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October 12, 2004

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: IP-Enabled Services, WC Docket No. 04-36; Vonage Petition for Declaratory Ruling, WC Docket No. 03-211**

Dear Ms. Dortch:

The attached white paper provides an analysis of the Commission's jurisdiction over IP-enabled services, including in particular VoIP, and the Commission's authority to preempt state regulation of such services.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/Kathleen M. Grillo

Attachment

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THE COMMISSION HAS AUTHORITY TO PREEMPT  
STATE REGULATION OF VoIP AND OTHER IP-ENABLED SERVICES

The Commission should declare that IP-enabled services are jurisdictionally interstate, and should preempt any state or local attempts to regulate these services. The Commission has established a policy of minimal regulation of the Internet and the services provided over it. This policy has resulted in an explosion of innovative services using Internet Protocol, including in particular Voice over Internet Protocol (“VoIP”), and has benefited consumers by encouraging vigorous competition among numerous providers of these services.

The Commission has ample authority to preempt state regulation of VoIP and other IP-enabled services that would negate the Commission’s exercise of its own lawful authority. As courts have explained, the Commission may preempt state regulation when “(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate[ ] the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be ‘unbundled’ from regulation of the intrastate aspects.” *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations and internal quotation marks omitted).

Each of these factors is present with respect to IP-enabled services. First, IP-enabled services have significant interstate aspects – these services are designed to enable users to communicate interstate and internationally, as well as locally, and the interstate and international aspects are key marketing features for these services. Second, Congress has directed that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,” 47 U.S.C. § 230(b)(1) and (2), and has charged the Commission with “encourag[ing]

the deployment on a reasonable and timely basis of advanced telecommunications and capability to all Americans.”<sup>1</sup> The Commission’s “established policy of minimal regulation of the Internet and the services provided over it,”<sup>2</sup> therefore, is based on statutory commands. Third, there is currently no commercially feasible way for providers of IP-enabled services, including Voice over Internet Protocol (VoIP), reliably to associate a particular customer’s IP address with that customer’s specific geographic location when the call is being made, and even if such technology could be developed, it would be completely impracticable to implement it across the board so as to allow the separation, on a call-by-call basis, of interstate and intrastate aspects of these services. Preemption of state regulation of IP-enabled services therefore is essential if the Commission’s deregulatory approach to these services is to have any practical impact, since state attempts to regulate intrastate aspects of these services would have the unavoidable effect of regulating interstate services, negating the Commission’s exercise of its own lawful authority.

1. Legal Standard. The Commission has authority to regulate interstate communications under section 2(a) of the Communications Act, 47 U.S.C. § 152(a). While section 2(b) of the Act reserves to the states jurisdiction over intrastate communications, courts have held that the Commission may preempt state regulation when a matter is entirely interstate or when a matter has interstate and intrastate aspects and “it is *not* possible to separate the interstate and intrastate components of the Commission’s regulation”:<sup>3</sup> “FCC preemption of state regulations is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3)

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<sup>1</sup> Communications Act of 1934, as amended, Section 706, 47 U.S.C. § 157 nt.

<sup>2</sup> Notice of Proposed Rulemaking, *IP-Enabled Services*, CC Docket No. 04-36, FCC 04-25, ¶2 (FCC Mar. 10, 2004) (“NPRM”)

<sup>3</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n. 4 (1986) (emphasis in original).

state regulation ‘would negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be ‘unbundled’ from regulation of the intrastate aspects.”<sup>4</sup> The Commission’s jurisdiction over IP-enabled services, and its authority to preempt state regulation that negates its own lawful authority, depend on whether the characteristics of the services meet these standards, and not on whether the services are facilities-based or not.

Thus, for example, both the Fourth Circuit and the D.C. Circuit have upheld Commission preemption of state regulations governing customer premises equipment (CPE), because “consumers use the same CPE in both interstate and intrastate communications.”<sup>5</sup> The Courts agreed with the Commission that state attempts to regulate CPE, either by regulating what could be connected to the telephone network, or by regulating the rates charged for CPE, would necessarily conflict with the Commission’s determination that consumers should have an unfettered selection of CPE in the competitive market.<sup>6</sup>

Similarly, the D.C. Circuit has upheld the Commission’s preemption of state regulation imposing charges for denial of non-payment (DNP) service, which was part of the billing and collection service offered by LECs to IXCs. Because DNP “involves total disconnection” of a customer’s service for non-payment of a bill, it thus “prevents the customer from using his phone at all for both interstate *and* local calls.”<sup>7</sup> The D.C. Circuit held that a state commission’s attempt

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<sup>4</sup> *Pub. Serv. Comm’n of Md.*, 909 F.2d at 1515 (citations omitted). *See also California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994).

