

Google Inc.  
Public Policy Department  
1101 New York Avenue, NW  
Second Floor  
Washington, DC 20005



Phone 202.346.1100  
Fax 202.346.1101  
www.google.com

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**Electronic Filing**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Connect America Fund*, WC Dkt. 10-90; *A National Broadband Plan for Our Future*, GN Dkt. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Dkt. 07-135; *High-Cost Universal Service Support*, WC Dkt. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Dkt. 01-92; *Federal-State Joint Board on Universal Service*, CC Dkt. 96-45; *Lifeline and Link-Up*, WC Dkt. 03-109.

Dear Ms. Dortch:

Google supports the FCC's efforts to reform this nation's universal service and intercarrier compensation systems. Our citizens deserve universal broadband connectivity and all-Internet Protocol (IP) networks to create the technology platforms that will drive future economic opportunity, growth and prosperity. The record before the Commission shows that meeting these goals will enhance efficiencies, reduce costs and create a springboard for innovation, investment and jobs.

At the same time, the FCC should not allow the small tail of yesterday's phone service regime to wag the big dog of tomorrow's IP services. Expanding legacy rate regulation to emerging networks and services – including for the first time applying the per-minute carrier charging regime to the broad swath of VoIP applications and services – is the wrong choice as a policy and a legal matter.

Google does not seek a regulatory “carve-out,” as some claim. Indeed, what those same parties want is to “carve-in” future technologies – the classic case of leveling proverbial playing fields in a way that invariably will harm competition, innovation, and consumer choice. We urge instead that the Commission tailor its regulatory “fix” to the alleged problem and ensure that the cure is not worse than the ailment. No matter how commendable and genuine parties may be in proposing a “compromise solution,” the FCC should not act to perpetuate legacy telephone rules at the expense of broader consumer welfare, and in ways that exceed its statutory authority.

## **Extending Access Charges to VoIP Will Harm Consumers, Chill Innovation, and Undermine the Benefits of IP**

When the FCC first examined emerging IP services comprehensively in 2004, the Commission foresaw the expanded use of IP services and networks and the transformative effect they were starting to have on the communications landscape, giving rise to a “virtuous circle” in which competition begets innovation, which in turn begets more competition.<sup>1</sup>

Today, hundreds of providers offer a wide-variety of VoIP services to consumers and businesses, fulfilling the FCC’s vision.<sup>2</sup> The majority of Internet-based VoIP services introduced in the marketplace, including one-way VoIP and similar software applications, come from software developers and others in the tech community, not traditional telephone companies. These services encompass a range of offerings and applications that utilize the flexibility and efficiencies of IP technology. Users throughout the nation (and the world), including individual consumers, small businesses, educational institutions, non-profits, and everyone else, can now accomplish more in less time with fewer costs.

VoIP offers features and tools that enhance productivity and communication, harnessing the explosion of devices and capabilities that are powered by increased bandwidth and IP technology. VoIP and IP-enabled functions and capabilities go far beyond what legacy phone networks could accomplish and include call and device direction, customized messaging, store-and-forward capabilities, interactive voice response, web-based calling, centralized calling, voice enhancements to social networking, text-to-voice, gaming communication, navigation services, and more. In addition to empowering users with a range of new features, VoIP services also help “contribute to the marketplace discipline of voice telecommunications services regulated under Section 201.”<sup>3</sup>

Many VoIP services and applications, including one-way VoIP and over-the-top services, are offered over the public Internet and are provided to consumers for free or at very low cost. Services are often free initially as the developers continue to develop and refine the product. Some VoIP services are free enhancements to other services, with the voice component serving only as an add-on, supplementing traditional voice (wireline or wireless) service.<sup>4</sup>

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<sup>1</sup> See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 17-22 (2004) (“*IP-Enabled Services NPRM*”).

<sup>2</sup> Examples of these services include Google Voice, Skype, VBuzzer, TringMe, Eyeball Chat, Wakerupper, iCall, SightSpeed, Yahoo! Voice Phone Out, Line2, Fring, Phonebooth, and many more.

