

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

In the Matter of
IP-Enabled Services

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WC Docket No. 04-36

**JOINT REPLY COMMENTS OF
SOUTHERN LINC AND SOUTHERN TELECOM**

Southern Communications Services, Inc. d/b/a Southern LINC (“Southern LINC”) and Southern Telecom, Inc. (“Southern Telecom”), by their attorneys, hereby reply to comments submitted in response to the notice of proposed rulemaking released on March 10, 2004 regarding IP-enabled services.¹ Southern LINC and Southern Telecom urge the Commission to move quickly but carefully to reduce the level of uncertainty regarding the regulatory status of IP-enabled applications and services. The Commission can best accomplish this goal by applying the statutory definitions to IP-enabled services rather than creating any new classification tests. In order to facilitate the Commission’s efforts, Southern LINC and Southern Telecom respectfully submit the following recommendations.

I. THE FCC SHOULD APPLY THE STATUTORY DEFINITIONS TO IP-ENABLED SERVICES RATHER THAN CREATE ANY NEW TESTS

The use of Internet Protocol (“IP”) is not a touchstone for determining the appropriate classification or regulation of services under the Communications Act, as many parties noted in their initial comments.² As Earthlink observed in its comments, IP is neither a network nor a

¹ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004). (“Notice of Proposed Rulemaking” or “NPRM”)

² *See, e.g.*, CBeyond et al. at 4-5 (stating that the FCC should distinguish facilities used to provide an IP-enabled service from the IP-enabled services riding over them in determining the appropriate regulatory treatment); Montana PUC at 4 (classification of IP-enabled service

service, but merely one of many transmission protocols.³ Although IP facilitates the provision of the types of capabilities set forth in the Act's definition of "information services," the mere fact that a particular service is IP-based has no bearing on the appropriate regulatory treatment of that service.⁴ Southern LINC and Southern Telecom also agree with Earthlink that the NPRM appears to conflate IP itself with networks that support IP-based transmissions and with services delivered on those networks, which creates the incorrect illusion of separate IP networks.⁵ IP does not necessarily involve new networks, but rather the use of existing networks in new ways. Therefore, the mere fact that an application or service is IP-based should not result in the regulation, or deregulation, of that service or application.

Southern LINC and Southern Telecom urge the Commission to continue to apply the Act's definitions of "telecommunications" and "information" to classify all services, including IP-enabled applications. Although the use of IP is not a touchstone for information services, the capabilities facilitated by IP may lead to more information services as defined by the Act, including those with real-time voice capabilities. Due to the capabilities that IP enables, it is important that the Commission apply the statutory definitions on a holistic basis, viewing the entire application and all of the capabilities available to end users, rather than to individual capabilities of the application or service at issue.⁶ Viewed from this perspective, IP-enabled

depends on meeting certain criteria rather than the underlying technology); NARUC at 4, 6 (arguing that regulatory classification should be based on characteristics of service, not technology used to provide the service); Pulver.Com at 17, 27 (explaining that IP-enabled services should be distinguished from the physical transmission facilities used to provide them); Conference of Catholic Bishops at 13-16 (arguing that classification should be based on functionality rather than facilities or technology used to provide the service); Vermont PSB (technologically neutral, function-based classification of IP-enabled services).

³ See Earthlink at 2.

⁴ *Id.*

⁵ *Id.* at 2-3, 17-19.