<sup>5</sup> *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 215 (D.C. Cir. 1982) (“CCIA”). *See also North Carolina Utilities Comm’n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied* 429 U.S. 1027 (1976); *North Carolina Utilities Comm’n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied* 434 U.S. 874 (1977).

<sup>6</sup> *CCIA*, 693 F.2d at 215.

<sup>7</sup> *Pub. Serv. Comm’n of Md.*, 909 F.2d at 1511.

to require a LEC to impose charges for DNP service to IXCs imposed costs on interstate billing and collection service, contrary to the Commission's determination that billing and collection services should be deregulated and offered in a competitive market. Because there was no practical way to separate interstate from intrastate traffic so as to apply DNP only to interstate traffic independent of local traffic, the Commission's preemption of state regulation was upheld.<sup>8</sup>

Likewise, the Ninth Circuit has upheld the Commission's authority to preempt state regulation of interstate or jurisdictionally mixed services. In *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Court affirmed the Commission's preemption of state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services. The Commission determined it would not be economically feasible for companies to offer the interstate portion of their services integrated with basic services, while maintaining separate facilities and personnel for the intrastate portion. As a result, in the Commission's view, providers would opt to comply with state requirements. That would negate the Commission's exercise of its own authority over interstate services, and preemption was therefore upheld.

In affirming the Commission's decision, the Court made clear that the nature of the service, and its particular classification as an information service, did nothing to alter the jurisdictional analysis. *California II*, 39 F.3d at 932 (stating that section 2(b)'s denial of power to the Commission applies to Title II as well as to Title I). Indeed, the Commission initially had tried to preempt state authority over *all* information services, even those that might be wholly intrastate. The Commission argued that, while section 2(b) reserves to the states the sole authority to regulate intrastate *basic* telephone services, it does not bar the Commission from regulating intrastate

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<sup>8</sup> *Id.*

*enhanced* services.<sup>9</sup> The Ninth Circuit reversed that decision, and held that the classification of the service did not alter the standard. The court expressly rejected the Commission’s argument, concluding that the jurisdictional question did not depend on whether the particular service was considered to be enhanced or basic. “As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad ‘in connection with’ language of § 2(b)(1) places them squarely within the regulatory domain of the states.”<sup>10</sup>

On remand, the Commission modified its ruling to preempt any wholly interstate services and any services that are jurisdictionally mixed. *See California II*, 39 F.3d at 932. The Commission concluded that it was not practicable to separate the interstate aspects from the intrastate aspects of the services: “because of economic and operational factors, enhanced service providers would separate their facilities for services that are offered both interstate and intrastate, thereby essentially negating the FCC’s goal of allowing integrated provision of enhanced and basic services.” *Id.*

The Commission has consistently applied this analysis to information services. For example, the Commission preempted state regulation of BellSouth’s MemoryCall voice mail service. The Commission held that the service was jurisdictionally mixed because it was “capable of receiving, and [did] receive, calls from out-of-state as well as in-state locations.”<sup>11</sup> The Commission determined that it was not economically or operationally feasible or practical to separate the interstate and intrastate components of that service: complying with the state order to block sales of MemoryCall would require BellSouth to market an “interstate only” voice mail service which the Commission concluded would likely not “find acceptance.” Because the state

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<sup>9</sup> *See California v. FCC*, 905 F.2d 1217, 1239 (9th Cir. 1990) (“*California I*”)

<sup>10</sup> *Id.* at 1240.

regulation effectively regulated the interstate aspects of the service, the Commission preempted in order to prevent the state from thwarting a valid federal regulatory policy.<sup>12</sup>

2. IP-enabled services are either interstate or jurisdictionally mixed. IP-enabled services consist of Internet Protocol-based (“IP”) networks and their associated capabilities and functionalities (i.e., an IP platform), and services and applications provided over an IP platform or for which an IP capability is an integral component. They also include services and applications that enable an end user to send or receive a communication in IP format. The communication may be voice, data, video, or any other form of communication that is sent to or received by the end user in IP over an IP infrastructure.

