or through a CLEC.

intercarrier compensation rules, it must make clear just what the current rules are. The claims of those who wish to rewrite the ESP exemption to include some non-carriers in the category of those entities required to pay carrier's carrier charges must do so by seeking a rule change. The current rules do not support their position.

## CONCLUSION

For all of the reasons set forth above, and in Qwest's Opening Comments, the Commission should (1) classify all true IP-enabled services and applications, including all true IP voice applications, as "information services;" (2) declare that all state regulation of all true IP-enabled services and applications, including all true IP voice applications, is preempted, except for state regulation that applies to all businesses; and (3) exercise its ancillary jurisdiction over IP-enabled networks, services and applications only where demonstrably necessary to achieve a social policy objective reflected in the Act. The Commission should issue on an expedited basis its rulings on the classification and preemption issues.

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Robert B. McKenna

Andrew D. Crain
Robert B. McKenna
Daphne E. Butler
Qwest Communications
International Inc.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2861

Roy E. Hoffinger
Elizabeth A. Woodcock
Perkins Coie LLP
Suite 700
1899 Wynkoop Street
Denver, CO 80202
(303) 291-2300

Counsel for
QWEST COMMUNICATIONS
INTERNATIONAL INC.

July 14, 2004

**Appendix 1 -** List of Parties That Filed Comments

8x8, Inc.
ACN Communication Services, Inc.
Ad Hoc Telecommunications Users Committee
Alcatel North America
Alliance for Public Technology
    Alliance for Technology Access
    American Association of People with Disabilities
    American Corn Growers Association
    American Federation of Labor-Congress of Industrial Organizations
    American Foundation for the Blind
    Association of Tech Act Projects
    Communications Workers of America
    Community Action Partnership
    Deaf and Hard of Hearing Consumer Advocacy Network
    Delta State University Center for Community and Economic Development
    Department for Professional Employees, AFL-CIO
    EDUCAUSE
    Gray Panthers
    Institute for the Study of Politics and Media at California State University, Sacramento
    Justice and Witness Ministries, United Church of Christ
    Latino Education Project
    MAAC Project
    National Association of the Deaf
    National Association of Development Organizations
    National Consumer Law Center on behalf of its low-income clients
    National Grange of the Order of Patrons of Husbandry
    Northern Virginia Resource Center for Deaf and Hard of Hearing Persons
    Self Help for Hard of Hearing People
    Telecommunications for the Deaf, Inc
    Telecommunications Research and Action Center
    The Arc of the United States
    United Cerebral Palsy
    World Institute on Disability
America's Rural Consortium
American Association of Retired Persons
American Foundation for the Blind
American Public Communications Council
Amherst, Massachusetts Cable Advisory Committee
APCO International
Association for Local Telecommunications Services
AT&T Corp. ("AT&T")
Attorney General of the State of New York

Attorney General of Texas
Avaya Inc.
Arizona Corporation Commission (“ACC”)
BellSouth Corporation (“BellSouth”)
Bend Broadband
    Cebridge Connections, Inc.
    Insight Communications Company, Inc.
    Susquehanna Communications
Boulder Regional Emergency Telephone Service Authority
BT Americas Inc.
Cablevision Systems Corp. (“Cablevision”)
Callipso Corporation
Carolyn McLaughlin
Cbeyond
    GlobalCom
    Mpower
CenturyTel, Inc.
Charter Communications
Cheyenne River Sioux Tribe Telephone Authority
Cisco Systems, Inc.
Citizens Utility Board ("CUB")
City and County of San Francisco
Comcast Corporation (“Comcast”)
    Comcast Cable Communications, Inc.
Communication Service for the Deaf, Inc.
Communications Workers of America
CompTel/ASCENT (“CompTel”)
Computer & Communications Industry Association
Computing Technology Industry Association
Consumer Electronics Association
Covad Communications (“Covad”)
Cox Communications, Inc.
CTIA – The Wireless Association™
David E. Magnenat Jr.
DialPad Communications
    ICG Communications, Inc.
    Qovia, Inc.
    VoicePulse, Inc.
DJE Teleconsulting, LLC
Donald Clark Jackson
EarthLink, Inc.
Educause
    American Council of Education
    Internet2
Electronic Frontier Foundation
Enterprise Communications Association

