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*NOT AN ACTIVE MEMBER OF THE DC BAR.

October 29, 2004

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

Re: *Ex Parte:*

IP-Enabled Services, WC Docket No. 04-36

Vonage Petition for Declaratory Ruling, WC Docket No. 03-211

Dear Ms. Dortch:

On October 28, 2004, Steven Teplitz, Vice President and Associate General Counsel, Time Warner Inc.; Donna Lampert, of Lampert & O'Connor, P.C.; and the undersigned, of Paul, Weiss, Rifkind, Wharton & Garrison LLP, met with John Rogovin, Austin Schlick, John Stanley, Christopher Killion, and Linda Kinney, all of the Office of General Counsel, to discuss jurisdictional issues relating to the above-captioned proceedings. We made the points set forth below.

1. Preemption of State Regulation Should Apply to All VoIP Providers.

As more fully explained in our comments in WC Docket No. 04-36, the Commission should preempt state VoIP regulation, including regulation of market entry and terms of service. We expressed concern, however, that the Commission might preempt state regulation only with respect to certain VoIP providers — such as Vonage

— on the theory that such providers cannot easily determine points of origination and termination of individual calls because they (1) provide “nomadic” service; (2) offer out-of-region NANPA numbers; and (3) route traffic over the “public Internet.”¹ Instead, the Commission should take a broader approach by recognizing additional characteristics of IP-based voice services and extend the benefits of preemption to all VoIP providers.

As a matter of policy, a distinction turning on the three factors noted above would make little sense. Only certain over-the-top providers would be captured by it; facilities-based providers would not be. The distinction would thus tilt the competitive playing field: it would liberate only a favored few VoIP providers from state regulation. Perversely, it would leave facilities-based providers to be regulated more intrusively, contrary to the Commission’s settled policy to promote investment in facilities.² And it would no doubt complicate the Commission’s pending *IP Enabled* rulemaking. The Commission there has proposed a category of VoIP service that should be subjected to limited regulation.³ Drawing artificial distinctions between VoIP providers at this early point will no doubt complicate the task of erecting a sensible and consistent regulatory framework.

Moreover, an order that would not expressly encompass all VoIP providers, including facilities-based providers, would put such providers in a difficult position. Such providers would have to read tea leaves to determine whether they are within the

¹ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 40 (2004) (“*IP-Enabled Services NPRM*”) (“If we were to draw jurisdictional distinctions between classes of IP-enabled services, what service characteristics (*e.g.*, ability to determine the geographical location of the originating and terminating points of their customers’ calls, use of the Internet) justify those distinctions?”).

² See, *e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494, 13533 (2004) (separate Statement of Chairman Powell) (“One of the Commission’s most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress’ goal of reducing regulation and promoting facilities-based competition”); *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 1673, ¶ 2 (2004) (noting the Commission’s “commitment to promoting the development of facilities-based competition”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 20912, 20916 (1999) (noting the goal of the Telecommunications Act of 1996 to “promot[e] facilities-based entry”).

³ See *IP-Enabled Services NPRM* ¶¶ 35-37.

order's scope, even when millions of dollars in state exactions may depend on that question. Moreover, such providers will be tempted to restructure their network architecture to become entitled to regulatory benefits. Such restructuring would not benefit consumers. For example, routing traffic over the "public Internet" would only impair the quality of their service. And query whether the Commission should reward the dispensing of out-of-region numbers, a practice that regulators have criticized.⁴

2. The Commission Can and Should Determine That VoIP Involves No Intrastate Communications.

The Commission can and should reach a broader preemption decision by determining that VoIP calls are not intrastate at all. As more fully explained in an *ex parte* letter filed by NCTA yesterday, VoIP signals — whether facilities-based or "over-the-top" — are interstate in character.⁵ In connection with substantially all VoIP call sessions, voice or signalling packets cross state boundaries, making such calls "interstate communication."⁶ Section 2(b)'s limitation on the Commission's jurisdiction with respect to "intrastate communications" is therefore simply inapplicable.⁷

It is true that, with respect to circuit-switched communications, the Commission has analyzed the inter- or intrastate nature of communications on the basis of their initial point of origination and ultimate point of termination. Thus, in connection with circuit-switched communications, the Commission has been unwilling to attach significance to intermediate switching points.⁸ But that so-called end-to-end doctrine

⁴ See, e.g., *Number Resource Optimization*, CC Docket No. 99-200, Comments of the Public Utilities Commission of Ohio at 4 (filed Aug. 16, 2004) ("The Ohio Commission notes that Vonage is currently advertising the ability of a customer anywhere in the country to be assigned the NPA of his or her choice regardless of geographic location. Such practice is in direct violation of current FCC service provider number portability rules. Therefore, the Ohio Commission strongly encourages that the FCC immediately put an end to such practice.").

