

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
International Comparison and Consumer)	
Survey Requirements in the Broadband Data)	GN Docket No. 09-47
Improvement Act)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications Capability to)	
All Americans in a Reasonable and Timely)	
Fashion, and Possible Steps to Accelerate)	GN Docket No. 09-137
Such Deployment Pursuant to Section 706 of)	
the Telecommunications Act of 1996, as)	
Amended by the Broadband Data)	
Improvement Act)	

**COMMENTS OF
THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON NBP PUBLIC NOTICE NO. 25:
TRANSITION FROM CIRCUIT-SWITCHED NETWORK TO ALL-IP
NETWORK**

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INTRODUCTION

On December 1, 2009, the Federal Communications Commission (“FCC” or “Commission”) noticed its intent to “set the stage for the Commission to consider whether to issue a Notice of Inquiry (NOI) relating to the proper policy framework to facilitate and respond to the market-led transition in technology and services, from the

circuit switched PSTN system to an IP-based communications world.”¹ The Commission sought public comment “to identify relevant public policy questions that an NOI on this topic should raise in order to assist the Commission in considering how best to monitor and plan for this transition.”²

The National Association of State Utility Consumer Advocates (“NASUCA”)³ believes that the Commission should issue an NOI as the first step in developing a policy framework to deal with the fundamental issues arising from the transition from the circuit-switched PSTN to IP-based communication. We have identified key policy issues that should be addressed in the NOI, set forth below in these comments.

The Commission poses two broad areas of inquiry: 1) which policies and regulatory structures may facilitate, and which may hinder, the efficient migration to an all-IP world; and 2) what aspects of traditional regulatory frameworks are important to consider, address, and possibly modify in an effort to protect the public interest in an all-IP world. These comments focus primarily but not exclusively on the second area of inquiry. They also point to the need to address regulation of the telecommunications facilities that support the Internet as a means of aiding the efficient transition to an all IP world.

¹ Public Notice DA 09-2517 (rel. December 1, 2009) at 1-2, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2517A1.pdf. The Notice earlier defines PSTN as Public Switched Telephone Network, and IP commonly refers to Internet Protocol.

² *Id.*

³ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

This is the twenty-fifth set of comments requested on the National Broadband Plan and NASUCA's comments may, in some respects, overlap with issues previously addressed in other comments. NASUCA will respond as completely as possible, but will refer, whenever appropriate, to previous comments in other dockets. The areas NASUCA believes the Commission should address in an NOI are presented in **bold type**. The issues raised in discussion below are examples of the topics that parties might raise in response to the areas of inquiry suggested by NASUCA, and are not intended to represent a complete list of issues that are relevant for each topic.

ISSUES THAT SHOULD BE ADDRESSED IN A NOI

- 1. Does the transition from provisioning telephone service over the circuit-switched networks to networks using IP protocol alter the fundamental nature of the service?**

Given that the impetus for this Notice is the impact of the transition of essential telecommunications services from being provided over what was previously referred to as a public circuit-switched network to networks using IP, the first issue to address is whether changes in the transmission protocols are changing the nature of these essential services. Following from that is the question of whether the policy and regulatory treatment of these essential services should be fundamentally altered.

While some carriers invoke the mantra of "net protocol conversion" in an attempt to place their traffic beyond existing interconnection compensation and other regulatory regimes,⁴ the network protocols in the PSTN have been constantly evolving since telephone service was first provided, and voice telephone service has been digitized and

⁴ See, e.g., *S. New Engl. Tel. Co. v. Global NAPs*, 2005 U.S. Dist. LEXIS 25898, at *14-15.

transmitted in packets for years.⁵ The continued and broadening use of IP protocols is the next step in an evolutionary process and may well be followed by transitions to other technical means of providing similar services in the future. While the Internet has wrought great and wonderful new services, from a technological and functional perspective, the distinction between Plain Old Telephone Service (“POTS”) and the VoIP service offered by carriers such as AT&T (including but not limited to U-Verse), Verizon (FiOS), Comcast, Cox and Time Warner is practically non-existent.⁶ These services are marketed to customers as regular telephone service; they depend on the network **not** transforming a customer’s call, so that what is said on one end is precisely what is heard on the other. Indeed, the Internet and the PSTN use the same physical infrastructure.⁷ In sum, the use of IP protocols to provide telecommunications services does not fundamentally alter the nature of these essential services.