Federation for Economically Rational Utility Policy (“FERUP”)
Francois D. Menard
Frontier and Citizens Telephone Companies
Gary West
General Communication, Inc.
Global Crossing North America, Inc.
GVNW Consulting, Inc.
Harry Sherman
ICORE, Inc.
IEEE-USA
Illinois Commerce Commission ("ICC")
Inclusive Technologies
Independent Telephone & Telecommunications Alliance
Information Technology Association of America
Information Technology Industry Council
Interstate Telcom Consulting, Inc.
Ionary Consulting
Iowa Utilities Board (“IUB”)
John H. West
King County E911 Program
Local Government Coalition
- National Association of Telecommunications Officers and Advisors
- National League of Cities
- National Association of Counties
- U.S. Conference of Mayors
- National Association of Towns and Townships
- Texas Coalition of Cities for Utility Issues
- Washington Association of Telecommunications Officers and Advisors
- Greater Metro Telecommunications Consortium
- Mt. Hood Cable Regulatory Commission
- Metropolitan Washington Council of Governments
- Rainier Communications Commission
- City of Philadelphia
- City of Tacoma, Washington
- Montgomery County Maryland

Level 3 Communications LLC
Lucent Technologies Inc.
Maine Public Utilities Commission (“ME PUC”)
MCI, Inc. (“MCI”)
Microsoft Corporation
Minnesota Public Utilities Commission (“MN PUC”)
Missouri Public Service Commission (“MO PSC”)
Motorola, Inc. (“Motorola”)
National Association of Regulatory Utility Commissioners (“NARUC”)
National Cable & Telecommunications Association (“NCTA”)
National Consumers League

National Emergency Number Association
National Exchange Carriers Association, Inc.
National Governors Association
National Grange of the Order of Patrons of Husbandry
National Telecommunications Cooperative Association
Nebraska Public Service Commission ("NE PSC")
Nebraska Rural Independent Companies
    Arlington Telephone Company
    Blair Telephone Company
    Cambridge Telephone Company
    Clarks Telecommunications Co.
    Consolidated Telco, Inc.
    Consolidated Telecom, Inc.
    Consolidated Telephone Company
    Eastern Nebraska Telephone Company
    Great Plains Communications, Inc.
    Hartington Telecommunications Co., Inc.
    Hershey Cooperative Telephone Company, Inc.
    K&M Telephone Company, Inc.
    Nebraska Central Telephone Company
    Northeast Nebraska Telephone Co.
    Pierce Telephone Co.
    Rock County Telephone Company
    Stanton Telephone Co., Inc
    Three River Telco
Net2Phone, Inc.
New Jersey Board of Public Utilities
New York City Department of Information Technology and Telecommunications
nexVortex, Inc.
Nortel Networks ("Nortel")
Nuvio Corporation ("Nuvio")
Office of the Ohio Consumers' Counsel
Office of the People's Counsel for the District of Columbia
Omnitor
Organization for the Promotion and Advancement of Small Telecommunications Companies
Pac-West Telecomm, Inc.
People of the State of California and the California Public Utilities Commission ("CA PUC")
PointOne ("PointOne")
Public Utilities Commission of Ohio ("OH PUC")
Pulver.com
Rebecca Ladew
Rehabilitation Engineering Research Center on Telecommunications Access
Rural Carriers
    Arctic Slope Telephone Association Cooperative, Inc

Cellular Mobile Systems of St. Cound, LLC d/b/a Cellular 2000
Comanche County Telephone, Inc.
DeKalb Telephone Cooperative, Inc. d/b/a DTC Communications
Grand River Mutual Telephone Corporation
Interstate 35 Telephone Company
KanOkla Telephone Association, Inc.
Siskiyou Telephone Company
Uintah Basin Telecommunications Association, Inc.
Vermont Telephone Company, Inc.
Wheat State Telephone, Inc.
Rural Independent Competitive Alliance
SBC Communications Inc. ("SBC")
Self Help for Hard of Hearing People, SHHH
Skype, Inc.
Sonic.net, Inc.
SPI Solutions, Inc.
Spokane County 911 Communications
Sprint Corporation ("Sprint")
State of New Jersey – Division of the Ratepayer Advocate
State of New York Department of Public Service ("NY DPS")
Deborah Taylor Tate ("Tate")
TCA, Inc.-Telcom Consulting Associates
Telecommunications for the Deaf, Inc.
National Association of the Deaf
Self Help for the Hard of Hearing
Deaf and Hard of Hearing Consumer Advocacy Network
Association of Late-Deafened Adults
Telecommunications Industry Association
Tellme Networks, Inc.
Texas Coalition of Cities for Utility Issues
Time Warner Inc.
Time Warner Telecom ("TW Telecom")
TracFone Wireless, Inc.
United States Conference of Catholic Bishops
Alliance for Community Media
Appalachian People's Action Coalition
Center for Digital Democracy
Consumer Action
Edgemont Neighborhood Coalition
Migrant Legal Action Program
United States Department of Homeland Security
United States Department of Justice
United States Telecom Association
U.S. Small Business Administration
USA Datanet, Inc.
Utah Division of Public Utilities ("UT DPU")