IP-enabled services, and VoIP services in particular, are clearly interstate or jurisdictionally mixed. These services are designed to enable users to communicate interstate and internationally, as well as locally. Most VoIP providers market “unlimited local and long distance” usage packages or pricing packages that bundle local and domestic long distance service, and they tout as one of the benefits of their service their international calling plans or low international rates.<sup>13</sup> It is inconceivable, given how these services are marketed and used, that VoIP services would fail to include more than a de minimis amount of interstate traffic.<sup>14</sup>

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<sup>11</sup> *Petition for Emergency Relief and Declaratory Ruling*, 7 FCC Rcd 1619, 1620, ¶ 9 (1992) (“*MemoryCall*”).

<sup>12</sup> *MemoryCall*, at 1621-1622, ¶¶ 13-16. Here, too, the Commission did not find persuasive arguments by the New York Department of Public Service and the Florida Public Service Commission that claimed the Commission’s preemption authority was different depending on whether the service was enhanced or basic. *Id.* at ¶ 13.

<sup>13</sup> See, e.g., <http://www.vonage.com>; <http://www.usa.att.com/callvantage/index.jsp?soac=64528>. Some VoIP providers, such as Vonage and AT&T’s CallVantage, include calls to Canada in their monthly price.

<sup>14</sup> See Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22468, ¶¶ 22, 26, 27 (1998) (“*GTE Order*”); 47 C.F.R. § 36.154(a).

Moreover, many IP-enabled services, including VoIP and other services relying on Internet Protocol, rely on the same dispersed networks that the Internet comprises. As the Commission has explained, the Internet is “an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world.”<sup>15</sup> Applications provided over the Internet “involve computers in multiple locations, often across state and national boundaries.”<sup>16</sup> Given the interjurisdictional nature of the Internet, a user may “access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously.”<sup>17</sup> IP-enabled services offer the same capability of interacting with a multitude of information sources in different jurisdictions during a single communication, and therefore include interstate aspects just as Internet services do.

3. Preemption of state regulation by the Commission is necessary to protect valid federal policy objectives. The Internet and other interactive computer services have historically been a matter of exclusive *federal* concern, *see American Libraries Ass’n v. Pataki*, 969 F. Supp., 160, 168 (S.D.N.Y. 1997). As the Commission has noted, “federal authority has already been recognized as preeminent . . . particularly in the area of the Internet and other

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<sup>15</sup> *GTE Order*, at ¶ 5; *see also* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4799, ¶ 1 n.1 (2002), *vacated in part on other grounds, Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (defining “the Internet” as a “global information system”).

<sup>16</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9178, ¶ 58 n.115 (2001) (“*ISP Remand Order*”), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003).

<sup>17</sup> *GTE Order*, at 22478-79, ¶ 22; *see also ISP Remand Order*, 16 FCC Rcd at 9178, ¶ 58 (recognizing that “[m]ost Internet-bound traffic traveling between a LEC’s subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis”).

interactive computer services.”<sup>18</sup> Congress has set forth a clear national policy that the Internet and other advanced services should remain free from regulation. For example, Congress has declared that it is the policy of the United States “to promote the continued development of the Internet and other interactive computer services and . . . 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 . . . .” 47 U.S.C. § 230(b)(1) and (2).<sup>19</sup> Further, Congress has stated that it is the policy of the United States “to encourage the provision of new technologies and services to the public,” 47 U.S.C. § 157(a), and has charged the Commission with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706, 47 U.S.C. § 157 nt.

Consistent with Congress’ directives, the Commission has recognized the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet or the

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<sup>18</sup> Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3307, ¶16 (2004) (“*Pulver Order*”).

<sup>19</sup> This strong statement of national policy is included in a section of the Act intended to “provide[ ] ‘Good Samaritan’ protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material.” H.R. Rep. No.140-458, at194 (1996), *reprinted in* The Telecommunications Act of 1996: Law & Legislative History, at CR-194 (1996) (“Conference Report on S. 652”). The context of Congress’ statement of national policy differs from the focus of the current proceeding, however, and the section does not contain an express authorization of Commission jurisdiction over the Internet. Therefore, the Commission should not rely solely on section 230(b) as a ground for preempting state regulation. Instead, as discussed in the text, the Commission should preempt state regulation of IP-enabled services because such services have both interstate and intrastate aspects that cannot feasibly be separated, and state regulation of these services would negate the exercise by the Commission of its own lawful authority, and thwart a valid federal policy.

