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October 24, 2008

VIA E-MAIL **EX PARTE**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: WC Dkt. Nos. 05-337, 99-68, & 04-36; CC Dkt. Nos. 01-92 & 96-45

Dear Ms. Dortch:

Press reports have indicated that the Commission is considering classifying VoIP/PSTN traffic as an information service. As explained on pages 18-27 of the enclosed comments, originally filed in WC Dkt. No. 04-36 on May 28, 2004 on behalf Time Warner Telecom Inc. (now renamed tw telecom inc.), such a classification would be unlawful.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

Respectfully submitted,

/s/

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202-303-1191

Enclosures

cc: Amy Bender
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services	)	

COMMENTS OF TIME WARNER TELECOM

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May 28, 2004

authority under Title II to limit the consequences of market power and advance desired social policies in Title II.

A. Classifying VoIP Service As A Telecommunications Service Subject To Title II Promotes Legal Stability More Effectively Than Alternative Approaches Without Undermining The Commission's Deregulatory Goals.

The public discourse regarding the proper regulatory classification of VoIP has been fraught with misleading assertions. Many have suggested that the best way of advancing the goal of limiting the extent to which VoIP is subject to regulation is to classify it as an information service or, more vaguely, as some new type of Title I service. But any attempt to exempt basic telephone service from common carrier regulation, regardless of the technology used to deliver it, would be legally risky. It would run counter to the longstanding rule that basic telephone service is subject to Title II regulation, even where the provision of such service involves functionalities that fall within the literal terms of the definition of information service. Moreover, any attempt to rely on ancillary jurisdiction to impose social policy requirements found in Title II on an unregulated service is legally suspect. It would be far safer to classify basic voice service provided *via* IP technology as a telecommunications service subject to Title II.

1. Longstanding Precedent And The Terms Of The Communications Act Indicate That Telephone Service Provided Using IP Technology Should Be Classified As A Telecommunications Service.

The analysis of how to classify VoIP service begins with the definition of telecommunications service. In 1996, Congress added the defined terms "telecommunications service," "telecommunications carrier," and "telecommunications" to the Communications Act, and it imposed extensive new Title II obligations on "telecommunications carriers." *See* 47

U.S.C. §§ 153(43), (44).[19] The Title II provisions that preceded the 1996 Act (mostly adopted in the 1934 Act itself) apply to "common carrier" or "carrier" service. *See, e.g.*, *id.* §§ 153(10), 201-203. The Commission has concluded that, "[t]he legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services."[20]

Accordingly, in determining whether a firm is acting as a "telecommunications carrier," the Commission has applied the test established in *NARUC I*[21] for determining whether a firm is a common carrier.[22] The basic question under this test is whether the transmission service is offered indifferently to all customers (*i.e.*, "for a fee directly to the public or to such classes of users as to be effectively available directly to the public," 47 U.S.C. § 153(46)) such that customers can transmit information of their choosing without change in form or content (*i.e.*, "between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" *id*. § 153(43)). *See Cable & Wireless* ¶ 14.

Where a firm makes a general offering for a fee of a service that consists of the transmission of real-time voice communications, that service likely qualifies as a telecommunications service under the *NARUC I* test. Such a service offers customers

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[19] A telecommunications carrier is an entity that provides telecommunications service, except that aggregators of telecommunications service are not to be classified as telecommunications carriers. *See* 47 U.S.C. § 153(44).

[20] *Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, Cable Landing License, 12 FCC Rcd 8516, ¶ 13 (1997) ("*Cable & Wireless*").

[21] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

[22] The D.C. Circuit has upheld this conclusion as a reasonable interpretation of the statute. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) ("*Virgin Islands v. FCC*").

transmission that is essentially "transparent" to the customer. This is the *sine qua non* of telecommunications.[23] When offered for a fee to the general public or such class of customers as to be effectively available to the general public, such voice service appears to fall squarely within the statutory definition of telecommunications service.

The Commission is not at liberty to ignore this definitional classification. As the D.C. Circuit explained in *NARUC I*, the Commission lacks the discretion to classify as a non-common carrier offering a service that falls within the definition of common carriage:

> we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carriers is sufficiently definitive as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.

NARUC I, 525 F.2d at 644 (D.C. Cir. 1976) (citations omitted). The Second Circuit later agreed that the "FCC is not at liberty to manipulate the definition of 'common carrier' in such a way as to achieve pre-determined regulatory goals." *American Telephone and Telegraph Co. v. FCC*, 572 F.2d 17, 26 (2nd Cir. 1978).