UTC/UPLC
Valor Telecommunications of Texas, LP
And Iowa Telecommunications Services, Inc.
Verisign, Inc.
Verizon Telephone Companies ("Verizon")
Vermont Public Service Board
Virgin Mobile, USA, LLC
Virginia State Corporation Commission Staff ("VA SCC Staff")
Voice on the Net (VON) Coalition
Vonage Holdings Corp. ("Vonage")
We Energies
Wisconsin Electric Power Company
Wisconsin Gas Company
Western Telecommunications Alliance
WilTel Communications, LLC
Yellow Pages Integrated Media Association
Z-Tel Communications, Inc.

**Appendix 2 -** List of Abbreviations and Acronyms Used in Reply Comments

| | |
|---|---|
| BOC | Bell Operating Company |
| BPL | Broadband Over Powerlines |
| CFR | Code of Federal Regulations |
| CI-II | Computer Inquiry II |
| CI-III | Computer Inquiry III |
| CLEC | Competitive Local Exchange Carrier |
| Commission | Federal Communications Commission |
| CPE | Customer Premises Equipment |
| DS0 | Digital Signal (Level) 0 |
| DSL | Digital Subscriber Line |
| ESP | Enhanced Service Providers |
| FCC | Federal Communications Commission |
| FWD | Free World Dialup |
| ILEC | Incumbent Local Exchange Carrier |
| IP | Internet Protocol |
| ISP | Internet Service Provider |
| IXC | Interexchange Carrier |
| LEC | Local Exchange Carrier |
| Notice | Notice of Proposed Rulemaking |
| POP | Point of Presence |
| POTS | Plain Old Telephone Service |
| PSTN | Public Switched Telephone Network |
| Qwest | Qwest Communications International Inc. |
| TDM | Time Division Multiplexed |
| TELRIC | Total Element Long Run Incremental Cost |
| TRO | Triennial Review Order |
| VoIP | Voice Over Internet Protocol |
| Wi-Fi | Wireless Fidelity |

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 04-36, 2) a copy of the **REPLY COMMENTS** to be served via e-mail on Ms. Janice M. Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, via janice.myles@fcc.gov, 3) a copy of the **REPLY COMMENTS** to be served via e-mail on the FCC's duplicating contractor Qualex International, Inc., via (qualexint@aol.com), and 4) a copy of the **REPLY COMMENTS** to be served, via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

July 14, 2004

Teresa K. Gaugler
Association for Local Telecommunications Services
Suite 1200
888 17th Street, N.W.
Washington, DC 20006

Theodore R. Kingsley
Richard M. Sbaratta
Stephen L. Earnest
BellSouth Corporation
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375-0001

Arthur H. Harding.....Bend Broadband
Matthew D. Emmer
Craig A. Gilley
Fleischman and Walsh, LLP
Suite 600
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006

Michael E. Olsen
Lara J. Leibman
Robbin Johnson
Cablevision Systems Corp.
1111 Stewart Avenue
Bethpage, NY 11714

Chérie R. Kiser.....Cablevision
Angela F. Collins.....Net2Phone
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, PC
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, DC 20004-2608

John F. Jones
CenturyTel, Inc.
100 Century Park Drive
Monroe, LA 71203

Karen Brinkmann.....CenturyTel
Jeffrey A. Marks
Thomas A. Allen
Latham & Watkins LLP
Suite 1000
555 Eleventh Street, N.W.
Washington, DC 20004

Mark E. Barber
Charter Communications
12405 Powerscourt Drive
St. Louis, MO 63131

Christopher W. Savage.....Charter
Cole, Raywid & Braverman, LLP
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006

Debbie Goldman
George Kohl
Communications Workers of America
501 Third Street, N.W.
Washington, DC 20001

James Kirkland
Susan J. Davis
Praveen Goyal
Covad Communications
Suite 750
600 14th Street, N.W.
Washington, DC 20005