development of competition,<sup>20</sup> and has “established [a] policy of minimal regulation of the Internet and the services provided over it.”<sup>21</sup>

The wisdom of the federal policy is shown by the explosion of innovative services using Internet Protocol, including VoIP and other IP-enabled services, and by the benefits consumers are already experiencing as a result of the vigorous competition among numerous providers of these services. The record here contains extensive evidence from Verizon and others describing the widespread deployment of VoIP services by cable operators, traditional CLECs and interexchange carriers, new VoIP-based providers such as Vonage, ILECs, and VoIP software and application providers such as Skype and pulver.<sup>22</sup> In addition, other IP-enabled services such as video-over-IP, wireless-over-IP, IP-virtual private network (“VPN”) services, IP Centrex services, and Hosted IP services are already being deployed commercially. *Comments* at 11-13. As explained below, preemption of state regulation is necessary to protect this important federal policy.

4. State regulation of IP-enabled services will negate the exercise by the Commission of its own lawful authority because regulation of the interstate aspects of these services cannot be unbundled from regulation of the intrastate aspects. To the extent that IP-enabled services are determined to be interstate, they are clearly within the Commission’s regulatory authority, and the Commission can preempt state regulation of them. 47 U.S.C. § 152(a). Even if these services are jurisdictionally mixed, however, it is impossible to separate IP-enabled services into intrastate and

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<sup>20</sup> See, e.g., *Pulver Order*, 19 FCC Rcd at 3318-19, ¶ 18.

<sup>21</sup> *NPRM* at ¶ 2; see also *Pulver Order* ¶ 1 (“formaliz[ing] the Commission’s policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation”).

<sup>22</sup> E.g. *Comments of the Verizon Telephone Companies*, WC Dockets 04-36 and 04-29, May 28, 2004 (“Comments”); Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, Mass Market Switching Data at 7-12, (filed August 3, 2004); *Competition in the Provision of Voice Over IP and Other IP-Enabled Services*, WC Docket No. 04-36, May 28, 2004, 5-14, App. C.

interstate components.<sup>23</sup> This is true whether the service is VoIP or some other IP-enabled service. With VoIP services, the caller's physical location does not bear any necessary relationship to the identifying "telephone number" assigned by the service. VoIP customers typically can "pick their own area code" – in other words, choose an area code that may have no geographic relationship to the customer's service address. Many providers also market "alternate numbers" – allowing customers to select additional numbers with different area codes that similarly may have no relationship to the customer's geographic location.<sup>24</sup> Many customers are attracted to VoIP services by these features.

Similarly, many providers of the most popular VoIP services market the fact that they are portable – *i.e.*, consumers can use them wherever they have access to a broadband connection, whether in a hotel, a vacation home, or while visiting at a friend's or relative's house. Depending on the particular service, a VoIP user may connect a telephone anywhere and yet appear to be communicating from his or her chosen area code. And even if a VoIP provider knows where its own end user is located, its ability to discern the location of the other party to a call may be limited. For example, when a VoIP call is made to a telephone number, the VoIP provider may not know whether the called party is an end user customer of the LEC to whom that number is assigned (and, therefore, likely to be located at the geographic location represented by the telephone number), or whether the LEC to whom the number is assigned has provided the number to another VoIP provider (so that the telephone number may have been selected by someone in a

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<sup>23</sup> See Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175, ¶52 (2001) (“[A]lthough some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, ISP traffic is properly classified as interstate, and it falls under the Commission’s section 201 jurisdiction.”) (footnotes omitted).

<sup>24</sup> See, e.g., <http://www.vonage.com/products.php>;  
<http://www.usa.att.com/callvantage/what/features.jsp>

different state). As a result, VoIP providers cannot know the called party's geographic location for certain.

Attempting to relate telephone numbers to IP addresses also would not inform the VoIP provider where the called party is located. IP addresses, which are used to route IP services to or from a particular end user's device (*e.g.*, computer or IP phone), have no necessary relation to the physical location of the user. IP addresses are assigned by Internet Service Providers. ISPs get blocks of IP addresses which they can allocate based on their internal architecture. Address pools used to support dynamic addressing can be associated with edge routers in their POPs or kept more centralized. For example, some ISPs may have highly centralized networks that do not use geographic address allocation schemes for their customers. One large ISP backhauls its traffic from across the country to a single location. In these situations, IP addresses that are assigned as customers log on do not necessarily have any geographic logic.

