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October 14, 2009

Sharon Gillett
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Federal Communications Commission
445 12th Street, SW
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Re: Google Voice; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Broadband Industry Practices*, 07-52

Dear Ms. Gillett:

As the debate regarding "net neutrality" has evolved, it appeared on the surface that all parties shared the same desire to preserve the "free and open" nature of the Internet, a goal enunciated by Chairman Genachowski with which we heartily agree. Ensuring consumers have the ability to go where they want to go on the Internet, communicate with whom they wish and access the lawful content they desire on the devices of their choice were principles that consumer groups, application and content providers and network providers alike supported throughout the discussion. The controversy over Google Voice demonstrates, however, that at least one party believes otherwise when it comes to its own services. As communications services increasingly migrate to broadband Internet-based platforms, we can now see the power of Internet-based applications providers to act as gatekeepers who can threaten the "free and open" Internet. Google's double-standard for "openness" – where Google does what it wants while other providers are subject to Commission regulations – is plainly inconsistent with the goal of preserving a "free and open" Internet ecosystem.

In this case, and contrary to the public pronouncements of Google and its allies, Google's rural call blocking regime is not limited to Google simply blocking calls to "adult sex chat lines" and "free" conference calling services to avoid high access charges.[1] As discussed in the attached fact sheet "The Truth About Google Voice and the Open Internet Principles," Google has been less than candid about the types of calls it is blocking. In fact, Google is blocking calls to, among others, an ambulance service, church, bank, law firm, automobile dealer, day spa, orchard, health clinic, tax preparation service, community center, eye doctor, tribal community college, school, residential consumers, a convent of Benedictine nuns, and the campaign office

[1] *Sex, conference calls, and outdated FCC rules*, Google Policy Blog, Posted by Richard Whitt (Oct. 9, 2009) (*October Google Blog*), available at http://googlepublicpolicy.blogspot.com/2009/10/sex-conference-calls-and-outdated-fcc.html. *See also AT&T Falls Back on "It's All About Google" Strategy*, Public Knowledge Blog, Posted by Harold Feld (Sept. 25, 2009) (*Public Knowledge Blog*), available at http://www.publicknowledge.org/node/2668; *Free Press Responds to AT&T Letter, Urges FCC to Ignore Net Neutrality Distraction*, Free Press News Release (Sept. 25, 2009) (*Free Press News Release*), available at http://www.freepress.net/node/73058.

of a Member of the U.S. House of Representatives. Moreover, these are PSTN-to-PSTN calls, so regardless of how Google Voice is ultimately classified, the Commission has ample jurisdiction to order Google to stop blocking. More importantly, despite the efforts of Google and its supporters to obfuscate this issue, Google's call blocking is *directly* related to "net neutrality." Indeed, Google's power to block calls – as well as its ability to abuse its market power in search and other services – dramatically underscores why the Commission cannot rationally exempt Google or any provider of Internet-based information services from any rules designed to preserve a "free and open Internet."

Google's assertion that such blocking is beyond the Commission's jurisdiction to stop because Google Voice is merely an Internet-based software application that is neither subject to the Commission's prohibition on blocking telephone calls nor the four Internet principles might be true *if* Google Voice were really just a "software" application. But Google Voice is far more than just a software application. Rather, Google Voice uses telecommunications (supplied by its wholesale partner Bandwidth.com) to transmit voice calls between end users and it thus unquestionably constitutes "interstate and foreign communications by wire or radio" under the Communications Act, placing it squarely within the Commission's jurisdiction.[2] Indeed, Google Voice appears to be a telecommunications service insofar as it transmits ordinary telephone calls between customers using the public switched telephone network.[3] But even if Google Voice is not a telecommunications service as Google contends (incorrectly, in AT&T's view), it would be an "information service" providing information processing capabilities "via telecommunications."[4] The Commission unequivocally declared in the *Pulver Order* that free "Internet applications" that use telecommunications are "information services" subject to the Commission's jurisdiction.[5] And by its own terms, the *Internet Policy Statement* applies to "network providers, application and service providers, and content providers."[6] Thus, regardless of how Google Voice is ultimately classified, Google's call blocking practices are well within the Commission's jurisdiction.