Michael F. Altschul
Carolyn W. Brandon
Diane Cornell
CTIA- The Wireless Association™
Suite 600
1400 16th Street, N.W.
Washington, DC 20036

Lee Tien
Seth Schoen
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Albert H. Kramer.....Enterprise Comm
Jacob S. Farber
Dickstein Shapiro Morin & Oshinsky, LLP
2101 L Street, N.W.
Washington, DC 20037

Danny E. Adams.....Enterprise Comm
Joan M. Griffin
Tamara E. Connor
Kelley Drye & Warren LLP
Suite 1200
8000 Towers Crescent Drive
Vienna, VA 22182

John W. Steadman, P.E., PH.D.
Deborah Rudolph
IEEE-USA
1828 L Street, N.W.
Washington, DC 20036

Jonathan Jacob Nadler.....ITAA
Angela Simpson
Squire, Sanders & Dempsey, LLP
POB 0407
Washington, DC 20044

Joel B. Shifman
Maine Public Utilities Commission
242 State Street
18 State House Station
Augusta, MA 04333-0018

Elana Shapochnikov
Net2Phone, Inc.
520 Broad Street
Newark, NJ 07102-3111

Jack S. Zinman
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
1401 Eye Street, N.W.
Washington, DC 20005

William T. Lake.....SBC
Lynn R. Charytan
Brian W. Murray
Alison H. Southall
Wilmer Cutler Pickering LLP
2445 M Street, N.W.
Washington, DC 20037-1420

Charles H. Kennedy.....Pac-West
Jim Tobin
Morrison & Foerster LLP
Suite 5500
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Derek R. Khlopin
Grant E. Seiffert
Telecommunications Industry Association
Suite 300
2500 Wilson Boulevard
Arlington, VA 22201

Laura H. Parsky
U.S. Department of Justice
Room 2213
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Michael L. Ciminelli
Drug Enforcement Administration
U.S. Department of Justice
Washington, DC 20537

Patrick W. Kelley
Federal Bureau of Investigation
U.S. Department of Justice
J. Edgar Hoover Building
Room 7427
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Brad Mutschelknaus.....USA Datanet
Todd D. Daubert
Kelley Drye & Warren LLP
Suite 500
1200 19th Street, N.W.
Washington, DC 20036

Thomas M. Koutsky
Z-Tel Communications, Inc.
Suite 500
1200 19th Street, N.W.
Washington, DC 20036

Henk Brands.....Time Warner
John H. Longwell
Aaron Futch
Paul, Weiss, Rifkind,
Wharton & Garrison LLP
1615 L Street, N.W.
Washington, DC 20036

Steven N. Teplitz
Time Warner Inc.
800 Connecticut Avenue, N.W.
Washington, DC 20006

Donna N. Lampert
Lampert & O'Connor, PC
Suite 600
1750 K Street, N.W.
Washington, DC 20006

TCA, Inc.-Telcom Consulting Associates
Suite 200
1465 Kelly Johnson Boulevard
Colorado Springs, CO 80920

Charles Davidson
Federation for Economically Rational
Utility Policy
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Colleen L. Boothby.....Ad Hoc Tel
Andrew M. Brown
Levine, Blaszak, Block and Boothby, LLP
Suite 900
2001 L Street, N.W.
Washington, DC 20036

Donald Clark Jackson
17720 Vista Avenue
Monte Sereno, CA 95030-3245

Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

William M. Ojile
Valor Telecommunications of Texas, LP
Suite 200
201 E. John Carpenter Freeway
Irving, TX 75062

D. Michael Anderson
Iowa Telecommunications Services, Inc.
POB 1046
Newton, IA 50208

Gregory J. Vogt.....Valor and ITS
Bradley K. Gillen
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

Julie L. Soderna
Citizens Utility Board
Suite 1760
208 South LaSalle
Chicago, IL 60604

David W. Carpenter.....AT&T
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

David L. Lawson.....AT&T
Richard D. Klingler
James P. Young
C. Frederick Beckner III
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

Leonard J. Cali
Lawrence J. Lafaro
Judy Sello
AT&T Corp.
Room 3A229
One AT&T Way
Bedminster, NJ 70921

Staci L. Pies
PointOne
Building 2, Suite 200
6500 River Place Boulevard
Austin, TX 78750

Charles Mathias
Lucent Global Government Affairs
Suite 640 West Tower
1100 New York Avenue, N.W.
Washington, DC 20005

