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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
IP-Enabled Services ) WC Docket No. 04-36  
 )  
Petition of SBC Communications Inc. for ) WC Docket No. 04-29  
Forbearance from the Application of Title II )  
Common Carrier Regulation to IP Platform )  
Services )  
 )

To: The Commission

**REPLY COMMENTS**

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July 14, 2004

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## SUMMARY

Broadband services are changing the way the world communicates and are rapidly evolving to respond to consumer demands. It is imperative that the Commission foster this environment and resist the temptation to regulate IP-enabled services that resemble more traditional services. To this end, the Commission should first and foremost clarify that IP-enabled services, consisting of IP networks and IP services and applications, are interstate services subject to the FCC's exclusive jurisdiction. These services must be considered interstate because they can be accessed or sent from anywhere in the world. For example, it is impossible to determine where a VoIP call will originate or terminate.

Also, the Commission should broadly define IP-enabled services as information services subject only to regulation pursuant to Title I of the Communications Act. A broad definition of IP-enabled services is necessary to avoid regulatory gamesmanship. A narrow, technical definition will encourage parties to develop IP-enabled services with nuances designed to avoid regulatory obligations, rather than focus development efforts on services and features demanded by consumers. The definition proposed by SBC provides clarity and ensures that IP-enabled services be treated as information services. Under this definition, IP-enabled services would offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and, therefore, satisfy the statutory definition of an information service.

As information services, IP-enabled services would be subject to the Commission's Title I authority. This authority should be exercised sparingly, however, to ensure that nascent IP-enabled services are not stifled by burdensome regulation. To the extent these services mirror traditional services, the Commission should employ a minimalist approach to Title I regulation and only impose requirements (i) once the services mature and (ii) if competitive conditions are insufficient to achieve the purpose behind the regulation.

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**REPLY COMMENTS**

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby submits reply comments in the captioned proceedings.<sup>1</sup> Broadband services are changing the way the world communicates and are rapidly evolving to respond to consumer demands. It is imperative that the Commission foster this open, flexible environment and resist the temptation to regulate IP-enabled services, consisting of IP networks (and their associated capabilities and functionalities) and IP services and applications, even if they resemble more traditional services. To ensure that the Commission’s efforts are not thwarted at the state level, the FCC should make clear that IP-enabled services are inherently interstate in nature and, therefore, subject to exclusive federal jurisdiction. As discussed below, Cingular agrees with those commenters urging the

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<sup>1</sup> See *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, FCC 04-28 (rel. Mar. 10, 2004) (“*NPRM*”), *summarized*, 69 Fed. Reg. 16193 (Mar. 29, 2004); FCC Public Notice, “Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to ‘IP Platform Services’,” WC Docket No. 04-29, DA 04-360 (rel. Feb. 12, 2004).

Commission to treat IP-enabled services as information services.<sup>2</sup> The Commission also should adopt a broad definition of IP-enabled services that will allow its regulations to keep pace with innovation. Moreover, as many commenters demonstrated, the classification of IP-enabled services as information services does not preclude the Commission from achieving important public policies, such as widespread deployment of enhanced 911 services.

**I. IP-ENABLED SERVICES ARE INTERSTATE SERVICES SUBJECT TO THE COMMISSION’S EXCLUSIVE JURISDICTION**

The United States Constitution, through the Supremacy Clause (Article VI, paragraph 2) and the Commerce Clause (Article I, section 8, clause 3), authorizes Congress to regulate interstate commerce and to preempt state regulations in this area. Under this constitutional scheme, states may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.<sup>3</sup>

In adopting the Communications Act of 1934 (“the Act”), Congress established a system of dual federal-state regulation whereby the Federal government is granted *exclusive* jurisdiction

