BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matters of	)	
	)	
IP-Enabled Services	)	**WC Docket No. 04-36**
	)	
E911 Requirements for IP-Enabled Service Providers	)	**WC Docket No. 05-196**
	)	

COMMENTS OF COMPTEL

CompTel, by its attorneys, hereby respectfully submits its comments on the issues raised in the Commission's Notice of Proposed Rulemaking in the above-captioned dockets. CompTel is the leading industry association representing competitive communications service providers. CompTel members are entrepreneurial companies building and deploying next generation, IP-based networks to provide competitive voice, data, and video services in the United States and around the world.

The Commission Should Not Too Readily Relinquish Title II Authority

In this rulemaking proceeding, the Commission seeks comment on the necessity of adopting additional rules to promote its core public safety functions – in this case, ensuring that consumers who choose voice over Internet protocol (VoIP) can access emergency services via 911.[1] In particular, the Commission seeks to ensure that "providers of VoIP services that interconnect with the nation's PSTN provide ubiquitous and reliable E911 service."[2] CompTel supports the Commission efforts to ensure public

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[1] *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers,* First Report and Order and Notice of Proposed Rulemaking, WC Dockets No. 04-36, 05-196 (released June 3, 2005), published 70 Fed. Reg. 37,307 (June 29, 2005) ("E911 Order and NPRM").

[2] *NPRM* at ¶ 56.

safety and other important consumer safeguards are met by providers of interconnected VoIP services. At the same time, CompTel cautions the Commission to avoid stifling innovation by adopting unnecessary rules that hamper deployment of new services. In addition, CompTel urges the Commission to consider the broad implications of continuing to place services outside of Title II in a manner that severely limits the Commission's authority to adopt the consumer protections it properly considers vital to its core mission.

This proceeding is an outgrowth of the Commission's apparent determination that VoIP regulation should arise, in the first instance, from Title I of the Act. Perversely, the Commission has chosen to exercise its statutory *in loco parentis* role to protect public safety by removing itself from oversight of providers of vital communications services like broadband and IP-enabled services. For example, in recent months, in response to requests from the Bell companies, the Commission has exempted from Title II various categories of broadband services offered by incumbent carriers.[3] By removing incumbent broadband services from the purview of Title II, the Commission has expressed its belief that Title I authority is sufficient to enact a broad range of consumer protection mandates, including E-911. The Commission had best be right.

It is important to note that the Commission's determination to lift Title II regulation is undertaken entirely of its own volition. In *Brand* X[4], the Supreme Court upheld the Commission's determination that cable modem services are not subject to

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[3] *See, e.g.*, "FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services," News Release, FCC 05-150, rel. Aug. 5, 2005, at 1 ("Specifically, the Commission determined that wireline broadband Internet access services are defined as information services functionally integrated with a telecommunications component.").

[4] *NCTA v. Brand X Internet Services*, Nos. 04-277 and 04-281, 545 U.S. __ (June 27, 2005).

Title II common carriage regulation, but noted that it was making no determination on the appropriate regulatory treatment of DSL services offered by incumbent LECs.[5] In so doing, the Court did not address the important consumer protection and competition policy questions that the Commission is currently exploring in a number of open proceedings. For example, the Court did not reach the issue of port blocking or other interferences with competitive VoIP service providers' abilities to offer their services over cable facilities or the facilities of incumbent local exchange carriers without degradation of their bit streams. Nor did the Court address the interplay between the regulatory classification of retail broadband services and the wholesale obligations, including interconnection and unbundling, that apply to incumbent LECs.

The Commission has already recognized that, in the absence of Title II regulation, incumbent network owners have a powerful economic incentive to deny their customers access to nonaffiliated service providers. For example, in March 2005, the Commission entered into a consent decree with incumbent LEC Madison River, terminating an investigation into Madison River's port blocking of VoIP service providers.[6] The Commission has also concluded that, notwithstanding the regulatory classification of retail services as either information services or telecommunications services, incumbent local exchange carriers (ILECs) are obligated to provide access to unbundled networks

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[5] *Id.*, *slip op. at* 31 ("In particular, we express no view on how the Commission should, or lawfully may, classify DSL service.").

[6] The Commission noted that its investigation of Madison River was undertaken pursuant to its section 201(b) authority to ensure that charges and practices of common carriers are "just and reasonable." 47 U.S.C. § 201(b). *See In the Matter of Madison River Communications, LLC and affiliated companies*, DA 05-543, at 1 (2005).

elements and interconnection.[7] Title II is the fundamental basis for the Commission's authority to implement the pro-consumer and pro-competition provisions of the Act. In response to these pro-consumer actions by the Commission, incumbent LECs are now arguing that the Commission should eliminate the last vestiges of regulatory oversight that would prevent such denial of consumer access to competitive services. The Commission should be concerned that, in limiting its own statutory authority, it eliminates legal tools that are vital to its ability to promote public safety.