Martina Bradford.....Lucent
Tom W. Davidson
Phil Marchesiello
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Donald J. Elardo
DJE Teleconsulting, LLC
9122 Potomac Ridge Road
Great Falls, VA 22066

Albert H. Kramer
Robert F. Aldrich
American Public Communications Council
2101 L Street, N.W.
Washington, DC 20037-1526

Henry G. Hultquist
Alan Buzacott
Lawrence E. Fenster
MCI, Inc.
1133 19th Street, N.W.
Washington, DC 20036

Mark D. Schneider.....MCI
Marc A. Goldman
Jenner & Block LLP
601 13th Street, N.W.
Washington, DC 20005

Caressa D. Bennet.....Rural Carriers
Howard S. Shapiro
Joshua Pl Zeldis
Bennet & Bennet, PLLC
10th Floor
1000 Vermont Avenue, N.W.
Washington, DC 20005

A. Sheba Chacko
BT Americas Inc.
11440 Commerce Park Drive
Reston, VA 20191

Chuck Crowders
Avaya Inc.
Suite 511
490 L'Enfant Plaza, S.W.
Washington, DC 20024

Andrew D. Lipman.....Callipso Corporation
Richard M. Rindler
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Thomas M. Sullivan
Eric E. Menge
Office of Advocacy
U.S. Small Business Administration
Suite 7800
409 3rd Street, S.W.
Washington, DC 20416

Peter Lurie
Virgin Mobile, USA, LLC
10 Independence Boulevard
Warren, NJ 07059

Kristen Neller Verderame
BT Americas Inc.
Suite 450
2025 M Street, N.W.
Washington, DC 20036

David L. Lawson
James P. Young
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

Christopher C. Kempley
Maureen A. Scott
Timothy J. Sabo
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Thomas Jones
Jonathan Lechter
Willkie Farr & Gallagher LLP.....Time Warner Telecom
1875 K Street, N.W.
Washington, DC 20006

Henry Goldberg
Brita Dagmar Strandberg
Goldberg, Godles, Wiener & Wright.....Skype
1229 19th Street, N.W.
Washington, DC 20036

To-Quyen T. Truong.....Cox
J.G. Harrington
Dow Lohnes & Albertson, PLLC
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

Joseph W. Waz, Jr.
Comcast Corporation
1500 Market Street
Philadelphia, PA 19102

James R. Coltharp
Comcast Corporation
Suite 500
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006

Terry S. Bienstock
Thomas R. Nathan
John G. Sullivan
Comcast Cable Communications, Inc.
1500 Market Street
Philadelphia, PA 19102

Gregg C. Vanderheiden
Judith E. Harkins
RERC on Telecommunications Access
c/o Gallaudet University
800 Florida Avenue, NE
Washington, DC 20003

Karen Peltz Strauss.....RERC
KPS Consulting
Suite 400
2120 L Street, N.W.
Washington, DC 20007

Geoffrey M. Klineberg.....Verizon
Leo R. Tsao
Kellogg, Huber, Hansen
Todd & Evans, PLLC
Suite 400 Sumner Square
1615 M Street, N.W.
Washington, DC 20036-3209

Karen Zacharia
Leslie V. Owsley
Joshua E. Swift
Verizon
Suite 500
1515 North Court House Road
Arlington, VA 22201

Tamar E. Finn.....DialPad
Jeffrey R. Strenkowski
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, N.W.
Washington, DC 20007

William B. Wilhelm, Jr.....Vonage
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Brian Cute
Verisign, Inc.
Suite 410
1666 K Street, N.W.
Washington, DC 20006-1227

Anthony M. Rutkowski
Verisign Communications Services Division
21355 Ridgetop Circle
Dulles, VA 20166-6503

Shana Knutson
Nebraska Public Service Commission
300 The Atrium
1200 N Street
Lincoln, NE 68508

Daniel F. Gonos
Colleen R. Jones
ACN Communications Services, Inc.
32991 Hamilton Court
Farmington Hills, MI 48334

Marty W. Weinstein
General Communication, Inc.
10th Floor
2550 Denali Street
Anchorage, AK 99503

Tina M. Pidgeon
Lisa R. Youngers
General Communication, Inc.
Suite 410
1130 17th Street, N.W.
Washington, DC 20036

Paula H. Boyd
Marc Berejka
Micrsoft Corporation
Suite 500
1401 Eye Street, N.W.
Washington, DC 20005