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<sup>2</sup> See Comments of 8x8, Inc. in WC Docket No. 04-36, at 15 (May 28, 2004) (“8x8 Comments”); Comments of Cablevision Sys. Corp. in WC Docket No. 04-36, at 7-9 (May 28, 2004) (“Cablevision Comments”); Comments of Computing Tech. Indus. Ass’n in WC Docket No. 04-36, at 12-14 (May 28, 2004) (“CompTIA Comments”); Comments of Dialpad Comm. Inc., ICG Comm. Inc., Qovia, Inc., & VoicePulse, Inc. in WC Docket No. 04-36, at 9-14 (May 28, 2004) (“Dialpad Comments”); Comments of Global Crossing N. Am., Inc. in WC Docket No. 04-36, at 7 (May 28, 2004); Comments of MCI in WC Docket No. 04-36, at 21-22 (May 28, 2004) (“MCI Comments”); Comments of Net2Phone Inc. in WC Docket No. 04-36, at 11 (May 28, 2004) (“Net2Phone Comments”); Comments of Pac-West Telecomm, Inc. in WC Docket No. 04-36, at 5 (May 28, 2004); Comments of Qwest Comm. Int’l, Inc. in WC Docket No. 04-36, at 19 (May 28, 2004) (“Qwest Comments”); Comments of United Telecom Council & United Power Line Council in WC Docket No. 04-36, at 5, 7 (May 28, 2004); Comments of USA Datanet Corp. in WC Docket No. 04-36, at 6-7 (May 28, 2004); Comments of Voice on the Net Coalition in WC Docket No. 04-36, at 21 (May 28, 2004) (“VON Coalition Comments”).

<sup>3</sup> *Operator Services Providers of America*, FCC 91-185, *Memorandum Opinion and Order*, 6 F.C.C.R. 4475 (1991).

over interstate communications and state jurisdiction over intrastate services is preserved.<sup>4</sup> In situations where a transmission includes both intra- and interstate components, the Federal government retains exclusive jurisdiction over the transmission if it is not possible to separate the intra- and interstate components.<sup>5</sup>

The record in this proceeding conclusively demonstrates that IP-enabled services are inherently interstate and, therefore, are subject to exclusive federal jurisdiction.<sup>6</sup> IP-enabled services utilize the dispersed networks that comprise the Internet and which the Commission has

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<sup>4</sup> 47 U.S.C. § 152(a), (b); *see also* 47 U.S.C. § 332(c)(3). The Supreme Court long ago recognized the Congressional intent to occupy the field of interstate communications regulation. *Benanti v. United States*, 355 U.S. 96, 104-06 (1957); *accord Operator Services Providers of America*, 6 F.C.C.R. 4475 (1991) (finding that Congress intended interstate communications to be regulated exclusively by the Commission).

<sup>5</sup> *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, FCC 04-27, 19 F.C.C.R. 3307, ¶ 20 (rel. Feb. 19, 2004) ("Pulver").

<sup>6</sup> *See* 8x8 Comments at 11; Comments of Alcatel N. Am. in WC Docket No. 04-36, at 9 (May 28, 2004); Comments of AT&T Corp. in WC Docket No. 04-36, at 42-43 (May 28, 2004) ("AT&T Comments"); Comments of BellSouth Corp. in WC Docket Nos. 04-36 and 04-29, at 11 (May 28, 2004) ("BellSouth Comments"); Cablevision Comments at 11-12; Comments of Cisco Sys., Inc. in WC Docket No. 04-36, at 3-6 (May 28, 2004) ("Cisco Comments"); Comments of CompTel/ASCENT in WC Docket No. 04-36, at 3-5 (May 28, 2004) ("CompTel Comments"); Comments of CTIA – The Wireless Association™ in WC Docket No. 04-36, at 2-3, 6-7 (May 28, 2004) ("CTIA Comments"); Dialpad Comments at 8-9; Comments of Fed'n for Economically Rational Util. Pricing in WC Docket No. 04-36, at 7-8 (May 28, 2004) ("FERUP Comments"); Comments of Info. Tech. Indus. Council in WC Docket No. 04-36, at 4 (May 28, 2004); MCI Comments at 23-24; Net2Phone Comments at 13-14; Comments of nexVortex, Inc. in WC Docket No. 04-36, at 6 (May 28, 2004); Comments of Nuvio Corp. in WC Docket No. 04-36, at 6-7 (May 28, 2004); Comments of PointOne in WC Docket No. 04-36, at 7-10 (May 28, 2004) ("PointOne Comments"); Qwest Comments at 28, 31-33; Comments of Skype, Inc. in WC Docket No. 04-36, at 3-4 (May 28, 2004); Comments of U.S. Telecom Ass'n in WC Docket Nos. 04-36 and 04-29, at 34-36 (May 28, 2004) ("USTA Comments"); Comments of Valor Telecomm. of Tex., L.P., and Iowa Telecomm. Servs., Inc. in WC Docket No. 04-36, at 8-9 (May 28, 2004); Comments of Verizon Tel. Co. in WC Docket Nos. 04-36 and 04-29, at 31-38 (May 28, 2004) ("Verizon Comments").