Moreover, in many situations, when service providers are using "dynamic IP addressing" for residential customers, they may assign a different IP address each time the user connects to the Internet. Once the user ends his or her Internet session or turns off the computer, the IP address can be reassigned to another user.<sup>25</sup> Depending on the provider's network architecture, the IP address could be assigned to a connection in another geographic location or even another state. For example, an ISP that backhauls all its customers' traffic to a single location before connecting to the Internet may assign a particular IP address to a California customer for one session, and then assign it to an Illinois customer for another session.

In the case of IP-enabled services, there is currently no commercially feasible way for providers reliably to associate a particular customer's IP address with that customer's specific

geographic location when the call is being made. Although some providers may record the assignment of IP addresses as they are used, others may not. And even those that do would only have a record of their own end user's assignment.

This situation is not ameliorated by the fact that a number of companies offer services for commercial use that attempt to match IP addresses associated with online customers with outside sources of data to determine the geographic location of the customer (in order, for example, to customize news services by providing different information by time zone).<sup>26</sup> This “geolocation” technology has significant limitations. First, it depends on extensive databases that must be constantly updated. Moreover, these technologies assume that the end user is at the same location as his or her ISP's POP. But this means that the technology is subject to the same limitations discussed above. For example, it cannot determine the location of end users served by ISPs that backhaul their traffic to a single location. It also cannot pierce the server architecture of large corporate networks deploying one or more proxy servers that function as gateways or hubs. And some network providers apply security or filtering procedures (for example, to limit viruses or Internet-based computer attacks) that obscure the location of the IP address.<sup>27</sup> Because providers of VoIP and other IP-enabled services are not able to determine whether a call is interstate or intrastate they would not be able to confine the applicability of state regulatory requirements only to intrastate communications.

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<sup>25</sup> This ensures that IP addresses, which are limited in comparison to the number of Internet users, are not “tied up” when the user is not connected.

<sup>26</sup> See, e.g., [http://www.quova.com/technology/tech\\_geopoint.shtml](http://www.quova.com/technology/tech_geopoint.shtml);  
[http://www.akamai.com/en/html/services/edge\\_how\\_it\\_works.html](http://www.akamai.com/en/html/services/edge_how_it_works.html).

<sup>27</sup> Information Technology Association of America (ITAA), *Ecommerce Taxation and the Limitations of Geolocation Tools*,  
<http://www.ita.org/taxfinance/docs/geolocationpaper.pdf>.

Even if geolocation technology (or another that might be developed) could accurately and reliably locate a particular customer on the basis of the assigned IP address, that would not divest the Commission of jurisdiction over these services. First, these technologies currently are used to identify the originator of the call; they would need to be expanded to identify the location of the called party. Moreover, the ability to identify the endpoints of a particular call is not the same as the capability to segregate all calls, across the board, between interstate and intrastate traffic. The industry would still have to develop, build, and deploy systems and infrastructure that would translate the information from the extensive databases used for geolocation technologies into systems that would allow all providers to identify the jurisdiction of every call on a real-time basis so as to handle it differently if regulatory rules from different jurisdictional authorities required it. This would be an extremely difficult, burdensome, and expensive industry-wide effort. It could require some IP-enabled service providers to undertake significant modifications to, or even completely redo, their network architecture – for example, they might be required to build POPs in every state; or to change the way IP addresses are assigned so that there is more geographic correlation. That, in turn, could exacerbate the scarcity of IP addresses. Indeed, it might require changes to the overall Internet architecture if routing algorithms are required to consider intrastate and interstate jurisdiction, rather than simply the most efficient route, before determining the next hop of a packet en route to its destination. Imposing such inefficiencies would defeat federal policy objectives. *See, e.g., NPRM*, at ¶¶ 1, 4-5; *Pulver Order* at ¶ 24.