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[2] *See* 47 U.S.C. § 152(a).

[3] *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt From Access Charges*, Order, 19 FCC Rcd 7457 (2004) (classifying IP-in-the-middle long distance as a telecommunications service); *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) (classifying enhanced prepaid calling cards as telecommunications services); *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008) (classifying audio bridging services as telecommunications services).

[4] *See* 47 U.S.C. § 153(20).

[5] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, ¶¶ 4, 5, 26 (Feb. 19, 2004) (*Pulver Order*) (describing Free World Dialup (FWD) as a free "Internet application" and declaring FWD to be an "'information service' subject to the Commission's jurisdiction").

[6] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151, ¶ 4 (Sept. 23, 2005) (*Internet Policy Statement*).

But Google's call blocking begs an even more important question that the Commission must consider as it evaluates whether to adopt rules regarding Internet openness. If the Commission is going to be a "smart cop on the beat preserving a free and open Internet,"[7] then shouldn't its "beat" necessarily cover the entire Internet neighborhood, including Google? Indeed, if the Commission cannot stop Google from blocking disfavored telephone calls as Google contends, then how could the Commission ever stop Google from also blocking disfavored websites from appearing in the results of its search engine; or prohibit Google from blocking access to applications that compete with its own email, text messaging, cloud computing and other services; or otherwise prevent Google from abusing the gatekeeper control it wields over the Internet? For that matter, how could the Commission stop any other Internet-based information service provider from engaging in similar behavior that compromises the openness of the Internet ecosystem?

One of the highest priorities of this Administration is to ensure that broadband services are ubiquitously deployed throughout the country.[8] As progress is made towards that goal, communications services will increasingly migrate to broadband Internet-based platforms. Google's suggestion that the FCC walk away from its jurisdiction over Internet-based information services would leave the FCC utterly powerless to protect the interests of consumers as that migration occurs. For example, when significant concerns arose about "data brokers" obtaining improper access to call detail records and other confidential customer account information, the Commission relied on its jurisdiction under both Titles I and II of the Act to ensure that telecommunications carriers and VoIP providers implemented appropriate safeguards to protect such information.[9] But if Google convinces the Commission that it operates completely outside both Titles I and II, the Commission would not only be unable to require Google to protect confidential information about its customers' calling records, emails, web searches and other online activities, but also powerless to prevent Google from using that confidential data for whatever purposes it chooses or selling that information to whomever it pleases. It is understandable why Google does not want the Commission looking over its shoulder to ensure that consumers are protected; it is unimaginable that the Commission would cede its authority to do so.[10]

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[7] Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity, Prepared Remarks of Chairman Julius Genachowski, FCC, at 4 (Sept. 21, 2009).

[8] *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (April 8, 2009).

[9] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-22 (April 2, 2007).

[10] Google's provision of Google Voice and other services has raised significant concerns about Google's exploitation of confidential customer information. *See Google's Free Phone Manager Could Threaten A Variety of Services*, New York Times (March 12, 2009) (describing the Electronic Privacy Information Center's concerns that Google Voice evinces the "increased profiling and tracking of users without safeguards" and the "growing consolidation of Internet-based services around one dominant company'); Letter from Catherine Novelli, Apple, to Ruth Milkman, FCC, Attachment at 2 (Aug. 21, 2009) (describing concerns about Google Voice transferring a consumer's contact list from a handset to Google's servers). Given the serious concerns raised by Google's business model of offering purportedly

Such a course of action would be all the more reckless given the structural changes underway in the Internet ecosystem. Contrary to conventional wisdom, recent studies show global Internet traffic is migrating away from traditional backbone providers and to Google and other "Hyper Giants" operating massive content delivery networks.[11] Thus, to the extent the Commission is concerned about the role of "gatekeepers" on the Internet, it would be arbitrary and capricious in the extreme to exclude those entities who "now generate and consume a disproportionate" share of all Internet traffic from any rules the Commission adopts.[12] The Commission should be particularly concerned about Google's 71 percent share of the market for Internet search,[13] which gives Google an unprecedented ability to influence where end users spend their time on the Internet, which websites will succeed or fail, and which viewpoints will shape public debate and which will not.