In addition to the instant rulemaking, the Commission has two other pending rulemaking proceedings exploring the appropriate regulatory structure for consumer protections, including public safety and competitive safeguards, that should apply to broadband services provided by incumbent LECs and cable modem providers.[8] The Commission should carefully evaluate the record in this rulemaking to explore whether Title I authority is sufficient to adopt the necessary consumer protections posited by the Commission.[9] In particular, the Commission sought comment in both rulemaking

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[7] *See, e.g., In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, WC Docket No. 03-211 at ¶ 144 n.155 ("We note that nothing in this Order addressing the Commission's jurisdictional determination of or regulatory treatment of particular retail IP-enabled services impacts competitive LEC access to the underlying facilities on which such retail services ride.") (*"Vonage Order"*).

[8] *See In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (assessing regulatory classification of wireleine broadband services offered by incumbent LECs); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52 (assessing need for open network access obligations for cable modem service providers).

[9] For example, many congressionally mandated consumer protections apply only to providers of telecommunications services. *See, e.g.,* 47 U.S.C. § 222 (customer privacy); 47 U.S.C. § 225 (services for hearing and speech impaired individuals); 47 U.S.C. § 229 (Communications Assistance for Law Enforcement). In addition, eligibility for many of the inputs competitive providers need from incumbents turns on whether the competitor is providing a telecommunications service. *See, e.g.,* 47 U.S.C. § 251(c)(3) (unbundled network elements); 47 U.S.C. § 251(c)(2) (interconnection); 47 U.S.C. § 251(c)(6) (collocation); 47 U.S.C. § 251(b)(2) (number portability); 47 U.S.C. § 251(b)(3) (dialing parity, operator services, and directory assistance). The Commission must ensure that these important congressionally-mandated goals are not thwarted in any subsequent rulemaking proceedings.

proceedings regarding the extent of its authority, pursuant to Title I of the Communications Act, to impose obligations on carriers for whom the Commission had granted an exemption from Title II. In the time since the Commission closed the record in those proceedings, the Commission's Title I authority has been called into serious question by the D.C. Circuit.[10] Given the important congressionally-mandated consumer protections, as well as pro-competition policies, that are expressly tied to the regulatory classification of broadband services, the Commission must proceed cautiously before eliminating its own jurisdiction to protect consumers.

CompTel also urges the Commission to carefully limit the scope of its new rules to those providers that actually fall outside the existing Title II framework. In the Notice, the Commission tentatively concluded that "a provider of a VoIP service offering that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN should be subject to the rules we adopt in today's Order if a user can combine those separate offerings or can use them simultaneously or in immediate succession."[11] The Commission's goal is clear: entities that market services as complete wireline telephony replacements should provide the same E911 capabilities as the wireline telephony service that the entity seeks to replace. In fulfilling that goal, the Commission must clearly apply its rules only to those providers that actually market full substitutes for traditional wireline voice services.

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[10] *See American Library Assoc. v. Motion Picture Assoc. of America*, No. 04-1037, at 18 (D.C. Cir. 2005) (rejecting Commission exercise of Title I authority as "*ultra vires*" because "the FCC's interpretation of its ancillary jurisdiction reaches well beyond the agency's delegated authority under the Communications Act").

[11] NPRM at ¶ 58.

The Commission also asks questions regarding the need for adoption of additional consumer protection safeguards, including privacy and disabilities access.[12] As the Commission correctly notes, the privacy safeguards of section 222 of the Act are applicable to "telecommunications carriers."[13] Similarly, the disabilities access provisions of the Act apply to providers of "telecommunications services."[14] Although the Commission has not yet decided whether interconnected VoIP services are telecommunications services or information services, the importance of privacy, disabilities access, and other consumer safeguards is not in dispute.[15] Nor is there any question that Title II of the Act contains all the necessary statutory provisions to address these important consumer protections. The Commission notes in the VoIP E911 Order that "[t]o the extent that the Commission later finds these services to be telecommunications services, the Commission would have additional authority under Title II to adopt these rules."[16] Although the Commission concluded that its ancillary authority is sufficient to provide legal justification for establishment of E911 rules pursuant to Title I of the Act, that assertion has not been tested in court.[17]

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[12] *NPRM* at ¶¶ 62-3.

[13] *NPRM* at ¶ 62 n.179. *See also* 47 U.S.C. § 222(c)(1).

[14] *See* 47 U.S.C. § 255(c).

[15] *See NPRM* at ¶ 24 ("We make no findings today regarding whether a VoIP service that is interconnected with the PSTN should be classified as a telecommunications service or an information service under the Act.")