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traditionally concluded are interstate in nature.<sup>7</sup> These services must be considered interstate because the communications can be accessed or sent from anywhere in the world. For example, it is impossible to determine where a VoIP call originates or terminates. If a call is placed from an office in Washington, DC and directed to a resident of Virginia, the call may be received virtually anywhere. The recipient may access the call from her home in Virginia, from a laptop at an airport in California, from an office in DC, or from a beach house in Maryland. Likewise, a VoIP call could be placed from any of those locations and the actual originating location would be unknown to the telephone network, with the call simply appearing to be made from a Virginia number. Once an IP-enabled transmission enters the Internet, it can be obtained from anywhere. As the Commission noted with regard to the IP-enabled service – Free World Dialup – offered by pulver.com:

FWD is an Internet application. The Internet is a distributed packet-switched network of interconnected computers enabling people around the world to communicate with one another, invoke multiple Internet services simultaneously and access information with no knowledge of the physical location of the server where that information resides. The Internet represents a paradigmatic shift in network technology: intelligence in the system no longer resides, as it did in the legacy circuit-switched network, primarily in the network itself, but has instead migrated to the edge of a vastly different type of network – to the end user’s CPE. FWD is an example of this migration because, as explained below, Pulver’s service *bears no geographic correlation to any particular underlying physical transmission facilities*. FWD depends on whether a user can establish a presence on the network at some point, not whether the user can access the network from a specific geographically defined end point. *Internet applications like FWD thus separate the user from geography* and the application

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<sup>7</sup> *E.g.*, VON Coalition Comments at 21-22.

enabling voice or other types of communication from the network over which the communication occurs.<sup>8</sup>

Accordingly, IP-enabled services are interstate in nature and subject to the FCC's exclusive jurisdiction. Any state regulations imposed on IP-enabled services should therefore be preempted.<sup>9</sup>

The Commission has found that the dynamic market for Internet applications that leads to the development of new and innovative IP services precludes the need for traditional state economic regulation.<sup>10</sup> Indeed, the Commission has stated that the negative impact of requirements to submit to more than fifty different regulatory regimes was the precise impact that Congress considered "when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation."<sup>11</sup> State-by-state

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<sup>8</sup> *Pulver* at ¶ 4 (emphasis added). This ability to send or receive traffic from virtually any location precludes use of the Commission's traditional "end-to-end" analysis for determining whether communications sent via the Internet or IP-enabled services are intra- or interstate in nature. See *Pulver* at ¶ 21. Moreover, even if it were possible to determine in advance that an IP-enabled transmission would take place between two parties in the same state, there would be a high probability that the transmission would access or traverse facilities in other states. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Order on Remand*, 15 F.C.C.R. 385, 392 n.38 (1999).

<sup>9</sup> See, e.g., Comments of SBC Comm. Inc. in WC Docket No. 04-36, at 43-47 (May 28, 2004) ("SBC Comments"); 8x8 Comments at 14-15; CompTel Comments at 4-5; Comments of Computer & Comms. Indus. Ass'n in WC Docket No. 04-36, at 14-15 (May 28, 2004) ("CCIA Comments"); Comments of Info. Tech. Ass'n of Am. in WC Docket No. 04-36, at 19-24 (May 28, 2004); Comments of Microsoft Corp. in WC Docket No. 04-36, at 14-17 (May 28, 2004) ("Microsoft Comments"); Comments of Nat'l Cable & Telecomm. Ass'n in WC Docket No. 04-36, at 32-39 (May 28, 2004) ("NCTA Comments"); PointOne Comments at 11-12; Qwest Comments at 34-36; USTA Comments at 34-36.

<sup>10</sup> *Pulver* at ¶ 24.

<sup>11</sup> *Id.* at ¶ 25. "Courts have repeatedly recognized this congressional intent and, as a result, have rejected state attempts to regulate such services." *Id.* at ¶ 18 & n.66, citing *Vonage* (continued on next page)

regulation of IP-enabled services is inconsistent with the constitutionally required federal role over interstate commerce.<sup>12</sup>

## **II. IP-ENABLED SERVICES SHOULD BE BROADLY DEFINED TO INCLUDE ALL SERVICES THAT ENABLE END-USERS TO SEND OR RECEIVE PACKETS IN IP FORMAT**

As recognized by the Commission and many commenters, IP-enabled services have developed “in an environment largely free of government regulation.”<sup>13</sup> It is imperative that this environment be maintained; otherwise, the growth and innovation that has characterized the Internet and IP-enabled services could be stifled.