Indeed, VoIP is just one aspect of a much larger shift in how these essential communications services are delivered. As described by former FCC staffperson Kevin Werbach:

Broadband connectivity is the fundamental public utility of the digital age. Like roads, libraries, electric grids, schools, and telephone networks before it, broadband will be a basis through which citizens are empowered to realize their potential, economic productivity is fostered, and major social goals are achieved. It is already a yardstick for competitiveness among nations. Given broadband's importance, there are few areas where

⁵ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, at ¶¶ 11-12, *passim* (2004) (“*IP-in-the-Middle*”).

⁶ Public Service Commission of Wisconsin, Petition of AT&T Wisconsin for Declaratory Ruling that Its “U-Verse Voice” Service is Subject to Exclusive Federal Jurisdiction, Docket 6720-DR-101, Direct Testimony Of Jeffrey J. Richter, Telecommunications Division, November 14, 2008. p. 3-11.

⁷ Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces tearing It Apart*, 42 U.C. Davis Law Rev. 343, 398 (2008) (“The Internet and the public switched telephone network (‘PSTN’) use the same physical infrastructure”).

government engagement is more necessary or, potentially, more productive. Yet America, almost uniquely among major industrialized countries, lacks a national broadband strategy.⁸

2. Should Regulation of Telecommunication Services Provided Over IP Networks Continue in the Same Fashion as Regulation Applied to Telecommunication Services Provided on the PSTN?

This question follows logically from Question 1. Since the fundamental nature of these telecommunications services has not changed, it can be argued that the nature of the regulation should not change. However, modifications to existing policies and regulations may be necessary to protect the vital public interest in what remains as *the* public communications network. Some potential modifications are discussed further below in discussion of specific topics.

3. What services should be considered “information services” and what services should be considered “telecommunications services” and subject to regulation?

NASUCA does not suggest here that FCC or state telecommunications regulation should be applied to applications or services that are truly information services, and likely comprise much of the content and applications accessible through the Internet.⁹ Nonetheless, as discussed above, there are reasons to conclude that many VoIP services and broadband services are, in fact, “telecommunications services” within the template and definitions of the 1996 Telecommunications Act. The issue of which services are

⁸ Werbach, *Connections: Beyond Universal Service in the Digital Age*, 7 J. Telecomm. & High Tech. L. 67, 67-68 (2009).

⁹ That is not to say that the services and applications provided over the Internet should not be subject to other types of statutory safeguards. These would include areas such as restrictions on unfair business practices that apply to all enterprises, protections against fraud, safeguards to prevent misuse of private information, and anti-trust laws.

properly classified as telecommunications and which are information has been and is currently being partially addressed in other Commission, state, and court proceedings and in comments in response to other Public Notices pertaining to the National Broadband Plan.¹⁰ This question is fundamental to the inquiry proposed in Notice No. 25 and should be fully addressed in the proposed NOI.

Whatever the ultimate classification of VoIP, the FCC has explained that interconnected VoIP services necessarily use telecommunication carriage to reach the PSTN.¹¹ The proposed NOI could profitably clarify the role and definitional importance of this telecommunications component of VoIP, and its ramifications for a future regulatory regime.

4. The Commission should seek comment on how the principles of common carriage and no undue or unjust discrimination should apply in an all IP world.

Historically, the concept of common carriage has been embodied in statute, supported by the U.S. Supreme Court and has been espoused by this Commission. It has served as a bulwark against efforts by carriers to repeat past (pre-regulatory) practices of unfair discrimination toward telephone service customers. The carriers who control the PSTN have not been permitted to engage in undue discrimination and the Commission needs to consider how that principle will be applied in an all IP world.

The Internet itself relies upon telecommunications networks to survive and thrive.

¹⁰ For example, parties have been asked to address the issue of Broadband Lifeline. If the Commission is to extend its Lifeline program to include broadband service, broadband service should be re-defined as a telecommunications service and subject to the types of surcharges levied on voice services.

¹¹ *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶ 41 (“ . . . whether [VoIP operators] own or operate their own transmission facilities or they obtain transmission from third parties”).