<sup>3</sup> *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905, ¶ 125 (2010) (footnote omitted) (“*Open Internet Order*”).

<sup>4</sup> See, e.g., *Contributions to the Telecommunications Relay Services Fund*, Report and Order, FCC 11-150, ¶ 15 (rel. Oct. 7, 2011) (“*TRS Fund Order*”); *IP-Enabled Services NPRM* at ¶¶ 17-19; *E911 Requirements for IP-Enabled Service Providers, et al.*, Notice of Proposed Rulemaking, Third Report and Order, and (footnote continued on following page)

Subjecting VoIP for the first time to legacy per-minute carrier access charges will undermine the fundamental advantages of IP-based communication and the benefits of Internet-based services, including increased efficiency, reduced expenditures, rapid service deployment, and geographic-agnostic costs. This is true even for charges described as “transitional,” especially given the proposed six year “transition” period – a virtual eternity in the Internet services space.<sup>5</sup> As no one can dispute, legacy carrier charges have no relation to the costs of VoIP services and IP networks. Instead, they are a drag on innovation and new services deployment and will erode the value of VoIP as a competitive option to traditional regulated wireline telephone services for consumers.

### **Imposing Legacy Carrier Charges on VoIP Will Arbitrarily Increase Costs**

Since carrier access charges were not designed for VoIP, and do not apply today, extending these charges will arbitrarily increase VoIP service costs, causing substantial consumer welfare harms.<sup>6</sup> In fact, despite years of requests,<sup>7</sup> the record confirms that the FCC has never held that telephone carrier charges should apply to VoIP, even to interconnected VoIP (IVoIP), a subset of VoIP.<sup>8</sup>

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(footnote continued from previous page)

Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 10074, ¶ 64 (2011). *See also* Comments of the Voice on the Net Coalition at 4, GN Dkt. 11-117, *et al.* (filed Oct. 3, 2011); Comments of Vonage Holdings Corp. at 3, GN Dkt. 11-117, *et al.* (filed Oct. 3, 2011); Comments of the Information Technology Industry Council at 4-5, GN Dkt. 11-117 (filed Oct. 3, 2011).

<sup>5</sup> Notably, “interim rules” often remain in place far longer than initially proposed. Indeed, the very carrier access charges at issue here were described as “interim” when they were adopted. *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 93 FCC 2d 241 (1983).

<sup>6</sup> *See* Letter from AT&T, CenturyLink, Fairpoint Communications, Frontier, Verizon and Windstream, to Julius Genachowski, Chairman, FCC, *et al.*, WC Dkt. 10-90, *et al.* (filed July 29, 2011), Professor Hausman Consumer Benefits Paper, Attach. 4 at 8, 15.

<sup>7</sup> *See, e.g.,* *Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Dkt. 03-266 (filed Dec. 23, 2003); *Petition for Declaratory Ruling that Inflexion Communications’ ExtendIP VoIP Service is Exempt from Access Charges*, WC Dkt. 04-52 (filed Feb. 27, 2004); *Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination*, WC Dkt. 05-276 (filed Aug. 20, 2004); *Petition of the SBC ILECs for a Declaratory Ruling that UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers are Liable for Access Charges*, WC Dkt. 05-276 (filed Sept. 21, 2005); *Petition of AT&T for Interim Declaratory Ruling and Limited Waiver Regarding Access Charges and the “ESP Exemption,”* WC Dkt. 08-152 (filed July 17, 2008) ; *Petition of the Frontier Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption*, WC Dkt. 08-205 (filed Sept. 25, 2008); *Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Dkt. 10-60 (filed Mar. 5, 2010); *Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges*, CC Dkt. 01-92 (filed Aug. 26, 2011).

<sup>8</sup> *See* 47 C.F.R. § 9.3.

Rather, some courts have held that VoIP services are not subject to access charges as a legal matter, so that many IVoIP providers have rightly refrained from making payments.<sup>9</sup> Even where courts have held that a VoIP provider must pay access charges, it is often as a result of a pre-existing commercial commitment to pay.<sup>10</sup> Other courts have stayed cases pending resolution of issues by the FCC.<sup>11</sup> At most, the record shows that while some IVoIP providers have agreed to pay access charges upon demand, this is not uniformly the case.<sup>12</sup> There is a complete lack of data before the FCC showing any payments by non-facilities-based and one-way VoIP providers.