Scott Blake Harris.....Microsoft
Harris, Wiltshire & Grannis LLP
Suite 1200
1200 Eighteenth Street, N.W.
Washington, DC 20036

Ben H. Lyon
Tellme Networks, Inc.
1310 Villa Street
Mountain View, CA 94041

Bruce D. Jacobs.....VON Coalition
Glenn S. Richards
David S. Konczal
Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1128

James Bradford Ramsay
National Association of Regulatory
Utility Commissioners
Suite 200
1101 Vermont Avenue, N.W.
Washington, DC 20005

Jim Petro
Duane Luckey
Steven T. Nourse
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Jonathan D. Lee
CompTel/Ascent
Suite 800
1900 M Street, N.W.
Washington, DC 20036

Robert J. Aamoth.....CompTel/Ascent
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
Suite 500
1200 19th Street, N.W.
Washington, DC 20036

Francois D. Menard
POB 203
Pointe Du Lac, QC, Canada
GOX 1Z0

Jill M. Lyon
Brett W. Kilbourne
UTC/UPLC
Fifth Floor
1901 Pennsylvania Avenue, N.W.
Washington, DC 20006

Agostino Cangemi
Mitchel Ahlbaum
New York City Department of Information
Technology and Telecommunications
9th Floor
75 Park Place
New York, NY 11201

Howard J. Symons.....NCTA
Tara M. Corvo
Christopher R. Bjornson
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, PC
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

Andrew D. Lipman.....Cbeyond
Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman LLP
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Tina W. Gabbrielli
Randy Beardsworth
United States Department of
Homeland Security
Nebraska Avenue Complex
Washington, DC 20528

William A. Rodger
Daniel L. Johnson
Computer & Communications Industry
Association
Sixth Floor
666 11th Street, N.W.
Washington, DC 20001

Clarence A. West
Texas Coalition of Cities
Utility Issues
Suite 200
1201 Rio Grande
Austin, TX 78701

Rhett Dawson
Information Technology Industry Council
Suite 200
1250 I Street, N.W.
Washington, DC 20005

Nicholas P. Miller.....Local Government Coalition
Matthew C. Ames
Gerard Lavery Lederer
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036

Alliance for Public Technology
Suite 900
919 18th Street, N.W.
Washington, DC 20006

James R. Hobson.....NENA
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036-4320

Gerard J. Duffy.....Interstate Telcom & Western Telecom
Blooston, Mordkofsky, Dickens Duffy &
Prendergast
Suite 300
2120 L Street, N.W.
Washington, DC 20037

Kristopher E. Twomey.....Sonic.net
Suite 300
1725 I Street, N.W.
Washington, DC 20006

Joseph P. Benkert, PC
Boulder Regional Emergency Telephone
Service Authority
POB 620308
Littleton, CO 80162-0308

Bryan R. Martin
8x8, Inc.
2445 Mission College Boulevard
Santa Clara, CA 95054

Christy C. Kunin.....8x8
Larry A. Blosser
Michael A. Schneider
Gray Cary Ware & Freidenrich LLP
Suite 300
1625 Massachusetts Avenue, N.W.
Washington, DC 20036

Paul M. Schudel.....Nebraska Rural Independent
James A. Overcash
Woods & Aitken LLP
Suite 500
301 South 13th Street
Lincoln, NE 68508

Robert M. Gurss
APCO International
Suite 808
1725 DeSales Street, N.W.
Washington, DC 20036

Jeanne M. Fox
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

William P. Hunt, III
Cindy Z. Schonhaut
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

John T. Nakahata.....Level 3
Charles D. Breckinridge
Harris, Wiltshire & Grannis LLP
Suite 1200
1200 Eighteenth Street, N.W.
Washington, DC 20036

Raymond L. Strassburger
Nortel Networks
325E
101 Constitution Avenue, N.W.
Washington, DC 20001

John Ridgway
Dennis Rosauer
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319

Walter Wolnik
Kristopher Pacunas
Cable Advisory Committee
Town Hall
4 Boltwood Avenue
Amherst, MA 01002

Philip L. Malet.....Nuvio
Carlos M. Nalda
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Paul W. Kenefick
Alcatel North America
Suite 800
1909 K Street, N.W.
Washington, DC 20006

L. Marie Guillory
Daniel Mitchell
National Telecommunications
Cooperative Association
10th Floor
4121 Wilson Boulevard
Arlington, VA 22203