For example, one researcher has found that the key variable in explaining the rate of Internet penetration worldwide is the availability and pricing of telecommunications circuits.¹² And, as he noted, the nation's largest telecommunications carriers, AT&T and Verizon, own "among the largest [Internet] backbones in terms of traffic and geographic coverage," and they are the only large Internet backbone providers who also control the networks that provide last-mile coverage in large areas of the country and serve large numbers of broadband subscribers.¹³ As further discussed below, these providers also own legacy copper loop facilities which they now propose to retire in favor of fiber optic transmission lines, any obligation to share these essential facilities with competitors should not be permitted to evaporate simply because of the switch from copper to fiber. Rather, network sharing obligations under the Telecommunications Act of 1996 must be extended to fiber deployment.

Net neutrality is one incarnation of the common carriage principle as it applies to IP enabled networks and services. Net neutrality is being addressed in another Commission proceeding. In the proceeding established pursuant to Public Notice No. 25, the Commission should consider comments made by parties in other dockets insofar as they address the role of net neutrality regulations in fostering an efficient, effective transition to an all-IP world.

¹² Werbach, *Centripetal Network*, *supra*, at 16, n. 249.

¹³ *Id.* p. 10

5. **How does the transition to an all IP world affect the long-standing policy of promoting competition in telecommunications markets? The Commission should also ask parties to address what regulations should apply to those telecommunications services that comprise the infrastructure that supports the Internet. How should the Commission address issues related to the retirement of copper plant? How does the transition affect the choices that will be available to customers?**

The essential characteristic of IP-enabled traffic is that it is a substantially more efficient mode of transferring data, including telephone traffic.¹⁴ Any proposed NOI should address how the FCC could best frame a regulatory approach to capture the savings inherent in these efficiencies for the consumer of telephone services.

As evident from the previous discussion regarding common carriage, the transition to a new mode of communication heightens the importance of carrier interconnection and its impact on the transfer of traffic between and across networks. For the all-IP world to function effectively, it is vitally important that the Commission address the role of federal and state regulation of telecommunications services provided by carriers to other carriers, by carriers to Internet Service Providers (“ISPs”) and broadband providers, and by carriers to agencies, enterprises, and individuals who use telecommunications lines as a means to provide services, information, and applications on the Internet. The interconnection, non-discrimination, and access-promoting policies of the Telecommunications Act of 1996 should continue to apply regardless of the technology used. Thus, Sections 251, 252 and 271 must continue to apply to any IP transition.

The transition to IP communication will accelerate the retirement of copper plant.

¹⁴ See, e.g., *IP-in-the-Middle* Order, *supra*, , 19 FCC Rcd 7457, at ¶ 3 (“VoIP uses available bandwidth more efficiently than circuit-switched telephony”).

This has implications for competition amongst telecommunications providers, because under current Commission policies, competitor access to fiber plant is more restricted than access to copper, and subject to the control of the large carriers who dominate both local broadband distribution and the Internet backbone. The Commission should solicit comment on copper retirement issues and what modifications to policies and regulations are necessary if the policy objective of fostering competition is to be realized as more and more copper plant is replaced with fiber. This must include expanding competitors' access to the fiber plant.¹⁵

The Commission should ask parties to comment on the impact on competition of transitioning to an all-IP world from a consumer's perspective – from the demand side as well as the supply side. In an all-IP environment, how should the Commission analyze the extent of competition for essential services and, thus, what choices are actually available to customers? What data is necessary to conduct such an analysis? In the new environment, will customers be able to choose and create their own combinations of the best local, interstate, broadband and video services or will the changing dynamics of the network mean that the choice is only among competing bundles? As discussed below, this question has important ramifications for universal service. The Commission should take steps to ensure that people with disabilities continue to have access to services provided by IP. The Commission should ask parties to address this issue.

¹⁵ See, e.g., *Cbeyond Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3)*, WC Docket No. 09-223 (filed November 16, 2009); see also *id.*, Public Notice, DA-09-2591 (rel. December 14, 2009).

6. What, if any, changes to the regulatory structure, including additional regulatory tools, are necessary to safeguard the public interest as a result of technological changes in the way that telecommunications services are provided?

For example, in an all-IP world, where networks are primarily designed for broadband applications and voice is arguably an incremental service, should the systems for carrier accounting (including separations) and reporting of costs and revenues be modified? As previously noted by NASUCA, the Commission should not only reinstate ARMIS reporting, but also improve it.¹⁶ In the context of this Notice, the Commission should request comment on ARMIS reporting, how it should be approved, and whether it should be applied to all carriers. Further, the Commission should solicit comment on establishing a new cost model for federal universal service support that reflects current and future network design and use. What types of service quality standards should apply to retail voice services provided over IP networks, or facilities/services provided to other carriers, ISPs, and Internet businesses? Does an IP network introduce safety or emergency preparedness risks that do not exist with a copper network, and if so, how should these risks be mitigated? These are just a few of the issues that could be addressed in response to this general area of inquiry and are not meant to be an exhaustive list.