⁵ See Ex Parte Letter from Howard J. Symons to Marlene H. Dortch, October 28, 2004, Attachment at 5.

⁶ See 47 U.S.C. § 153(22) ("'interstate communication' . . . means communication or transmission . . . from any State . . . to any other State . . .").

⁷ 47 U.S.C. § 152(b) ("nothing in this Act shall be construed to . . . give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication* service by wire or radio of any carrier") (emphasis added).

⁸ See, e.g., *Free World Dialup Order* ¶ 21 ("[t]raditionally, the Commission has applied its so-called end-to-end analysis, looking at the end points of a communication, to determine the jurisdictional nature of any given service . . . the Commission

has functioned as a means of protecting the Commission's jurisdiction — not as a means of artificially defeating it.⁹ And the Commission has never suggested that this interpretation is statutorily compelled even with respect to circuit-switched communications, let alone with respect to VoIP communications.¹⁰

And it clearly is not. It is true that Section 3(22) of the Communications Act provides that “interstate communication” “shall not . . . include . . . communication between points in the same State . . . through any place outside thereof, if such communication is regulated by a State commission.”¹¹ But that definition applies only “with respect to the provisions of Title II.”¹² Section 2(b) is not a provision of Title II.

considers the ‘continuous path of communications, beginning with the inception of a call to its completion, and has rejected attempts to divide communications at any intermediate points between providers’”); *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, ¶ 12 (1994) (“[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch.”); *AT&T Corp. et al. v. Bell Atl. — Pennsylvania, et al.*, Memorandum Opinion and Order, 14 FCC Rcd 556, 573 (1998) (“[c]ourts and this Commission have consistently emphasized that they consider the end-to-end nature of communications rather than the various facilities used Interstate wire communication is regulated from its inception to its completion by the Communications Act and, within the meaning of the Act, does not end at an intermediate switch.”).

⁹ See, e.g., *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 1619, ¶ 12 (1992) (“Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call.”).

¹⁰ See *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, ¶ 42 (2002) (recognizing that the characterization of IP-based communications is an open question).

¹¹ 47 U.S.C. § 153(22).

¹² *Id.*

Nor does the end-to-end doctrine have to be interpreted the same way in the different packet-switched and circuit-switched contexts.¹³ The Commission can readily view as an “end” point a soft-switch or a router,¹⁴ which will virtually always be located in a different state than the end user. Indeed, the Commission has analyzed Internet-bound traffic as being interstate communication between the end-user and a website — not intrastate communication from the end user to a website and back to the end-user.¹⁵ Just so, a VoIP-related communication from the end-user to the soft-switch or router should be viewed as a communication in itself.

It is no answer to say that, in connection with a *de minimis* number of VoIP calls, VoIP packets may remain wholly within one state — for example, when a caller calls his next-door-neighbor and all soft-switches and routers involved in the call happen to be located within the same state. Some regular Internet traffic also remains wholly within one state.¹⁶ Yet, the Commission has been unwilling to allow that fact to alter its conclusion that, for purposes of the Communications Act, Internet traffic is not intrastate.¹⁷ That result is plainly correct: “the venerable maxim *de minimis non curat lex* (‘the law cares not for trifles’) is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”¹⁸

¹³ See *GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 22 (1998) (“An Internet communication does not necessarily have a point of ‘termination’ in the traditional sense.”).

¹⁴ Cf. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (EPA had discretion in deciding whether different chimneys in same factory were one “source” or different “sources”).

¹⁵ *GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 20 (1998) (“*GTE Order*”) (“We . . . analyze ISP traffic as a continuous transmission from the end user to a distant Internet site.”).

¹⁶ See *id.* ¶ 22 (“we recognize that some of the ISP traffic carried by GTE’s ADSL service may be destined for intrastate or even local Internet websites or databases”).

¹⁷ See *id.* ¶¶ 23-32.