The codification of the definition of telecommunications service in the 1996 Act confirms that Congress intended that the Commission would continue to possess little discretion in determining whether a service is subject to Title II. While there are some stray suggestions in the *Computer II* proceeding that the Commission has the authority to exempt a service from

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[23] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 90 (1980) ("*Computer II Final Decision*") (explaining that basic telephone service is a common carrier service because it provides a transmission path that is "transparent" to the end user).

common carrier regulation where the service is subject to competition,[24] that option has been ruled out by the 1996 Act. An administrative agency has only the jurisdiction granted it by Congress, and the FCC has no authority under the Act to ignore the codified definition of telecommunications service. In addition, Congress adopted numerous social policies applicable to telecommunications services in the 1996 Act (*e.g.*, universal service, privacy, access to the disabled, etc.) that are relevant regardless of whether a carrier possesses market power. The obvious implication is that Congress expected the telecommunications service classification to apply regardless of whether a service provider has market power. Importantly, in establishing the forbearance powers in Section 10 (applicable only to "telecommunications services"), Congress specified forbearance, rather than definitional reclassification, as the appropriate means of reducing regulation applicable to a service that otherwise falls within the definition of a telecommunications service.

Moreover, telephone service holds a special place within the telecommunications service classification. It has been viewed as the prototypical common carrier offering. It has been regulated as such regardless of the underlying physical characteristics of the network or the transmission protocols used. Indeed, basic voice service has evolved from the days of manually circuit-switched calls carried over copper wires to digitally packet-switched VoIP calls carried over microwave, co-axial cable, satellite and glass. These changes in technology have continuously improved common carrier basic telephone service to make it richer and more

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[24] *See Computer II Final Decision* ¶ 127 ("In view of all of the foregoing evidence of an effective competitive situation, we see no need to assert regulatory authority over data processing services *whether or not such services employ communication facilities* in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment.") (emphasis in original).

useful.[25] In fact, VoIP service is best understood as advancing further changes that have long been part of the evolution of regulated voice service.

For example, a key feature of IP technology is that it allows carriers the flexibility to efficiently deploy the "intelligence" in the network in servers or soft switches that can be located anywhere (thus obviating the need for circuit switches located in central offices). Moreover, IP technology severs the link between network ownership and the ability to develop service offerings by allowing anyone to design services that can then be made available to customers *via* servers and soft switches. While important, these features are merely a further step in a progression advanced earlier by SS7, Intelligent Network ("IN") and Advanced Intelligent Network ("AIN") technology. Those advances have allowed service providers to deploy signaling intelligence anywhere and have loosened the connection between network ownership and the design of service features. Despite the innovations introduced by SS7, IN and AIN, however, basic telephone service has remained regulated under Title II. Similarly, VoIP promises users greater mobility, since a customer can use VoIP service in any location. But commercial mobile radio service already provides complete mobility, and yet it is regulated as a common carrier service. *See* 47 U.S.C. § 332(c).

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[25] The Commission has held that improvements to the network should be encouraged and regulated as voice services. This was the goal of the adjunct-to-basic distinction in the *NATA/Centrex Order*. *See North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 F.C.C.2d 349, ¶ 24 (1985) *(*"The computer processing services [which are] permissible adjuncts to basic services are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use and which bring maximum benefits to the public through their incorporation into the network. The FCC has explicitly rejected the notion that the public interest would be served by prohibiting intelligence or new optional features from the basic network.") ("*NATA/Centrex Order*").

Even where a voice communication includes functionalities that fall within the literal terms of the information services definition, those functionalities are likely to be classified as part of the common carrier offering if they improve, but do not change the basic nature of, the telephone service offering. In the *Computer II Tentative Decision*, the Commission noted that these "necessary" enhanced/information services could be offered in conjunction with basic voice service without changing the character of the basic service; they were deemed essentially a part of the basic service.[26] In the *Computer II Final Decision*, the Commission further explained that if these services do not change the "nature" of the basic service, then the integrated package would be regulated as a telecommunications service.[27]

The Commission further elaborated on how to regulate these "packaged" service offerings in its *NATA/Centrex Order*.[28] That order reiterated the Commission's conclusion in the *Computer II Final Decision* that carriers may offer "enhanced" features as part of their basic service offering under Title II.[29] These enhanced features were defined in the *NATA/Centrex*

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[26] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Tentative Decision and Further Notice Proposed Rulemaking, 72 FCC 2d 358, n.60 (1979)("*Computer II Tentative Decision"*) ("We are not foreclosing enhanced processing applications from being performed in conjunction with 'voice' service. Certain applications may be considered essential or necessary…Computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc., may be used in conjunction with 'voice' service.").