7. What are the appropriate roles for the Commission and for the states in regulating telecommunication services provided using IP?

Parties should be asked to comment on the applicability of the Constitution, federal statutes, and case law as they pertain to the authority of the Commission and the

¹⁶ NASUCA NBP Notice #19 Comments at 12.

states to regulate telecommunications services provided using IP. Section 2(b) of the Communications Act of 1934 reserves to the states jurisdiction over intrastate communications.¹⁷ Section 252 of the 1996 Telecommunications Act preserves a role for the states in the negotiation and arbitration of interconnection agreements, many of which address IP-PSTN traffic.¹⁸ And Section 706(f) preserves the power of state laws and police powers with respect to wireless and wireline communications involving advanced services except in instances where exercising that power would affect the transmission of government communications or the issuance of stocks and bonds.¹⁹ Contrary to the claims of some carriers, the provision of voice telephone service using Internet protocols has not rendered state jurisdiction moot, and the FCC has an obligation in this proceeding to ensure this result is clearly articulated.

8. The Commission should ask parties to address universal service in the new environment. What policies, regulations and programs should be retained to protect and advance national universal service objectives? What changes to existing universal service support mechanisms are necessary? Should carriers be required to offer stand-alone voice services so that people who are economically disadvantaged are not forced to purchase expensive bundles?

For decades, the Commission has worked to ensure that policies and programs were in place to ensure that the most vulnerable members of society had access to basic telephone service, the service deemed most essential. This effort has had varying degrees of success. Despite significant resources being deployed, telephone penetration still

¹⁷ 47 U.S.C. 152(b).

¹⁸ 47 U.S.C. 252.

¹⁹ 47 U.S.C 706(f).

varies significantly depending on factors such as income, race, age, and location.

The Commission is addressing many aspects of universal service in other proceedings. For example, the Commission has received extensive comments addressing the issue of how to modify federal universal service support mechanisms.²⁰ Parties should be asked to supplement their comments in those dockets by specifically addressing the question of what elements of existing universal service support mechanisms should be altered to reflect changes in circumstances caused by the increasing provision of VoIP.

The Commission should ask parties to address issues associated with affordability that arise from the increased provision of integrated services. In particular, should carriers offering voice services be required to offer stand-alone voice services so that customers, including those who are economically disadvantaged, are not forced to purchase bundles? Conversely, low income consumers should not risk losing any discounts they are currently receiving for basic service should they choose to receive additional services in a bundle. In situations where there is little or no competition, if carriers are permitted to offer only packages or bundles, how would the universal service support mechanisms be modified and what would be the impact on the size of the fund? Should the Commission establish policies and requirements for customer information, outreach and education to vulnerable segments of the population? How can the Commission best work with the states to achieve universal service goals? What type of data should the Commission collect to measure the success of universal service in an all IP world?

²⁰ This includes the comments in response to NBP Notice #19 (filed on December 7, 2009).

9. What service quality issues should be addressed by regulators in an all-IP world?

Service quality is both a federal and state concern. Section 2(b) of the Communications Act of 1934 preserves the right of states to enact and enforce service quality standards “for intrastate communication service by wire or radio.”²¹ In the past, for interstate communication, the Commission has required those carriers that control and operate the PSTN to report important data on installation and repair intervals for interstate access and local service, common trunk blockage, total switch downtime, duration downtime, and service quality complaints. The service quality standards that applied to the PSTN may or may not be appropriate or adequate for IP telecommunication services. But service quality standards must apply (with penalties on carriers for failure to meet standards), so that consumers are protected, as discussed below.

The Commission should solicit comment on this issue. Some service quality issues are encompassed in the consideration of net neutrality – *i.e.*, how different types of traffic are treated relative to others. Insofar as issues raised in the Net Neutrality proceeding²² relate to service quality, comments from parties on those issues should be considered in this docket.

²¹ 47 U.S.C. 152 (b).

²² See *Preserving the Open Internet*, GN Docket No. 09-52 and *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. October 22, 2009).