Requiring the development of such systems and infrastructure would serve no purpose other than enabling more onerous regulation of IP-enabled services. As a result, it would directly frustrate the federal policy of minimal regulation of these services and the federal objective of promoting the rapid and efficient deployment of innovative new IP-based services. As the Commission itself recognized, requiring providers of IP-enabled services “to locate [their] members for the purpose of adhering to a regulatory analysis that served another network would be

forcing changes on th[ese] service[s] for the sake of regulation itself, rather than for any particular policy purpose.”<sup>28</sup> Furthermore, any effort along these lines ultimately would be self-defeating, since it would merely prompt development of new ways of getting around any systems that were developed.<sup>29</sup> The cost and complexity of countering *these* developments would only further frustrate the federal policy. And on the cycle would go.

In other circumstances where the Commission has determined that it is impracticable to separate the interstate and intrastate aspects of a service, Courts have upheld preemption of state regulation that would thwart federal policy. For example, as discussed earlier, even though it might have been technically possible for end users to purchase separate CPE for interstate and intrastate calls, it was completely impractical, since customers would have required two separate transmission networks. The Court therefore agreed with the Commission that preemption of state regulation of CPE was appropriate.<sup>30</sup> Similarly, although the Maryland PSC suggested the possibility of a technical solution that would allow denial for non-payment only of interstate traffic independent of local traffic, the Commission concluded such separation was not practical and therefore preempted state rate regulation of DNP.<sup>31</sup>

The Commission also has preempted state regulation of BellSouth’s voice mail service which was “capable of receiving, and [did] receive, calls from out-of-state as well as in-state

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<sup>28</sup> *Pulver Order* at 3321, ¶ 21.

<sup>29</sup> *See, e.g.*, “VoIP hacks gut Caller I.D.” <http://www.securityfocus.com/news/9061>; “Caller ID: Do you really know who's calling?” [http://news.com.com/Caller+ID%3A+Do+you+really+know+who%27s+calling%3F/2100-1039\\_3-5330682.html?tag=sas.email](http://news.com.com/Caller+ID%3A+Do+you+really+know+who%27s+calling%3F/2100-1039_3-5330682.html?tag=sas.email).

<sup>30</sup> *See CCA*, 693 F.2d at 214-15

<sup>31</sup> *Pub. Serv. Comm’n of Md.*, 909 F.2d at 1511.

locations.”<sup>32</sup> The Commission determined that it was not technically feasible or practical to separate the interstate and intrastate components of that service so as to allow state regulation of only the intrastate aspects; because state regulation would have the effect of regulating the interstate aspects of the service, the Commission preempted state regulation to prevent it from thwarting a valid federal regulatory policy.<sup>33</sup> Similarly, the Commission has determined that “mixed use” special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to its jurisdiction because the portions of the traffic that are interstate or intrastate traffic cannot be measured without significant additional administrative efforts.<sup>34</sup>

Like CPE, DNP, BellSouth’s MemoryCall service, jurisdictionally mixed information services, and mixed use special access, IP-enabled services are, at the very least, jurisdictionally mixed and cannot be broken apart into separate interstate and intrastate components.<sup>35</sup> If states are allowed to regulate the intrastate aspect of these services, a service provider will as a practical matter only be able to comply with a state’s requirements by conforming the interstate part of its mixed use IP-enabled service to that state’s regulation as well. In addition, because of the indeterminacy of the endpoints of a VoIP call (due to user mobility or the lack of relationship among telephone numbers, IP addresses and geography), a VoIP provider cannot know for certain

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<sup>32</sup> *Petition for Emergency Relief and Declaratory Ruling*, 7 FCC Rcd 1619, 1620, ¶ 9 (1992) (“*MemoryCall*”).

<sup>33</sup> *Id.* at 1621-1622, ¶¶ 13-16.

<sup>34</sup> *See* Decision and Order, *MTS and WATS Market Structure; Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5660, ¶ 6 n.7 (1989).

<sup>35</sup> *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175, ¶52 (2001), *remanded on other grounds WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“[A]lthough some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be

which state's rules it should be conforming to on any particular call. As a result, it would have to conform its entire service, including the interstate aspects, to the regulatory requirements of the most restrictive state. The effect of allowing the states to regulate part of a jurisdictionally mixed service, therefore, would be to defeat the federal policy of deregulating the interstate aspect of the service.<sup>36</sup> This is a valid federal policy, and similar policy decisions by the Commission have long been upheld by the courts.<sup>37</sup>

Moreover, if several states impose different or inconsistent regulations, it would be difficult, if not impossible, for a provider to comply with all of the regulations simultaneously. Because a provider would be unable to determine which communications are subject to each state's regulatory regime, such inconsistent regulations could preclude providers' ability to offer the service altogether. This would undermine Congress' purpose "to encourage the provision of new technologies and services to the public," 47 U.S.C. § 157(a), and "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." *Conference Report on S. 652* at 1. The Commission should, therefore, preempt state regulation of IP-enabled services to prevent such regulation from negating federal policy.