Google's ability to parlay its substantial market power in search into dominance of the related markets for Internet search advertising and syndication was a core concern underlying the Department of Justice's objections to the proposed Google/Yahoo arrangement for Internet search services. The Department found that "Internet search advertising and Internet search syndication are each relevant antitrust markets and that Google is by far the largest provider of such services, with shares of more than 70 percent in both markets."[14] In preparing a complaint to challenge the Google/Yahoo arrangement, the Department reportedly concluded that Google had a "monopoly" in these markets and the proposed arrangement "would have furthered [Google's] monopoly."[15] Upon learning of the Department's findings, Google abandoned the deal just hours before the Department was set to file its complaint in court.[16]

"free" services in exchange for access to confidential customer information, it would be all the more short-sighted for the Commission to disavow its jurisdiction over Google.

[11] *See Two-Year Study of Global Internet Traffic Will Be Presented at NANOG47*, Arbor Networks Press Release (Oct. 13, 2009) ("Over the last five years, Internet traffic has migrated away from the traditional Internet core of 10 to 12 Tier-1 international transit providers. Today, the majority of Internet traffic by volume flows directly between large content providers, datacenter / CDNs and consumer networks. . . . Five years ago, Internet traffic was proportionally distributed across tens of thousands of enterprise managed web sites and servers around the world. Today, most content has increasingly migrated to a small number of very large hosting, cloud and content providers."), available at http://www.arbornetworks.com/en/arbor-networks-the-university-of-michigan-and-merit-network-to-present-two-year-study-of-global-int-2.html.

[12] *Id.*

[13] *See Google Receives 71 Percent of Searches in September 2009*, Experian Hitwise Press Release (Oct. 6, 2009). Google is fond of claiming that search competition is only "one click away." But if Google is exempted from the very same nondiscrimination and customer disclosure requirements it advocates for others, consumers would have no reason or ability to know whether Google had manipulated their search results.

[14] *Yahoo! and Google Inc. Abandon Their Advertising Agreement*, U.S. Department of Justice, Press Release (Nov. 5, 2008), available at http://www.usdoj.gov/archive/opa/pr/2008/November/08-at-981.html.

[15] *Hogan's Litvack Discusses Google/Yahoo*, The AmLaw Daily (Dec. 2, 2008).

[16] *Id.*

The Department of Justice is not alone in such concerns. At least one European regulator, which found that Google maintains "undoubted dominance in online search services," is currently investigating a complaint from a group of newspaper publishers alleging that Google is blocking news websites from appearing in its search results unless the publishers of those websites agree, without any compensation, to let Google post their content on the Google News website.[17] Those allegations should be of grave concern to any regulator concerned about preserving the "free and open Internet."

Nor is the Commission itself a stranger to examples of Google's abuse of its market power in search services. As the record in the Commission's docket on *Broadband Industry Practices* shows, Google shapes consumers' Internet experiences in some very non-"neutral" ways by discriminating in favor of certain political messages it prefers.[18] In late 2007, for example, Google ignited controversy when, invoking obscure trademark concerns, it blocked political advertisements by Senator Susan Collins that criticized the political advocacy group MoveOn.org, which has joined Google in supporting an aggressive net neutrality agenda.[19] And in 2006, questions were raised about the unusually prominent placement in Google's search results of websites with pro-Google views on net neutrality regulation. In response,