¹⁸ *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

3. Even If VoIP Involves Intrastate Communications, the Commission Can Still Preempt, Whether VoIP Is an Information or Telecommunications Service.

In addition or in the alternative, the Commission may rely on more traditional preemption rationales, which permit preemption even if VoIP communications in part constitute “intrastate communication” for purposes of Section 2(b). And the Commission can do so without determining whether VoIP constitutes an “information service” or a “telecommunications service.”

a. If VoIP Constitutes an “Information Service,” Section 2(b) Does Not Apply at All.

As the Commission has held on numerous occasions,¹⁹ Section 2(b) by its terms applies only to a firm that is a “carrier.” “Carrier” means “common carrier.”²⁰ When a firm is not a “common carrier,” Section 2(b) therefore does not apply at all. And the Commission has held that providers of information services are not “telecommunications carriers,” and thus are not “common carriers.”²¹ In sum, Section

¹⁹ See, e.g., *Public Serv. Co. of Okla. Request for Declaratory Ruling*, Declaratory Ruling, 3 FCC Rcd 2327, ¶ 25 (1988) (“Section 2(b) is not a limitation on the scope of the Commission’s jurisdiction over private carriers”); *Norlight Request for Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd 132, ¶ 31 (1987) (“[b]y its terms, Section 2(b) only applies to the intrastate activities of common carriers, because Section 3(h) defines the word ‘carrier’ under the Act as ‘any person engaged as a common carrier for hire’”); *id.* ¶ 33 (“federal authority over private carriers is broader than that over common carriers because neither Section 2(b) nor any other provision of the Act expressly restricts the Commission’s jurisdiction over private carriers”); *Detariffing the Installation and Maintenance of Inside Wiring*, Memorandum Opinion and Order, 1 FCC Rcd 1190, ¶ 14 (1986) (“[b]ecause Section 3(h) of the Act, equates ‘carrier’ with ‘common carrier,’ Section 2(b)(1) applies only to common carriers and only in relation to those services which are properly classified as common carrier communications services”); *Cox Cable Communications, Inc., Memorandum Opinion*, Declaratory Ruling, and Order, 102 F.C.C.2d 110, ¶ 21 (1985) (whether a firm operates as a common carrier matters to preemption analysis because “Section 2(b), 47 U.S.C. § 152(b), limits this Commission’s jurisdiction over intrastate communications of any common carrier”).

²⁰ 47 U.S.C. § 153(10).

²¹ See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 21 (1998) (“[w]e find generally, however, that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers”).

2(b) is inapplicable to providers of information services. That being the case, the Commission can preempt state regulation unrestrained by Section 2(b) — *i.e.*, on a mere showing that preemption will help effectuate federal policy.

Courts have admittedly held that Section 2(b) *does* apply to non-common-carrier services where such services are provided by firms that are common carriers in a closely related aspect of their business.²² But courts have held Section 2(b) inapplicable in connection with non-common carrier services unrelated to any common-carrier business.²³ If VoIP constitutes an information service, the Commission should therefore be able to preempt with respect to substantially all VoIP providers.

b. If VoIP Constitutes a “Telecommunications Service,” the Commission Can Take Advantage of the “Impossibility Exception.”

Courts have held that, even where Section 2(b) applies, the FCC may preempt if state regulation “negates” legitimate federal policies.²⁴ The inquiry here is whether

²² See *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) (“The plain meaning of the language ‘of any carrier’ is that the statute applies to communications services provided by common carriers such as AT&T and the BOCs as distinguished from communications services provided by non-common carriers such as IBM. Thus, the distinction made by the statute is between providers of communications services, *i.e.*, between carriers and non-carriers.”); *NARUC v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989) (“even if the statute could be interpreted to read ‘intrastate common carrier communications service,’ inside wiring would still fall within it as a facility or service offered ‘for or in connection with’ a common carrier service, namely, intrastate telephone service”).

²³ See *NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (because “Section 152(b) explicitly denies Commission jurisdiction over intra state common carrier operations,” Section 2(b) was an obstacle to preemption of intrastate communications by cable operators (which generally are not common carriers) only insofar as the communication service at issue itself was provided on a common carrier basis); *NARUC v. FCC*, 525 F.2d 630, 647 (D.C. Cir. 1976) (“Under 47 U.S.C. § 153(h), the term ‘carrier,’ as used in § 152(b), is equated with ‘common carrier.’ Thus, § 152(b) only has application to common carriers, and our affirmance of the Commission’s non-common-carrier classification of SMRS vitiates any objection which might rest upon it.”).