Gabriel Garcia
D. Esther Chavez
C. Brad Schuelke
Consumer Protection & Public Health Division
POB 12548, Capitol Station
Austin, TX 78711-2548

Burl W. Haar
Minnesota Public Utilities Commission
Suite 350
121 Seventh Place East
St. Paul, MN 55101-2147

William Irby
Virginia State Corporation Commission
POB 1197
Richmond, VA 23218

Richard A. Muscat
Public Agency Representation Section
POB 12548, Capitol Station
Austin, TX 78711-2548

Susanna M. Zwerling
Keith H. Gordon
Michael Berlin
State of New York
120 Broadway
New York NY 10271

Ava-Marie Madeam
Seema M. Singh
State of New Jersey Ratepayer Advocate
POB 46005
Newark, NJ 07101

Blaine Gilles, Ph.D.
WilTel Communications, LLC
Suite 140
9525 W. Bryn Mawr
Rosemont, IL 60018

Adam Kupetsky
WilTel Communications, LLC
One Technology Center TC 15-h
Tulsa, OK 74103

Peter A. Rohrbach.....WilTel
David L. Sieradzki
Hogan & Hartson LLP
555 13th Street, N.W.
Washington, DC 20004

Jeanine Poltronieri
Motorola, Inc.
Suite 400
1350 I Street, N.W.
Washington, DC 20005-3305

The Computing Technology Industry Association
4350 N. Fairfax Drive
Arlington, VA 22203

Jeffrey A. Campbell
Cisco Systems, Inc.
601 Pennsylvania Avenue, N.W.
Washington, DC 20004

Timothy J. Simeone
Harris, Wiltshire & Grannis LLP
Suite 1200
1200 Eighteenth Street, N.W.
Washington, DC 20036

Jonathan Askin
Pulver.com
Suite 225
115 Broadhollow Road
Melville, NY 11747

Wendy Wigen
EduCause
Suite 1010
1150 18th Street, N.W.
Washington, DC 20036

Amy Healy
Yellow Pages Integrated Media Association
First Floor
Two Connell Drive
Berkeley Heights, NJ 07922

Joel Bernstein.....Yellow Pages
Halprin Temple
1317 F Street, N.W.
Washington, DC 20004

John C. Graham
State of New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

David Certner
American Association of Retired Persons
601 E Street, N.W.
Washington, DC 20049

Brad Henry
Mike Rounds
Diane Duff
Ron Teixeira
National Governors Association
Suite 267
444 North Capitol Street, N.W.
Washington, DC 20036

Joel B. Shifman
Maine Public Utilities Commissioners
242 State Street
18 State House Station
Augusta, ME 04333-0018

Natelle Dietrich
Marc D. Poston
Missouri Public Service Commission
POB 360
Jefferson City, MO 65102

Michael J. Shortley III
Global Crossing Limited
1080 Pittsford Victor Road
Pittsford, NY 14534

Paul Kouroupas
Global Crossing Limited
3rd Floor
200 Park Avenue
Florham Park NJ 07932

Jan Reimers
ICORE, Inc.
326 S. 2nd Street
Emmaus, PA 18049

Richard A. Askoff
Clifford Rohde
National Exchange Carrier
Association, Inc.
80 South Jefferson Road
Whippany, New Jersey 07981

James W. Olson
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tutle
United States Telecom Association
Suite 600
1401 H Street, N.W.
Washington, DC 20005-2164

Michael Petricone
Veronica O'Connell
Consumer Electronics Association
2500 Wilson Boulevard
Arlington, VA 22201

Susan Grant
National Consumers League
Suite 1200
1701 K Street, N.W.
Washington, DC 20006

Terry L. Etter
Office of the Ohio Consumers' Counsel
Suite 1800
10 W. Broad Street
Columbus, OH 43215

David W. Zesiger
The Independent Telephone &
Telecommunications Alliance
Suite 600
1300 Connecticut Avenue, N.W.
Washington, DC 20036

Donn T. Wonnell
Counsel for ITTA
2925 Kitchum's Pond Road
Williamsburg, VA 23185

Paul W. Shcroeder
Alan M. Dinsmore
American Foundation for the Blind
Suite 400
820 First Street, N.E.
Washington, DC 20002

Randolph L. Wu
Helen M. Mickiewicz
Ellen S. Levine
People of the State of California and the
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

John W. Butler.....Earthlink, Inc.
Sher & Blackwell
Suite 900
1850 M Street, N.W.
Washington, DC 20036