> Google's top Washington lobbyist disclosed that the company had configured its search engine to return paid links that support Google's position on net neutrality after the entry of certain key words. "This week we've been running a large set of which I would call public service announcement-type advertisements. So if you type in net neutrality at Google, you'll see advertisements for the Its Our Net coalition or other sites we may be pointing to." . . . Imagine the uproar on Capitol Hill if Comcast and Time Warner rigged their broadband networks so that computer screens defaulted to NCTA's Web site for a sample of cable's take on net neutrality legislation.[20]

When questioned further about this practice, Google unapologetically explained that it purportedly "participated in its own auction for the keywords 'net neutrality' and that if

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[17] *Investigation Begun Into Google Italia Following a Complaint from FIEG*, Italian Competition Authority, Press Release (Aug. 27, 2009), available at http://www.agcm.it/eng/index.htm. *See also Google Inc. to Be Included in Investigation into Google Italy Over Possible Abuse of a Dominant Position*, Italian Competition Authority, Press Release (Sept. 4, 2009) (extending investigation to Google Italy's U.S. parent company, Google, Inc.), available at http://www.agcm.it/eng/index.htm.

[18] *See* Comments of AT&T, WC Docket No. 07-52, at 85-92 (June 15, 2007); Reply Comments of AT&T, WC Docket No. 07-52, at 53-59 (July 16, 2007); Comments of AT&T on Petitions of Free Press and Vuze, WC Docket No. 07-52, at 34-40 (Feb. 13, 2008).

[19] *See Google bans anti-MoveOn.org ads*, Examiner.com (Oct. 11, 2007), available at http://www.examiner.com/printa-983100~Google_bans_anti-MoveOn.org_ads.html. Google reportedly claimed that it removed the advertisements because, by mentioning "MoveOn.org" by name, "they violated Google's trademark policy," even though "Google routinely permits the unauthorized use of company names such as Exxon, Wal-Mart, Cargill and Microsoft in advocacy ads.").

[20] *Google Web Search: Do No Evil?*, Multichannel Newsday (June 12, 2006).

opponents of the concept wanted their ads to appear higher in sponsored Internet search results, they could have decided to pay more."[21] However, Google never explained what it means when it claims to have "participated in its own auction;" all we know is that it unilaterally moved its favored political messages to the head of the queue, apparently at no cost to itself.

In 2008, Google blocked Inner City Press, which has been a vocal critic of the United Nations Development Programme (UNDP), from appearing in the Google News website shortly after Google entered into a partnership with the UNDP.[22] Despite having included Inner City Press in Google News for several years, Google informed Inner City Press that it was being blocked because Google seeks to ensure Google News "offers a high quality experience for our users," a standard which Google suddenly concluded Inner City Press no longer satisfied even though Inner City Press had been accredited by the U.N. and its editor-in-chief had been elected first vice president of the U.N. Correspondents Association.[23] Only after other U.N. watchdog organizations howled in protest against Google's blocking did Google relent and re-admit Inner City Press to Google News.

Earlier this year, Google admitted to blocking a free text messaging application that "harnesses its Google Talk chat program to provide free text-message service" after the application became popular among end users.[24] According to Google, it blocked the application because it "has been using Google technology to provide free SMS to users, while we were paying for the cost of the text messages."[25] In other words, Google acted in its economic self-interest to block what it considered to be a free-riding competitor.

Ironically, Google appears oblivious to the hypocrisy of its net neutrality advocacy relative to its own conduct. On the one hand, Google repeatedly professes concern that net neutrality regulation is necessary to prevent broadband Internet access providers from misusing their position in a platform market to disadvantage unaffiliated providers of Internet applications or content.[26] Yet at the same time, Google exploits the dominance of its search engine and its

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[21] *Google E-Mail Highlights Division Over Net Neutrality*, Technology Daily PM (June 13, 2006) (citing Google spokesman Jon Murchinson).

[22] Michael Park, *Journalist Who Exposes U.N. Corruption Disappears From Google*, Fox News (Feb. 18, 2008) http://www.foxnews.com/story/0,2933,331106,00.html.