After clarifying that IP-enabled services are interstate, the next step in evaluating IP-enabled services and the potential need for regulation is establishing a definition for these services. Cingular disagrees with commenters that would forgo this essential step and merely sort IP-enabled services into existing regulatory baskets, such as classifying VoIP as a telecommunications service merely because it may be the functional equivalent of traditional telephony.<sup>14</sup> This approach has numerous downfalls.<sup>15</sup> First, it ignores the competitive

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*Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn. 2003); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>12</sup> See *Pulver* at ¶ 16.

<sup>13</sup> See *NPRM* at ¶ 35; *Pulver* at ¶ 17; see, e.g., Net2Phone Comments at 3-5; Comments of Tellme Networks, Inc. in WC Docket No. 04-36, at 3-4 (May 28, 2004).

<sup>14</sup> See Comments of America’s Rural Consortium in WC Docket No. 04-36, at 6 (May 27, 2004); Comments of Am. Found. for the Blind in WC Docket No. 04-36, at 2 (May 28, 2004) (“American Foundation for the Blind Comments”); Comments of APCO in WC Docket No. 04-36, at 6-7 (May 28, 2004); Comments of Cal. Pub. Utils. Comm’n in WC Docket No. 04-36, at 14 (May 28, 2004); Comments of Comms. Workers of Am. in WC Docket No. 04-36, at 4 (May 28, 2004) (“Communications Workers of America Comments”); Comments of Frontier & Citizens Tel. Co. in WC Docket No. 04-36, at 5, 10 (May 28, 2004); Comments of Ill. Citizens  
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environment associated with IP-enabled services. Existing regulations should not be imposed on an IP-enabled service simply because it resembles another service that is subject to regulation. Instead, these services should be exempt from regulation unless and until the Commission determines that, due to market failure, regulation is warranted for the particular IP-enabled service.

Second, assigning IP-enabled services to pre-existing regulatory categories creates opportunities for regulatory gamesmanship. Definitions will be dissected to find loop-holes to avoid the imposition of regulations on new services. Features will be used to distinguish a new IP-enabled service from an existing service subject to regulation. There will be endless litigation that will result in a hodgepodge of regulation. Certain IP-enabled services will be treated as more traditional services subject to regulation, while other similar IP-enabled services will be exempt from regulation due to slight legal and technical distinctions that are largely irrelevant from the consumer's perspective.

Third, this approach discourages true innovation. Parties have less incentive to develop or deploy competitive alternatives to existing services if their new offerings would be subjected to the full panoply of regulations imposed on the existing service. For example, a carrier offering IP-enabled services that are exempt from regulation will be reluctant to add a VoIP

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Util. Bd. in WC Docket No. 04-36, at 3-5 (May 28, 2004); Comments of Iowa Utils. Bd. in WC Docket No. 04-36, at 1-2 (May 28, 2004); Comments of Nat'l Ass'n of Regulatory Util. Comm'rs in WC Docket No. 04-36, at 4-7 (May 28, 2004) ("NARUC Comments"); Comments of Neb. Pub. Serv. Comm'n in WC Docket No. 04-36, at 2 (May 28, 2004).

<sup>15</sup> See Verizon Comments at 1-3; CompTIA Comments at 8, 10-11; CCIA Comments at 11-13; Net2Phone Comments at 7; Comments of Vonage Holdings Corp. in WC Docket No. 04-36, at 33 (May 28, 2004); Comments of Z-Tel Comms. Inc. in WC Docket No. 04-36, at 3-4 (May 28, 2004).

feature if that functionality would subject the carrier's offerings to regulatory oversight and extensive obligations. The incremental revenue gains associated with this added functionality – given the highly competitive environment for voice service – would be outweighed by the regulatory burdens. Moreover, services not exempt from regulation would be subject to endless tweaking in an effort to qualify for exempt status. As the Commission has recognized, “[r]egulation often can distort the workings of the market by imposing costs on market participants which they otherwise would not have to bear.”<sup>16</sup>

To avoid these pitfalls, Cingular agrees with the approach advocated by SBC Communications, Inc. Under this approach, IP-enabled services would be classified as information services and defined broadly as (i) services that permit the consumer to send or receive communications in an IP format, and (ii) the IP networks (and the associated capabilities and functionalities) utilized to provide the service.<sup>17</sup> By adopting SBC's proposal, the Commission would ensure that IP networks could not be utilized to avoid regulation without providing customers the benefits associated with IP-enabled services. If a service utilizes IP networks as an intermediate link, but provides no IP capability to consumers, the service is not

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<sup>16</sup> *Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, CC Docket No. 81-893, *Report and Order*, 95 F.C.C.2d 1276, 1301 (1983).