Jeffry H. Smith
GVNW Consulting, Inc.
Suite 200
8050 SW Warm Springs Street
Tualatin, OR 97062

Stuart Polikoff
Stephen Pastorkovich
Jeffrey W. Smith
Organization for the Promotion and Advancement
of Small Telecommunications Companies
Suite 700
21 Dupont Circle, N.W.
Washington, DC 20036

Michael L. Ginsberg
Utah Division of Public Utilities
POB 140857
Salt Lake City, UT 84114-0857

Mitchell F. Brecher.....TracFone Wireless, Inc.
Tracie Chesterman
GreenBerg Traurig, LLP
Suite 500
800 Connecticut Avenue, N.W.
Washington, DC 20006

David Cosson.....Rural Independent Competitive Alliance
Kraskin, Moorman & Cosson, LLC
2120 L Street, N.W.
Washington, DC 20037

James A. Bachtell.....USCCB
Angela J. Campbell
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

Karen Peltz Strauss.....Comm Serv for the Deaf
KPS Consulting
Suite 400
2120 L Street, N.W.
Washington, DC 20037

Communications Service for the Deaf, Inc.
102 North Krohn Place
Sioux Falls, SD 57103

Lee G. Petro.....Telecom for the Deaf
Fletcher, Heald & Hildreth, PLC
11th Floor
1300 North 17th Street
Arlington, VA 22209

Jim Tauer
SPI Solutions, Inc.
Building 900, Suite 910
Roswell, GA 30076

Virgil Rogers
nexVortex, Inc.
11428 Nightstar Way
Reston, VA 20194

Dennis J. Herrera
Theresa L. Mueller
Lisa S. Gelb
City and County of San Francisco
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Gregg C. Sayre
Frontier and Citizens Communications
180 South Clinton Avenue
Rochester, NY 14646-0700

Marlys R. Davis
King County E911 Program Office
Room 129
7300 Perimeter Road South
Seattle, WA 98108-3848

Elizabeth A. Noël
Sandra Mattavous-Frye
Office of the People's Counsel for
the District of Columbia
Suite 500
1133 15th Street, N.W.
Washington, DC 20005-2710

David A. Irwin.....America's Rural Consortium
Gregory V. Haledjian
Irwin, Campbell & Tannenwald, PC
Suite 200
1730 Rhode Island Avenue, N.W.
Washington, DC 20036-3101

Peter Bluhm
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Inclusive Technologies
37 Miriam Drive
Matawan, NJ 07747

Ronald P. LeFever
Robert Bischke
We Energies
333 West Everett Street
Milwaukee, WI 53203-2046

Terry D. Portis
Self Help for Hard of Hearing People, SHHH
Suite 1200
7910 Woodmont Avenue
Bethesda, MD 20814

Christine F. Ericson
Illinois Commerce Commission
Suite C-800
160 N. Lasalle
Chicago, IL 60601

Leroy Watson
National Grange of the Order of Patrons of Husbandry
1616 H Street, N.W.
Washington, DC 20006

David E. Magnenat Jr.
911 Center, Kisap County, Washington
1720 Warren Avenue
Bremerton, WA 98337

Alice E. Walker.....Cheyenne River Sioux Tribe
Scott B. McElroy
Greene, Meyer & McElroy, PC
No. 220
1007 Pearl Street
Boulder, CO 80302

Fred R. Goldstein
Ionary Consulting
POB 610251
Newton Hlds, MA 02461

Lorlee Mizell
Spokane County 911 Communications
1620 N. Rebecca Street
Spokane, WA 99217

Omnitor AB
Gunnar Hellström
Renathvägen 2
SE-121 37 Johanneshov
Sweden

VAT no: SE 5565584413-01

Richard Juhnke
David Nall
Norina Moy
Sprint Corporation
Suite 400
401 9th Street, N.W.
Washington, DC 20004

Sue D. Blumenfeld.....Sprint
Angie Kronenberg
Megan Anne Eden
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006-1238

Harry Sherman
6232 186th Street, S.W.
Lynnwood, WA 98037

Gary West
4565 Hazeltine Avenue
Sherman Oaks, CA 91423

Carolyn McLaughlin
240 Corriher Grange Road # 627
Mooresville, NC 28115

John H. West
3 Depot Road
Chichester, NH 03258

Rebecca Ladew
1608 Roundhill Road
Baltimore, MD 21218-2213