[23] Google claimed that its decision was based on an undisclosed, anonymous complaint asserting that Inner City Press did not have a sufficient number of employees to meet Google's "ground rule that news organizations it lists must have two or more employees," despite Inner City Press assertion that it has two employees and "about a half dozen volunteers." *Id.* (internal quotations omitted).

[24] *Google Blocks Popular iPhone SMS App*, IDG News Service (March 10, 2009), available at http://www.networkworld.com/news/2009/031109-google-blocks-popular-iphone-sms.html?hpg1=bn

[25] *Id*.

[26] *See FCC announces plan to protect access to an open Internet*, Google Policy Blog, Posted by Vint Cerf (Sept. 21, 2009) (Internet service providers "should not be in the anti-competitive business of picking winners and losers" and "should not be allowed to degrade access to competitors' web sites, to favor access to a corporate partner or their own value-added services to the detriment of a Mom and Pop shop, or to discriminate against protected political speech."), available at http://googlepublicpolicy.blogspot.com/2009/09/fcc-announces-plan-to-protect-access-to.html.

gatekeeping power over other applications to give its preferred content greater visibility than its political opponents' content or to simply block its competitors' applications altogether.

Even Google's founders acknowledge its inherent power to secretly discriminate in harmful ways. As they put it: "advertising funded search engines will be inherently biased towards the advertisers and away from the needs of consumers" and "[s]ince it is very difficult even for experts to evaluate search engines, search engine bias is particularly insidious."[27] Thus, it should come as no surprise that leading net neutrality advocate Tim Wu – the Chairman of Free Press's Board of Directors – has suggested that preemptive regulations may be needed to "block discrimination by powerful applications providers."[28]

Of course, as a company whose motto is "don't be evil,"[29] Google *should* have no objection to abiding by the *Internet Policy Statement* and other net neutrality principles it advocates with respect to Google Voice and *all* of the Internet-based services, applications and content that it offers. And as an agency committed to "preserving a free and open Internet," the Commission *should* show no hesitation in ensuring its Internet principles are applied evenhandedly to the "network providers, *application* and service providers, and content providers" – including Google – who are expressly subject to them today.[30]

As the Wall Street Journal aptly reported, however, the call blocking incident with Google Voice has exposed Google's true agenda for adulterating the *Internet Policy Statement*: "The Internet giant wants cumbersome [net neutrality] rules applied to everyone—except Google."[31] In other words, Google wants the Commission to rig the game in its favor by re-writing the Commission's broadband principles to cover only broadband Internet access providers, while giving Google a free pass to discriminate against whatever calls, websites, applications or content it pleases.

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[27] *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, Sergey Brin and Lawrence Page (1999), available at http://infolab.stanford.edu/pub/papers/google.pdf.

[28] Timothy Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. Telecomm. & High Tech. L. 15, 46 (2006). *See also* CFA Comments in WC Dkt. No. 07-52, at 9 ("The role of regulation should be to ensure that *strategically placed actors with market power* cannot undermine innovation *at any layer* of the platform.") (emphasis added); *id.* at 29 (urging Commission to "declare that *discrimination of any kind* . . . undermines competition among network providers, applications and service providers, and content providers") (emphasis added; quotation marks omitted); Jeff Chester, *Is The Open Internet Coalition About A Real Democratic Net—or One Safe for Data Collection and Interactive Advertising?*, Digital Destiny (May 25, 2007) ("We are uneasy about the alliance between public interest groups and Open Internet Coalition members such as Google and Interactive Corp. (Ask.com). . . . [W]ithout rules governing Google's expansion, limits on data collection, a strong legal framework for privacy, and policies promoting meaningful open non-commercial civic space, the Internet will be 'open' in name only.").

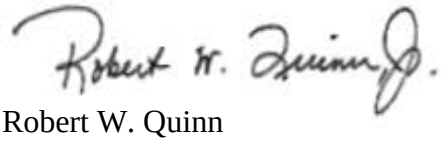
[29] *See* Google Code of Conduct, available at http://investor.google.com/conduct.html.

[30] *Internet Policy Statement* ¶ 4 (emphasis added).