[27] *See Computer II Final Decision* ¶ 98 ("…while POTS is a basic service, there are ancillary services directly related to its provision that do not raise questions about the fundamental communications or data processing nature of a given service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service. Any option that changes the nature of such telephone service is subject to the basic/enhanced dichotomy and their respective regulatory schemes…Thus, any tariffed optional services must not change the nature of traditional telephone service.").

[28] *See generally NATA/Centrex Order*.

[29] *See id.* at ¶ 23 ("It is clear, however, that although [in *Computer II*] we drew the rules so as to limit the scope of tariffed basic service to the provision of a pure transmission capacity, we did not intend that our definition of enhanced services should be interpreted as forbidding carriers to use the processing and storage capabilities within their networks to offer tariffed features which facilitate use of traditional telephone service.").

Order as "adjunct-to-basic." Although these services might fall within the literal meaning of an enhanced service, they were deemed "basic" if they 1) facilitate the establishment of a transmission path over which a telephone call may be completed; and 2) do not alter the fundamental character of telephone service.[30] The means or technology used to provide the adjunct-to-basic service is irrelevant; if the service meets this two part test, it is be regulated as a basic service.[31]

The 1996 Act essentially codified the "adjunct to basic" concept. In the *Non-Accounting Safeguards Order*, the Commission determined that the 1996 Act explicitly classified adjunct-to-basic services as telecommunications services because they fall within the Act's "telecommunications management exception" for information services.[32] Under that exception,

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[30] *See NATA/Centrex Order* at ¶¶ 25, 27. For example, the Commission determined that electronic directory assistance is an adjunct-to-basic service because directory assistance enables the user to complete a phone call. *See Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission's Rules, Revisions to Tariff F.C.C. No. 68, Transmittal No. 1741,* Memorandum Opinion and Order, 5 FCC Rcd 3792, ¶ 13 (1990) ("In the instant case, the purpose of DLC, which, as proposed, is no more than a particular electronic form of the directory assistance discussed in the Commission's Orders, is to facilitate the placement of telephone calls. Accordingly, we conclude that the service is properly treated as an adjunct to basic service."). By contrast, reverse directory assistance, which gives the caller the ability to obtain the *name* of a telephone customer if the service is provided with a telephone number, is an enhanced service; a name is not necessary information to place a call. *See US West Communications, Inc. Petition for Computer III Waiver,* Memorandum Opinion and Order on Reconsideration, 11 FCC Rcd 7997, ¶ 14 (1996) ("*US West*") ("While US West's reverse-search service enables customers to avoid calling a number without knowing the name and address of the called party, the customer already possesses the telephone number that is needed to place the call. The additional information gained through the reverse-search capability -- the name and address -- is not necessary to make the call. Therefore, we conclude that the reverse-search capability is not an adjunct to basic service because it provides information in addition to that necessary to use the network to place a call.").

[31] *See Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf,* Memorandum Opinion and Order, 11 FCC Rcd 6808, ¶ 18 (1996); *US West* at ¶ 14.

[32] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order, 11 FCC Rcd 21905, ¶ 107 (1996) ("*Non-Accounting Safeguards*") ("…services that the Commission has classified as 'adjunct-to-basic' should be classified as telecommunications services rather than information services. In the NATA Centrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services. Although the latter services may fall within the literal meaning of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character if the telephone service.

a service that otherwise meets the definition of information service is excluded from that classification if used for "the management, control or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). The Commission has applied the two-part test established in the *NATA/Centrex Order* to determine whether a service falls within the telecommunications management exception.[33]

Furthermore, although voice calls carried by certain VoIP providers undergo a net protocol conversion during transmission, it is hard to see how this fact renders such calls information services rather than telecommunications services.[34] The Commission concluded in the *Non-Accounting Safeguards Order* that net protocol conversion is an information service under the Act, but this rule has never been used as the basis for removing voice service from Title II regulation. For example, voice traffic among cell phones and between cell phones and wireline phones is often converted between CDMA, TDMA, FDMA, and TDM protocols. Yet, these voice calls have never been classified as information services.

Similarly we conclude that 'adjunct-to-basic' services are also covered by the 'telecommunications management exception' to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act.") (citations omitted); *see also Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, n.46 (2004) ("In the *Non-Accounting Safeguards Order*, the Commission recognized that certain capabilities previously treated as basic services when provided by a carrier fell within the telecommunications management exception: adjunct-to-basic services and 'no net' protocol processing.").

[33] *See Bell Operating Companies' Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, Memorandum Opinion and Order, 13 FCC Rcd 2627, ¶ 19 (1998); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 77 (1999) (reiterating the *NATA/Centrex Order* definition of "adjunct-to-basic").