Notably, even in the limited instances where the record shows some payments for VoIP traffic, they are far below carrier interstate access charges (or even reciprocal compensation). For example, the agreement between Bandwidth and Verizon reflects a rate of \$0.0007 per minute, a rate not reached under proposals before the FCC until VoIP suffers five years of higher regulated charges.<sup>13</sup> Today's market-based negotiated rates clearly reflect the near-zero costs of IP traffic, underscoring why legacy charges designed for TDM services are wholly inapplicable to VoIP. Perversely, an FCC mandate of much higher rates will also surely stymie future market-based arrangements, and could even undermine existing agreements.<sup>14</sup>

There is also no analysis or evidence in the record of this proceeding explaining how or why the proposed rates would be rational as applied to VoIP traffic. No study, model, or facts show, for example, what any of the costs are for terminating VoIP traffic. In fact, the proposed rates that would apply for many years are significantly higher than

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<sup>9</sup> See *Sw. Bell v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008); *PAETEC Commc'ns v. CommPartners, LLC*, No. 08-0397, 2010 U.S. Dist. LEXIS 51926 (D.D.C. Feb. 18, 2010).

<sup>10</sup> See *Global NAPS Cal., Inc. v. Pub. Utils. Comm'n*, 624 F. 3d 1225, 1233–34 (9th Cir. 2010); *Cent. Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, 759 F. Supp. 2d 789 (E.D. Va 2011).

<sup>11</sup> See *Pac-West Telecomm., Inc. v. MCI Commc'ns Servs.*, 2011 U.S. Dist. LEXIS 30044 (E.D. Cal. Mar. 22, 2011); *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., LP*, 2010 U.S. Dist. LEXIS 140454 (W.D. La. Dec. 15, 2010), *aff'd* 2011 U.S. Dist. LEXIS 7132 (W.D. La. Jan 24, 2011).

<sup>12</sup> See *Connect America Fund, et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 4554, ¶ 613 (2011); Comments of AT&T Inc. at 25-26, WC Dkt. 10-90, *et al.* (filed Apr. 1, 2011); Comments of Cablevision Systems Corporation and Charter Communications at 13, WC Dkt. 10-90, *et al.* (filed Apr. 1, 2011); Comments of Cox Communications, Inc. at 3, 6-7, WC Dkt. 10-90, *et al.* (filed Apr. 1, 2011); Comments of Verizon and Verizon Wireless at 2-3, 8-9, WC Dkt. 10-90, *et al.* (filed Apr. 1, 2011).

<sup>13</sup> See Comments of Verizon and Verizon Wireless at 12, n. 17, WC Dkt. 10-90, *et al.* (filed Apr. 18, 2011).

<sup>14</sup> Ironically, the seemingly separate debate over whether and how the Commission should allow the current caps on Subscriber Line Charges (SLCs) to be eased also relates to this discussion. To the extent the flat-rate SLCs are increased for traditional wireline telephone services, which Google does not necessarily advocate here, consumers should have viable alternatives to paying those charges for fixed voice services from traditional carriers. Today, these alternatives increasingly include a plethora of low-cost or free over-the-top VoIP services and applications. Should these same VoIP providers be saddled with legacy carrier charges, however, consumers will have few, if any, realistic alternatives to maintaining their current phone service and paying increased SLCs.

rates determined to be reasonable for dial-up TDM traffic directed to Internet Service Providers (ISPs) over ten years ago.<sup>15</sup> Since that time, costs have only fallen.<sup>16</sup> Choosing a rate exponentially higher than what was deemed compensatory for TDM traffic over a decade ago would be irrational, especially in light of the dramatic changes and notable efficiencies stemming from IP traffic. Rather than imposing above-cost charges on new services to pay for TDM networks, the Commission should adopt a more rational approach. This includes ensuring that charges for TDM networks and services are borne by the cost-causers and do not look to IP services for subsidized support.