[31] *Google Exceptionalism*, Wall Street Journal (Oct. 3, 2009).

AT&T once again emphasizes that the principles in the existing *Internet Policy Statement* are serving consumers well in their current form and there is no sound reason to radically expand and codify those principles. But if the Commission nonetheless chooses to proceed down such a path in its proposed rulemaking, it cannot expand and codify these principles for some providers and eliminate them for Google and other Internet-based information service providers, particularly in the face of conduct by Google that blatantly violates those principles. Deliberately narrowing the principles to award Google a special privilege to play by its own rules – or no rules at all – would be grossly unfair, patently unlawful, and a renunciation of President Obama's assurance that the Commission's *Internet Policy Statement* would be used to "ensure there's a level playing field" between competitors.[32] Thus, the Commission's first fundamental step in leveling that playing field must be to unequivocally re-affirm in its proposed rulemaking that it will not exempt Google from whatever rules it ultimately adopts.

Sincerely,



Robert W. Quinn

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker

[32] *Remarks by the President on Innovation and Sustainable Growth*, Troy, New York (Sept. 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Innovation-and-Sustainable-Growth-at-Hudson-Valley-Community-College/.

The Truth About Google Voice and the Open Internet Principles

1. **What Google Wants You to Believe:** Google Voice is only blocking adult chat line services and "free" conference calling arbitrage schemes.[33]

   The Truth: Rather than blocking only the individual telephone number associated with a chat line or conference calling service (the area code plus a specific 7-digit number, *e.g.*, (123) 456-7890), Google Voice appears to be blocking *all* numbers in various rural exchanges. To use the above example, instead of merely blocking (123) 456-7890, Google appears to be blocking all ten thousand numbers between (123) 456-0000 and (123) 456-9999).

   In particular, recent test calls performed by AT&T using Google Voice have revealed that Google is blocking calls to an ambulance service, church, bank, law firm, automobile dealer, day spa, orchard, health clinic, tax preparation service, community center, eye doctor, tribal community college, school, residential consumers, a convent of Benedictine nuns, and the campaign office of a Member of the U.S. House of Representatives, among others.[34]

   In addition, based on Google's call blocking methodology, none of these entities (or anyone else with a number in a blocked exchange) would appear to be able to use Google Voice to place calls from their blocked telephone numbers. Thus, Google is not only blocking calls into rural communities, but it is also blocking the people in those communities with blocked telephone numbers from using Google Voice to make calls to anyone else.[35]

2. **What Google Wants You to Believe:** Google Voice is just a software-based Internet application, so it's not subject to the FCC's jurisdiction and the FCC has no authority to stop Google from blocking calls.[36]

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[33] *October Google Blog* ("The reason we restrict calls to certain local phone carriers' numbers is simple. Not only do they charge exorbitant termination rates for calls, but they also partner with adult sex chat lines and 'free' conference calling centers to drive high volumes of traffic."), available at http://googlepublicpolicy.blogspot.com/2009/10/sex-conference-calls-and-outdated-fcc.html.

[34] To protect the privacy of the individuals and organizations affected by Google's call blocking activities, their names and numbers are not disclosed in this document. To the extent the Commission would like such information, AT&T would be pleased to provide it to the Commission, subject to a request for confidential treatment.

[35] Google Voice also does not complete calls to 911 emergency services or 711 telecommunications relay services for the hearing impaired.

[36] *Response to AT&T's letter to FCC on Google Voice*, Google Policy Blog, Posted by Richard Whitt (Sept. 25, 2009) (*September Google Blog*) (Google Voice is a "free Web-based software application" and "the FCC does not have jurisdiction over how software applications function"), available at http://googlepublicpolicy.blogspot.com/2009/09/response-to-at-letter-to-fcc-on-google.html.