[16] *NPRM* at ¶ 26.

[17] *NPRM* at ¶¶ 27-9 (concluding that "predicates for ancillary jurisdiction are satisfied here").

The Commission Should Clarify The Applicability of The New 911 Rules

In the E911 Order, the Commission adopted rules requiring providers of "interconnected VoIP" service to supply E911 capabilities to their customers. In addition to requiring the provision of E911 service, the Commission's rules require VoIP providers to advise in writing both new and existing customers of the circumstances under which E911 service may not be available through the interconnected VoIP services or "may be in some way limited by comparison to traditional E911 service. Such circumstances include, but are not limited to . . . broadband connection failure [or] loss of electrical power. . . ." The rules also require VoIP providers to distribute stickers or labels to new and existing customers warning if and when E911 service may be limited or not available.

What appear to be conflicting statements in the E911 Order have created confusion as to the applicability of the new rules requiring customer notification and distribution to customers of stickers or other labels warning of limitations on the availability if E911 service. As the Commission is aware, numerous state certificated telecommunications carriers use Internet Protocol to provision non-nomadic telecommunications services. These telecommunications services provide customers with the same access to emergency services through the existing wireline E911 network as is provided by traditional telephone service and are implemented in compliance with state and local E911/911 requirements and regulations. In footnote 78 of the E911 Order, the Commission stated that "[t]he E911 requirements we impose in this Order apply to all VoIP services that are encompassed within the scope of the *Vonage Order.* " In that

Order,[18] the Commission preempted certain state regulation of Vonage's DigitalVoice VoIP service, including the requirement that Vonage provision 911 service comparable to that provided by the incumbent local exchange carrier. Limiting the applicability of the new rules to Vonage-like VoIP providers would appear to exempt telecommunications carriers using Internet Protocol that are interconnected with the wireline E911 network and are providing their customers access to emergency services in compliance with state and local law from the customer notification and distribution of warning label requirements.

At paragraph 25 of the E911 Order, however, the Commission stated that "the rules we adopt today apply to providers of *all* interconnected VoIP services" (emphasis added). The new rules define interconnected VoIP service expansively as a "a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."

These broad statements would seem to bring within the reach of the new rules virtually all, if not all, providers of telecommunications services using Internet Protocol regardless of whether the carriers offering those services are already interconnected with the wireline E911 network and are providing their customers access to emergency services in compliance with state and local requirements. Unless the Commission intended by this language to preempt all state regulation of voice telecommunications services using Internet Protocol, it should use this opportunity to reiterate and clarify that

[18] *Vonage Order* at ¶¶ 9,42.

the new rules apply only to VoIP services encompassed within the scope of the *Vonage Order* -- i.e., those that, in reliance on the Commission's preemption of state regulation, currently do not afford customers access to E911 capabilities in accordance with state and local requirements.

The Commission's failure to issue such a clarification will result in more burdensome regulation for telecommunications carriers using IP protocol to provision voice services than for carriers providing traditional telephone service. For example, access to E911 service would be compromised even for traditional telephone service provided over a T-1 line or other broadband connection in the even of a broadband connection failure or loss of electrical power. Nonetheless, carriers providing traditional telephone service over a T-1 line or other broadband connection would not be subject to the customer notification and warning label requirements despite the fact that risk of loss of access to E911 would be no less than for telecommunications services using Internet Protocol in the event of a broadband failure or loss of electrical power. In addition, a loss of electrical power would prevent a subscriber to traditional telephone service from accessing E911 on a cordless phone and a cable cut would prevent such a subscriber from accessing E911 on any phone. Yet the Commission imposes no requirement on traditional telephone carriers to notify customers or distribute labels warning of these or other circumstances where access to 911 may be limited or unavailable. More onerous requirements should not be imposed on carriers using Internet Protocol technology.

CompTel submits that imposing the federal customer notification and warning label E911 requirements on carriers using Internet Protocol technology to provision voice services comparable to traditional telephone service in compliance with state and local

E911 regulations would be unreasonable, unnecessary and inconsistent with the Commission's goal of promoting new technologies and new uses of technology with minimal regulation. The Commission asserted that the E911 Order fulfilled its role to "ensure that the increasingly widespread deployment of a new communications technology does not damage the ability of states and localities to provide reliable and high-quality 911 service to all citizens."[19] Because the ability of states and localities to provide reliable and high-quality 911 service to all citizens is not damaged by the deployment of Internet Protocol technology by telecommunications carriers that are already interconnected with the wireline E911 network and compliant with state and local regulation, the Commission should make clear that the federal E911 rules do not apply to such carriers.

Respectfully submitted,

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[19] E911Order at ¶10.