⁶ See, e.g., Comptel/Ascent at 12 (urging Commission to apply the statutory definitions on a holistic basis); Qwest at 22-23 (supporting viewing IP-based services as an integrated whole

services or applications that offer the capability of engaging in real-time voice communications may nonetheless meet the Act's definition of "information service" (e.g., Microsoft's X-Box). Accordingly, the capability to engage in real-time voice communications should not be viewed as a litmus test for telecommunications services.⁷

For similar reasons, the factors identified in the NPRM are not the appropriate means for applying the statutory definitions of "telecommunications" and "information" services. Specifically, the "Functional Equivalence" factor and "Substitutability" factor are relevant only to the extent that they may indicate that the IP-enabled application or service is a telecommunications service for the same reasons that traditional telephony is a telecommunications service.⁸ Likewise, interconnection with the PSTN and use of the North American Numbering Plan have no bearing upon whether a particular application is an information or telecommunications service.⁹ It is well established that information services are provided via telecommunications services and, thus, information services frequently "interconnect" with the PSTN and rely upon the use of numbering resources.¹⁰ Numbers are

instead of segregating individual features); USA Datanet at 7 (urging Commission to apply the statutory definitions on a holistic basis).

⁷ See, e.g., MCI at 21-23 (arguing that although certain aspects of voice applications are similar to traditional telecom service, broader capabilities of VoIP applications render them information services).

⁸ See, e.g., SBC at 60-61 (advocating against functional equivalence and substitutability because question is not objective and requires additional definition); WE Energies at 5 (explaining that functional equivalence doesn't distinguish among types of IP-based services and IP-based services defy simple classification); Z-Tel at 7 and 13 (rejecting functional equivalency because it applies telecommunications regulation only to services that look like "traditional telephony" services); Cablevision Systems at 10-11 (arguing that the Commission should not base regulatory classification decisions on "substitutability" for traditional telephony).

⁹ See, e.g., SBC at 22 (arguing regulatory classification should not hinge on use of PSTN); NY DPS at 5-6 (interconnection with PSTN and use of NANP are not appropriate factors in categorizing VoIP service).

¹⁰ See, e.g., *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, ¶ 39 (1998) (explaining relationship between telecommunications services and information services).

merely a means for accessing services, not indicators of whether the service being accessed is a telecommunications or information service. For similar reasons, the distinction between “Peer-to-Peer Communications v. Network Services” does not necessarily correlate to the distinction between telecommunications and information services.¹¹ Finally, although the distinction between “Facility Layer v. Protocol Layer v. Application Layer” is useful when determining which regulation is appropriate, there may not always be a direct correlation between the various layers and the Act’s definitions of telecommunications and information services.¹²

II. THE COMMISSION SHOULD FOCUS ON RESOLVING SPECIFIC ISSUES WITH TARGETED SOLUTIONS RATHER THAN SEEKING TO CREATE ONE-SIZE-FITS-ALL REGULATORY CATEGORIES

Most of the commenting parties agree that the Act provides the Commission with the flexibility to adopt narrowly targeted regulations in order to achieve specific statutory goals.¹³ Specifically, the Commission has the authority under Section 10 of the Act to forbear from

¹¹ *See, e.g.*, Arizona Corporation Commission at 8 (arguing that this factor should not alone be determinative of the ultimate classification of the service); Nebraska Rural Indep. Companies at 7-8 (asserting that this is not a valid regulatory model because peer-to-peer communications still rely on ISP to provide transmission).

¹² *See, e.g.*, Nuvio Corp. at 5-6 (supporting regulation of layers where ILECs can exercise market power); SBC at 61-62 (advocating against use of layers model because no consensus on definition of layers, and layers change over time); Tellme Network at 10-11 (layered approach is legitimate but imperfect and any regulation should be limited to providers of bottleneck facilities); Vonage at 6-9 and 13 (arguing that layered approach is legitimate, but any regulation should be limited to bottleneck facilities), MCI at 13-20 (arguing physical layer is not competitive and should be regulated); Pulver.Com at 11-15 (advocating use of layered theory to analyze appropriate regulatory treatment); WE Energies (advocating use of layers model to determine appropriate regulatory structure); Z-Tel at 5-6 and 17-22 (advocating use of the layers model to extend interconnection and wholesale network access regulations, but that the approach should limit economic regulation to carriers with bottleneck control).