<sup>17</sup> SBC Comments at 21-22; *accord Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services*, WC Docket No. 04-36, at 28 (filed Feb. 5, 2004).

IP-enabled. The critical issue becomes whether the consumer is able to send or receive IP communications,<sup>18</sup> not whether IP networks are utilized at some point of the communication.

The benefits of this approach are clear. It establishes a competitively neutral, bright line definition and establishes the foundation for ensuring that IP-enabled services remain free from regulation. Such an approach is consistent with Congressional intent to insulate the Internet and associated applications from Federal and state regulation.<sup>19</sup> The Commission has complied with this mandate by adopting a “policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels. This action is designed to bring a measure of regulatory stability to the marketplace and therefore remove barriers to investment and deployment of Internet applications and services.”<sup>20</sup> IP-enabled services should be treated as “Internet applications and services” and subject to this nonregulation policy.

### **III. THE CLASSIFICATION OF IP-ENABLED SERVICES AS INFORMATION SERVICES DOES NOT DEPRIVE THE COMMISSION OF JURISDICTION TO SUBJECT THESE SERVICES TO REGULATIONS THAT FURTHER IMPORTANT PUBLIC POLICIES**

By defining IP-enabled services broadly and classifying them as information services, the Commission will not eliminate its ability to foster important public policies. Although information services are exempt from regulation pursuant to Titles II, III, and VI of the Act, the

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<sup>18</sup> If so, the service offers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” and therefore meets the statutory definition of an information service. *See* 47 U.S.C. § 153(20).

<sup>19</sup> *See* 47 U.S.C. § 230(b)(2).

<sup>20</sup> *Pulver* at ¶ 1.

Commission retains jurisdiction over these services under Title I.<sup>21</sup> Pursuant to Title I, the Commission has authority to adopt rules necessary to accomplish its responsibilities under the Act.<sup>22</sup> In fact, the Commission has repeatedly recognized that it has Title I jurisdiction over information services<sup>23</sup> and has used its ancillary Title I jurisdiction to adopt regulations designed to protect consumers.<sup>24</sup>

The Commission has historically refrained, however, from exercising its Title I authority to impose obligations where there are no barriers to entry or where services are competitive.<sup>25</sup> As the record in this proceeding demonstrates, IP-enabled services are subject to extensive competition.<sup>26</sup> Accordingly, although the Commission retains Title I jurisdiction to adopt regulations that further its statutory obligations, it should do so sparingly.

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<sup>21</sup> See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Declaratory Ruling*, 17 F.C.C.R. 4798, 4847-48 (¶ 95) (2002); *Pulver* at n.64; *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, 16 F.C.C.R. 6417, 6457 (1999) (“*Section 255 Order*”).

<sup>22</sup> See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-69, 172-73, 178 (1968); see also Comments of Communication Service for the Deaf, Inc. in WC Docket No. 04-36, at 13 (May 28, 2004); SBC Comments at 52-57; Qwest Comments at 36-40; American Foundation for the Blind Comments at 4.

<sup>23</sup> *Section 255 Order*, 16 F.C.C.R. at 6457.

<sup>24</sup> See *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 9 F.C.C.R. 6891, 6893-94 (¶ 17) (1994).

<sup>25</sup> *Pulver* at n.69; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, FCC 80-189, *Final Decision*, 77 F.C.C.2d 384, 428-30 & 432-43 (1980) (“*Computer II*”).

<sup>26</sup> See Net2Phone Comments at 20; Microsoft Comments at 18; BellSouth Comments at 14-20; Cisco Comments at 1, 7-9.

Section 230(b) of the Communications Act of 1934, as amended, states that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered* by Federal or State regulation . . .”<sup>27</sup> The Commission has embraced the Act’s language to keep the Internet free from unnecessary government regulation because Section 230 reflects several decades of the Commission’s deregulatory policies related to information services and enhanced services.<sup>28</sup>

In its recent decision holding that pulver.com’s Free World Dialup is an unregulated information service subject to the Commission’s jurisdiction, the Commission formalized its long-standing policy of nonregulation “to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels.”<sup>29</sup> In clarifying its jurisdiction, the Commission reasoned that “federal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation.”<sup>30</sup>

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<sup>27</sup> 47 U.S.C. § 230(b)(2) (emphasis added).