The Commission's preemption of state regulation should extend to several categories of state regulation. First, the Commission should preempt state "economic regulation," such as price controls, tariff requirements, or entry and exit restrictions. Because it is impracticable to separate

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reliably separated. Thus, ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction.") (footnotes omitted).

<sup>36</sup> See, e.g., *Pub. Serv. Comm'n of Md.*, 909 F.2d at 1516; *MemoryCall*, at ¶¶ 13-16.

<sup>37</sup> See *Pub. Serv. Comm'n of Md.*, 909 F.2d at 1515, 1516 (denying petition for review of FCC order that preempted state regulation imposing rates for DNP contrary to federal deregulatory policy); *CCIA*, 693 F.2d at 214 (Commission preemption of state regulation of customer premises

the intrastate and interstate components of IP-enabled services, providers of such services would have to conform their entire service to these types of regulations in order to ensure that the intrastate aspects of the service complied. Such state regulations, therefore would effectively negate the Commission's ability to apply its policy of minimal regulation to IP-enabled services.<sup>38</sup> Second, the Commission should preempt state service quality requirements. Because providers of IP-enabled services cannot practicably isolate the interstate from the intrastate aspects of the services, they would be required to comply with state service quality regulations for all aspects of their services. This would frustrate the Commission's ability to allow consumers, through competitive market forces, to determine the combinations of quality, price, and features that meet their needs.<sup>39</sup> Third, the Commission should preempt state regulations imposing other traditional telecommunications requirements, such as requirements for the format of bills, announcements of price changes, regulation of whether practices, classifications, and regulations of providers are just and reasonable, and service and rate discrimination. Again, the inability of providers of IP-enabled services to separate the interstate and intrastate components of their services would mean that they would have to comply with such regulations for both aspects of their services. As discussed above, this would thwart the Commission's ability to establish a policy of minimal regulation of these services.

The Commission also should preempt state "policy regulation" over areas such as ensuring law enforcement access, emergency 911 service, universal service, disability access, and availability of numbering resources. Verizon has already explained that some regulation of VoIP

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equipment ("CPE") justified because state regulation of CPE would interfere with achievement of federal policy of deregulation).

<sup>38</sup> See *CCIA 693 F.2d at 214-215; MemoryCall* at ¶¶ 19-20.

<sup>39</sup> *Cf. Pub. Serv. Comm'n of Md.*, 909 F.2d at 1515-1516.

is appropriate to effect important federal policy objectives.<sup>40</sup> For example, all VoIP customers should have access to basic 911 services, while access to enhanced 911 (“E911”) services should await the industry’s development of standards and solutions for VoIP E911 functionality. Similarly, the universal service fund should be adequately supported through contributions from all providers of voice communications, including VoIP providers. *Id.* Individual states, however, may take different and potentially inconsistent approaches in these areas. The need to comply with differing and potentially inconsistent requirements imposed by many states would impede the development and expansion of IP-enabled services, and could slow compliance with these important policy objectives. Indeed, as discussed above, because it is impossible to determine the jurisdiction of particular VoIP calls under current Internet architecture, imposition of conflicting state regulations could preclude a provider’s ability to offer the service at all. Consequently, preemption of state regulation in these areas is equally important to avoid negating federal policy objectives.

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The Commission’s policy of minimal regulation of the Internet and services offered over it will be thwarted, and the innovation and development of IP-enabled services curtailed, if states attempt to regulate IP-enabled services. VoIP and other IP-enabled services are interstate or, at the least, include a significant interstate component, and it is not feasible to isolate discrete intrastate and interstate components of an IP-enabled service. As a result, state regulation of “intrastate” aspects of IP-enabled services would unavoidably regulate interstate IP-enabled services. This

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<sup>40</sup> See *Comments* at 47-62; *Reply Comments of the Verizon Telephone Companies*, WC Dockets 04-36 and 04-29, July 14, 2004, at 28-40 (“*Reply Comments*”).

would negate the Commission's exercise of its own authority over interstate services; the Commission, therefore, has authority to preempt state and local regulation of IP-enabled services.