The Truth: "Google Voice" is an umbrella term used to describe a collection of different services that include, among other things, unified communications capabilities and a domestic/international telecommunications service that performs certain audio bridging functions,[37] just like many of the other services that the FCC has previously declared to be telecommunications services.[38]

In order to offer Google Voice, Google uses more than just "software." Google also uses computer servers to control and route incoming and outgoing Google Voice calls; storage devices to store the email addresses, phone numbers, passwords, contact lists, call logs, configuration preferences, and other data belonging to Google Voice customers; transmission links to carry calls to and from their destinations; and a host of other facilities to support Google Voice.

Google likely owns and operates many of these facilities itself; indeed it has some of the largest, most advanced "server farms" in the world and it operates its own fiber-optic Internet backbone.[39] It also acquires certain functionalities, including connectivity to the public switched telephone network, from its telecommunications carrier partner Bandwidth.com and incorporates that connectivity into the Google Voice service.[40]

Thus, Google Voice (just like Google Search, Gmail, Google Docs, Google Chat, Google Wave, Google Maps, YouTube and many other Google products) unquestionably qualifies as "interstate and foreign communication by wire or radio" under the Communications Act and is subject to the FCC's jurisdiction.[41] And even if some aspects of Google Voice do not qualify as a telecommunications service as Google alleges, they would nonetheless qualify as an "information service" under the Communications Act because they would offer a "capability for generating, acquiring,

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[37] *See* Google Voice website at http://www.google.com/support/voice/bin/answer.py?hl=en&answer=115073 (unified communications capabilities); http://www.google.com/support/voice/bin/answer.py?hl=en&answer=115079 (instructions for making calls); http://www.google.com/support/voice/bin/answer.py?hl=en&answer=141922 (international calling features); http://www.google.com/support/voice/bin/answer.py?hl=en&answer=141925 (international calling rates).

[38] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt From Access Charges*, Order, 19 FCC Rcd 7457 (2004) (classifying IP-in-the-middle long distance as a telecommunications service); *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) (classifying enhanced prepaid calling cards as telecommunications services); *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008) (classifying audio bridging services as telecommunications services).

[39] *See* AT&T Comments, WC Docket 07-52, at 15-16 (June 15, 2007) (describing Google's extensive facilities-based network).

[40] *See* http://www.google.com/support/forum/p/voice/thread?tid=7cd09d194631ae4a&hl=en (messages from Google Voice users identifying Bandwidth.com as carrier for Google Voice traffic and describing complaints about blocked calls).

[41] 47 U.S.C. § 152(a).

storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[42] These services are thus *no* less subject to FCC jurisdiction than is broadband Internet access service, which is an information service.

Moreover, the FCC's jurisdiction is not affected by Google's claim that it offers the domestic calling capabilities of Google Voice for "free," nor its assertion that Google Voice is an Internet-based application, nor Google's requirement that Google Voice users separately purchase wireline or wireless telephone service to use Google Voice. In the *Pulver Order*, the FCC ruled that Pulver's Free World Dialup (FWD) Service, which the FCC described as a free "Internet application" that facilitates calling between users who supply their own broadband connectivity, is an information service "subject to the Commission's jurisdiction."[43] As the FCC explained,

> We reject Pulver's reading of the definition of "information service." Pulver argues that FWD cannot be an "information service" as that term is defined in the Act because Pulver does not offer transmission to its members. However, the statutory definition of an information service speaks only to the *offering* of various types of computing capabilities *via* telecommunications, not the *offering* of telecommunications itself. The fact that FWD's computing capabilities, as described above, are available to its members via "telecommunications" – *i.e.*, the telecommunications underlying its members' Internet connectivity; the telecommunications connecting Pulver's FWD server to the Internet; and the telecommunications underlying the Internet backbone itself – is sufficient to meet the statutory definition of "information service." . . . The Commission has never required or even suggested that the information service provider must be the entity that provides or offers the telecommunications over which the information service is made available to its members.

