November 2, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: WC Docket Nos. 04-36, 03-211
Ex Parte Presentation

Dear Ms. Dortch:

On November 1 and 2, 2004, Carolyn Brandon, Vice President, Policy, CTIA – The Wireless Association™ ("CTIA"), Diane Cornell, Vice President, Regulatory Policy, CTIA, and Paul Garnett, Director, Regulatory Policy, CTIA, together with L. Charles Keller and Adam Krinsky of Wilkinson Barker Knauer, LLP, met separately with Christopher Libertelli, Office of Chairman Michael Powell, and Aaron Goldberger, Wireless Telecommunications Bureau; Matt Brill, Office of Commissioner Kathleen Abernathy; Jessica Rosenworcel, Office of Commissioner Michael Copps; and Scott Bergmann and Barry Ohlson, Office of Commissioner Jonathan Adelstein. During the meetings, CTIA noted the competitive and pervasively interstate nature of Internet protocol-enabled ("IP-enabled") services and urged the Commission to find that such services are subject to exclusive federal jurisdiction. This letter provides additional discussion of the legal authority in support of prompt assertion of exclusive federal jurisdiction and responds to recent suggestions in favor of a jurisdictional split modeled after the wireless experience.

A. IP-enabled Services are Pervasively Interstate and Should be Subject to Exclusive Federal Jurisdiction

Although the states' power to regulate intrastate communications is grounded in section 2(b) of the Communications Act,[1] the courts have established that the Commission has authority to 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

[1] 47 U.S.C. § 152(b). *See also Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986) *("Louisiana PSC").*

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aspects."[2] All aspects of this test unquestionably are met with respect to IP-enabled services.

First, the record developed in response to both the Vonage Petition and the IP-Enabled Services rulemaking conclusively demonstrates that IP-enabled services are pervasively interstate and international in nature.[3] Indeed, as discussed below, one of the fundamental debates in these proceedings is whether it is even possible to identify and isolate intrastate IP-enabled communications. Therefore, there is no question that IP-enabled communications have an interstate "aspect," satisfying the first prong of the preemption analysis.

Second, preemption is necessary to protect valid federal objectives. Congress has established that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [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."[4] Congress further enacted section 706 of the Telecommunications Act of 1996, which requires regulators to encourage the deployment of advanced telecommunications capability to all Americans through deregulatory actions designed to remove barriers to infrastructure investment.[5] Preemption is necessary here to protect these market-oriented and deregulatory goals for IP-enabled services; in the alternative, the technical and administrative difficulties inherent in complying with a patchwork of 51 different and likely inconsistent state utility regulatory schemes would undermine these important federal policy objectives, thwarting the roll-out of these innovative services and increasing prices for consumers.

Third, preemption is necessary because there is no way to "unbundle" or carve out a discrete sphere for state regulation without negating the Commission's exercise of its own lawful authority. The Commission's traditional "end-to-end" analysis is of no practical use. IP routing recognizes neither state nor national boundaries. The FCC has previously acknowledged, moreover, that in "a single Internet communication, an Internet user may, for example, 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."[6] Further, one of the primary consumer benefits of many IP-enabled services is the ability for consumers to access such services anywhere or anytime from any location with broadband access. In addition, CTIA believes there is a serious question whether the technology exists today to

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[2] *Public Service Comm'n of Maryland v. FCC,* 909 F.2d 1510, 1515 (1990) *("Maryland PSC")* (internal citations and quotation marks omitted).
[3] *See, e.g.,* Comments of CTIA, WC Docket No. 04-36 (filed May 28, 2004).
[4] 47 U.S.C. § 230(b). Congress also has acknowledged the Commission's policy of favoring deregulation and preemption in a competitive marketplace in the wireless context. 47 U.S.C. § 332(c).
[5] Section 706 of the 1996 Act is codified in the note to 47 U.S.C. § 157.
[6] *GTE Telephone Operating Cos.,* Memorandum Opinion & Order, 13 FCC Rcd 22466, 22479 (1998).

allow a provider of IP-enabled services to identify the location of both parties to a communication in order to determine whether it is intrastate. Even if IP-enabled service providers could identify the originating and terminating points of a call, they would be doing so purely to satisfy arbitrary regulatory obligations. The possibility that IP-enabled service providers could, at significant expense, develop the ability to identify the originating and terminating points of a call does not change the interstate and international nature of the service as purchased by consumers.

Ultimately, as a result of the pervasively interstate nature of IP-enabled communications, state regulation is problematic. In CTIA's reply comments in the IP-Enabled Services proceeding, we discussed the circumstances Vonage faced when the Minnesota Commission attempted to regulate Vonage's IP telephony service.[7] Vonage was unable to comply with the strict E-911 requirements that the Minnesota Commission sought to impose (which mirrored those applicable to the mature landline telephony market). At the same time, because of the inherently boundary-less nature of the Internet, Vonage was unable to prevent customers from accessing its service in Minnesota. Customers who live in other states might access the service while visiting Minnesota and customers who live in Minnesota might use addresses in other states in order to subscribe. In either of these situations, Vonage would be unable to know whether it was illegally providing intrastate service in Minnesota. By the same token, customers with billing addresses in Minnesota might legally access the service from elsewhere, but Vonage might deny them service based on their Minnesota billing address. IP-enabled traffic is jurisdictionally mixed and inseverable, and no state carve-out is possible or practical.