¹³ *See, e.g.*, AT&T at 15-21 (explaining that where VOIP services do not fit squarely within the information services regulatory classification, and a telecommunications service classification would otherwise produce unnecessarily stringent regulatory outcomes, the Commission has broad authority to avoid that result, through forbearance, interpretation, waiver or rulemaking.); BellSouth at 56 (noting that the FCC has a “host of statutory tools” to target issues without imposing unnecessary regulation).

applying Title II regulation to telecommunications services,¹⁴ and the authority under Section 4(i) of the Act to impose Title II-type regulations on information services when necessary to achieve the goals of the Act.¹⁵ Southern LINC and Southern Telecom support the exercise of this flexibility by the Commission to adopt narrowly targeted policies and regulations to meet specific needs. Targeted policies and regulations are a far better means than sweeping categorizations for facilitating market driven solutions to the challenges that providers of IP-enabled services face. Among other things, the Commission should focus on resolving disputes relating to the intercarrier compensation regime, as many parties advocated in their comments.

Southern LINC and Southern Telecom believe that the Commission should exercise its flexibility under the Act to focus on specific key issues that have led to many of the disputes

¹⁴ See, e.g., AT&T at 15-21 (explaining that where VOIP services do not fit squarely within the information services regulatory classification, and a telecommunications service classification would otherwise produce unnecessarily stringent regulatory outcomes, the Commission has broad authority to avoid that result, through forbearance, interpretation, waiver or rulemaking.); BellSouth at 59-62 (urging FCC to use its authority, including forbearance authority to eliminate Title II regulation for IP-enabled services that are Telecommunications services); CISCO at 17-18 (explaining that, if any IP services are considered telecommunications that are subject to Title II, the Commission can and should invoke forbearance authority to decline to apply full regulations over IP services); Comcast at 15-16 (noting that the Commission can use its forbearance authority with respect to VoIP services that are classified as “telecommunications services” under Title II); Cox at 22 (explaining that, “to the extent that the Commission concludes that IP telephony is a telecommunications service, the Commission can employ its forbearance authority to eliminate any unnecessary regulation on IP-based services”); NASUCA 26-28 (noting that FCC has the authority to forbear from Title II regulation); NCTA at 29-32 (same); SBC at 33-37 (same); CPUC at 41 (same); Time Warner at 36 (same); USTA at 22-25 (same); DOJ at 6 (same); Verizon at 24, 29-31 (same).

¹⁵ See, e.g., BellSouth at 29-32 (explaining that FCC has authority under Title I to “ensure rational, pro-competitive” treatment of IP-based services); Comcast at 11, 14-15 (urging Commission to excise its authority under Title I); Cox at 23 (noting that if the Commission decides that certain IP-Enabled services are information services, it has ancillary jurisdiction to promulgate regulations of such services); ITA at 17 (supporting use of FCC ancillary authority under Title I to adopt rules governing VoIP); MCI at 24-35 (discussing FCC’s authority to exercise Title I ancillary jurisdiction); NCTA at 24-25 (supporting use of FCC ancillary authority under Title I to adopt rules governing VoIP); Net2Phone at 12 (urging FCC to apply Title I regulation to address specific issues but do not impose other regulation); Qwest at v-vi, 36-40 (acknowledging ancillary jurisdiction over IP-based services); SBC at 52-57 (noting the FCC’s ancillary jurisdiction); Catholic Bishops at 13-16, 21-22, 29-33 (discussing FCC’s ancillary authority); USTA at 28-29 (urging use of Title I authority to maintain deregulation of information services); VON at 19-21, 28-29 (supporting Title I ancillary jurisdiction).