Based upon at least one understanding of what has been proposed, the rate structure rules would also create arbitrary rate differentials even for VoIP traffic that terminates at the same called party premises. For example, a call made from Albany, NY to New York City using a mobile VoIP application over a CMRS network could be subject to reciprocal compensation rates. The same call, also made using a VoIP application, but accessed through the caller's laptop, however, could be subject to interstate access charges. No meaningful basis for these rate differentials is set forth in the record. The reason, of course, is simple; the new proposed rates are wholly arbitrary when extended to VoIP. These unfounded rate levels serve only to work against the Commission's objectives in this proceeding to rationalize carrier charges, encourage IP networks and services, and spur broadband use and adoption.

In addition to saddling VoIP with irrelevant charges, imposition of the proposed regulated rates will require VoIP providers to expend significant resources to implement systems to monitor traffic (including to distinguish between wireline and wireless traffic), call signaling, set-up accounting and payment systems, and incur the increased overhead costs inevitable with any federal regulatory obligation and oversight.<sup>17</sup> As some propose, VoIP providers could be required to track and pay over fifty different interstate access and state reciprocal compensation rates, none of which have any demonstrated connection to costs incurred.<sup>18</sup> Low-cost and free VoIP services will be especially impacted, with many consumer-oriented services likely forced to shut down and others

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<sup>15</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, ¶ 8 (2001) (stating the adopted "rates reflect the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery."). *See also id.* at ¶ 84 (noting the "evidence in the record to suggest that technological developments are reducing the costs incurred by carriers in handling all sorts of traffic, including ISP-bound traffic").

<sup>16</sup> *See, e.g., Open Internet Order* at ¶ 22, n. 50 citing PriMetrica, Inc., Executive Summary to TeleGeography Report at 5 (2009); Letter from Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC (filed Dec. 10, 2010) (noting that in telecom, "prices can only go down.").

<sup>17</sup> *Cf.* Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al.* (filed Oct. 5, 2011).

<sup>18</sup> *See, e.g.,* Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al.* (filed Oct. 3, 2011), Discussion Draft, attach.

will probably never come to market.<sup>19</sup> In fact, given the nature of Internet traffic, with its routing over multiple networks and its non-circuit based architecture, it may not even be possible to track traffic along geographic lines. Given the clear record supporting a bill-and-keep charging methodology for all traffic, it is especially irrational for the FCC to burden VoIP with obligations related solely to subsidizing legacy networks.

These burdens, divorced from any identified costs of VoIP, serve only to prop-up the outdated telephone rate regime. As the FCC previously described regulatory impediments to VoIP, “it is this kind of impact Congress considered when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation.”<sup>20</sup>

### **Extending Access Charges to VoIP Information Services Exceeds the FCC’s Authority.**

Though the FCC has determined the regulatory classification of specific VoIP services twice before,<sup>21</sup> it has never extended the most onerous telecommunications service regulation – rate regulation – to any VoIP services to date. Rate regulation that dictates rate structures and rate levels has been described instead as unduly burdensome and inconsistent with the emerging dynamic and competitive marketplace.<sup>22</sup> While it is debatable whether the FCC may be able to proceed here without determining how some or all VoIP services should be classified under the Communications Act (Act), the agency cannot avoid obvious limitations in its ability to regulate services outside of its primary jurisdiction, including information services and other online services and applications.<sup>23</sup>

The Commission’s authority to prescribe rates derives from Section 201 of the Communications Act and, more broadly, from its authority over Title II telecommunications services.<sup>24</sup> Many VoIP offerings today are not Title II

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<sup>19</sup> Cf. *TRS Fund Order* at ¶ 17 (noting the administrative burdens of subjecting non-interconnected VoIP providers to TRS contributions).

<sup>20</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, ¶ 25 (2004) (“*Free World Dialup*”).

<sup>21</sup> See *Free World Dialup* at ¶ 11; *AT&T’s Phone-to-Phone IP Telephony Services*, Order, 19 FCC Rcd. 7457, ¶ 12 (2004).