[34] For example, when a customer using a service similar to Vonage's or Level 3's calls a customer on the PSTN, that call begins in IP format with the VoIP customer, is transported on the Internet to the VoIP company's gateway and translated into TDM for delivery to the PSTN customer.

It is also important to recognize that the FCC may not even have the authority to treat net protocol conversions as information services. While net protocol conversion was included in the definition of enhanced services,[35] Congress excluded protocol conversion from the statutory definition of information services.[36] Under the doctrine of *expressio unius est esclusio alterius*,[37] it is arguable that the Commission must construe Congress's omission of protocol conversion from its information services definition to mean that net protocol conversions cannot be classified as information services.[38]

The relevant case law indicates that the *expressio unius* doctrine applies when the circumstances, as they arguably do here,[39] support the inference that the exclusion was intentional.[40] It has been used to exclude possible implicit meanings of a statute even when a

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[35] *See* 47 C.F.R. § 64.702(a) ("For the purposes of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.").

[36] *See* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunication and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.").

[37] The mention of one thing implies the exclusion of another thing. *See Halverson v. Slater*, 206 F.3d 1205, 1207 (D.C. Cir. 2000).

[38] The Commission itself admitted as much in the *Stevens Report* when it noted that, "Senators Stevens and Burns raise a substantial point. The conference committee's decision not to adopt language explicitly classifying services employing protocol conversion supports the inference that the conferees did not intend that classification." *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 51 (1998) ("*Stevens Report*").

[39] The conference Committee explicitly declined to adopt the Senate version of the information services definition, which included protocol conversion, while adopting the House version, which had no such reference. *See Stevens Report* ¶ 49.

[40] *See Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("The maxim's force in particular situations depends entirely on context, whether or not the draftsmen's

statute has no historical antecedent.[41] Yet, the doctrine has special force in situations like the one at hand where it is used to interpret a statute that is meant to supercede,[42] *in toto*,[43] a similar[44]prior statute or regulation.[45] Accordingly, a strong argument can be made that the definition of information services in the Act superceded *Computer II's* enhanced services definition.[46]

2. There Are Substantial Legal Risks Associated With Attempting To Apply The Requirements Of Title II To Information Services Or Other Title I Services.

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mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives.").

[41] *See United States v. Smaw*, 22 F.3d 330, 333 (D.C. Cir. 1994) (holding that because a sentencing commission was "expressly thinking" about what types of jobs to include in a list that would be subject to increased sentences, the doctrine operates to prohibit the guidelines from covering non-listed jobs).

[42] *See NPRM* ¶ 26 ("In 1996, the Telecommunications Act *codified, with minor modifications*, the Commission's distinction between regulated "basic" and largely unregulated "enhanced" services.")(emphasis added); *see also Stevens Report* ¶ 21 ("Reading the statute closely, with attention to legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act.").

[43] When it is presumed that the legislature has spoken on an entire topic, usually by specifically listing its components, but has chosen to remain silent on a particular subset of the topic, it leads to the inference that silence implies exclusion. *See Miami Free Zone Corp. v. Foreign Trade Zones Bd*., 22 F.3d 1110, 1112 (D.C. Cir. 1994).

[44] *See United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C. Cir. 1980) (holding that the *expressio unius* doctrine is at its strongest when comparing two similar pieces of legislation).

[45] *See Department of Air Force, Sacramento Air Logistics Center, etc. v. Federal Labor Relations Authority*, 877 F.2d 1036, 1040 (D.C. Cir. 1989) ("[w]hile the Assistant Secretary's regulation provided that employees appearing as witnesses would be granted *both* official time *and* travel expenses, Congress expressly included only the 'official time' portion in section 7131(c). The statute is silent on the subject of travel expenses and per diem, leading to the inference that Congress intended to continue the Executive Order practice with respect to official time, *but not with respect to travel expenses*.") (emphasis added).

[46] Indeed, both the *Stevens Report* and the *NPRM* in this proceeding discuss Internet telephony in terms of 1996 Act terminology. *See Stevens Report* ¶ 55 ("We consider the regulatory status of various forms of 'phone-to-phone' telephony service mentioned generally in the record. The record currently before us suggests that certain of these services lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.'"); *NPRM* ¶ 6 ("Part IV examines the jurisdictional issues associated with VoIP and other IP-enabled services and seeks comment on whether to extend the application of the Commission's ruling that a certain type of VoIP offering is an *unregulated information service* subject to federal jurisdiction.") (emphasis added).