<sup>28</sup> See Statement of Chairman Michael K. Powell *re: IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 (“More than two decades ago, the Commission made the courageous decision to fence off information services – the precursors of today’s Internet – from traditional monopoly regulation. This approach was embraced by Congress in that 1996 Act. The Commission’s pro-competitive and deregulatory policies allowed competition to flourish and helped usher in a period of growth and innovation unlike any other in our nation’s history.”); see, e.g., *Computer II*, 77 F.C.C.2d at 428-30, 432-43.

<sup>29</sup> *Pulver* at ¶ 1.

<sup>30</sup> *Id.* at ¶ 16.

In its declaratory ruling that AT&T's phone-to-phone IP telephony service was a telecommunications service, the Commission recognized Congress' intent to single out "Internet or interactive services" for special treatment.<sup>31</sup> The Commission reiterated that it must foster the growth of IP services through a "hands off" regulatory approach, but distinguished AT&T's service from this class because AT&T's service did not provide any enhanced functionality to the end user through the internal conversion to IP.<sup>32</sup> Chairman Powell reiterated his view that VoIP should be very lightly regulated in a separate statement about the order.<sup>33</sup>

Nevertheless, Title I grants the Commission the authority to impose regulatory obligations in furtherance of certain public policy goals. Some of these public policy objectives are discussed below.

**A. The Universal Service Fund**

As a matter of public interest, Cingular supports the goals of Universal Service, which, as mandated by the 1996 Act, include the promotion and availability of quality services at just, reasonable, and affordable rates; increased access to advanced telecommunications services; and advancement of availability of such services to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in

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<sup>31</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, FCC 04-97, 19 F.C.C.R. 7457, ¶ 17 (rel. April 21, 2004).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, Statement of Chairman Michael K. Powell.

urban areas.<sup>34</sup> However, Cingular agrees with those commenters who suggest the need to reassess the current regulatory program in light of the deployment of IP-enabled services.<sup>35</sup>

The low-cost provision of basic voice service through utilization of IP-enabled services makes available another option for consumers and increases competition, which in turn impacts the Universal Service Fund (“USF”). In February 2004, Chairman Powell declared that

[t]oday, Internet applications are bringing new competition to old markets and, in turn, ushering in an era of innovation, lower prices and high quality services. Just as email and e-commerce were drivers of the narrowband Internet, higher bandwidth applications like streaming video and music entertainment, home networking and Internet voice will be the ‘killer apps’ for broadband. Whether we are talking about Internet voice services, or Internet video and audio services, Internet news services, or Internet commerce, the broadband revolution is bringing tomorrow’s communication and commerce tools to more and more Americans today.<sup>36</sup>

The roll out of IP-enabled services presents the Commission with an opportunity to address the funding of Universal Services. With networks shifting to packet-based architecture, IP-enabled services increasingly supplant circuit-switched services. In doing so, carriers are able to avoid contributing to the USF. Thus, the Commission’s current regulatory paradigm for

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<sup>34</sup> 47 U.S.C. § 254(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 F.C.C.R. 8776, 8780 (1997); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 8078, 8082 (1999).

<sup>35</sup> *See, e.g.*, AT&T Comments at 38; Comments of Cheyenne River Sioux Tribe Tel. Auth. in WC Docket No. 04-36, at 15 (May 24, 2004); CTIA Comments at 12-17; Net2Phone Comments at 25; SBC Comments at 65.

<sup>36</sup> Chairman Michael K. Powell, testimony on Voice over Internet Protocol (VoIP), Tuesday, February 24, 2004, Before the Committee on Commerce, Science, and Transportation, U.S. Senate at 2.

Universal Service ultimately creates unreasonable advantages for IP-enabled services, and disadvantages for other telecommunications providers.