<sup>22</sup> See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Order, 22 FCC Rcd. 18705, ¶¶ 33-35 (2007) (finding forbearance from price regulation, including Part 69 access charge rules, allows more rapid responses to technological and market developments and encourages a more market-based environment).

<sup>23</sup> See 47 U.S.C. § 230(b)(2); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 976-77 (2005) (“*Brand X*”); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005); *Free World Dialup* at ¶¶ 15-18.

<sup>24</sup> See, e.g., 47 U.S.C. §§ 201 *et seq.* Section 201(b), for example, grants the FCC authority to ensure that the charges and practices of providers of telecommunications services (common carriers) are “just and reasonable.” *Id.* § 201 (b).

telecommunications services but are instead information services, outside of the scope of Section 201 Title II rate regulation. For example, many one-way and over-the-top VoIP services are unquestionably information services, enhancing the underlying communications transmissions, such as by interaction with stored information, voicemail capabilities, and more. Some VoIP services provide an integrated offering of telecommunications and information service features that are inextricably intertwined with underlying telecommunications functions.<sup>25</sup> Still other VoIP offerings are simply online applications.

Notably, many VoIP services, typical of offerings the FCC has classified as information services, such as voicemail,<sup>26</sup> also require an underlying transmission connection that provides the telecommunications service (secured from a facilities-based provider), whether an ordinary telephone service or a broadband transmission service. In fact, the record before the Commission reflects the recognition by many parties of the clear distinctions between facilities-based IVoIP and other VoIP services, including over-the-top VoIP and applications that are offered over the public Internet versus a specialized or managed connection.<sup>27</sup> Whatever the merit of including facilities-based VoIP within the framework of traditional telephony regulation, there is no basis at all to expand legacy rate rules to other VoIP services.<sup>28</sup>

The Act directs the FCC to do more than just give lip service to its structure and directives. These include the mandate to promote the continued development of Internet and interactive services<sup>29</sup> and deployment of broadband and advanced telecommunications services.<sup>30</sup> Though the Commission may consider how best to reach its delineated goals, it may not exceed its statutory authority in its efforts to do so.

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<sup>25</sup> See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853, ¶ 9 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶¶ 41-43 (2002), *aff'd sub nom. Brand X* at 989-91 (2005).

<sup>26</sup> See *IP-Enabled Services NPRM* at ¶ 27, n. 94. See also *Free World Dialup* at ¶ 11.

<sup>27</sup> See, e.g., Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, at 1, WC Dkt. 10-90, *et al.* (filed Oct. 13, 2011) (“COMPTTEL Letter”); Letter from Matthew Brill, Counsel for Time Warner Cable Inc., and Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, at 2, WC Dkt. 10-90, *et al.* (filed Sept. 27, 2011); Comments of Comcast at 5, WC Dkt. 10-90, *et al.* (filed Aug. 24, 2011);

<sup>28</sup> Google agrees with many diverse parties that urge the FCC to address IP interconnection given its growing importance as the transition to all IP continues. See, e.g., COMPTTEL Letter at 1.

<sup>29</sup> See 47 U.S.C. § 230(b)(2); Letter from Donna N. Lampert, Lampert, O'Connor & Johnston, P.C., on behalf of Google Inc., Skype Communications S.A.R.L., Sprint Nextel Corporation, and Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al.* (filed Sept. 30, 2011), *Hold the Phone (Charges)*, Attach. at 7 (“VoIP White Paper”).

<sup>30</sup> See 47 U.S.C. §§ 1302(a), (b); VoIP White Paper at 9-11.

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The FCC's goals in this proceeding – to help stimulate all-IP networks and eliminate the implicit subsidies in the intercarrier compensation systems – remain vital. For the reasons we explain, to best meet these goals, the Commission should not expand legacy rate rules to VoIP services.

Respectfully submitted,



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Richard S. Whitt, Esq.  
Director and Managing Counsel  
Telecom and Media Policy

Adrienne T. Biddings, Esq.  
Telecom Policy Counsel

GOOGLE INC.  
Public Policy Department  
1101 New York Avenue NW  
Second Floor  
Washington, DC 20005