10. The Commission should ask for comment on the public safety issues that are associated with VoIP. What requirements should apply regarding the provision of E911 service for VoIP service? What issues arise from the reliance of VoIP service on the public power supply? What actions should the Commission take to ensure that service is reliable?

The transition to provisioning voice service over IP networks raises unique and important public safety issues. One such issue is the need to require the provision of E911 service regardless of what technology is used to provide voice telephone service. The Commission has previously addressed this issue and has faced resistance to this requirement from some segments of the industry. The Commission should not revisit this issue because access to E911 should never be technology-dependent.

One fundamental difference between telephone service provided over the circuit-switched PSTN and VoIP is that many VoIP services, including fixed VoIP, rely on the public power system to function, rather than the independent power used by the PSTN. For a VoIP customer, if the power goes out, a backup battery located at the customer premises temporarily powers service. In lengthy power outages – sometimes lasting just an hour – however, customers who do not have a robust backup power supply (*e.g.*, a generator) will lose telephone service. Needless to say, this raises significant public safety issues. In a prolonged power outage following a catastrophe, the potential exists for tens of thousands of customers to lose telephone service and likely lose the ability to contact emergency services.

The Commission should request comment on the public safety issues associated with VoIP reliance on the public power grid. Some state commissions have begun

exploring these issues.²³ Issues that have been addressed by the states include (but are not limited to), the following questions: How long do backup batteries last? Are carriers or customers responsible for maintaining or replacing backup batteries? What type of monitoring and/or data is necessary to determine whether the backup power currently supplied is sufficient to ensure the public safety? Do carriers and/or service providers adequately inform customers about backup power issues? Is this information provided in formats that are accessible to people with disabilities? Is this important information provided to customers in the language in which the service is being marketed?

11. The Commission should seek comment on privacy issues that are associated with VOIP.

The Commission has required carriers to establish and maintain a system to adequately protect subscribers' customer proprietary network information ("CPNI"). On February 25, 2009, the FCC's Enforcement Bureau cited approximately 650 companies with failure to file their annual CPNI compliance certificate, making each company liable for a monetary forfeiture of \$20,000.²⁴ The FCC's Notice of Liability underscores the importance of compliance with the safeguards intended to protect CPNI from unauthorized access and disclosure to databrokers or pretexters, and the widespread disregard of those consumer safeguards by numerous companies at this point in time.

Because of the widespread disregard by many telecommunications carriers in

²³ See, for example, Public Utilities Commission of the State of California, R. 07-04-015, Rulemaking on the Commission's Own Motion into Reliability Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems Pursuant to Assembly Bill 2393.

²⁴ See Omnibus Notice of Apparent Liability for Forfeiture (Feb. 24, 2009); <http://www.securityprivacyandthelaw.com/uploads/file/FCC%20NAL%20DA-09-426A1.pdf>.

complying with the FCC's privacy protections, the FCC should examine adequate enforcement of consumer privacy protection mechanisms in an all-IP network environment. The Commission should also identify the specific risks to customers when privacy in an IP network fails to be secured, the cost to customers of remediating the effects of such failure by their carrier, and what additional steps should be implemented to protect customers when a violation of privacy safeguards has occurred.

12. What types of consumer protection rules and regulations are necessary in an all IP, or partial IP world? Should existing policies, regulations and rules be retained, modified or expanded?

If there is one lesson the past 20 years has taught consumer advocates, and hopefully the Commission, it is that regardless of the technical means used to provide essential communications services, strong consumer protection rules – on both state and federal levels – are necessary to ensure that customers are fully informed about the services they are purchasing and utilizing, and penalties are in place to discourage misleading marketing or the failure to comply with consumer protections and the improper imposition of fees on the part of service providers. Parties should be asked to address what types of consumer protection rules, and regulations are necessary in an all-IP world. In particular, parties should be asked to comment on the following questions: Should existing policies, regulations, and rules regarding billing, consumer notifications, terminations, and privacy of customer data be retained, expanded, or otherwise modified? What policies and requirements should be considered to ensure that protection is afforded to the most vulnerable segments of the population? Should the Commission establish policies, programs, or requirements pertaining to consumer education, including

information for vulnerable members of the population such as seniors, the economically disadvantaged, people with disabilities, and ethnic populations?

CONCLUSION

NASUCA appreciates the opportunity to bring these views to the Commission's attention.

Respectfully submitted,

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