Further, CTIA believes that the Commission should not refer issues to the Federal-State Joint Board on Jurisdictional Separations before making a preemption decision.[8] The FCC, not the Separations Joint Board, is charged with making threshold determinations as to whether a service is interstate or intrastate, or a telecommunication service or an information service. Once the FCC makes those threshold determinations, the Separations Joint Board's role is to assist the Commission in making decisions regarding the jurisdictional division of the cost of telecommunications equipment.[9] As discussed in detail above, a preemption decision requires the conclusion that the facilities in question *cannot* effectively be separated into interstate and intrastate components. Thus, there is no role for the Joint Board in deciding a preemption question. If accepted, the state members' argument would require a referral in any instance where the Commission considered preemption. Such referrals have not been required in prior preemption cases and, indeed, because the statute gives the states a majority of the seats on the Joint Board, a referral requirement would contravene the principles of federalism that underlie preemption jurisprudence.

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[7] Reply comments of CTIA, WC Docket No. 04-36 (filed July 14, 2004) at 2.
[8] Late-Filed Comments by State Members of Separations Joint Board, WC Docket Nos. 04-36 and 03-211 (filed Oct. 26, 2004).
[9] 47 U.S.C. § 410(c).

B. CTIA Supports Full and Exclusive Federal Jurisdiction over IP-Enabled Services, Rather Than a Jurisdictional Split Modeled after Section 332

CTIA understands that some interested parties have suggested the Commission use the existing jurisdictional framework governing commercial mobile radio service ("CMRS") as a model for IP-enabled services – providing for "hands-off" economic regulation and preemption of state entry and rate regulation, but allowing state regulation of "other terms and conditions." While FCC rulings in favor of a light regulatory approach would undoubtedly contribute to the growth of IP-enabled services, a decision to impose the CMRS jurisdictional regime – with state authority over "other terms and conditions" – would subject these *inherently interstate* offerings to 51 individualized public utility regulatory regimes, impeding entry and the development of these innovative, highly competitive services. Instead, the Commission can and should exercise its plenary authority to find full and exclusive federal jurisdiction over IP-enabled services. To the extent that regulation is necessary, a uniform, nationwide regulatory framework is far more appropriate than 51 separate regulatory schemes.

Pursuant to Section 332 of the Communications Act, in 1993 Congress allowed the FCC to forbear from strict Title II economic regulation and preempted state regulation of rates and entry for CMRS providers, while allowing states to exercise authority over "other terms and conditions."[10] The Commission's market-oriented decisions in the mid-1990s allowed the CMRS market to develop freely and contributed to the tremendous growth within this highly competitive industry sector. The following two examples illustrate the CMRS industry's concerns that state regulation under the "other terms and conditions" rubric undermines services that are highly competitive and nationwide in nature, resulting in a direct, negative impact on consumers and on the continued growth and proliferation of what are inherently interstate services.

First, under the "other terms and conditions" language of Section 332, the Ohio Public Utilities Commission chose to retain rules that provided for structural separation between a cellular carrier's retail and wholesale operations, leading to separate affiliates that otherwise would not exist under the FCC's rules and policies.[11] Although the Public Utility Commission eliminated the rule in 1999,[12] the regulation nonetheless spawned multiple class action suits seeking billions of dollars in purported damages, and caused a significant drain on providers operating in Ohio.

Earlier this year, the California Public Utilities Commission adopted a "Telecommunications Bill of Rights" and the Minnesota Legislature passed a

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[10] 47 U.S.C. § 332(c)(1)&(3).
[11] *See Commission Investigation into the Regulatory Framework for Telecommunications Services in Ohio*, 1985 Ohio PUC LEXIS 44 (Apr. 9, 1985).
[12] *See Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers,* 1999 Ohio PUC LEXIS 745 (Dec. 16, 1999).

"Consumer Protections for Wireless Consumers" bill – both dictate the relationship between wireless carriers and their customers – despite the fact that existing laws and the wireless industry's own 10-part Voluntary Consumer Code include significant protections that help consumers make informed choices, better understand their wireless services and rate plans, and ensure that wireless carriers meet their needs. The wireless industry has appealed both sets of laws in federal court and the litigation is ongoing. State regulations like those adopted in Minnesota and California have significant impact beyond the state's borders, splintering nationwide operations into state-by-state systems and minimizing the economic, technical and administrative efficiencies that have been passed on to wireless consumers in the form of steadily decreasing prices for an expanding group of services and products. State by state regulation of CMRS impedes the national dissemination of information about pricing and services, thereby limiting consumer information and ultimately choice. As noted above, balkanized utility regulation also increases the cost of doing business in wireless which translates into higher costs for consumers.

CTIA urges the Commission to allow the marketplace to respond in the first instance to consumer demand for IP-enabled services Already, VOIP providers have demonstrated a keen commitment to address E911 issues in the IP-enabled context. As IP-enabled services develop, CTIA is confident that providers will take it upon themselves to address important social policy goals. As Chairman Powell noted upon the adoption of the voluntary wireless consumer code, "Ultimately, voluntary efforts, like the code, are not only good for consumers; they are good for business too by improving the customer experience and encouraging subscription."[13] Where regulation is necessary, moreover, a uniform, nationwide policy is far more appropriate that 51 individualized regulatory regimes for a pervasively interstate service. While states will, of course, continue to have an important role in protecting against consumer fraud and deceptive practices via state laws of general applicability, the regulation of communications than are inherently interstate is more appropriately addressed at the national level.

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[13] News Release, *FCC Chairman Michael Powell Statement on Wireless Industry Voluntary Consumer Code,* (Sept. 9, 2003).

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically for inclusion in the record of these proceedings.

Respectfully submitted,

/s/

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Vice President, Policy

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