about the proper classification of IP-enabled services, including, among other things, issues relating to intercarrier compensation, pending interconnection disputes, and universal service funding. For example, many commenting parties recognize the need for reformation of the intercarrier compensation regime.¹⁶ By eliminating the current disparities between above-cost access charges and reciprocal compensation, the Commission can reduce the likelihood of intercarrier disputes. Likewise, the Commission should focus on resolving many of the currently pending interconnection disputes, which not only create uncertainty and raise the costs of providing service, but also increase the potential that calls are not completed properly. Finally, many commenters agree that the Commission should complete its reexamination of the universal service funding mechanism.¹⁷ Southern LINC and Southern Telecom urge the Commission to

¹⁶ See, e.g., AT&T at 6, 21-28 (urging Commission to move away, as soon as possible, from the system of wildly varying carrier-to-carrier payments for functionally identical transport and termination and towards a uniform rule of bill-and-keep or other cost-based compensation); CISCO at 8 (noting that the intercarrier compensation regime “is an example of outmoded economic regulation that should not be applied to VoIP services”); Computer & Comm. Assoc. at 19 (explaining that distinctions between local and long distance calls vis-à-vis VOIP make no sense from either a technology viewpoint or an access charge advantage point); Computing Tech. Industry Assoc. (“CompTIA”) at 12 (explaining that the current intercarrier compensation scheme is antiquated and essentially broken, and that the continuation of subsidy policies from the legacy era is entirely counterproductive); Covad at 26-27 (urging the FCC to refrain from imposing legacy access charge regulations on VoIP services); DialPad at 22 (noting that the current access charge system requires reform to reflect the new realities of the telecommunications market); FERUP at 18-19 (explaining that the current intercarrier compensation scheme is broken); ITA at 24-28 (supporting waiver of carrier access charge regime); MCI at 44-47 (supporting replacement of current intercarrier access regime with “cost-causative, technologically neutral, and jurisdictionally-agnostic manner.”); Net2Phone at 26 (supporting waiver of carrier access charge regime until pending reform is resolved); NJ BPU at 9 (explaining that FCC must incorporate a forward looking view rather than dwelling on past outdated categorizations of telephony services and providers); Nuvio at 11 (supporting waiver of intercarrier compensation regime); Texas Atty Gen’l. at 7-8 (IP-enabled service providers should pay intercarrier compensation but not the current per minute access charges that apply to interstate service); Pulver.Com at 19-20 (explaining that VoIP services that do not touch the PSTN should not be subject to intercarrier compensation, and VoIP services that touch the PSTN should not be subject to current dysfunctional intercarrier compensation regime); VON at 26-28 (current intercarrier compensation regime is inefficient, chills innovation and should not apply to VoIP); Vonage at 45-47 (urging FCC to reform existing regime before considering whether to apply it to VoIP services).

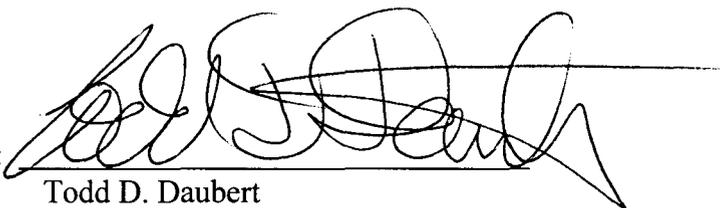
¹⁷ See, e.g., Global Crossing at 12-13 (recommending USF be competitively neutral); ITA at 24-28 (supporting waiver of USF payment requirement until funding mechanism is reformed).

ensure that the funding mechanism is competitively neutral, and that no single end user service becomes subject to multiple funding obligations. For example, if the funding mechanism requires a contribution at the facilities layer, it should not also require a contribution at the application layer, which could potentially result in a double funding mechanism for a single end user service.

III. CONCLUSION

Southern LINC and Southern Telecom urge the Commission to act promptly in accordance with the foregoing recommendations in order to reduce the level of regulatory uncertainty regarding IP-enabled applications and services.

Respectfully submitted,

By: 

Todd D. Daubert
Garret R. Hargrave
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

*Counsel to Southern LINC and
Southern Telecom, Inc.*

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