In order to ensure the future sustainability of USF funding, the Commission must keep account of evolving technology and accordingly reassess and reconfigure the regulatory program. The Commission should ensure that the obligation for USF support is shared by all market competitors. Service providers similarly situated from a consumer's perspective should be brought to the same level of obligation with regards to USF funding. If all IP-enabled services are exempt from USF contributions, the Commission will create an incentive for telecommunications providers to move traffic to IP networks, which will result in regulatory arbitrage. This will increase the burden on the remaining contributors and undermine Universal Service as market participants who do not contribute their share to USF funding will enjoy an artificial cost advantage over those providers who do meet their obligations.

As urged by numerous commenters, the Commission should eliminate this problem by exercising its Title I authority to require IP-enabled service providers to contribute to USF if their services are connected to the public switched telephone network ("PSTN").<sup>37</sup> Title I of the Act grants the Commission all necessary authority to assess universal service contributions on these services.<sup>38</sup> The Commission should take note of the record being developed in this proceeding and ensure that the base of contributors is expanded sufficiently such that no provider benefits from a lesser contribution burden than its competitors.

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<sup>37</sup> See, e.g., SBC Comments at 112-22.

<sup>38</sup> 47 U.S.C. § 151. The D.C. Circuit expressly "recognize[d] the prominence of [section 151's] universal service objective" among the statutory objectives of Title I. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1108 (D.C. Cir. 1984); *accord Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988).

## B. National Security and Public Safety

The Commission also has sufficient authority under Title I to ensure that IP-enabled services address national security and public safety needs, where appropriate. Section 1 of the Act specifically authorizes the Commission to take steps to ensure that communications services address national security and public safety needs.<sup>39</sup>

CALEA and 911/E911 obviously are important for national security and public safety. The Commission should not require, however, that CALEA and E911 mandates be satisfied before nascent IP-enabled services can be made available to the public. The Commission has previously refrained from imposing these obligations on nascent services until technological solutions could be developed.<sup>40</sup> In essence, the Commission determined that new services should not be delayed until they could be CALEA and E911 compliant. This same model should be applied to IP-enabled services.

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<sup>39</sup> 47 U.S.C. § 151 (noting that the Commission was created to ensure the “rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the *purpose of the national defense*, for the *purpose of promoting safety* of life and property through the use of wire and radio communications. . .”) (emphasis added).

<sup>40</sup> See, e.g., *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676, 18717-18 (1996) (exempting Mobile Satellite Services (“MSS”), 220 MHz licensees, and multilateration Location and Monitoring Services from E911 obligations due to infancy of services and technical limitations); *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Memorandum Opinion and Order*, 12 F.C.C.R. 22665, 22706-7 (1997) (affirming decision not to impose E911 requirements upon MSS providers at this time); *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Second Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 25340, 25378 (2003) (deferring E911 regulatory action for telematics providers due in part to the experimental environment).

In today's market, consumers understand the necessity for and demand quality, reliable access to emergency services. The Commission should not interfere unnecessarily with the operation of free markets or the introduction of new technologies. Not only will the market itself, without the need for regulation, lead providers of IP-enabled services to ensure that all potential customers receive such services, but premature regulation also may undermine innovation. Instead, the Commission should let the market dictate the means by which emergency goals are achieved. The Commission should mandate deployment of CALEA, E911, and similar capabilities only when a particular IP-enabled service matures into widespread acceptance, technologies exist for meeting the mandate, and the marketplace is not meeting these needs on its own.

### **C. Disability Access**

Cingular supports ensuring that services are accessible by individuals with disabilities. The issue is whether a regulatory mandate is needed to achieve that goal, as some commenters suggest.<sup>41</sup> As IP-enabled services evolve and new means of addressing the needs of the hearing and speech impaired are discovered, it will be in the interest of providers of IP-enabled services to make their services accessible to individuals with disabilities. Rather than impose outdated TTY equipment specifications developed for the circuit switched environment on providers of IP-enabled services, the Commission should instead encourage voluntary efforts that utilize these new technologies to bring additional access and convenience to those individuals with disabilities.

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<sup>41</sup> See USTA Comments at 38-39; Communications Workers of America Comments at 16; American Foundation for the Blind Comments at 3.

## CONCLUSION

For the foregoing reasons, the Commission should eliminate any uncertainty surrounding the regulatory treatment of IP-enabled services by classifying them as interstate services subject to the Commission's exclusive jurisdiction. To avoid arbitrage opportunities, the Commission should adopt the broad definition of IP-enabled services proposed by SBC. Under this approach, the Commission would retain ancillary jurisdiction under Title I to impose regulations necessary to achieve statutory objectives, but should only use this authority sparingly.

Respectfully submitted,

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