The fact of the matter is that GoogleVoice likely is a *telecommunications service* insofar as GoogleVoice customers place PSTN-to-PSTN calls using Google's carrier partner, Bandwidth.com. But, even if that were not the case, it would clearly be an information service, just like Pulver's FWD. And, for that matter, so too are many other Google "Internet applications." This is not just AT&T's opinion – Skype, a leading proponent of net neutrality regulation, made the very same argument when it urged the FCC to "clarify that all IP-enabled services are information services."[44] According to Skype, the FCC "has already determined that Pulver's Free World Dialup is subject to exclusive federal jurisdiction, and should do the same for all Internet applications. . . . Provision of transmission by underlying transport providers in concert with applications, so that users

[42] 47 U.S.C. § 153(20).

[43] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, ¶¶ 4, 5, 26 (Feb. 19, 2004) (*Pulver Order*).

[44] Skype Comments, WC Docket No. 04-36, at 3 (May 28, 2004).

of those applications may connect with the PSTN, does not alter this jurisdictional analysis."[45]

3. **What Google Wants You to Believe:** The principles in the FCC's *Internet Policy Statement* do not apply to Internet applications, content or services, such as Google Voice, Google Search or other Google products.[46]

The Truth: The *Internet Policy Statement* consists of four principles that provide entitlements for consumers using the "public Internet." In particular, consumers are entitled to access lawful content, run applications and use services, connect devices, and enjoy competition.[47] Nothing in the *Internet Policy Statement* limits these principles to Internet access providers. In fact, the fourth principle – competition – expressly applies to "network providers, application and service providers and content providers."[48] Indeed, the whole purpose of the *Internet Policy Statement* is to "foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition," which is only possible if the principles apply to all Internet-based information service providers, including application, content and service providers.[49]

4. **What Google Wants You to Believe:** Google's practice of blocking Google Voice calls has nothing to do with the debate over net neutrality.[50]

The Truth: As discussed in the attached letter, Google's practice of blocking Google Voice calls demonstrates exactly why any open Internet principles must also apply evenhandedly to providers of Internet applications, content and services. If, as Google claims, it is allowed to block whichever Google Voice calls it wants and the FCC is powerless to stop it, then Google also can block whichever Internet sites, applications, services or content that it wants and the FCC cannot do anything about that either.

Of course, the FCC already has jurisdiction over Google and the FCC's *Internet Policy Statement* already prevents Google from blocking calls, websites, applications, services or content. But if Google is successful in convincing the FCC to re-write the *Internet*

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[45] *Id.*

[46] *October Google Blog*; Google Reply Comments, WC Docket No. 09-51, at 32 (July 21, 2009) (arguing that applying a net neutrality nondiscrimination obligation to Google and other providers of Internet applications "plainly would be well outside the FCC's Title I 'ancillary' jurisdiction"). *See also Free Press News Release* ("The Internet Policy Statement applies only to Internet access services.").

[47] *Internet Policy Statement* ¶ 4.

[48] *Id.*

[49] *Id.* ¶ 5.

[50] *October Google Blog* ("this issue has nothing to do with network neutrality""); *Public Knowledge Blog* (Google Voice raises "an interesting and important question" but "it has nothing to do with network neutrality"); *Free Press News Release* ("Whether Google Voice should be subject to the same rules as a traditional telephone service has absolutely nothing to do with Net Neutrality rules.").

Policy Statement so that it applies only to Internet access providers and excludes Google then Google will enjoy a special privilege to discriminate as it pleases.

But again, this is not just AT&T's opinion. When telecommunications carriers first started blocking certain calls to high-cost chat lines and conference services in 2007 (a practice the FCC subsequently banned), a Skype executive described the issue as "the phone version of network neutrality."[51] Now that Google is engaged in the very same behavior, however, it and its closest allies claim that such blocking has "nothing to do" with net neutrality. Such denials only highlight Google's double-standard: Google gets to play by its own rules while the rest of the industry, including those who compete with Google, must instead adhere to the FCC's regulations.

[51] *Ia. Access-Charge Fight Enlivens Net Neutrality Debate*, Communications Daily (March 22, 2007) (quoting Chris Libertelli, Skype Senior Director for Government and Regulatory Affairs).