²⁴ See, *e.g.*, *PSC of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (preemption permitted where “state regulation would negate the exercise by the FCC of its own lawful authority”) (internal quotation marks and brackets omitted); *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (preemption permitted “when the state’s exercise of [its authority over intrastate telephone service] negates the exercise by the FCC of its own lawful authority over interstate communication”).

state regulation that in name applies only to intrastate communications frustrates the practical effect of the Commission's legitimate policy initiatives with respect to interstate communications.²⁵ In part because of play in the joints both in defining the Commission's "federal policy" and in evaluating the degree of "frustration," courts have allowed the Commission to invoke the impossibility exception to preempt a host of state regulations.²⁶

The Commission impossibility exception permits broad preemption of state VoIP regulation. The FCC is well within its powers in seeking to promote, insofar as interstate communication is concerned, a competitive VoIP market, characterized by free and unhindered entry and a level playing field. Indeed, Congress has declared it to be "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."²⁷ Similarly, Congress has proclaimed that

²⁵ See *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 1619, ¶ 18 (1992) ("[t]he Commission may preempt state regulation when the state regulation would thwart or impede the exercise of lawful federal authority over interstate communications").

²⁶ See, e.g., *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996) (FCC entitled to preempt PUC order requiring LECs to provide per-line blocking of Caller ID where this negated FCC's policy of promoting interstate Caller ID); *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (FCC entitled to preempt state rules requiring BOCs to offer enhanced services through separate subsidiary where, "because of economic and operational factors," such requirements negated FCC policy of allowing BOCs to offer enhanced services on an integrated basis); *PSC of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (FCC entitled to preempt state regulation requiring ILECs to raise rates charged to long-distance carriers for disconnecting subscribers failing to pay long-distance bills); *PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (FCC entitled to preempt PUC order prohibiting large end user from connecting trunk lines to facilities of LEC other than the LEC servicing area in which end user was located where trunk lines supported both inter- and intrastate service); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (FCC entitled to require BOC to make Centrex service available to resellers where Centrex inseparably supports inter- and intrastate service); *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) (FCC entitled to preempt state regulation of inside wiring insofar as it would "thwart achievement of a free and competitive inside wiring market").

²⁷ 47 U.S.C. § 230(b)(2); see also *id.* § 230(e)(2) (defining "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server").

“[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.”²⁸

State regulation of entry and service terms would frustrate the legitimate federal objective of promoting an unregulated and competitive market for VoIP.²⁹ All else being equal, state regulation of entry and terms will unquestionably block or deter some competitors (whether facilities-based or over-the-top), thereby sapping the market’s competitive vigor. State regulation is particularly onerous if it differs or even conflicts from state to state: by its nature, VoIP is provided on a multistate basis, making differing state regulatory requirements particularly debilitating.³⁰ Thus, state regulation stymies federal policy, and preemption is indicated.

For similar reasons, the Commission can also preempt state regulation pursuant to Section 253 of the Communications Act. Under that provision, the Commission may — indeed, must — preempt state and local regulation that “may . . . have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”³¹ As the Commission has observed, preemption under Section 253 is appropriate where the “economic impact” of state regulation is “great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service.”³² Unduly extensive non-federal regulation would have “the effect of prohibiting the ability” of VoIP providers to “provide . . . telecommunications service.”

²⁸ 47 U.S.C. § 157(a).

²⁹ See, e.g., *Free World Dialup Order* ¶ 17 (state regulation “would conflict with the national policy of nonregulation”); *PSC of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (“preventing state encroachment on federal interstate telecommunications policy is a valid regulatory objective”).

³⁰ Cf. *Free World Dialup Order* ¶ 25 (“[T]he Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication[.]”).

³¹ 47 U.S.C. § 253(a).

³² *Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶ 81 (1997); see also *Pittencrieff Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 1735, ¶ 32 (1997) (in determining whether, for purposes of preemption under Section 253, “a state or local requirement has the effect of prohibiting an entity from providing telecommunications services we consider whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”).

* * *

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed electronically in the above-captioned proceedings for inclusion in the public record. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Henk Brands', with a long horizontal flourish extending to the right.

Henk Brands
Counsel for Time Warner Inc.

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein

Christopher Libertelli
Jon Cody
Matthew Brill
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